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Ms. Penny Coleman, Assistant General Counsel
National Indian Gaming Commission
1441 L Street, N.W., 9th Floor
Washington, D.C. 20005

Dear Ms. Coleman:

On July 1, 1996 your office requested an opinion as to whether a restricted Indian allotment in the State of Kansas known as the Maria Christiana Miami Reserve No. 35 falls within the statutory definition of "Indian lands" for purposes of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988).[1] In a May 23, 1995, opinion, we determined that the Tribe did not exercise the necessary governmental powers over this land because the land was not owned by the Miami Tribe, the land had been erroneously allotted to non-members of the tribe and the Miami Tribe was compensated for this erroneous allotment, the owners of the restricted land were not members of the Tribe and the land was distant from the Tribe's land in Oklahoma. We concluded, therefore, that the land was not "Indian lands" under IGRA.

Subsequent to our 1995 opinion, the district court in Miami Tribe of Oklahoma v. United States, 927 F. Supp. 1419 (D. Kan. 1996)(Miami Tribe), determined that only lands within the Tribe's jurisdiction could qualify as "Indian lands" under IGRA. The court reviewed de novo the legal determination by the Department that the tribe did not exercise governmental authority over the land. Id. at 1422. The court held that not only had the Miami Tribe relinquished its authority, but Congress abrogated the Tribe's governmental authority over the Kansas lands when the Tribe moved to Oklahoma and thus, the Miami Tribe did not retain jurisdiction over the allotment based on the tribal membership of either the original allottee or her heirs, who had not consented to membership. The court held that the record was devoid of evidence that the owners of Reserve No. 35 had consented to become members. Id. at

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[1] IGRA allows Class II and III gaming on "Indian lands." IGRA defines "Indian lands" as:

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4)(1996 Supp.).

1428. The finding of the district court that the tribe abrogated jurisdiction over these lands confirms our conclusion that the Tribe had no jurisdiction at the time of our opinion in 1995. Since the historical background of the Tribe and the allotment are covered in our 1995 opinion and the 1996 district court decision in Miami Tribe, they need not be extensively reiterated. The court in Miami Tribe did not address whether an amendment to the Miami tribal constitution extending membership to the owners of the Maria Christiana allotment would extend the governmental authority of the Tribe over the allotment.

The issue presented by your current request is whether the amendment to the Tribe's constitution, or any other changes in circumstances, brings the Maria Christiana parcel within the definition of "Indian lands" under IGRA such that the Tribe may now lawfully conduct gaming on the lands. For the reasons set forth below, we conclude that the Maria Christiana allotment does not constitute "Indian lands" under IGRA. The only aspect of this situation that has changed is the membership status of the owners of the land. At the time of our first opinion, the constitutional changes in membership eligibility were proposed but not approved by the Secretary of Interior. The proposed Miami Constitution was approved by the Secretary on February 22, 1996, and the owners of the property became members of the Tribe thereafter. The Miami Tribe of Oklahoma did not exercise governmental powers over the land in 1995 and, in our opinion, the admission of the owners of the land into the Tribe is alone not sufficient evidence of tribal authority to bring the land within the definition of "Indian lands" under IGRA.

As we noted in our earlier opinion, when the Western Miamis ceded their remaining lands in Kansas,[2] Congress directed the Secretary of the Interior to determine which individuals were entitled to share in the resulting funds and to specifically include in the determination those persons of Miami blood or descent who were the beneficiaries of the Act of June 12, 1858. Congress charged the Secretary to determine if, in the opinion of the Secretary of the Interior, these individuals were entitled to be included under treaty stipulations. 17 Stat. 631, 632. On February 11, 1873, the Secretary of the Interior forwarded to Congress a report from the Superintendent of Indian Affairs which determined that none of the individuals who had received an allotment pursuant to the June 12, 1858 Act were entitled to share in the proceeds from the sale of the Tribe's land in Kansas. The Commissioner determined that these individuals, though of Miami blood, had not been "recognized as Miamis, either by the tribe in Kansas or by those residing in Indiana." The report concluded that these individuals never joined the tribe in Kansas, and had claimed no benefits from the Tribe's annuities." See H.R. Exec. Doc. No. 199, 42nd Cong., 3d Sess. (1873). Maria Christiana DeRome had been

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[2] The allotment of the Tribe's land in Kansas to individual Indians was done to facilitate the assimilation of Indians into mainstream society and was intended to weaken tribal governments by breaking up the commonly held land-base of the Tribe. See F.Cohen, Handbook of Federal Indian Law 98-99 (1982).

included in this group and had received her allotment despite the lack of tribal membership in either group.

The Miami Tribe refused to recognize these individuals as members of the Tribe or to allow them to share in the proceeds from the sale of the Kansas lands. Additionally, in 1891 the Western Miamis sued the United States in the Court of Claims, seeking reimbursement for erroneous annuity payments made to the 73 individuals. The Tribe also sought reimbursement from the United States for the land erroneously allotted to these individuals in Kansas Territory, amounting to approximately 14,000 acres. The Court of Claims held that the Western Miamis were entitled to recover the amount of money erroneously paid as annuities for the 73, as well as the value of the land allotted to the individuals. See H.R.Report No. 3852, 51st Cong., 2d Sess. (1891) (setting forth the Court of Claims decision in Western Miami Indians v. United States). In 1891 Congress appropriated funds to compensate the Western Miamis for the annuities paid to those not entitled to them and directed the Secretary of the Treasury to pay the Western Miami Indians for their land that was allotted to persons not entitled to the lands. See 26 Stat. 1000.

In construing the provision of the IGRA that relates to an Indian tribe exercising governmental authority over trust or restricted land, the district court in Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523 (1993), aff'd, 3 F.3d 273 (8th Cir. 1993), suggested factors to consider in making the determination regarding whether land is Indian lands under IGRA. The court noted that where a dispute relates to whether, under IGRA, a tribe exercises governmental power over certain locations, these factors provide indicia regarding who exercises governmental power. The court indicated that the determination regarding tribal governmental power would require evidence regarding:

> (1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.

Id.

In the case of the Maria Christiana allotment, the land was originally allotted in 1859 to a nonmember of the Tribe. It is some distance from the Tribe's headquarters. Until the adjoining landowner recently provided the Tribe with access, it was inaccessible. It remains undeveloped. No member of the Tribe resides on the land. Until very recently, there had been no tribal oversight. The heirs of the original allottee were not members of the Tribe until 1996 when they were adopted because of their ownership interest in the land. The Miami Tribe of Oklahoma agreed by treaty to move to Oklahoma and cede its interest in this land. The Miami Tribe of Oklahoma did not allege governmental power over the land in the early 1990's and there is no agreement by local jurisdictions that the Tribe has civil and regulatory

jurisdiction over the land. Finally, the Miami Tribe of Oklahoma twice received compensation from the United States based on the loss of this land. The initial payment compensated the Tribe for the land; the second payment compensated the Tribe for unpaid interest on the initial payment. Considering all these circumstances leads us to the conclusion that the Miami Tribe does not exercise governmental powers over the Maria Christiania Reserve No. 35 within the meaning of IGRA.

If you have any further questions on this matter, please contact Troy Woodward at (202) 208-6526.

Sincerely,

Edward B. Cohen
Acting Solicitor

cc:

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