Memorandum

To: Philip N. Hogen, Chairman
From: Penny J. Coleman, Acting General Counsel
Subject: Legality of Gaming under the IGRA on the Shriner Tract owned by the Wyandotte Tribe
Date: July 19, 2004

I. Introduction

On March 24, 2004, the National Indian Gaming Commission (NIGC) Office of General Counsel (OGC) provided you with its written opinion that gaming is not legal under the Indian Gaming Regulatory Act (IGRA) on the Shriner Tract, a parcel of land in Kansas City, Kansas, held in trust for the benefit of the Wyandotte Tribe of Oklahoma (Tribe). On March 31, 2004, the Tribe requested reconsideration of the March 24, 2004, opinion. On April 5, 2004, the Tribe filed suit against the NIGC in U.S. District Court for the District of Columbia, challenging the March 24, 2004, opinion.[1]

Upon reconsideration, we recognize that some of the language in the March 24, 2004 opinion is over broad, and we have therefore revised the opinion. Consequently, the March 24, 2004 opinion is superceded by this memorandum. The conclusion, however, remains the same. It is the opinion of the OGC that the Tribe cannot lawfully game on the Shriner Tract pursuant to the IGRA.

At this time the Tribe is not conducting gaming on the property. Thus, no further action need be taken. With your permission, I will transmit this opinion to the Tribe and other interested parties.

[1] The case was transferred to the U.S. District Court for the District of Kansas. The Kansas District Court denied the Tribe's Motion for a Temporary Restraining Order, and that issue is now before the 10th Circuit Court of Appeals on an interlocutory appeal.

II. Background

On August 28, 2003, the Tribe commenced gaming on a parcel of land in downtown Kansas City, Kansas known as the Shriner Tract.[2] This parcel was taken into trust for the benefit of the Tribe on July 15, 1996. Because the Shriner Tract was taken into trust after October 17, 1988, for gaming to be legal under the IGRA, it must fall within one of IGRA's exceptions to the prohibition on gaming on lands acquired into trust after October 17, 1988.

The NIGC Chairman approved the Tribe's gaming ordinance on June 29, 1994. The approved ordinance is not site specific. On June 20, 2002, the Tribe submitted an amended gaming ordinance specific to the Shriner Tract property. The Tribe also submitted documentation supporting its claim that the Shriner Tract met three separate IGRA exceptions to the prohibition on gaming on post 1988 acquired lands. On August 27, 2002, the Tribe withdrew the amended ordinance to give the NIGC more time to issue an Indian lands opinion. The Tribe later advised the NIGC that it did not plan to game on the Shriner Tract after all.

On September 2, 2003, the Tribe advised the NIGC by letter that it had commenced gaming. The Tribe also resubmitted the supporting material from June 2002. Subsequently, on October 18, November 12, and November 31, 2003, the Tribe provided additional supporting materials and arguments. In addition to information received from the Tribe, we solicited and reviewed information from the State of Kansas on this issue. The four gaming tribes in Kansas also submitted information.

The Office of General Counsel has evaluated the status of the Shriner Tract and finds that it does not fall within one of the IGRA exceptions. Therefore, the Tribe may not game on the Shriner Tract pursuant to the IGRA.

III. Historical Background

The Tribe provided much of the following historical background in its September 2, 2003, submission.

[2] "A tract of land in the Northwest Quarter of Section 10, Township 11, Range 25 Wyandotte County, Kansas situated in Kansas City, Kansas and more particularly described as: Beginning at the SW corner of Huron Place, as shown on the recorded plat of Wyandotte City, in Kansas City, Kansas, thence North 150 feet; thence East 150 feet; thence South 150 feet; thence West 150 feet to the point of beginning, meaning and intending to describe a tract of land 150 feet square in the Southwest corner of Huron Place as shown on the recorded Plat of Wyandotte City, which is marked 'Church Lot' thereon." 61 Fed. Reg. 114, 29757-29758 (June 12, 1996).

A. Pre Revolutionary America

Prior to the first contact with European settlers, the Tribe's ancestors, known as the Huron, resided in an area known as "Huronia" between the Georgia Bay and Lake Ontario south of the Ottawa River in Canada. After a bloody conflict with the Iroquois Confederacy in 1648 and 1649, the Huron left their homeland and took refuge with the Ottawa and Chippewa on the northwest shore of Lake Huron in the present state of Michigan. During the early 18th century, the Huron gradually moved south to the area around the Detroit settlement and into the Western Reserve (the present State of Ohio and western Pennsylvania) and became known as the Wyandotte.

B. Cessation of Ohio and Michigan Lands

Beginning in 1795 after their defeat at the Battle of Fallen Timbers, the Tribe began ceding their lands to the United States. In a series of treaties with the United States between 1795 and 1832, the Tribe ceded to the United States all of the Tribe's interest in approximately 6 million acres of land in the present States of Ohio and Michigan. See Treaty with the Wyandot dated August 3, 1795, 7 Stat. 49; Treaty of Fort Industry dated July 4, 1805, 7 Stat. 87; Treaty with the Wyandot dated July 22, 1814, 7 Stat. 118; Treaty with the Wyandot dated September 8, 1815, 7 Stat. 131; Treaty with the Wyandot dated September 29, 1817, 7 Stat. 160; Treaty with the Wyandot dated September 17, 1818, 7 Stat. 178; Treaty with the Wyandot dated September 20, 1818, 7 Stat. 180; Treaty with the Wyandot dated January 19, 1832, 7 Stat 364. After the Treaty of January 19, 1832, the Tribe's land holdings were limited to a 109,144-acre reservation in Crawford County, Ohio and a 4,996-acre reservation in Michigan.

C. Removal to Kansas

In 1842, the Tribe again entered into a treaty with the United States pursuant to which the Tribe ceded its remaining Ohio and Michigan lands to the United States. See Treaty with the Wyandot dated March 17, 1842, 11 Stat. 581. Under the Treaty of 1842, the United States in consideration of the Tribe's land cession, granted to the Tribe a 148,000-acre tract of land located west of the Mississippi River. Id. at Art. 2. The Treaty did not identify the specific location of the new 148,000-acre reserve, but the Tribe negotiated to purchase land from the Shawnee Tribe near Westport, Missouri. The last 664 Wyandotte left the State of Ohio on July 12, 1843.

The Tribe arrived in the Town of Kansas between July 28 and 31, 1843, and originally took up residence on a strip of United States owned land between the Missouri border and the Kansas River. Shortly after arriving in the Kansas Territory, the Tribe learned that the Shawnee would not complete the sale of the Westport lands and that the United States would not honor its 1842 Treaty commitment to provide the Tribe with a 148,000-acre reserve.

On December 14, 1843, the Tribe entered into an agreement with the Delaware Nation to acquire land in the Kansas Territory. Under the 1843 agreement the Delaware gifted to the Tribe three (3) sections of land, each comprising 640 acres, situated in the Kansas Territory at the confluence of the Kansas and Missouri Rivers. Agreement between the Delaware Nation and the Wyandot Nation, dated December 14, 1843, at Art. I., 9 Stat. 337. Additionally, the Delaware sold the Tribe thirty-six (36) sections of land to the west of the gifted land. Id. at Art II. The 1843 agreement between the Tribe and the Delaware was ratified by the United States Senate on July 25, 1848, with the following additional proviso: "the Wyandot Indian Nation shall take no better right or interest in and to said lands than is now vested in the Delaware Nation of Indians." 9 Stat. 337.

D. Termination of Tribal Status, Removal to Oklahoma, and Restoration

Between 1843 and 1855 the Tribe was instrumental in the founding and platting of Wyandotte City, which was later renamed Kansas City. In 1855 the Tribe again entered into a treaty with the United States. Treaty with the Wyandot dated January 31, 1855, 10 Stat. 1159. Under the Treaty of 1855, the Tribe agreed to cede the 36 sections of land it had purchased from the Delaware Nation to the United States. Id. at Art. II. Specifically reserved from the treaty cession was the Huron Indian Cemetery, which was and remains adjacent to the Shriner Tract, and 2 parcels of land that were then in use as Methodist Episcopal churches. Id.

In addition to ceding tribal lands to the United States, the Treaty of 1855 offered tribal members the option of (i) renouncing their tribal affiliation and becoming citizens of the United States and receiving an allotment from the lands ceded to the United States under the Treaty, or (ii) maintaining their tribal affiliation and identity and removing to the Indian Territory (the present State of Oklahoma). Id. at Art. I, Art. III. In 1857, some 200 tribal members who had elected to maintain their tribal affiliation were removed to the Indian Territory and resided among the Seneca Nation in the northeastern portion of the Territory.

During the Civil War most of the Wyandotte and Seneca left the Indian Territory and relocated back to Wyandot City to live among their relatives who had become citizens of the United States and had received allotments from the tribal lands. After the war, these Wyandottes again relocated back to the Indian Territory and received a reservation under the Omnibus Treaty of 1867. 15 Stat. 513. This reservation was allotted in 1893.

The Tribe, pursuant to the Oklahoma Indian Welfare Act of 1936, adopted a constitution and by-laws, which were ratified on July 24, 1937. In 1956, however, Federal supervision of the Tribe was terminated. Act of August 1, 1956, 70 Stat. 893. The Tribe was restored as a federally recognized Indian tribe on May 14, 1978. Act of May 14, 1978, 92 Stat. 246. The Assistant Secretary – Indian Affairs on May 30, 1985, approved the Tribe's Revised Constitution.

E. Trust Land Acquisitions

On June 8, 1979, the United States took into trust for the benefit of the Tribe a 1.5-acre parcel in Wyandotte, Oklahoma. In a memorandum from the BIA Superintendent of the Miami Agency to the BIA Area Director, Muskogee Area Office, regarding the Tribe's request to have land taken into trust it states, "The Wyandotte tribe was recently reinstated and recognized by the United States Government as Indians and, more recently, acquired a land base with desires of purchasing additional land adjacent and elsewhere." Memorandum from BIA Superintendent of the Miami Agency to the BIA Area Director, Muskogee Area Office, Re: Request for Land to be Placed and Held in Trust..., Dated November 13, 1878. The memorandum further states, "The Wyandotte tribe will use their land as a base for tribal economic development..." Id.

Five years later, in 1984, two additional parcels of land in Wyandotte, Oklahoma, one 3.8 acres, the other 189[3] acres were taken into trust for the Tribe. With respect to the 189 acres, the BIA Muskogee Area Director stated in a June 3, 1980, letter to the United States General Services Administration, "I have [d]etermined and hereby certify that subject property is located within the boundary of the former reservation of the Wyandotte Tribe of Oklahoma..." Letter from BIA Muskogee Area Director to United States General Services Administration, June 3, 1980.

F. Indian Claims Commission

The Indian Claims Commission (ICC) was established to resolve Indian claims that had accrued against the federal government prior to August 13, 1946. 25 U.S.C. §§ 70-70v-3. During the 1950s, the Tribe filed several actions against the United States with the ICC. On August 17, 1978, in ICC Docket No. 139, the ICC entered a judgment in favor of the Tribe against the United States in the amount of $561,424.21 as additional compensation for the Tribe's land cession to the United States under the Treaty of Fort Industry of 1805, 7 Stat. 87. Funds to cover this judgment were appropriated on October 31, 1978. On January 19, 1979, in ICC Docket No. 141, the ICC entered a judgment in favor of the Tribe against the United States in the amount of $2,348,679.90 as additional compensation for the Tribe's land cessions to the United States under the treaties dated September 29, 1817, 7 Stat. 160; Sept. 17, 1818, 7 Stat. 178; and Sept. 20, 1818, 7 Stat. 180. Funds to cover this judgment were appropriated on March 2, 1979. Finally, on January 20, 1983, the U.S. Court of Claims, in ICC Docket Nos. 212 and 213, entered judgment in favor of the Tribe against the United States in the amount of $200,000 as additional compensation for the Tribe's land cessions to the United States under the treaties of 1832, 1836 and 1842.

[3] The 189-acre parcel, a former Indian boarding school, was actually transferred by the General Services Administration to the Secretary of the Interior to be held in trust for the Tribe in 1979. However, other Oklahoma Tribes appealed that transfer, and lengthy litigation ensued. The other Oklahoma Tribes were unsuccessful, and the transfer was completed in 1984. (See Memorandum from Assistant Secretary-Indian Affairs to Deputy to the Assistant Secretary-Indian Affairs (Trust and Economic Development), Re: Recording the Transfer of Seneca Indian School, dated: October 14, 1986.

Under the Indian Tribal Judgment Funds Use or Distribution Act of 1973, 87 Stat. 466, the Secretary of the Interior is required to provide a distribution plan for judgment funds within 180 days after the appropriation of such funds. 25 U.S.C. §1402(b). The Secretary did not provide a plan for the use or distribution of the funds appropriated in settlement of the judgments entered in ICC Docket Nos. 139 and 141 within the prescribed time. On December 20, 1982, Pub. L. No. 97-371, 96 Stat. 1818, was enacted to provide for the distribution of funds appropriated to the Nation in settlement of the judgments entered in ICC Docket Nos. 139 and 141.

Questions subsequently arose regarding the equity of the formula used to divide the award between the Tribe and Absentee Wyandottes no longer associated with the Tribe. Therefore, Pub. L. 97-371 was repealed and on October 31, 1984, Pub. L. 98-602, 98 Stat. 3149, was enacted to replace it. The distribution plans contained in Pub. L. No. 97-371 and Pub. L. No. 98-602 both provided that $100,000 of the judgment funds was to be used for the purchase of real property that the Secretary was required to take into trust for the benefit of the Tribe. See, Pub. L. No. 97-371, §3(b)(1); Pub. L. No. 98-602, §105(b)(1).

G. Park City, Kansas Property

On November 22, 1992, the Tribe purchased a 10-acre parcel of real property located in Park City, Sedgwick County, Kansas (the "Park City Property") for $25,000.00. In February 1993, the Tribe petitioned the United States to accept title to the Park City property in trust for the benefit of the Tribe for gaming purposes. On February 4, 1993, the Muskogee Area Director requested guidance from the Field Solicitor on what actions, if any, were necessary to insure compliance with the IGRA. On February 9, 1993, at the invitation of the Field Solicitor, the Tribe submitted a memorandum stating, among other things, that the land claim settlement exception applied to the Park City property. In a memorandum to the Area Director dated February 19, 1993, the Field Solicitor, however, concluded that the land claim settlement exception would not apply to the Park City property if the Property were accepted into trust. (Exhibit 3 to Tribe's September 2, 2003, submission). On April 28, 1993, the Muskogee Area Director advised the Tribe that if the Tribe intended to use the Park City Property for gaming, it must go through the Secretarial determination process contained in 25 U.S.C. §2719(B)(1)(A).

The Tribe consulted with the BIA regarding the trust acquisition of the Park City Property throughout 1993 and 1994, and as a result of those consultations, the Tribe elected to cease temporarily its efforts to have the United States accept title to the Park City Property in trust for the benefit of the Tribe.

H. Shriner Tract Trust Acquisition

During 1994 and 1995, the Tribe negotiated to purchase several properties adjacent to the Huron Cemetery. In January 1996, the Tribe submitted an application to the BIA requesting that the United States accept title to certain parcels of real property located in

Kansas City, KS, including the Shriner Tract, in trust for the Tribe. The Tribe's trust application cited Pub. L. No. 98-602 as the statutory authority for the requested trust acquisition. The trust application further stated that the proposed trust lands were contiguous to the Huron Cemetery and argued that because the Huron Cemetery was reservation land of the Tribe on October 17, 1988, the Tribe would be entitled to conduct gaming on the proposed trust parcels pursuant to 25 U.S.C. § 2719(a)(1). On June 12, 1996, the BIA published in the Federal Register a notice stating its intention to accept title to the Shriner Tract in trust for the Tribe.

On July 12, 1996, the State of Kansas and four (4) Indian tribes in Kansas filed suit against the Assistant Secretary seeking to enjoin the trust acquisition of the Shriner Tract. Plaintiffs argued that Pub. L. No 98-602 did not mandate a trust acquisition and the Secretary's determination to accept title to the Shriner Tract in trust for the Nation was arbitrary and capricious because the Secretary did not consider the factors enumerated in 25 C.F.R. Part 151. The plaintiffs also argued that the trust acquisition was in violation of Federal law because the Secretary did not require compliance with certain Federal statutes, including the National Environmental Policy Act. Plaintiffs further contended that the Secretary's determination that the Huron Cemetery constituted an Indian reservation of the Nation was arbitrary and capricious and inconsistent with applicable law. Although an injunction was entered against the United States on July 12, 1996, the Nation took an emergency appeal to the Tenth Circuit, and on July 15, 1996, the Tenth Circuit vacated the July 12 injunction. The United States accepted title to the Shriner Tract in trust for the benefit of the Nation on July 15, 1996.

Although the Tenth Circuit vacated the July 12, 1996, injunction, the Court preserved the rights of the parties to assert any all claims or defenses with respect to the trust acquisition. The matter proceeded before the United States District Court, and on March 2, 2000, the District Court entered judgment dismissing Plaintiffs' Complaint on the grounds that Plaintiffs had failed to join an indispensable party, i.e., the Tribe. Sac and Fox Nation of Missouri v. Babbitt, 92 F. Supp.2d 1124 (D. Kan. 2000). While the District Court did not rule on the merits of the case, it did note that had it been required to address the merits the Court would have ruled that Pub. L. No. 98-602 was a mandatory trust acquisition statue. Id. at 1128. The District Court left undecided the question of whether the Huron Cemetery was a reservation for purposes of the IGRA. Id. at 1129.

The State appealed the District Court's dismissal to the Tenth Circuit. In a February 28, 2001, opinion, the Court of Appeals concluded that Pub. L. No. 98-602 was a mandatory trust acquisition statute, and that, if funds allocated to the Tribe under Section 105(b)(1) of Pub. L. No. 98-602 were used to acquire the Shriner Tract, the Secretary had no discretion and was required to accept title in trust for the Tribe. Sac and Fox Nation, 240 F.3d at 1262. The Appeals Court, however, concluded that it was unclear from the administrative record whether the Tribe had in fact used Pub. L. 98-602 funds to purchase the Shriner Tract, and the Court remanded the matter back to the District Court with instruction that the District Court remand the matter back to the BIA for confirmation that Pub. L. No. 98-602 funds were used to purchase the Shriner Tract. Id. at 1263-64.

After addressing the Pub. L. No. 98-602 issue, the Tenth Circuit turned to the question of the status of the Huron Cemetery. Id. at 1264. The Court noted that under Chevron Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), courts typically extend considerable deference to determinations by executive agencies charged with the administration of a particular statute. The Court stated, however, that "when Congress enacted IGRA, it established the . . . [National Indian Gaming] Commission and charged the Commission with exclusive regulatory authority for Indian gaming conducted pursuant to IGRA." Sac and Fox Nation, 240 F.3d at 1265-66. The Court concluded that because Congress vested the Commission, and not the BIA, with exclusive regulatory authority over Indian gaming, the Court was not required under Chevron to extend any deference to the Secretary's determination that the Huron Cemetery was a reservation for purposes of the IGRA. Id. Owing no deference to the Secretary's determination, the Court determined that the Huron Cemetery was not a reservation for purposes of the IGRA as Congress had contemplated, and directed the District Court to enter judgment declaring that the Huron Cemetery was not a reservation for purposes of the IGRA. Id. at 1267.

On August 23, 2001, the District Court, pursuant to the directions from the Tenth Circuit, entered its final judgment. The judgment remanded the matter "to the Secretary of the Interior to reconsider whether Pub. L. 98-602 funds alone were used to purchase the Shriner Tract in connection with the decision to approve taking the Shriner Tract into trust for the Wyandotte Tribe of Oklahoma." The District Court also entered judgment "declaring that the Huron Cemetery is not a 'reservation' for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq."

On March 11, 2002, the Assistant Secretary published a notice in the Federal Register concluding that the Tribe had used only Pub. L. 98-602 funds to purchase the Shriner Tract. The notice also confirmed the trust status of the Shriner Tract. To alleviate any confusion the March 11 notice may have caused, the Assistant Secretary published on May 5, 2002, a revised notice stating that the original March 11 notice was not intended as a determination on the question whether the Shriner Tract was taken into trust as part of the settlement of a land claim.

After the publication of the March 11 notice, the State of Kansas and the four Kansas tribes filed suit in the U.S. District Court for Kansas, alleging that the Secretary's March 11 determination was arbitrary and capricious. At the same time, the State filed a request with the Assistant Secretary asking that the Assistant Secretary reconsider the March 11 determination. On or about June 11, 2002, the Assistant Secretary granted the State's request for reconsideration. On June 12, 2003, the Acting Assistant Secretary issued an Opinion on Reconsideration, finding that only Pub. L. 98-602 funds were used to purchase the Shriner Tract.

IV. Applicable Provisions of IGRA and NIGC Regulations

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are within such tribe's jurisdiction." 25 U.S.C. §§ 2710(b)(1) and 2710(d). Additionally, if

the proposed lands are trust or restricted lands, rather than land within the limits of an Indian reservation, the tribe may conduct gaming only if it exercises "governmental power" over those lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

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).

NIGC regulations further clarify the Indian lands definition:

> Indian lands means:
> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either –
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. Lands that do not qualify as Indian lands under IGRA generally are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

Section 2719(a) of the IGRA provides that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions are met. For the purposes of reviewing the Shriner Tract, the following exceptions are particularly relevant. The general prohibition does not apply to lands located in a state other than Oklahoma that are within the Indian tribe's "last recognized reservation within the State or States" within which the tribe is presently located. 25 U.S.C. § 2719(a)(2)(B). In addition, the prohibition does not apply when:

> lands are taken into trust as part of—
>
> (i) a settlement of a land claim, [or]
> (ii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. §§ 2719(b)(1)(B)(i), (iii).

V. Legal Analysis

An Indian tribe may engage in gaming under IGRA only on "Indian lands" that are within such tribe's jurisdiction. 25 U.S.C. § 2701; 25 U.S.C. §§ 2710(b)(1) and 2710(d); 25 U.S.C. § 2703(4). Additionally, if the lands at issue are trust lands outside the tribe's reservation, the tribe may conduct gaming on it only if it exercises "governmental power" over the land. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). Therefore, to determine whether the Shriner Tract is Indian land, we must determine that the Tribe has jurisdiction, and, because the Shriner Tract is trust land outside a reservation, that the Tribe exercises governmental power over it.

Tribal jurisdiction is a threshold requirement to the exercise of governmental power. See, e.g., Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 701-703 (1st. Cir. 1994), cert denied, 513 U.S. 919 (1994), superceded by statue as stated in Narragansett Indian Tribe v. National Indian Gaming Commission, 158 F.3d 1335 (D.C. Cir. 1998) (In addition to having jurisdiction a tribe must exercise governmental power in order to trigger [IGRA]); Miami Tribe of Oklahoma v. United States, 5 F.Supp. 2d 1213, 1217-18 (D.Kan.1998) (Miami II) (A tribe must have jurisdiction in order to be able to exercise governmental power); Miami Tribe of Oklahoma v. United States, 927 F.Supp. 1419, 1423 (D. Kan. 1996) (Miami I) (The NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land); State ex. rel. Graves v. United States, 86 F.Supp. 2d 1094 (D. Kan. 200), aff'd and remanded, Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001). This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands within such tribe's jurisdiction. 25 U.S.C. §§ 2710 (d)(3)(A), 2710(b)(1); see also Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 701-703 (1sr. Cir. 1994) cert denied 513 U.S. 919 (1994). As a threshold matter, we must therefore analyze whether the Tribe possesses jurisdiction over the trust parcel.

A. Jurisdiction

As a general matter, tribes are presumed to possess tribal jurisdiction within "Indian country." See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998). The Supreme Court has stated that Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982).

Historically, the term "Indian country" has been used to identify land that is subject to the "primary jurisdiction . . . [of] the Federal Government and the Indian tribe inhabiting it." Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998). The U.S. Code defines "Indian country" as:

(a) all land within the limits of any Indian reservation...,

(b) all dependent Indian communities..., and
(c) all Indian allotments, the Indian titles to which have not been extinguished....

18 U.S.C. § 1151. The Venetie court observed that Section 1151 reflects the two criteria the Supreme Court "previously . . . had held necessary for a finding of 'Indian country' ... first, [the lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." Venetie, 522 U.S. at 527. Prior to the enactment of section 1151 in 1948, the Court had already found that reservation lands and allotments satisfied those requirements. See, e.g., United States v. Pelican, 232 U.S. 442, 449 (1914) (Indian country includes individual Indian allotments held in trust by the United States because they "remain Indian lands set apart for Indians under governmental care"); Donnelly v. United States, 228 U.S. 243, 269 (1913) (Indian country includes lands within formal reservations). The Venetie court also observed that Congress used the term "dependent Indian communities" in Section 1151(b) to codify the Court's understanding, as expressed in United States v. McGowan, 302 U.S. 535 (1938), and United States v. Sandoval, 231 U.S. 28 (1913), that other lands, although not formally designated as a reservation, may also possess the attributes of "federal set-aside" and "federal superintendence" characteristic of Indian country. Venetie, 522 U.S. at 530; see, e.g., McGowan, 302 U.S. at 538-539 (Reno Indian Colony land held in trust by the United States is Indian country); Sandoval, 231 U.S. at 45-49 (Pueblo Indian lands).

Several Supreme Court decisions hold or assume that tribal trust lands are Indian country although they are not part of a formal reservation. In Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, the Supreme Court concluded that lands held in trust by the United States for the Tribe were "validly set apart for the use of the Indians as such, under the superintendence of the Government," and therefore were Indian country, with the consequence that the State did not have the authority to tax sales of goods to tribal members that occurred on those lands. 498 U.S. 505, 511 (1991). The Potawatomi Court specifically rejected the contention that the tribal trust land was not Indian country because it was not a reservation, noting that no "precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges." Id.; see also Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 452-453 and n.2 (1995) (treating tribal trust lands as Indian country); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123-125 (1993); United States v. John, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for purposes of federal criminal jurisdiction"); United States v. McGowan, 302 U.S. 535, 539 (1938).

Here, consistent with Venetie and other Supreme Court decisions, the Tribe's trust land, although not a formal reservation is "Indian country," within the meaning of section 1151. The land has been "validly set-aside for the tribe under the superintendence of the federal government." United States v. McGowan, 302 U.S. at 539, quoted in Venetie, 522 U.S. at 529.

It is unnecessary to decide whether the Tribe's trust lands are more properly categorized as an informal reservation under section 1151(a) or as a dependent Indian community under section 1151(b) because, regardless of category, the property in this case, owned by the United States in trust for the Tribe, is Indian country. The Tribe's trust lands come within at least one of the three statutory categories, because the trust lands possess the two characteristics of Indian country reflected in section 1151. See Venetie, 522 U.S. at 527.

B. Exercise of Governmental Power

Because the trust land is Indian country, we can conclude that the Tribe has jurisdiction over it. For the land to fit the definition of "Indian lands," we must next decide whether the Tribe also exercises governmental power over the parcel. See 25 U.S.C. § 2703(4)(B); see also Narragansett Indian Tribe, 19 F.3d at 703.

IGRA is silent as to how NIGC is to decide whether a tribe exercises governmental power. Furthermore, the manifestation of governmental power can differ dramatically depending upon the circumstances. For this reason NIGC has not formulated a uniform definition of "exercise of governmental power," but rather decides that question in each case based upon all the circumstances. See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12382, 12388 (1992).

Case law provides some guidance. The First Circuit in Narragansett Indian Tribe found that satisfying this requirement depends "upon the presence of concrete manifestations of [governmental] authority." Narragansett Indian Tribe, 19 F.3d at 703. Such examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. Id.

In Cheyenne River Sioux Tribe v. State of South Dakota, 830 F. Supp. 523 (D.S.D. 1993), aff'd 3 F.3d 273 (8th Cir. 1993), the court stated that several factors might be relevant to a determination of whether off-reservation trust lands constitute Indian lands. The factors were:

(1) Whether the areas are developed;
(2) Whether the 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; and
(5) Other indicia as to who exercises governmental power over those areas.

Id. at 528.

The Tribe identified several actions it believes demonstrates its present exercise of governmental power over the Shriner Tract. We find the following actions significant:

(1) The Tribe asserted its governmental authority to challenge taxes purported to be levied by the Unified Government of Wyandotte County/Kansas City, Kansas. In 2001, the Unified Government filed a legal action to foreclose a tax lien on the Shriner Tract. The Tribe asserted its sovereignty and the foreclosure action was dismissed by Wyandotte County;

(2) The Tribe has posted signs around the perimeter of the Shriner Tract which advise the public that the property is Indian country, and that persons entering upon the property are subject to the laws and jurisdiction of the Tribe and the United States;

(3) The Tribal Police Department provides law enforcement services to the property;

(4) In 1998, the Tribe entered into a Settlement Agreement with its sister tribe, the Wyandot Nation of Kansas, wherein the Tribe agreed the Masonic Temple Building on the Shriner Tract would be used solely for governmental purposes; and

(5) The Tribe's Business Committee is in the process of finalizing the Tribe's Historic Preservation Plan, which provides that the Tribe will have the exclusive jurisdiction over historic properties located on its lands, including the Masonic Temple Building on the Shriner Tract.

Also relevant is a Memorandum of Understanding entered into in 1998 between the Tribe and the Unified Government of Wyandotte County/Kansas City, Kansas wherein the Unified Government recognized the governmental jurisdiction of the Tribe.

In addition, the Tribe has, on at least one occasion, excluded non-tribal members from the property. In a letter dated September 22, 2003, from David McCullough, Esq. to Phill Kline, Attorney General of Kansas, the Tribe denied the State of Kansas's request to inspect the Masonic Temple Building. (Letter from David McCullough, Esq., attorney for the Tribe, to Phill Kline, Kansas Attorney General, dated September 22, 2003).

These "concrete manifestations of governmental authority" show that the Tribe in fact exercises governmental authority over the trust lands in question. We are satisfied that the parcel in question meets the statutory and regulatory definition of "Indian lands." However, a determination of whether the Tribe has Indian lands is not the end of the inquiry of whether the Tribe can conduct gaming on the land.

C. Lands Acquired in Trust by the Secretary After October 17, 1988

Section 20 of the IGRA, 25 U.S.C. § 2719, generally prohibits gaming on lands acquired in trust after the enactment of IGRA on October 17, 1988, unless one of several exceptions apply. Accordingly, because the Shriner Tract was taken into trust after

October 17, 1988, it is necessary to review the prohibition and its exceptions to determine whether the Tribe may conduct gaming on the Shriner Tract.

The Tribe argues that three exceptions to the general prohibition on gaming on after-acquired lands apply to the Shriner Tract. The Tribe argues that (1) the Shriner Tract is within the Tribe's last reservation; (2) the Shriner Tract was taken into trust as part of a settlement of a land claim, and (3) the Shriner Tract was taken into trust as part of the restoration of their lands. We address each of these arguments in turn.

1. Last Reservation

The Tribe argues that the "last reservation exception" applies to the Shriner Tract. The "last reservation exception" provides that gaming may be conducted on lands acquired after October 17, 1988, provided that the tribe had no reservation on October 17, 1988, and the lands are located in a state other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located. 25 U.S.C. § 2719(a)(2)(B). The first two parts of this exception are met: the Tribe had no reservation on October 17, 1988,[4] and the land is in Kansas, not in Oklahoma. We therefore turn our attention to the remaining question, whether the land at issue is within the tribe's last recognized reservation within the State within which the Tribe is presently located.

To answer this question, we must first determine where the Tribe is presently located. The Tribe argues that it is presently located in Kansas, and that the Shriner Tract is within the Tribe's last recognized reservation in Kansas. The Tribe argues that it is "presently located" in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. The Tribe argues that the existence of an inter-governmental agreement with Kansas City providing for the maintenance and security of the Huron Cemetery establishes this jurisdiction.

The answer to this question turns on the scope and meaning of the term "presently located." To determine the scope of a statute, we look first to its language. Reves v. Ernst & Young, 507 U.S. 170, 177 (1993). To ascertain the plain meaning of a statute, we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); (See also, U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002), "In interpreting a statute, the [Tenth Circuit] gives effect to a statute's unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Furthermore, we must give the words of the statute "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." Williams v. Taylor, 529 U.S.420, 432 (2000).

[4] We understand there are no reservations in the State of Oklahoma, as contemplated by the IGRA. Otherwise, the all encompassing Oklahoma exception in 25 U.S.C. § 2719 (a)(2) would likely not exist.

While tribes can be located in more than one state (see e.g. the Navajo Nation which is located in three states or the Standing Rock Sioux Tribe which is located in two states), we believe the plain meaning of the term "presently located" is clear. It is not where the tribe happens to have an isolated tract of land. It plainly means where the tribe is currently to be found, i.e., where the tribe physically resides. To determine where this is, we look to where the seat of tribal government is, and where the Tribe's population center is. The seat of the Wyandotte Tribal government and its population center is in Wyandotte, Oklahoma. We therefore find that the Tribe is presently located in Oklahoma.[5]

We do not subscribe to the Tribe's argument that it is presently located in Kansas because it exercises jurisdiction over the Huron Cemetery, located in Kansas. As stated by the Tenth Circuit, "[a]lthough the Huron Cemetery was reserved by the federal government in the 1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract's status as a burial ground. It is further uncontroverted that, since the time of the 1855 treaty, the Huron Cemetery has not been used by the Wyandotte Tribe for purposes of residence. Rather, the tract, which is now separated by a significant distance from the actual reservation of the Wyandotte Tribe in Oklahoma, has consistently maintained its character as a public burial ground." Sac and Fox at 1267.

This plain reading of the statutory language is consistent with our reading of the whole of section 2719(a). The language of section 2719(a) evidences a Congressional intent to limit gaming to tribal reservations or, if no reservation exists, to areas within former reservations or last reservations where the tribe is located. This section of IGRA limits, not expands, the right to game. It is clear that Congress intended to allow some gaming to occur on lands acquired after enactment of the IGRA under this provision, but only contemplated gaming on newly acquired lands far from the current or prior reservation in very specific isolated circumstances.

If a court were to find that the term "presently located" is ambiguous, the court would defer to the NIGC's reasonable interpretation of the statutory language. U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002). The court would also look to the legislative history. The legislative history here does not support the Tribe's views. With respect to lands acquired after October 17, 1988, the Select Committee on Indian Affairs stated, "[g]aming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary [of the Interior] determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination." S. Rep. No. 446, 100th Congress, 2d Session 8 (1988).

[5] If a court were to find that the term "presently located" is ambiguous, the court would defer to the NIGC's reasonable interpretation of the statutory language. U.S. v. Seminole Nation of Oklahoma, 321 F.3d 939, 944 (10th Cir. 2002).

Because we find that the Tribe is not presently located in Kansas, we need not address the Tribe's other arguments in support of its contention that the Shriner Tract is within its last reservation.[6]

2. Settlement of a Land Claim

The Tribe argues that the land claim settlement exception to the prohibition on gaming on lands acquired after 1988 applies to the Shriner Tract. This exception allows gaming on land taken into trust after 1988 as part of a settlement of a land claim. The Tribe argues that the Tribe's ICC claims are land claims within the meaning of 25 U.S.C. § 2719(b)(1)(B)(i), and that the Shriner Tract was taken into trust as part of a settlement of those claims. (Tribe's September 2, 2003, submission at 15-17).

Specifically, the Tribe argues that, in Docket Nos. 139 and 141, the ICC held that the Tribe was granted recognized title to Royce Areas 53 and 54 by virtue of the Treaty of Greenville and the Treaty of Fort Industry, and that the ICC, as a precursor to evaluating damages, had to apportion interests in the areas among the various tribal signatories to these two treaties. (Tribe's September 2, 2003, submission at 16). The Tribe argues that a claim requiring a determination of ownership of title to land is a "land claim" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(ii).[7]

As stated above in our discussion of the "last reservation" exception, the interpretation of the land claim settlement exception must begin with the language of the provision itself. Reeves, 507 U.S. at 177. To ascertain the plain meaning of a statute, we look to the particular statutory language at issue, as well as the language and design of the statute as a whole. KMart Corp. 486 U.S. at 291; (See also, Seminole Nation of Oklahoma at 944 ("In interpreting a statute, the [Tenth Circuit] gives effect to a statute's unambiguous terms. In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Furthermore, we must give the words of the statute "their ordinary,

---

[6] We note, however, that the Tenth Circuit Court of Appeals has held that the Huron Cemetery, adjacent to the Shriner Tract, is not a reservation for purposes of the IGRA because it was not set aside for the Tribe to reside on. Sac and Fox Nation of Missouri v. Norton, 240 F. 3d. 1250, 1267 (10th Cir. 2001; *cert. denied,* Wyandotte Nation v. Sac & Fox Nation, 534 U.S. 1078 (2002). The court found that "IGRA's use of the phrase 'the reservation of the Indian tribe' in 25 U.S.C. § 2719(a) suggests that Congress envisioned that each tribe would have only one reservation for gaming purposes." Id. at 1267. Further, the court held, "IGRA specifically distinguished between the reservation of an Indian tribe and lands held in trust for the tribe by the federal government. If the term 'reservation' were to encompass all land held in trust by the government for Indian use (but not necessarily Indian residence), then presumably most, if not all, trust lands would qualify as 'reservations.' In turn, all of those parcels could be used in the manner in which the Wyandotte Tribe seeks to use the Huron Cemetery and its surrounding tracts." Id.

[7] The Tribe cites to no substantive authority to support this definition, only to cases discussing the Indian Canon of Construction, which provides that ambiguous statutes are to be construed liberally, with ambiguities resolved in favor of Indians. Bryan v. Itasca County, 426 U.S. 373, 392 (1976). However, because we find that the term "land claim" is unambiguous, we need not resort to any statutory construction aids, including the Indian Canons of Construction.

contemporary, common meaning, absent an indication Congress intended them to bear some different import." Williams, at 432.

If the language of the land claim settlement provision is clear and unambiguous, then the plain meaning of the provision will apply and there is no need to turn to the legislative history of the provision or to traditional aids to statutory construction. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 251 (1992); Sacramento Regional County Sanitation Dist. v. Reilly, 905 F.2d 1262, 1268(9th Cir. 1990).

Subsection (b)(1)(B)(i) makes an exception to the no-gaming-on-after-acquired-lands rule for "lands [] taken into trust as part of a settlement of a land claim." This provision clearly requires that there be a claim for land, and that land be taken into trust as part of a settlement of that claim. It is clear and unambiguous. It means a claim made by a Tribe for the return of land. To determine whether the Tribe's ICC claims were land claims requires an inquiry into the nature of the claim brought by the Tribe and the resulting award to the Tribe. The Tribe brought claims before the ICC and the Claims Court exclusively for money damages, not over title to land itself. Furthermore, the Tribe's award was limited to money damages. While the ICC may have evaluated whether the Tribe previously held title to the land, and had to assign interests among the various tribes to ascertain money damages, this does not transform the claim into a land claim. The claim was for money, not the land, and the evaluation undertaken by the court to arrive at the amount of money damages does not change that. Furthermore, Pub. L. 98-602 was merely a mechanism with which to distribute judgment funds awarded to the Tribe.

Congress was fully aware of the ICC and the pre-existing process created for the tribes to bring claims against the United States when it enacted the IGRA. Congress could have included a broad exception to the gaming prohibition on lands taken into trust for property purchased with funds awarded by the ICC and the Claims Court; however, no such exception exists in the legislation. Instead, Congress chose to narrowly except lands taken into trust "as part of . . . a settlement of a land claim."

To find that ICC money judgments fit within the plain language of the after-acquired lands exception would result in the exception swallowing the rule. The ICC handled large numbers of claims during its lifetime, and substantial relief was granted to many tribes. William C. Canby, Jr., American Indian Law at 267 (2nd Ed. 1988). Interpreting the land claim settlement exception to apply any time a tribe uses such monetary judgments to purchase land would open up the exception far beyond what was intended.

Finally, the Department of the Interior (DOI) previously determined that the Tribe's land in Park City, Kansas, purchased with Pub. L. 98-602 funds, was not land within the meaning of the IGRA land claim settlement exception. The DOI Tulsa Field Solicitor, in an opinion dated February 19, 1993, concluded that:

> Public Law 98-602 which authorizes the expenditure of judgment funds awarded to the Tribe by the Indian Claims Commission and its successor

> forum, the United States Claims Court, for acquisition of lands to be taken into trust by the Secretary of the Interior, does not come within the meaning of [IGRA's land claim settlement exception]. While the argument of the Tribe is cogent, we are mindful of the limitations on the jurisdiction of the Indian Claims Commission and the United States Claims Court to award money judgments based upon the fair market value of lands taken by the United States at the time of the taking and not land. 25 U.S.C. §§70-70v. Strictly speaking, settlements reached in cases before the Indian Claims Commission and the United States Claims Court are not land settlements wherein the parties assert competing claims to title to property, but rather are settlements of claims against the United States for money damages.

Memorandum from M. Sharon Blackwell, Field Solicitor, Tulsa, to Area Director, Muskogee Area Office, BIA, February 19, 1993 at 11. We see no reason to depart from this interpretation.

3. Restoration of Land

Finally, the Tribe argues that the "restored lands" exception applies to the Shriner Tract. This analysis requires a two-part determination: (1) that the Tribe is a "restored" tribe, and (2) that the Shriner Tract was taken into trust as part of a restoration of land. 25 U.S.C. §2719(b)(1)(B)(iii); See also, Grand Traverse Band v. United States Attorney for the Western District of Michigan, ("Grand Traverse Band II"), 198 F. Supp. 2d 920 (W.D. Mich. 2002); aff'd, 2004 FED App. 0151P (6th Cir. 2004). We agree that the Tribe is a restored tribe.[8] We therefore turn our attention to whether the Shriner Tract was taken into trust as part of a restoration of land.

Federal courts, the United States Department of the Interior, and the NIGC have recently grappled with the concept of restoration of land. In so doing, they have established several guideposts for a restoration-of-land analysis. First, "restored" and "restoration" must be given their plain, primary meanings. Grand Traverse Band II at 928 (W.D. Mich. 2002); aff'd, 2004 FED App. 0151P (6th Cir. 2004); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt ("Coos"), 116 F. Supp.2d 155, 161 (D.D.C. 2000). In addition, to be "restored," lands need not have been restored pursuant to Congressional action or as part of a tribe's restoration to federal recognition. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band I"), 46 F. Supp.2d 689, 699 (W.D. Mich. 1999); Coos at 164.

Nonetheless, there are limits to what constitutes restored lands. As the NIGC stated in its opinion, requested by the court in Grand Traverse II, "[W]e believe the phrase

[8] The Tribe was terminated by the Act of August 1, 1956, 70 Stat. 893, and was restored to federal recognition by the Wyandotte, Peoria, Ottawa and Modoc Tribes of Oklahoma: Restoration of Federal Services Act, May 15, 1978, 25 U.S.C. § 861, 92 Stat. 246.

'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." Letter from Kevin K. Washburn, National Indian Gaming Commission General Counsel, to Honorable Douglas W. Hillman, Senior United States District Judge, United States District Court (W.D. Michigan), Re: Whether the Turtle Creek Casino site [h]eld in trust [f]or the benefit of the Grand Traverse Band of Ottawa and Chippewa Indians is exempt from the [IGRA's] general prohibition of gaming on lands acquired after October 17, 1988, dated August 31, 2001, p. 15 (NIGC GTB Opinion); see also Office of the Solicitor's Memorandum Re: Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, p. 8. (Office of the Solicitor's Coos Opinion) ("It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied.").

The courts in Coos and Grand Traverse Band I and II noted that some limitations might be required on the term "restoration" to avoid a result that "any and all property acquired by restored tribes would be eligible for gaming." Coos at 164; Grand Traverse Band I at 700; See also Grand Traverse Band II at 935 ("Given the plain meaning of the language, the term 'restoration' may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion") aff'd, 2004 FED App. 0151P (6th Cir. 2004). All three courts proposed that land acquired after restoration be limited by "the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration." Id.

The Associate Solicitor, Department of the Interior adopted a similar interpretation in his Coos Opinion on remand from the Coos court. "We believe [t]hat to apply [the] dictionary definition to the restored lands provision without temporal or geographic limitations would give restored tribes an unintended advantage over tribes who are bound to the limitations in IGRA that prohibit gaming on lands acquired after October 17, 1988. Moreover, we believe that, in examining the overall statutory scheme of IGRA, Congress intended some limitations on gaming on restored lands." Id. at 6.

The Associate Solicitor further stated that:

> [B]ecause IGRA provides certain temporal (i.e. the October 17, 1988 limitation for reservation boundaries) and geographic limitations (i.e., land within or contiguous to the tribe's reservation) we cannot view § 2719(b)(1)(B)(iii) to allow gaming on after-acquired lands with no limitations. Consequently, we do not use a dictionary definition of restored to include all lands "restored." It also seems clear that restored land does not mean any aboriginal land that the restored tribe ever occupied. Tribes that were not terminated and thereby not capable of being 'restored' lost vast amounts of land and were forced to move all over the country such that their reservations on October 17, 1988, are vastly different than their aboriginal land.

Id. at 8.

In addition to the above referenced sources, we also consulted our restored lands opinions with regard to the Bear River Band of Rohnerville Rancheria, (See Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by Bear River Band of Rohnerville Rancheria, dated August 5, 2003) (NIGC Rhonerville Opinion) and the Mechoopda Indian Tribe of the Chico Rancheria (See Memorandum from NIGC Acting General Counsel to NIGC Chairman, Re: Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria, dated March 14, 2003)(NIGC Mechoopda Opinion).

In this case, these factors (factual circumstances, location and temporal relationship) and our review of agency and judicial precedent lead us to conclude that the Tribe's land acquisition is not a "restoration."

A. Factual Circumstances of the Acquisition

During 1994 and 1995, the Tribe negotiated to purchase several properties adjacent to the Huron Cemetery. In January 1996, the Tribe submitted an application to the BIA requesting that the United States accept title to certain parcels of real property located in Kansas City, KS, including the Shriner Tract, in trust for the Tribe. The Nation's trust application cited Pub. L. No. 98-602 as the statutory authority for the requested trust acquisition. On June 12, 1996, the BIA published in the Federal Register a Notice stating its intention to accept title to the Shriner Tract in trust for the Tribe.

On July 12, 1996, the State of Kansas and four (4) Indian tribes in Kansas filed suit against the Assistant Secretary seeking to enjoin the trust acquisition of the Shriner Tract. Plaintiffs argued that (i) Pub. L. No 98-602 was not a mandatory trust acquisition and the Secretary's determination to accept title to the Shriner Tract in trust for the Nation was arbitrary and capricious because the Secretary did not consider the factors enumerated in 25 C.F.R. Part 151, and (ii) was in violation of Federal law because the Secretary did not require compliance with certain Federal statutes, including the National Environmental Policy Act. Plaintiffs also contended that the Secretary's determination that the Huron Cemetery constituted an Indian reservation of the Nation was arbitrary and capricious and inconsistent with applicable law. Although an injunction was entered against the United States on July 12, 1996, the Nation took an emergency appeal to the Tenth Circuit, and on July 15, 1996, the Tenth Circuit vacated the July 12 injunction. The United States accepted title to the Shriner Tract in trust for the benefit of the Nation on July 15, 1996.

B. Location-Geographical Proximity and Historical Nexus

The Tribe emphasizes that the most significant evidence demonstrating that lands can be considered "restored lands" is the physical location of the land, and that both the Grand Traverse I and Coos courts ruled that "[p]lacement within a prior reservation is

significant evidence that the land may be considered in some sense restored." Tribe's September 2, 2003, Submission at 13. See Grand Traverse I, 46 F., Supp. 2d at 702; and Coos, 116 F. Supp. 2d at 164 (quoting Grand Traverse I). The Tribe also quotes language from Grand Traverse I that "any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under § 2719." Tribe's September 2, 2003, Submission at 13; Grand Traverse I at 701. The Tribe argues that the Shriner Tract satisfies the "location" prong because it is within the Tribe's prior reservation in the State of Kansas. Tribe's September 2, 2003 Submission at 13.

We agree that the physical location of the land is significant. The parcel at issue on which the Tribe proposes to game is located in Kansas City, Kansas. However, the seat of the Wyandotte Tribal government, its present trust lands, and its population center are in Wyandotte, Oklahoma, a distance of approximately 175 miles from Kansas City. Also in Wyandotte, Oklahoma are the Tribe's Turtle Stop Convenience Store, Turtle Tot Learning Center, a Seniors Program, and educational assistance programs. In 1993, the Tribe completed an expansion of the tribal complex, which includes administrative offices, new classrooms for the Turtle Tots Learning Center, as well as a Library and Heritage Center. See Tribe's web site at www.wyandot.org. It is clear that the Shriner Tract is sited far from where the Tribe is actually located in Wyandotte, Oklahoma.

In Grand Traverse and Rhonerville, the land at issue was located either near the tribal center or near tribal programs. In Grand Traverse, the site was located in the same area as a tribal housing development and an 80-acre youth camp. NIGC GTB Opinion at 1. In Rhonerville, the parcel at issue was six miles from the Rhonerville Tribe's original Rancheria, whose boundaries had been re-established. NIGC Rhonerville Opinion at 2. In Mechoopda, the parcel was located approximately 10 miles from the Tribe's original Rancheria, which it occupied immediately prior to termination, and which was located in what is now the center of the city of Chico, California. NIGC Mechoopda Opinion at 1 and 9. While we do not, in this opinion, establish a standard for determining what is a reasonable distance for purposes of the restoration of lands analysis, we do not believe a distance of 175 miles between the parcel and the tribal center is close enough to establish a geographical connection.

We also look to the historical nexus between the Tribe and the parcel at issue. In Grand Traverse, we found that restoration was shown by the "Band's substantial evidence tending to establish that the...site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition." NIGC GTB Opinion at 15. We further stated, "At the time of termination, Band members lived not far from the [parcel at issue]. For most of the Band's recorded history, it has lived and worked in [the general area of the parcel at issue]". Id. at 18. Finally, it was significant to the NIGC GTB Opinion that the land had "been at the heart of the Band's culture throughout history..." Id. at 19.

In Coos, the Associate Solicitor found that the land had a geographic nexus to the Coos and that the Coos were not seeking to game on far-flung land. Associate Solicitor Coos

Opinion at 13. The Associate Solicitor further found it relevant that the Coos had a presence in the area of the parcel at issue at the time of termination. Id. In concluding that the parcel at issue was restored land, the Associate Solicitor stated that he considered that the Coos were "seeking to game on land which has been historically tied to the Tribes and has a close geographic proximity to the Tribes." Id. at 14.

In Mechoopda, we found that the parcel at issue had cultural and historical significance to the Mechoopda Indians. Three buttes with historical significance were located one mile from the parcel. These buttes figured prominently in a tribal myth. In addition, an historic trail linking several tribal villages crossed the parcel. Furthermore, several Mechoopda villages were located in close proximity to the parcel. NIGC Mechoopda Opinion at 10-11.

In Rhonerville, we found that the tribe had a longstanding historical and cultural connection to the parcel at issue. The parcel was located within one mile of two aboriginal villages and two major tribal trails. It was located within three miles of five aboriginal villages. Also within three or four miles from the parcel was the site of a mythic flood in a tribal story telling. Furthermore, the parcel was located 6 miles from the tribe's original Rancheria, which was purchased by the United States for the Rhonerville Indians in 1910. The Rhonerville Tribe was terminated in 1962, and the Rancheria was divided and distributed to individual Indians. At the time the Rancheria boundaries were re-established in 1983, there were still 6 acres in individual Indian ownership. We found that, based on this information, the area had historical and cultural significance to the Tribe. It was also important to our determination that tribal members resided on the original Rancheria at the time of termination. Rhonerville Opinion at 10.

In contrast, we do not find that the Tribe has a sufficient historical nexus to the Shriner Tract to qualify it as restored land. As evidenced by the information submitted by the Tribe, the Tribe was transient for much of its history. In the first part of the 1600's, the tribe resided in Canada. It then moved to Lake Huron in what is the present State of Michigan. In the early 1700's, the Tribe moved south and into the present State of Ohio and western Pennsylvania. Beginning in 1795, the Tribe began ceding land to the United States. In 1842 the United States granted the Tribe an unspecified area of land located west of the Mississippi River. The Tribe negotiated to purchase land from the Shawnee Tribe near Westport, Missouri. The Shawnee did not honor their agreement with the Tribe, and at the end of 1843, the Tribe entered into an agreement with the Delaware to acquire land in the Kansas Territory, which includes the parcel at issue. The Tribe occupied this land until the beginning of 1855, when it ceded the land to the United States.

The Tribe occupied the Shriner Tract area for a very brief time (late 1843 to early 1855-only 11 full years). The cases discussed above do not support a finding that this short time period qualifies as an historical nexus. In all of the cases that have analyzed the restored lands question, there was a significant, longstanding historical connection to the land—sometimes even an ancient connection. We are not prepared to find that occupation of land for a period of 11 years, despite that significant roots were put down,

rises to the level of an historical connection.[9] We believe that, if we were to so find, we would conceivably be bound to find that the Tribe also had an historical nexus to Michigan, Ohio, Pennsylvania and Missouri, and that if land were taken into trust in those locations, the Tribe could game there. As we said in our Grand Traverse Opinion, "[W]e believe the phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." NIGC GTB Opinion, p. 15.

Furthermore, the Tribe has not shown that it had a presence in the area of the Shriner Tract upon termination. According to the Tribe's submission, it left Kansas in 1855 when it ceded the lands to the United States. The Tribe's status was terminated in 1956. Act of August 1, 1956, 70 Stat. 893. Therefore, more than 100 years elapsed between the time the Tribe left the lands, and the Tribe was terminated. In Grand Traverse, Coos, Mechoopda, and Rhonerville, it was important to the determination of restored lands that the tribes in those cases had a presence on the lands upon termination.

C. Temporal Relationship of Acquisition to the Tribal Restoration

The Tribe argues that the temporal relationship of the acquisition to the Tribe's restoration is similar to the timelines in the other cases applying the restored lands exception. Tribe's September 2, 2003, Submission at 14. The Tribe points particularly to the temporal relationship in the Grand Traverse case. Id. at 14-15. The Tribe emphasizes that in both its case and the Grand Traverse case, it took years from the time of restoration for approval of a tribal constitution, which was a necessary precursor for any trust acquisition. The Tribe further argues that in both cases, the subject trust acquisitions were the first meaningful acquisitions after restoration, and both were part of a concerted effort to acquire trust lands as part of an economic development program. Finally the Tribe argues that in both cases, the subject lands were previously ceded to the United States by treaty. Id.

We see several distinctions between the temporal relationship in Grand Traverse and that here. First, with respect to the issue of the tribal constitution, it was noted in Grand Traverse II that the Secretary of the Department of Interior would not take land into trust on behalf of the Grand Traverse Band until its constitution had been approved. Grand Traverse II at 936, aff'd, 2004 FED App. 0151P (6th Cir. 2004). The Band's constitution was approved in 1988, and the subject property was taken into trust in 1989. Therefore, the court found that, "as a matter of timing, the acquisition of the [subject property] was part of the first systemic effort to restore tribal lands." Id. Here, the Tribe has provided no evidence that it was required to have an approved constitution prior to the acquisition of land in trust. In fact, the Tribe's constitution was approved in 1985, yet the United

[9] The Tribe argues that the land qualifies as restored because it is within the Tribe's prior reservation. The Tribe argues that the land is within its prior reservation because the land was reservation land of the Delaware Indian Nation, and when the Tribe acquired it, the agreement provided that the Wyandotte Tribe "shall take no better right or interest in and to said lands than is now vested in the Delaware Nation of Indians." 9 Stat. 337. See also page 3, herein. Even if the land could be considered reservation land because it was reservation land of the Delaware, the land does not meet the historical nexus prong, as explained above.

States took land into trust for the Tribe in 1979 and 1984. It is upon this land that the Tribe resides in Wyandotte, Oklahoma.

The Grand Traverse II court further found the absence of any substantial restoration of lands preceding the property at issue to be important. Id. at 937, aff'd, 2004 FED App. 0151P (6th Cir. 2004). Here, the Tribe had a substantial restoration of land preceding the Shriner Tract. In fact, three parcels of land were restored, one within one year and two within six years of tribal restoration.

The Tribe was restored to federal recognition in 1978. The following year, land was taken into trust in Wyandotte, Oklahoma for the Tribe. Noteworthy is a memorandum from the BIA Superintendent of the Miami Agency to the BIA Area Director, Muskogee Area Office, dated November 13, 1978, regarding the Tribe's request to have land taken into trust. The memorandum states, "The Wyandotte tribe was recently reinstated and recognized by the United States Government as Indians and, more recently, acquired a land base with desires of purchasing additional land adjacent and elsewhere." It further states, "The Wyandotte tribe will use their land as a base for tribal economic development...." The trust deed for these 1.5 acres is dated June 8, 1979.

Five years later, in 1984, two additional parcels of land, one 3.8 acres, the other 189acres were taken into trust for the Tribe. With respect to the 189 acres, the BIA Muskogee Area Director stated in a June 3, 1980, letter to the United States General Services Administration, "I have [d]etermined and hereby certify that subject property is located within the boundary of the former reservation of the Wyandotte Tribe of Oklahoma...."

We do not agree with the Tribe that the Shriner Tract was the first meaningful acquisition. Certainly the Oklahoma land acquisitions, coming on the heels of tribal restoration, and comprising the land upon which the Tribe currently resides, are nothing if not meaningful. The Oklahoma land acquisitions have a strong temporal relationship to tribal restoration, and therefore may more appropriately be considered the Tribe's restored lands. These lands were taken into trust within one and six years of tribal restoration, and were noted by the BIA for being both a land base for the Tribe and within the Tribe's former reservation.

The Shriner Tract, on the other hand, was acquired in trust in 1996, a period of 18 years from the Tribe's restoration in 1978. In Grand Traverse and Mechoopda, the period between restoration and acquisition was 9 years (with the approval of the constitution a requirement in Grand Traverse). In Rhonerville, 10 years elapsed between restoration and acquisition. In Coos, the period between restoration and acquisition was 14 years.

It could be argued that the difference between 14 and 18 years is small. This difference might not be significant if the Tribe met the other factors. However, we cannot find that the land is restored based solely on an 18-year passage of time. Perhaps if the Tribe met the other factors, we might be willing to push the outer limits of what has previously been considered an acceptable delay. However, that is not the case here. Furthermore, here, the Tribe acquired land upon which it currently resides within one and six years of

restoration. We conclude that, if any land is to be considered restored, it is this intervening land. [10]

Finally, the Tribe argues that in both Grand Traverse and its case, the subject lands were previously ceded to the United States by treaty. The relevant language from Grand Traverse II is as follows; "The Band has introduced substantial and uncontradicted evidence that the parcel is located in an area of historical and cultural significance to the Band that was previously ceded to the United States." Grand Traverse II at 937, aff'd, 2004 FED App. 0151P (6th Cir. 2004). Our reading of this language suggests that the previously ceded land must be in an area of historical and cultural significance to be considered restored. As discussed above, the Shriner Tract, which the Tribe occupied for some 11 years, does not qualify as historically significant. Therefore, the fact that the land was ceded, without the historical connection, does not warrant a finding of restoration.

VI. Conclusion

As discussed above, the Shriner Tract does not meet any of the exceptions to the IGRA prohibition on gaming on lands acquired after October 17, 1988. Therefore, the Tribe may not lawfully game on the Shriner Tract. Gaming on the Shriner Tract subjects the Tribe to enforcement action by the Chairman of the NIGC.

[10] We acknowledge that the Mechoopda Tribe had acquired intervening land. However, that land was purchased to address the housing needs of its members, but was an almond orchard located in a flood plain and unsuitable for housing. In the Wyandotte's case, the land they purchased is where the tribal headquarters is located, and is where the Tribe could game if it chose.