May 19, 2008

Buford L. Rolin, Tribal Chairman
Poarch Band of Creek Indians
5811 Jack Springs Road
Atmore, AL 36502

Dear Chairman Rolin:

The Poarch Band of Creek Indians (Band or Tribe) is conducting gaming at the Tallapoosa Entertainment Center, which is located near the city of Montgomery, Alabama, on land taken into trust on March 25, 1995 (Tallapoosa Site). Thank you for your extraordinary patience as our office reviewed the question of the status of the Poarch Band's Tallapoosa Site. I recognize that this review was disruptive to the Tribe financially and for that I apologize. However, I am happy to inform you that our review is concluded and that we continue to consider the Tribe's Tallapoosa site to be Indian lands on which the Tribe may conduct gaming.

I recognize that this decision, coming from me and at this time, is a bit unusual. However, the Department of the Interior is on the cusp of issuing its regulations interpreting parts of 25 U.S.C. § 2719. Those regulations should provide extremely helpful guidance for the Commission in the future as it reviews the status of lands on which tribes hope to conduct gaming. Asking the Tribe to start over in light of the Department's regulations, however, would be significantly unfair and as such, I am persuaded that the Poarch Band, which has worked tirelessly over the past several years to assist us in our review of the Tallapoosa site, should have our views now. Further, I am persuaded that, to the extent my conclusions might differ from the Department's regulations, this decision will not open the Indian Gaming Regulatory Act (IGRA) to a number of far ranging and unexpected interpretations.

Our review was prompted by a November 20, 2003, letter from John Park Jr., Assistant Attorney General for the State of Alabama, questioning whether the Band could lawfully conduct gaming on the Tallapoosa Site. We reviewed numerous submissions from the tribe and the record supporting the Band's 1984 recognition by the United States through the federal acknowledgement process. As a result of our extensive review of the Tribe's submissions and the Department of the Interior's records, I conclude that the Tallapoosa Site is part of "the restoration of lands for an Indian tribe restored to Federal recognition" within the meaning of the IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii), and that gaming on the land is therefore permissible.

THE TALLAPOOSA SITE

The United States recognized the Poarch Band of Creek Indians in June 1984. 49 Fed. Reg. 24083 (June 11, 1984). At the time, the Band had no land base. Shortly after recognition, the Department of the Interior took into trust eight small parcels that together total some 229½ acres and proclaimed them to be reservation land. 50 Fed. Reg. 15502 (Apr. 18, 1985).

These parcels serve basic tribal functions – a school house, powwow grounds, a tribal administration building, a gymnasium, a fire station, two small sites for tribal housing, and pasture lands for a tribal farm. Affidavit of Eddie Tullis, ¶ 8 (Mar. 25, 2004).

Given the location of these eight parcels, there are, as a practical matter, two reservations. The larger consists of seven of the eight parcels – approximately 193¾ acres – and is located near Atmore, Escambia County, in the southwestern part of Alabama, northeast of Mobile. The smaller reservation consists of approximately 36 acres and is located in the central part of the state, near Wetumpka, Elmore County, just northeast of Montgomery and more than 100 miles away from Atmore. As with so much of the geography relevant here, this is best conveyed visually. In Figure 1, below, the Atmore reservation land appears in a cluster as parcels 1, 2a, 2b, 3, 7, 8, and 9, while the Wetumpka reservation land appears as parcel 4:

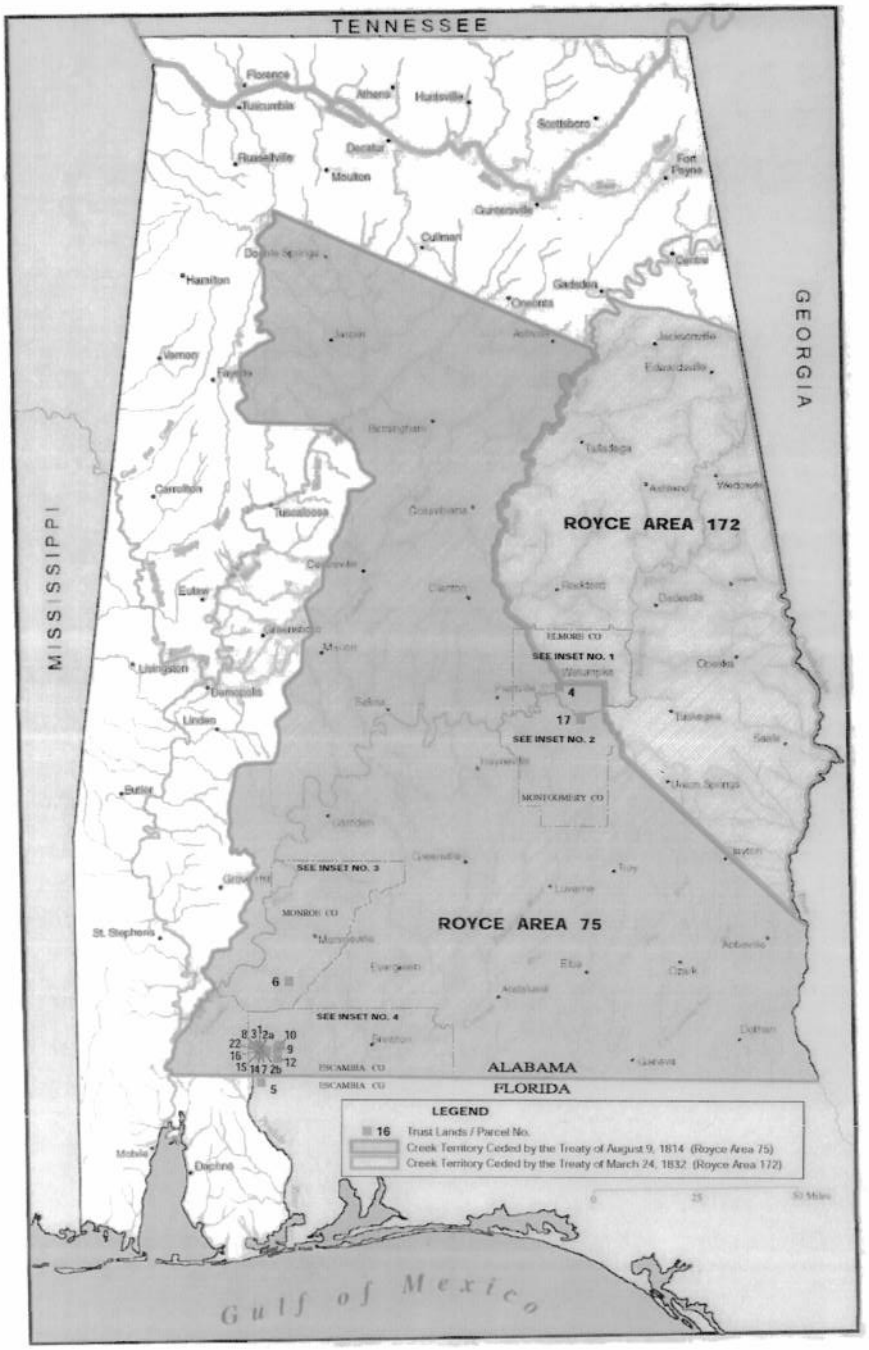

Figure 1: Poarch Band trust lands (Source: Poarch Band surveys)

On November 14, 1988, four years after recognition, the Tallapoosa Site, containing just under 13 acres, was donated to the Band in fee, in part because Creek burial mounds are located there. The Tallapoosa Site is located approximately 12 miles from the Wetumpka reservation and appears on Figure 1 as tract 17. The legal description of the land is:

> Commence at the SW corner of Section 27, T-17-N, R-19-E, Montgomery County, Alabama and run EAST, 4340.49 feet; thence NORTH, 1806.29 feet to a point on existing fence line and being the Point of Beginning; Thence

> continue along said fence line S89°13'03"E, 136.34 feet; Thence continue along said fence line S23°49'20"E, 62.92 feet; Thence continue along said fence line N69°23'34"E, 219.92 feet to an existing iron pin; Thence continue along said fence line N17°23'26"W, 968.84 feet to an existing iron pin; Thence leaving said fence line N18°23'18"W, 503.62 feet to a point on the southeast edge of the Tallapoosa River; Thence along said edge S43°24'16"W, 618.01 feet; Thence leaving said edge S39°49'22"E, 150.00 feet to a point on an existing fence line; Thence along said fence line S26°17'56"E, 374.05 feet; Thence continue along said fence line S39°39'24"E, 198.60 feet; Thence continue along said fence line S17°38'01"E, 386.15 feet to the Point of Beginning. All lying in the E 1/2 Section 27, T-17-N, R-19-E, Montgomery County, Alabama, and containing 12.86 acres more or less.

Warranty Deed, Parcel 17 (Mar. 23, 1995).

On July 21, 1989, the Band wrote to the Area Director of the Bureau of Indian Affairs asking that the land be placed into trust. On March 23, 1995, after a delay of nearly six years, BIA's Eastern Area Office took the land into trust. Warranty Deed, Parcel 17 (Mar. 23, 1995).

LEGAL ANALYSIS

I. Indian lands, generally.

IGRA permits gaming only on Indian lands, 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2), which it defines 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). The National Indian Gaming Commission's implementing regulations clarify:

> 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. I conclude that the Tallapoosa Site is "Indian lands" under these definitions. It is trust land over which the Band exercises governmental power.

A. Trust land

The Tallapoosa Site is, without question, trust land. Again, the Band received the land in fee as a gift in November 1988, and the BIA finished its fee-to-trust acquisition in March 1995. Warranty Deed, Parcel 17 (Mar. 23, 1995)

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B. Governmental power

The Band also exercises governmental power over the Tallapoosa Site. This conclusion, however, is not as straightforward as simply noting that the United States holds the Site in trust for the Band. In order to exercise governmental power over its land, the Band, like any other government, must first have jurisdiction to do so. *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), *superseded by statute on other grounds, 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]); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D. Kan. 2000), *aff'd and remanded, Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (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) (a tribe must first have jurisdiction in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4)).

1. Jurisdiction

Tribes are presumed to possess jurisdiction within "Indian Country." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). 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). Moreover, "Indian Country" refers to 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). Thus, if the Tallapoosa Site is Indian Country, the Band possesses jurisdiction to exercise governmental authority there.

Whether land is Indian Country may be determined by reference to statute. Though there have been several definitions of Indian Country over the long history of federal Indian law, the definition accepted and commonly used today is:

> (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. Though by its terms, § 1151 applies to questions of criminal jurisdiction, it generally applies to questions of civil jurisdiction as well. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427, n. 2, (1975).

In *Venetie*, the Court held that § 1151, enacted in 1948, codified a number of its earlier decisions concerning Indian lands. In each of those decisions, the Court held that Indian Country was distinguished by two essential characteristics: it is land set aside by the federal government for the use of Indian tribes, and the land remains under federal supervision or superintendence. *Venetie*, 522 U.S. at 530 ("Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases…").

Thus, paragraph (a) of 18 U.S.C. § 1151 equates Indian Country and reservation land. It adopts *Donnelly v. United States*, 228 U.S. 243, 269 (1913), which held, "not surprisingly," that Indian country includes lands within formal reservations. *Venetie*, 522 U.S. at 528 n. 3, 530. Paragraph (b) equates Indian Country and "dependent Indian communities." It adopts *United States v. McGowan*, 302 U.S. 535, 538-539 (1938) and *United States v. Sandoval*, 231 U.S. 28, 46 (1913), which held that Indian Country includes other lands such as Pueblos or federally created colonies, not formally designated as reservations, that nonetheless possess the attributes of federal set-aside and federal superintendence. *Venetie*, 522 U.S. at 528, 529-530. Finally, paragraph (c) equates Indian Country and Indian allotments where title has not been extinguished. It adopts *United States v. Pelican*, 232 U.S. 442, 449 (1914), which held that individual Indian allotments held in trust by the United States are Indian Country because they "remain Indian lands set apart for Indians under governmental care." *Venetie*, 522 U.S. at 529, 530.

Section 1151 does not, by its terms, address trust land such as the Tallapoosa Site. Nevertheless, several Supreme Court decisions hold that tribal trust lands are Indian Country, even if they are not part of a formal reservation. First and foremost, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), 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. *Id.* at 511. As a consequence, the State did not have the authority to tax sales of goods to tribal members that occurred on those lands. The *Potawatomi* Court specifically rejected the contention that 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) (same); *United States v. John*, 437 U.S. 634, 649 (1978) (observing that land "declared by Congress to be held in trust by the Federal Government for the benefit of the . . . Indians . . . [is a] 'reservation,' at least for the purposes of federal criminal jurisdiction").

Likewise, federal appellate courts unequivocally hold that trust lands are Indian Country. In *United States v. Roberts*, 185 F. 3d 1125 (10th Cir. 1999), for example, the Tenth Circuit held that "official 'reservation' status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian country pursuant to [18] U.S.C. § 1151." *Id.* at 1131. Similarly, in *Langley v. Ryder*, 778 F. 2d 1092 (5th Cir. 1985), the Fifth Circuit held that lands held in trust for the Coushatta Indian Tribe of Louisiana were Indian Country, regardless of whether they were proclaimed a reservation. *Id.* at 1095.

Further, not only do the courts hold that trust land is Indian Country, they hold that trust land is Indian Country under 18 U.S.C. § 1151(a). For jurisdictional purposes, there is no distinction between reservation land and trust land. Again, in *Potawatomie*, the Supreme Court unambiguously held that trust land is "validly set apart" and thus qualifies *as a reservation* for jurisdictional purposes. *Potawatomie*, 498 U.S. at 511 (emphasis added). *Accord*, *John*, 437 U.S. at 649.

Appellate courts hold the same. *See, e.g., HRI, Inc., v. Environmental Protection Agency*, 198 F. 3d 1224, 1249 (10th Cir. 2000) (following *Potawatomi*, "[u]nder Supreme Court and Tenth Circuit precedent, trust lands … are Indian country"); *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980) (the court is "convinced that, barring possible specific exceptions to which our attention is not directed, lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)"); *United States v. Sohappy*, 770 F. 2d 816, 822-823 (9th Cir. 1985) (holding that trust lands are Indian Country and "amount to 'reservation lands'" for purposes of jurisdiction, following *John*).

Here, then, once the United States took the Tallapoosa Site into trust for the benefit of the Band, the land became "Indian Country" within the meaning of 18 U.S.C. § 1151. The Site was "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Potawatomi*, 498 U.S. at 511. Accordingly, the Band has jurisdiction to exercise governmental authority at the Tallapoosa Site.

2. Exercise of governmental authority

In order for the Tallapoosa Site to be "Indian lands" within the meaning of IGRA, the Band must also exercise present-day, governmental authority on the land. How exactly a tribe does this IGRA does not say, though there are many possible ways in many possible 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. *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (Apr. 9, 1992).

The courts provide useful guidance. For example, governmental power involves "the presence of concrete manifestations of … authority." *Narragansett Indian Tribe*, 19 F.3d at 703. Examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.* Here, the Band has exercised, and it continues to exercise, governmental authority over the Tallapoosa Site in a variety of ways.

The Band's Constitution extends the Band's governmental jurisdiction to all of its lands, including its trust lands:

> The jurisdiction of the Poarch Band of Creek Indians shall extend to all lands now held in the name of the Band or which hereafter may be acquired for or by and held in the name of the Poarch Band of Creek Indians.

Constitution of the Poarch Band of Creek Indians, Art. III, § 1. Similarly, the Band's constitution gives the tribal council the authority to "[e]stablish and enforce ordinances governing the conduct and civil relations of the residents within the territorial jurisdiction of the Tribe…." Constitution of the *Poarch Band of Creek Indians*, Art. IV, § 4, ¶ k. In the exercise of that authority, the Band's council has adopted a tribal code that, among other things, establishes a tribal court system. *Porch Band of Creek Indians, Tribal Code*, § 3-1-1(a).

Further, the Band's police have governmental offices within the Band's gaming facility at the Site. Letter from William R. Perry, Esq., Sonosky, Chambers, Sachse, Endreson & Perry, to Katherine L. Zebell, Esq., NIGC (Nov. 2, 2004). The Band provides law enforcement on the Site 24 hours a day. The Band is in the process of providing other governmental services, including additional law enforcement, through an agreement between the Band and the Montgomery County sheriff. Letter from William R. Perry, Esq., Sonosky, Chambers, Sachse, Endreson & Perry, to Philip N. Hogen, Chairman, NIGC (Mar. 29, 2004). The Band is also implementing plans for the restoration of the burial mounds at the Site and has adopted a video monitoring system to protect the mounds from vandalism. Tullis Aff. ¶ 12.

Further still, the Band has adopted a Class II gaming ordinance applicable to the Site and has formed a gaming commission to regulate the Band's Class II gaming operations there. Letter from Anthony J. Hope, NIGC Chairman, to Eddie L. Tullis, Tribal Chairman, Poarch Band of Creek Indians (Aug. 2, 1993). Both the Band's gaming commission and police have offices within the Band's facility at the Site. Letter from William R. Perry, Esq., Sonosky, Chambers, Sachse, Endreson & Perry, LLP to Katherine L. Zebell, Esq., NIGC, re: Poarch Band of Creek Indians (Nov. 2, 2004).

Given the foregoing, then, the Band exercises governmental authority over the Tallapoosa Site; it has jurisdiction to exercise that authority; and the land is held in trust for the Band by the United States. Accordingly, the Tallapoosa Site is Indian land within the meaning of IGRA. 25 U.S.C. § 2703(4)(B).

II. GAMING ON AFTER-ACQUIRED TRUST LAND

Meeting the definition of "Indian lands" does not finish the analysis, however. The United States took the Tallapoosa Site into trust in March 1995, and thus the land falls within IGRA's general prohibition against gaming on trust land acquired after October 17, 1988. 25 U.S.C. § 2719(a). As such, the question becomes whether the Tallapoosa Site meets any of the exceptions in § 2719. It is our opinion that the Site is the "restored land" of a tribe itself restored to federal recognition. 25 U.S.C.
§ 2719(b)(1)(B)(iii).

To meet this exception, a tribe must be an "Indian tribe that is restored to Federal recognition," and the acquisition of the land into trust must be part of a "restoration of lands" for the tribe. These terms are not defined in IGRA or the NIGC's implementing regulations, but there is precedent. The plain, primary meaning of the terms should be used. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich. (Grand Traverse III)*, 369 F.3d 960, 967 (6th Cir. 2004), *aff'g* 198 F. Supp. 920, 928 (W.D.

Mich. 2002); *Confederated Tribes of Coos, Lower Umpqua & Suislaw Indians v. Babbitt* (*Coos*), 116 F. Supp. 2d 155, 161 (D.D.C. 2000).

A. The Band has been restored to federal recognition

To be an "Indian tribe that is restored to Federal recognition," a tribe must demonstrate a period of recognition by the United States, termination of that recognition, and reinstatement of recognition by the United States. *Grand Traverse III*, 369 F.3d at 967. The Band satisfies all three conditions.

1. Recognition by the United States

In the first half of the 19th century, the Band was recognized by the United States as I understand the term. The record demonstrates this in two different, though equally sufficient, ways. First and foremost, the United States treated repeatedly with the Creek Nation. Second, separate and apart from any treaty-making, the record amply demonstrates a government-to-government relationship between the United States and a tribal town founded by the Band's progenitors. That town, like other Creek towns, was an autonomous political entity within the historic Creek Nation.

a. Treaties with the historic Creek Nation

For most of its history, the Creek Nation was a confederacy. One historian describes the confederacy at the time of first European contact in 1540 this way:

> The Creek Nation was a confederacy – an alliance of separate and independent tribes that gradually became, over a long period, a single political organization. Through most of its history, however, the Confederacy was a dynamic institution, constantly changing in size as tribes, for whatever reason, entered the alliance or left it. The evidence suggests that many more groups joined than withdrew….

BIA Office of Federal Acknowledgement memorandum recommending federal recognition of Poarch Band of Creek Indians, p. 67 of 130 (Dec. 29, 1983)("OFA memo"); *Michael D. Green, The Creeks: A Critical Bibliography* vii (1979). Even in Colonial times, the center of political life for the Creeks was the town, which exercised powers of broad self-government:

> The leading men of the town assembled everyday in council, either at the square or the chokofa. Here they made decisions involving war and peace, planting and hunting, disputes between citizens, the maintenance of order, the punishment of offenders, the care of the public building and grounds, the ceremonials and amusements….

Angie Debo, The Road to Disappearance: A History of the Creek Indians, 12 (1941). Beginning around 1780, the Band's direct, lineal ancestors migrated from a number of "Upper Creek" towns around the area of what is now Montgomery, Alabama, OFA memo, p. 4 of 130, and founded a tribal town on the Tensaw River in the southwestern part of the state, about 50 miles north of what is now Mobile. OFA memo, pp. 3, 4 of 130. The reasons

for the migration, which took place gradually over 20 years, OFA memo, p. 70 of 130, were cultural and political.

The Band's forebears were "half-bloods," a partially acculturated group, highly intermarried, and among whom were wealthy traders and landowners. OFA memo, pp. 5, 70 of 130. Although called "half-blood," it is probable that the blood quantum was higher than half. OFA memo, p. 4 of 130. This group, though increasingly influential among the Creeks in the late 18th and early 19th centuries, OFA memo, p. 5 of 130, nevertheless "did not live harmoniously with their full-blood kinsmen in the Upper Creek towns." OFA memo, p. 70 of 130.

The Band's forebears applied to the council of the Creek Convention for leave to settle on the Tensaw lands, which it received. OFA memo, pp. 4, 70 of 130. From its beginnings, the Tensaw settlement, like other Creek towns, was autonomous within the Creek Nation.

> Even in its embryonic stage, however, the community was both autonomous and sanctioned by the council of the Creek Confederacy.... The half-blood settlement near Tensaw was like the Yuchis, Shawnees, etc., a legitimate town of the Creek Confederacy maintaining full political relations with the Convention meeting alternately in Tuckabatchee and Coweta.

OFA memo, pp. 70-71.

Against this historical backdrop, the United States struck 13 treaties with the Creek Nation before 1833. Treaty of New York, 1790, Aug. 7, 1790, 7 Stat. 35; Treaty with the Creeks, 1796, June 29, 1796, 7 Stat. 56; Treaty with the Creeks, 1802, June 16, 1802, 7 Stat. 68; Treaty with the Creeks, 1805, Nov. 14, 1805, 7 Stat. 96; Treaty of Fort Jackson, 1814, Aug. 9, 1814, 7 Stat. 120; Treaty with the Creeks, 1818, Jan. 22, 1818, 7 Stat. 171; Treaty with the Creeks, 1821, Jan. 8, 1821, 7 Stat. 215; Treaty with the Creeks, 1821, Jan. 8, 1821, 7 Stat. 217; Treaty with the Creeks, 1825, Feb. 12, 1825, 7 Stat. 237; Treaty with the Creeks, 1826, Jan. 24, 1826, 7 Stat. 286; Treaty with the Creeks, 1827, Nov. 15, 1827, 7 Stat. 307; Treaty with the Creeks, 1832, Mar. 24, 1832, 7 Stat. 366; Treaty with the Creeks, 1833, Feb. 14, 1833, 7 Stat. 417. The first, the Treaty of New York, a "treaty of peace and friendship" was signed in 1790:

> There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals, towns and tribes of the Upper, Middle and Lower Creeks and Semanolies [sic] composing the Creek nation of Indians. 7 Stat. 35, Art. I. Among the last, in 1832, was the instrument of the Creek's removal to the Indian Territory.

7 Stat. 366 (March 24, 1832). The significance of these treaties is that they, *per se*, indicate a government-to-government relationship between the United States and the historic Creek Nation.

Before the modern era of federal Indian law, one way the United States recognized the governmental status of Indian tribes was by negotiating and entering into treaties with them. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675

(1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties"); *United States v. Washington*, 898 F. Supp. 1453, 1458 n.7 (W.D. Wash. 1995), *aff'd in part, rev'd in part on other grounds*, 157 F.3d 630 (9th Cir. 1998) (treaty rights are "the result of the negotiation between two sovereigns, the United States and the Tribes"); *NIGC Karuk Lands Opinion* at 3 (Oct. 12, 2004) ("Based on the fact that the Tribe negotiated treaties with the United States it can clearly be stated that there existed a government-to-government relationship at one time").

Of course, one might reasonably suggest that while the United States certainly recognized and treated with the Creek Nation, now largely in Oklahoma, it did not do so with the Poarch Band of Creek Indians, which did not exist in the 19th century as such. In this view, treating with the Creek Nation says nothing about treating with, recognizing, or having a government-to-government relationship with the Band. The suggestion, however, draws a false distinction. The Poarch Band of Creek Indians *is now* what the historic Creek Nation *was* before removal – the Creeks in Alabama. This is a matter of historical fact, and treating with the historic Creek Nation says that there was once a government-to-government relationship with, and recognition by the United States of, the Band.

Under the 1832 removal treaty, all of the remaining Creek lands east of the Mississippi River were ceded to the United States, 7 Stat. 366 at Art. I, (see Figure 1), and tribal members were directed to relocate to Indian Territory. *Id.* at Art. XII. Despite the treaty's central purpose, it stopped short of mandating the immediate removal of all Creeks from Alabama, stating "this article shall not be construed so as to compel any Creek Indian to emigrate, but they shall be free to go or stay, as they please." *Id.* at Art. XII. The treaty facilitated this construction by providing for the conveyance of individual fee lands to Creek leaders and heads of families who remained in Alabama. *Id.* at Art. II.

The "Trail of Tears," the forced march of the Creeks to the Indian Territory, took place primarily between 1836 and 1837. By 1838, only a handful of Creeks remained in Alabama, among them the Band's forebears at Tensaw. OFA memo, p. 86 of 130. The community subsequently "shifted within a small geographic area until it settled permanently near present-day Atmore, Alabama." OFA memo, p. 2 of 130.

By according the Band recognition under the federal acknowledgement process, the Department of the Interior concluded that the Band, following the removal of most Creeks, maintained a continuous and distinct cultural, political, and social identity up to the current day. 25 C.F.R. § 83.7. The OFA memo finds:

> The Poarch Band of Creeks forms a community distinct from other populations in the area. Its members are descended from the historic Creek Nation, from a community within that nation which developed in the late 18th Century. This community developed into several Indian settlements in Escambia County, Alabama, which form the Poarch Band of Creeks today.

OFA memo, p. 5 of 130. There is, in short, an unbroken historical line or connection between the historic Creek Nation in Alabama and the Band, and the Department of the Interior thus concluded that the Band is the successor to the Creek Nation: "[t]he contemporary Poarch Band of Creeks is a successor of the Creek Nation of Alabama prior to its removal to Indian Territory." OFA memo, p. 2 of 130. Consequently, by treating with the Creek Nation in Alabama, the United States once had a government-to-government relationship with, and once recognized, the Band.

Put somewhat differently, the historic Creek Nation has greatly changed in form from the first half of the 19th century to today. The historic Creek Nation, politically organized around tribal towns, now exists as the Poarch Band of Creek Indians in Alabama, the Muskogee (Creek) Nation in Oklahoma, and recognized tribal towns – tribes with multi-branch governments established through tribal constitutions. *See, e.g., Constitution of the Poarch Band of Creek Indians*, Art. IV (June 1, 1985); *Constitution of the Muscogee (Creek) Nation*, Arts. V – VII (Feb. 18, 2006). To suggest that the United States' recognition of the historic Creek Nation is not recognition of the Band – or the Muskogee (Creek) Nation for that matter – because the Band is not identical in form to the historic Creek Nation is inconsistent with federal Indian policy generally and with case law.

The federal government's long-standing policy is to encourage tribal self-government, and numerous statutes, including IGRA, embody this policy. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); 25 U.S.C. § 2702(1) ("The purpose of this chapter is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"). Federal law has thus consistently recognized and protected this right of self-government. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56. The right of self-government, of necessity, includes the ability of a tribe to make changes to the form and structure of its government, and this ability too is recognized in federal law. *See, e.g.,* 25 C.F.R. Parts 81 and 82 (procedures for Secretarial elections governing adoption, amendment or revocation of tribal constitutions, etc.).

Any self-governing entity will change in form and composition over time, and this is particularly true of the Indian tribes, who over the past centuries have also had such changes thrust upon them by federal law. Significantly, none of these changes in form or reorganizations are in any way inconsistent with federal recognition.

> Reflecting federal policies, a congressionally created confederated or consolidated tribe can be comprised of different tribes presently occupying the same reservation, such as the Wind River Tribes (Shoshone and Arapaho). Or tribes may confederate for political purposes, forming governmental entities such as the Minnesota Chippewa Tribes or the Central Council of the Tlingit & Haida Indian Tribes, which have received federal recognition, in addition to their constituent tribes. Under the Indian Reorganization Act of 1934, Indians living on any given reservation were allowed to organize into federally recognized tribes, whether or not they were linguistically, culturally, or politically united.... Other federally recognized entities represent fragments of previously unified peoples. The great Sioux nation, for example, was divided by federal law into geographically separated

> and independently recognized tribes in order to weaken the Sioux militarily. Other groups, such as the Oneida, the Cherokee, and the Choctaw are recognized as multiple separate nations, because some members moved to new territories as part of the federal removal process in the nineteenth century and others refused to leave ancestral homelands.

Cohen's Handbook of Federal Indian Law ("Cohen"), § 302[2] at 137 (2005 ed.). To suggest, then, that the recognition of the historic Creek Nation does not also apply to the Band because of the change in form and composition over time is inconsistent with the fundamental policy of encouraging tribal self-government.

It is also inconsistent with the Sixth Circuit's decision in *Grand Traverse III*. There, the court determined that the Grand Traverse Band of Ottawa and Chippewa Indians met the plain-language, three-part test for a restored tribe set out above. In so doing, the court made no distinction between today's Grand Traverse Band and the combined Ottawa and Chippewa nations, whom the United States aggregated solely for the purposes of negotiating the 1836 Treaty of Washington (and which was subsequently dissolved by the 1855 Treaty of Detroit). *Id.* at 962 n. 2.

The Grand Traverse Band was, the court found, the successor to the Ottawa and Chippewa, and it described the Grand Traverse Band's relationship to its predecessor and to the United States this way:

> The Band is a federally recognized Indian tribe presently maintaining a government-to-government relationship with the United States. The Band previously maintained a government-to-government relationship with the United States from 1795 until 1872, and is a successor to a series of treaties with the United States in 1795, 1815, 1836 and 1855.

Id. at 961. In short, the court found that because the Grand Traverse Band was the successor to the Ottawa and Chippewa, and because the United States treated with the Ottawa and Chippewa, the Grand Traverse Band was once recognized by the United States. The change in form of the tribe – from the disaggregation of the Ottawa and Chippewa in 1855 to the present day Grand Traverse – was immaterial:

> The district court appropriately looked to the dictionary definitions of "restore" and "restoration," which include the following meanings: to give back, return, make restitution, reinstatement, renewal, and reestablishment. The court then correctly held that the Band clearly was a "restored tribe" under these definitions. The Band had treaties with the United States and a prior relationship with the Secretary of the Interior at least as far back as 1795. Until 1872, the Secretary had treated the Band as a recognized tribe.

Id. at 967. (Internal citations omitted.)

So too here. There is no legal significance to the change in form over time from the historic Creek Nation to the Poarch Band of Creek Indians, its successor. The Band

had treaties with the United States as far back as 1790 and, therefore, was once recognized by the United States.

b. Relationship with the town at Tensaw

Even if one does not accept the United States' treaties with the historic Creek Nation as a basis for finding a period of recognition for the Band, a separate, equally sufficient basis appears in the record. The United States had a government-to-government relationship with the town at Tensaw founded by the Band's forebears. The record shows this not through treaty but rather through "the empirical indicia of recognition, namely, a 'continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs.'" *Grand Traverse III* at 968, *citing* Cohen at 6 (1982).

Again, the town at Tensaw, like Creek towns generally, was autonomous within the Creek Nation. Benjamin Hawkins, U.S. Agent to the Creek Nation from 1795 to 1826, appears to have had many interactions with the Band's ancestral community. He is described as a "prolific correspondent and journalist," and he provided "the first significant direct accounts of the history and activities of the ancestors of the present Poarch Band of Creeks...." OFA memo, p. 72 of 130. Hawkins referred to a "community of half-bloods in Tensaw" as an autonomous town within the Creek Nation, and was "personally familiar with several half-bloods there with whom he had working relations." OFA memo, p. 64 of 130. Hawkins's significance, however, was not merely as an observer. It was through Hawkins that the United States had a government-to-government relationship with the Tensaw town.

The Bureau of Indian Affairs was established in 1824 by administrative directive of then-Secretary of War, John C. Calhoun. H.R. Doc. No. 19-146 (1824). That office was created without congressional authority and lacked formal control over Indian agents. COHEN, § 103[4][b] at p. 56. Thus, in 1832, Congress created the position of Commissioner of Indian Affairs, 4 Stat. 564 (July 9, 1832), to supervise "all matters arising out of Indian relations." *Id.* at § 1. The BIA was transferred to the Department of the Interior in 1849. 9 Stat. 395 (March 3, 1849), *codified at* 25 U.S.C. §§ 1-2. Prior to the creation of the BIA, then, relationships between the United States and the Indian tribes was conducted through War Department or presidential agents and commissioners such as Hawkins.

Hawkins, living among the Creeks at Tensaw, sometimes dealt with them individually rather than governmentally. He was "personally familiar with several half-bloods there with whom he had working relations." OFA memo, p. 64 of 130. In his writings, he mentions several half-blood ancestors of the Poarch Band by name, and places "certain of its [Tensaw's] principal members as originally from the Upper Creek country." OFA memo, p. 72 of 130. He refers to Tensaw as the "Creek half-blood colony," writing that "many of the half bloods were raised with a high degree of Creek customs and world view, and identified more as Creek than white." *Id.*

Hawkins also, however, dealt with the Tensaw community as an autonomous political entity. This occurred most notably during the Creek War of 1813-14, when the Band's forebears at Tensaw broke ties with the Creek Nation and formed an alliance with the United States military against the Hostile Creeks. Members of the Band fought as a separate unit alongside the United States military at the battle of Burnt Corn:

> Having procured arms and ammunition in Pensacola, the hostiles started back to the Nation, and were met by a 180-man force of whites under Colonel James Caller to the Nation, and half-bloods under Captain Dixon Bailey, David Tate, and James Cornells at Burnt Corn.

OFA memo, p. 75 of 130. Under the command of Dixon Bailey, the half-blood unit also fought with the military commander of the region, General Ferdinand Claiborne, in the battle of Fort Mims, where the Hostile Creeks overran the defenders and killed almost all of the refugees. *Id.*

This alliance was actively sought and encouraged by the United States government. Just two weeks after Fort Mims, Hawkins sent letters to "public offices in that quarter," *i.e.* to Creek towns at Fort Stoddert and Tensaw, seeking military allies. OFA memo, p. 77 of 130. He wrote, "directing the half-breeds there to unite with their white brethren and that the people in the fork of the Alabama should put themselves into the best situation they could to resist an attack." *Id., quoting Letters, Journals and Writings of Benjamin Hawkins, Vol. II, 1802-1816,* 664 (C.L. Grant, ed. 1980). Again, Creek towns like Tensaw made decisions about a wide variety of their own affairs, including "decisions involving war and peace...." *Angie Debo, The Road to Disappearance: A History of the Creek Indians*, 12 (1941). As such, Hawkins's letter to Tensaw was not only a suggestion for how the town could best defend itself. It was also a self-interested request from the agent of the United States government to the Tensaw government for a military alliance.

One consequence of Tensaw's choosing to break with the hostile faction of the Creek Nation and ally itself with the United States during the Creek War is that it increased the estrangement that already existed between the half-blood community and other Creeks. The town's decision served "to place the pro-American half-blood community of former Upper Town Creeks into highlight, contraposing them with the hostile or anti-American faction...." OFA memo, p. 74 of 130. The friction is evident from this description:

> The white and half-blood settlements in and around the Nation began bracing themselves for an all-out attack by the hostiles, who by August had worked themselves into a religious fervor under the promise of expelling the whites and redeeming their pristine aboriginal state.

OFA memo, p. 75 of 130. Further, in a June 23, 1813 letter to General Ferdinand Claiborne, Harry Toulmin, a local judge, acknowledged the half-bloods' estrangement from the hostile Creeks and described the reaction in the Tensaw area:

> The half-breeds, however, do not think fit to trust themselves with them [the hostiles] or to embark in their measures. They have fled and have left behind them their crops & other property. I visited them yesterday. They are in confusion and distress. Not less so are my white neighbors on Tensaw.

Id.

The 1814 Treaty of Fort Jackson, entered into between the Creek Nation and the United States at the end of the Creek War, recognized the Tensaw alliance with the United States and rewarded the Tensaw Creeks with land grants and placed them under the protection of the United States:

> Provided, nevertheless, that where any possession of *any chief or warrior of the Creek Nation, who shall have been friendly to the United States during the war*, and taken an active part therein, shall be within the territory ceded by these articles to the United States, *every such person shall be entitled to a reservation of land within the said territory of one mile square*, to include his improvements as near the center thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States: but upon the voluntary abandonment thereof, by such possessor or his descendants, the right of occupancy or possession of said lands shall devolve to the United States and be identified with the right of property ceded hereby.

7 Stat. 120, Art. I. (Emphasis added.) By contrast, there were massive land cessions required of the Creek Nation – approximately half of what is today the State of Alabama. (See Figure 1.)

Given the foregoing, the record demonstrates a government-to-government relationship between the United States and the Band's forebears at Tensaw. The United States, through its agent to the Creeks, sought a military alliance with the Tensaw town. Having succeeded in forming an alliance against the Hostile Creeks, the 1814 Treaty of Fort Jackson rewarded allied Creeks with land and the protection of the United States. In view of this relationship, the United States recognized Tensaw as an autonomous entity separate and apart from the historic Creek Nation.

2. Non-recognition

The second condition for demonstrating that a tribe is restored to Federal recognition is the termination of prior recognition by the United States. Such a loss may occur through legislative action – *e.g.*, by statute or treaty – or by administrative action. *Grand Traverse III*, 369 F.3d at 968-72; *TOMAC v. Norton,* 193 F. Supp. 2d 182, 193-94 (D.D.C. 2002); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 705-07 (W.D. Mich. 1999), *vacated on other grounds*, 288 F.3d 910 (6th Cir. 2002). The Band lost its recognition by the United States as early as 1837, under the terms of a treaty with the historic Creek Nation, recognition it did not regain until 1984.

Again, the 1814 Treaty of Fort Jackson provided the Tensaw Creeks, and other allied Creeks, with land grants and placed them under the protection of the United States. 7 Stat. 120, Art. I. The 1832 removal treaty provided for cession of all remaining Creek lands east of the Mississippi River, 7 Stat. 366 at Art. I; removal of most, but not all, Creeks, *Id.* at Art. XII; a general land grant for the Creeks in the Indian Terriory, *Id.* at Art. XIV; and conveyance of lands to Creek leaders and heads of families who remained in Alabama, *Id.* at Art. II, among them the Band's forebears at Tensaw. OFA memo, pp. 3, 5 of 130.

However, for the community of the Band's ancestors who remained, the 1832 Treaty explicitly terminated federal protection of their lands after five years, or by 1837, if they chose to remain in Alabama:

> The United States engage to survey the [ceded] land as soon as the same can be conveniently done, after the ratification of this treaty, and when the same is surveyed to allow ninety principal Chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for the term of five years....
>
> ***
>
> At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefore in fee simple, from the United States.

7 Stat. 366, Art. 2, 4.

The Band's forebears, of course, remained. "Most of the families in the [Tensaw] community acquired title to their lands after the cession of this area to the United States under the 1814 Treaty of Fort Jackson and most remained after the Creek Nation was removed to Indian Territory in the 1830's." OFA memo, p. 5 of 130. As a practical matter, federal protection of the Band's land already disintegrated by 1837, the stated time that federal protection was to expire. OFA memo, p. 85 of 130. The Band then "shifted within a small geographic area until it settled permanently near present-day Atmore, Alabama." OFA memo, p. 2 of 130.

In short, by its terms, the 1832 treaty ended federal recognition of the Band in 1837. Most Creeks were removed to the Indian Territory, and federal protection for those who remained expired at a time certain. The record bears this reading out. From 1837 forward, the United States disclaimed relationship of any kind with the Creeks in Alabama.

For example, for many years, an annual report was published by the Commissioner of Indian Affairs which summarized, on a state-by-state (or territory-by-territory) basis, the activities of the federal government with respect to all recognized tribes. This report, called the Annual Report of the Commissioner of Indian Affairs (Annual Report), described both the implementation of federal Indian policy and the general conditions of each recognized tribe. During the 1840's, the Annual Reports noted the diminishing number of Creeks remaining in Alabama. *Annual Report of the Commissioner of Indian Affairs* 1845-46 at 1 (Nov. 21, 1845). By 1849, the removal of the Creeks was deemed essentially complete, and the Commissioner reported that from the next year forward, the Creeks who remained in Alabama were to be left alone:

> Within the last year, forty-four of the few Creek Indians remaining in Alabama, and five hundred and forty-seven Choctaws from the State of Mississippi, have removed to the country of their brethren west, leaving about two thousand five hundred of the latter people still east of the

> Mississippi River, notwithstanding the great exertions and the large expenditures that have been made for some years past in endeavoring to effect their emigration. These Indians were made citizens by the laws of the States where they are, and the effort to remove them was an obligation voluntarily assumed by the government for their benefit and the advantage of those States. New arrangements have been adopted for a final effort to effect that object, which it is hoped will be attended with success. *All that can be induced to go will probably be removed within another year, at the end of which all further proceedings and expenses should be terminated, and those that shall then remain be permitted to do so in the quiet enjoyment of their rights as citizens.*

Annual Report of the Commissioner of Indian Affairs at 948 (Nov. 30, 1849). (Emphasis added.)

Subsequent Annual Reports reflect an uninterrupted absence of federal involvement over a span of many years. Creeks outside of Oklahoma are rarely mentioned. In the 1856 Annual Report, for example, there is only a passing reference to the sale of 34 sections of Creek Indians lands, presumably fee lands originally set aside in the 1832 removal treaty. In the 1871 Annual Report, there is a passing reference to "some indigent Creeks remaining in Alabama…." *Report of the Commissioner of Indian Affairs*, 1856 at 19 (Nov. 22, 1856); *Report of the Commissioner of Indian Affairs*, 1871 at 576 (Nov. 15, 1871).

Further, express and implied disclaimers of any federal relationship with the Band continued into the 20th century. Ongoing efforts by concerned individuals to gain federal assistance for the Band were repeatedly rebuffed by federal officials. For example, in 1906, an attorney wrote to President Roosevelt seeking federal help for the Creek Indians in Alabama. The Acting Commissioner of Indian Affairs, to whom the letter had been forwarded, responded:

> this Office knows of no band of Indians located in the southern part of Alabama. It is possible, of course, that there are persons of Indian or part Indian blood located in Alabama, as there are in many other States, but these people are in no way connected with the tribes of Creeks, Chickasaws and Cherokees that are located in the Indian Territory. The Creeks, Chickasaws and Cherokees that are now in the Indian Territory located there many years ago by virtue of treaties made between their leaders and the United States, and the individual members of such tribes that may have elected to and did remain east of the Mississippi River when the general emigration of the tribes took place, surrendered any right to share in the property of the tribes as at present constituted in the Indian Territory. *Such Indians as may be found in southern Alabama at the present time are the descendants of those who chose to remain there rather than emigrate to what is now the Indian Territory, and so far as this Office is concerned, are citizens of the State and are entitled to no consideration not due to other citizens who may be of white blood.*

Letter from Acting Commissioner of Indian Affairs to John D. Beck 1-2 (Dec. 31, 1906). (Emphasis added.)

In 1931, an Episcopal clergyman who was working among the Creek near Atmore, Alabama, wrote to the Commissioner of Indian Affairs seeking land and protection for "a small tribe

of Indians located near here." Letter from Rev. Edgar Van W. Edwards to Charles J. Rhoads, Commissioner of Indian Affairs (Sept. 10, 1931). The Assistant Commissioner of Indian Affairs replied that since 1912, "we have had little or nothing to do with any Creek Indians in Alabama," and concluded that the federal government is "not in a position to grant the relief requested." Letter from Henry J. Scattergood, Assistant Commissioner of Indian Affairs to Rev. Edgar Van W. Edwards (Sept. 25, 1931).

A similar letter, written by the same Episcopalian minister to the BIA in 1936, also sought federal assistance for the Band. The Commissioner of Indian Affairs responded, "[t]here is reason to doubt whether this Office has authority to assume jurisdiction over the affairs of the Indians of Alabama…," and he indicated that the BIA "would have to refuse all help on the basis of information now available." Letter from John Collier, Commissioner of Indian Affairs, to Rev. Edgar Van W. Edwards (Apr. 21, 1936).

Correspondence in 1938 from the BIA's Director of Education, Willard W. Beatty, also reveals an unwillingness to provide any assistance to the Band:

> We have given a great deal of thought to the status of the Indian group near Atmore since my visit to you early this spring. In general, the Office appears to take the same position toward these Indians that I expressed to you on the last day of my visit: that *it might be far wiser for the federal government not to interfere.* Any attempt on the part of the government to develop reserved lands or to raise the educational standards through the payment of tuition would tend to relieve the local community of any feeling of responsibility for this group of Indians as citizens.

Letter from Willard W. Beatty, Director of Education, BIA to Rev. Edwin Edwards, (May 27, 1938).(Emphasis added.)

That same year, Mr. Beatty wrote to the Episcopal Missionary in New York, urging the Church to assist the Indians in Alabama because the federal government could not, stating:

> [t]here are no tribal Indian reserves in Alabama, and while many of these Indians were given individual pieces of property by the federal government many years ago, most of this land has been sold. . . . *Special legislation would be required to enable the Indian Office to assume any responsibility for this group* and a careful consideration of the situation and the growing assimilation of the group by the surrounding community raises serious questions as to the advisability of the federal government stepping in.

Letter from Willard W. Beatty, Director of Education, BIA to Theodora Wade, National Council of Protestant Episcopal Church (May 27, 1938). (Emphasis added.)

With each request for assistance during this period for the Creek Indians in Alabama, the federal government disclaimed any relationship with the Poarch Band in Alabama and communicated that the educational and other needs of the Band had to be met through non-Federal sources. The Band's former Chairman, Eddie L. Tullis, recollects that

> [f]rom 1964 until the Tribe gained federal recognition in 1984, the federal government did not provide to Poarch Creek or its members the programs, benefits and services that the government provided to tribes that were federally recognized and their members. For example, during this period the Bureau of Indian Affairs provided no funds to the Tribe, and no services to our people, for any purpose. Likewise, our tribal members received no health care services from Indian Health Service . . . and no funding from HUD for purposes of establishing or implementing a Tribal housing program. While the Administration for Native Americans (ANA) provided the tribe with a small amount of grant funds in this period, those were specifically limited to tasks relating to our efforts to gain federal recognition . . . .

Supplemental Affidavit of Eddie L. Tullis at ¶ 2 (May 26, 2005). He concludes by summarizing that "the Tribe and tribal members received no funds appropriated by Congress for purposes of serving federally recognized tribes during the period from 1964 until recognition in 1984" and notes that "this pattern by the federal government of not treating Poarch Creek as it treated all federally recognized tribes extended back to the time of removal in the 1840's." *Id.*

Given the foregoing, the Band, while once recognized by the United States, lost federal recognition under the terms of the 1832 treaty removing the Creeks to Oklahoma and ending federal superintendence over the Creeks in Alabama in 1837. Recognition of the Band was then absent well into the 20th Century.

3. Reinstatement of recognition

Finally, a tribe with a history of governmental recognition, withdrawal of recognition and then reinstatement of recognition has been "restored" under IGRA, whether the reinstatement of recognition was achieved through Congressional action, the administrative federal acknowledgment process, or administrative recognition. *Grand Traverse III*, 369 F.3d at 967, 969-72; *Ione Indian Lands Opinion* (Sept. 19, 2006.)

Here, the Department of the Interior issued a final determination in June 1984 recognizing the Band. 49 Fed. Reg. 24083 (June 11, 1984). In this determination, Interior expressly found that "the contemporary Poarch Band of Creeks is a successor of the Creek Nation of Alabama prior to its removal to Indian territory [Oklahoma]," and that the Poarch Band of Creeks were those Creeks who "remained in Alabama after the Creek removal of the 1830's...." *Id.*

In sum, over its history, the Poarch Band of Creek Indians was recognized by treaty and by military alliance with the United States, lost this recognition by treaty and federal action, and was reinstated to federal recognition through the federal acknowledgement process. Therefore, the Band is a "tribe that is restored to Federal recognition" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

B. The Tallapoosa Site was taken into trust as part of the Band's restoration

Given that the Band is a restored tribe, the Tallapoosa Site only satisfies the requirements of § 2719(b)(1)(B)(iii) if it was taken into trust as part of the Band's restoration. Nothing in IGRA requires that this be done by Congressional action or in the very same transaction that restored the Tribe. Lands may be restored to a tribe through the administrative fee-to-trust process. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002)("Grand Traverse II"), *aff'd*, *Grand Traverse III*; *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 689, 699-700 (W.D. Mich. 1999)("Grand Traverse I").

Still, not every trust acquisition for a restored tribe meets this exception. There must be some limiting condition – something that ties the trust acquisition to, or shows it to be a part of, the tribe's restoration. *Grand Traverse II*, 198 F. Supp. 2d 920 at 935. This avoids the result that "any and all property acquired by restored tribes would be eligible for gaming." *Coos*, 116 F. Supp. 2d at 164; *Grand Traverse I*, 46 F. Supp. 2d at 700.

Accordingly, both the NIGC and the courts that have considered the question find the necessary limiting condition in the factual circumstances of the trust acquisition, the location of the trust acquisition, and the temporal relationship of the trust acquisition to the tribal restoration. *See, e.g., Coos,*116 F. Supp. 2d at 164; *Grand Traverse II*, 198 F. Supp. 2d at 935; *In Re Sault Ste. Marie Tribe of Chippewa Indians, Resolution No. 2006-101, amendment to Tribal Code § 42.801, Gaming Ordinance* (restored lands opinion, September 1, 2006); *In Re Karuk Tribe of California* (restored lands opinion, October 12, 2004).

At the same time, in response to overly narrow interpretations, several courts have noted that Section 2719 should be read broadly. It is possible to adopt a reasonably limited construction of the exception while rejecting overly narrow interpretations. Courts have already indicated instances in which the interpretation was unduly narrow. *Roseville v. Norton*, 348 F.3d 1020, 1027 (D.C. Cir. 2003) (rejecting the Secretary's interpretation of "restoration of lands" to "be strictly limited to land constituting a tribe's reservation immediately before federal recognition was terminated"); *Coos*, 116 F. Supp. 2d at 164 (rejecting the Secretary's requirement that an act of Congress restoring the tribe to federal recognition must explicitly provide for the restored lands).

1. Factual circumstances surrounding the trust acquisition

In 1984, when the Band regained its federal recognition, it was landless. The Band requested that the BIA take several parcels into trust for its benefit. Memorandum from Bill D. Ott, Area Director, Eastern Area Office to Acting Assistant Secretary – Indian Affairs, re: Request for Reservation Proclamation – Poarch Band of Creek Indians of Alabama (Feb. 12, 1985). The Eastern Office Area Director forwarded the request to the Acting Assistant Secretary – Indian Affairs, noting:

> It is recommended that favorable action be taken on the Poarch Band resolution with two exceptions. After a close review of the total enrollment, land area, and the location of the primary portion of the Poarch Band of

> Indians, I feel it would not be in the best interests of the Bureau of Indian Affairs and the United States Government to create one-acre reservations in Monroe County, Alabama, and Escambia County, Florida. Those plots were taken into trust at the request of the Tribe; however, the plots are not in the immediate proximity of the major Poarch holdings.
>
> I am, therefore, recommending reservation status be granted for those holdings in Elmore County and Escambia County, Alabama.
>
> It is noted that the Poarch Band holdings in Elmore County [Wetumpka] consists of approximately 36 acres which is a site of particular historical significance to the Tribe. Although there is no significant population of Poarch Band Indians in that immediate area, I am including that site in my recommendation since Reservation status will provide the Poarch Band with additional jurisdictional control.

Id.

Accordingly, on April 12, 1985, BIA declared eight parcels, amounting to approximately 229½ acres, to be reservation land. 50 Fed. Reg. 15502-03 (Apr. 12, 1985). Again, seven of the parcels were located in Escambia County, Alabama. Figure 1, parcels 1, 2a, 2b, 3, 7, 8, and 9. The eighth, the Wetumpka site, was over 100 miles away in Elmore County. Figure 1, parcel 4.

Another two parcels, totaling 1 acre each, were taken into trust in 1984, and a parcel of 10.9 acres was taken into trust in 1989. Letter from William R. Perry, Esq., Sonosky, Chambers, Sachse, Endreson & Perry to Andrea Lord, Esq. NIGC (July 18, 2007)).

On November 14, 1988, the Tallapoosa Site, known to have two Creek burial mounds, was donated to the Band. The Site is located between Wetumpka and Atmore, but is closer to the former (approximately 12 miles) than to the latter (approximately 110 miles). Figure 1, parcel 17.

The Band asked the BIA to take the Tallapoosa Site, and two others, into trust on July 27, 1989. Letter from Cielo I. Gibson, Planning Director, Poarch Band of Creek Indians to B.D. Ott, Area Director, Bureau of Indian Affairs (July 27, 1989). The Eastern Office Area Director required additional information before doing so:

> In regard to Parcel 17, which is located a distance from the main reservation and is not included in your current Comprehensive Tribal and Community Development Plan, the application will be held in abeyance pending additional justification for Trust Status.

Letter from B.D. Ott, Eastern Office Area Director, to Eddie Tullis, Chairman, Poarch Band of Creek Indians (Aug. 7, 1989).

Accordingly, the Band commissioned a report of the Tallapoosa Site by Dr. Diane Silvia, a local expert in archaeology and anthropology. Letter from Chairman Eddie L. Tullis, to B.D.

Ott, Eastern Office Area Director (June 1, 1990). Dr. Silvia's study confirmed that a portion of the Site contained two historically and culturally significant Creek burial mounds and the aboriginal Creek village of Kolomi. Diane E. Silvia, PhD, Report on the Cultural Significance of the Poarch Band of Creek Indians' Parcel 17, Montgomery County, Alabama.

On the basis of this report, the BIA concluded that the Site "is probably significant" and "may be important to the Tribe culturally." Letter from B.D. Ott, Eastern Office Area Director, to Eddie Tullis, Chairman, Poarch Band of Creek Indians (Oct. 22, 1990). However, BIA completed the trust acquisition of the Tallapoosa Site only on March 23, 1995 – a five-year delay. Warranty deed (March 23, 1995).

In the interim, BIA took five more sites totaling just under 133 acres in trust for the Band, all in 1992. Letter from William R. Perry, Esq., Sonosky, Chambers, Sachse, Endreson & Perry, to Andrea Lord, Esq., NIGC (July 18, 2007). The Band thus had approximately 242 acres in trust when it applied to have the Site placed into trust and approximately 375½ acres in trust when the Tallapoosa Site acquisition was complete.

These facts suggest that the Tallapoosa Site is restored land, for they show that the Site was part of the Band's "first systematic effort to restore tribal lands." *Grand Traverse II*, 198 F. Supp. 2d at 936. Of course, at first, Area Director Ott referenced the Band's systematic plan for restoring its land base, the Comprehensive Tribal and Community Development Plan, and noted that the Tallapoosa Site was not in it.

However, the Tallapoosa Site contains an ancestral Creek village and burials, and, importantly, was known to be associated with the Upper Creeks from whom the Poarch descend. The Site was donated to the Band in order to transfer the land into tribal ownership. At the time, the Band was newly restored, had limited funds, took the donation of culturally significant lands when offered only 4 years after restoration, and requested within a year that the land be put into trust. This was consistent with the Band's trust land acquisition goals of fostering economic development, self-determination, and cultural survival through cultural preservation and religious activities. Tullis Aff. ¶¶ 5-6. In addition, the Tribe requested that the Tallapoosa Site be taken into trust before many of the other parcels that were accepted into trust on its behalf, and the United States had determined that the land should be taken into trust five years before it acted to do so.

Even though, then, the Tallapoosa Site was not part of the Band's initial development plan, the BIA nevertheless took the fortuitous acquisition into trust while taking other land into trust in furtherance of that plan. Acquisition of the Tallapoosa Site was thus part of the Band's first systematic effort to restore tribal lands.

2. Location of the Trust Acquisition

The location of a trust acquisition is "arguably the most important" component of the restored lands factors. *Wyandotte*, 437 F. Supp. 2d at 1214. What is significant here is a tribe's historical and modern ties to the land. *Id.* at 1216 (court "agrees with the NIGC that in order to evaluate this issue fully, the agency must evaluate the present circumstances of the Tribe and its relationship with the land at issue").

The Tallapoosa Site is only 12 miles from the Band's Wetumpka reservation. Commonly known as "Hickory Ground," Wetumpka was the last governmental center of the Creek Nation before the Nation's removal westward in the 1830's. Letter from Roger Sumner Babb, Regional Solicitor, DOI Southeast Regional Office, to Michael Cox, General Counsel, NIGC (Aug. 3, 1995). Wetumpka was also "the site of the Creek Nation's sacred fire, the ashes of which were transported to and rekindled at Hickory Ground in the present State of Oklahoma. The Hickory Ground in Alabama was also the site of a trading post, an inn, an Indian ball court, and a horse racing track where gaming frequently occurred." *Id.* Accordingly, Wetumpka was said to be "of particular historical significance" to the Band by the Eastern Office Area Director when recommending that it be proclaimed a reservation. Letter from Bill D. Ott to Acting Assistant Secretary – Indian Affairs re: Request for Reservation Proclamation (Feb. 12, 1985).

Although the Band's members and main affiliations were with Atmore, Alabama, at the time of removal, OFA memo, p. 3 of 130, the Band has both familial and tribal ties to the Tallapoosa and Wetumpka area. Located on the southeast bank of the Tallapoosa River in Montgomery County, Alabama, near the confluence of the Coosa and Tallapoosa Rivers, the Tallapoosa Site lies in the center of an area that was exclusively lands of the historic Creek Nation from aboriginal times until removal. Figure 1; *and see* Aug. 27, 2004 affidavit of University of Auburn Professor of Anthropology John Cottier at ¶ 12 ("[T]he Tallapoosa Site currently owned by the Poarch Band of Creek Indians is within what was once the historic Creek town of Kolomi. Kolomi was geographically a central area of the Creek Nation in historic times – and could by no means be viewed as a fringe area within the 18th and 19th century Creek Nation").

Of equal importance is the fact that members of the Poarch Band trace their lineage directly from the Upper Creeks and their villages, including Kolomi, along the drainage of the Coosa and Tallapoosa Rivers in northeastern Alabama within an area ceded to the United States by the 1814 Treaty of Fort Jackson. Figure 1; Cottier Aff. at ¶ 7. It was known to the public that the Tallapoosa Site contains two aboriginal Creek earthen burial mounds, and the previous land owner was aware of their importance and prevented uncontrolled excavation or farming activities that would disturb the site. Silvia report at 2.

Even after relocating south to Tensaw and Atmore, the Band continued to maintain its connection to Wetumpka. Many of the Band's ancestors were political leaders, such as Alexander McGillivray, who stayed connected to Hickory Ground (Wetumpka) and the region through their participation in governmental matters. OFA memo, pp. 16, 69-73. Indeed, Alexander McGillivray was a signatory to the Treaty of New York, and he was accompanied on his trip by his nephews, Lachlan Durant and David Tate, also Poarch Band forebears. OFA memo, p. 16, 71 of 130. Many of the Band's ancestors also had land holdings in both the Tensaw region and in the Upper Creek towns. OFA memo, pp. 70-72 of 130. The lands were commonly used for hunting, trading and farming.

The Poarch Band also has important modern ties to the area, other than through its affiliation with the historic Creek Nations. The Band's Historical Preservation Officer, for example, protects and preserves the burial mounds located on the Tallapoosa site and from there gathers plants used in traditional Creek ceremonies as the plants are not available on the Atmore reservation. Decl. of Robert Thrower (Mar. 22, 2007). It is in view of such ties

that the BIA's Division of Trust Services found the Tallapoosa Site to be "probably significant" and "may be important to the Tribe culturally." Letter from Eastern Office Area Director to Eddie Tullis, Chairman, Poarch Band of Creek Indians (Oct. 22, 1990).

Given these facts, there is a nexus between the Poarch Band and the Tallapoosa Site consistent with that found in our previous opinions. Past indicators of a connection we have examined include how significant the land is to the tribe, whether the gaming site is within a former reservation or ceded lands of the tribe, and whether the land is near to a tribal center or tribal programs.

First, we have looked at the significance of the gaming site and nearby area to the tribe. 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 Grand Traverse Opinion* at 15. The Grand Traverse Band had lived and worked near the Turtle Creek site from the time of its first recorded history, *Id.* at 18, and the land had "been at the heart of the Band's culture throughout history…" *Id.* at 19. Additionally, the *Coos* tribes were "seeking to game on land which has been historically tied to the Tribes and has a close geographic proximity to the Tribes." *DOI Coos Opinion* at 14.

Here, the Site is at the core of the Creek Nation's former territory and is additionally the site of an ancestral Poarch Band village. In addition, the Tallapoosa Site was known to contain Creek burial mounds. Several other Indian lands opinions have mentioned as a consideration that the local community had known for years the land was closely tied to that tribe. *NIGC Grand Traverse Opinion* at 18-19; *DOI Coos Opinion* at 13.

Beyond containing burial mounds and an ancestral village itself, the Tallapoosa Site is also near the spiritually important site of the former Creek sacred fire at Wetumpka, 12 miles away. Previous positive opinions have found a nexus when the proposed gaming site was near ancestral villages and religious sites.

In our *Mechoopda* opinion, three buttes that figured prominently in a tribal myth were located one mile from the parcel, a historic trail linking several tribal villages crossed the parcel, and several Mechoopda villages were located in close proximity to the site. *NIGC Mechoopda Opinion* at 10-11. In our *Rohnerville* opinon, the parcel was located within one mile of two aboriginal villages and two major tribal trails and was within three miles of five aboriginal villages. *NIGC Rohnerville Opinion* at 11. Also, the site of a mythic flood in tribal lore was within three or four miles from the Rohnerville site.

We have also examined whether the proposed gaming land is within a former reservation or land ceded to the United States by treaty. Both the *Grand Traverse I* and *Coos* courts held that "[p]lacement within a prior reservation is significant evidence that the land may be considered in some sense restored." *See Grand Traverse I*, 46 F. Supp. 2d at 702; and *Coos*, 116 F. Supp. 2d at 164. A historical nexus has also been found when the gaming site was ceded to the United States via treaty. *NIGC Sault Ste. Marie Opinion* at 11-12. In *Grand Traverse II,* the Court held that the lands lay within counties that had previously been ceded by the tribe to the United States. 198 F. Supp. 2d at 936. The Sault Ste. Marie Tribe was one of a number of separately recognized Chippewa bands that ceded lands in the Treaty with the Ottawa,

Etc., Mar. 28, 1836 (7 Stat. 491). Here, the Tallapoosa Site was ceded to the United States by the Creek Confederacy in 1814 as a result of the war against the Hostile Creeks.

Next, the NIGC has taken into consideration the proximity of the land in question to the tribal center, programs, and membership. The Tallapoosa Site is only 12 miles from a portion of the Poarch reservation. Many of our previous positive opinions have dealt with smaller distances. *NIGC Rohnerville Opinion* (6 miles from original rancheria); *NIGC Mechoopda Opinion* (10 miles from original rancheria).

Accordingly, the facts show that the Band has strong historical and modern ties to the Tallapoosa Site. Those ties are sufficient to show that the Site is land restored to the Band.

3. Temporal relationship of the trust acquisition to tribal restoration

Finally, there is the question of whether the timing of the acquisition of the Site supports a conclusion that the land is restored. Again, when the Band regained recognition in 1984, it had no land base at all. In late 1984, eight small parcels amounting to approximately 229½ acres were taken into trust and made the Atmore and Wetumpka reservation. These acquisitions constituted the beginning of the Band's plan to reestablish a post-recognition land base.

As discussed above, the acquisition of the Tallapoosa site occurred in the middle of the time frame to re-establish a land base. Again, the Band's fee acquisition of the Tallapoosa Site occurred in 1988, only four years after the Band's restoration to federal recognition, when it was donated to the Band by a local private owner. In 1989, one year later, within five years of restoration, the Band applied to the BIA to have the Site taken into trust. When the Eastern Office Area Director sought more information, the Band provided the report of Dr. Silva in 1990, six years after restoration. Letter from B.D. Ott, Eastern Office Area Director, to Eddie Tullis, Chairman, Poarch Band of Creek Indians (June 1, 1990).

For whatever reasons, it took an additional four years for the BIA to complete the Tallapoosa trust acquisition. In the meantime, it took five more sites totaling just under 133 acres in trust for the Band, all in 1992. Letter from William R. Perry, Esq., Sonosky, Chambers, Sachse, Endreson & Perry, to Andrea Lord, Esq., NIGC (July 18, 2007). The acquisition of the Tallapoosa Site, then, was contemporaneous with the trust acquisitions for the Band that occurred after the proclamation of its initial reservations. Accordingly, the timing supports a finding that the Site acquisition was part of a larger process of restoring lands for the Band.

III. Conclusion

Given all of the foregoing, and in light of the factual circumstances of the Tallapoosa acquisition, the Band's modern and historical connections to it, and the timing of the acquisition in the middle of the Band's efforts to acquire other lands, the Tallapoosa Site is "restored lands." As the Band is a "restored tribe," the Tallapoosa Site is Indian land that falls within the exception of 25 U.S.C. § 2719(b)(1)(B)(iii) and is eligible for gaming notwithstanding its acquisition after the effective date of IGRA.

Thank you for patience on this matter. For me, the status of the Tallapoosa Site is resolved and we will continue to regulate the Band's facility.

Sincerely,

Philip N. Hogen
Chairman

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Aurene Martin, Ietan Consulting
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