



## MEMORANDUM FOR THE CHAIRWOMAN

July 18, 2013

FROM: Heather L. Corson, Staff Attorney *hcc*

THROUGH: Eric Shepard, Acting General Counsel *ES*  
Jo-Ann M. Shyloski, Associate General Counsel *JMS*

CC: Christinia Thomas, Acting Chief of Staff

SUBJECT: Kialegee Tribal Town, Proposed Gaming Site on Neal Freeman Parcel

This memorandum concludes a legal review of whether the land held in trust by the United States for Neal Ernest Freeman, a Muscogee Creek Nation member and a Kialegee Tribal Town member, in Wagoner County, Oklahoma, is Indian land eligible for gaming by the Kialegee Tribal Town (Kialegee or Tribe) under the Indian Gaming Regulatory Act (IGRA) and applicable regulations. As explained below, it is our opinion that the Neal Freeman parcel does not qualify as Kialegee's Indian lands eligible for gaming under IGRA because Kialegee does not have legal jurisdiction over the parcel for purposes of IGRA. The Department of the Interior ("Interior"), Office of the Solicitor, concurs with this opinion.

### I. BACKGROUND

The Kialegee Tribal Town is a federally recognized tribe with headquarters in Wetumka, Oklahoma. On March 22, 2013, the NIGC received the Tribe's 120-day notice of intent to license a new Class II gaming facility on Neal Freeman's property (Freeman Parcel).<sup>1</sup> The Freeman Parcel is held in trust by the United States for Neal Ernest Freeman, an enrolled Kialegee member and an enrolled member of the Muscogee

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<sup>1</sup> The property is located in Wagoner County, Oklahoma. The legal description follows:

A tract of land containing 11 acres, more or less, described as the S/2 NE/4 SE/4 of Section 4-T17N-R15E less and except all minerals, together with the right of ingress/egress across 15 feet of S/2 SE/4 of Section 4-T17N-R15E and less & except the surface nine (9) acre tract described as the north 625 feet of the east 627.264 feet of the SE/4 NE/4 SE/4 of Section E 4-T17N-R15E, Wagoner County.

(Creek) Nation.<sup>2</sup> Documentation provided by the Muscogee (Creek) Nation indicates Neal Ernest Freeman's date of enrollment with the Muscogee (Creek) Nation as June 17, 1981. Kialegee indicates that Neal Ernest Freeman was approved for membership in the Kialegee Tribal Town on June 4, 2001. Kialegee Tribal members can also be citizens of the Muscogee (Creek) Nation.<sup>3</sup>

The Freeman Parcel was originally part of the 1903 allotment of Simon Belcher, a Creek Nation member who was previously on the rolls of the Coweta Town.<sup>4</sup> It is located within the area constituting the former, historic reservation of the Muscogee (Creek) Nation.<sup>5</sup> When Simon Belcher died, the property was inherited in 1938 by his half brother, Major Freeman, a member of the Creek Nation (County Court of Wagoner County, Case No. 2473).<sup>6</sup> When Major Freeman died in 1951, the property passed to his son Columbus Freeman, also a Creek Nation member (County Court of Tulsa County, Case No. 26,203).<sup>7</sup> Around 1952, as a result of a divorce decree, Columbus Freeman conveyed the property as a life estate to Rachel McGilberry Freeman, also a Creek Indian,<sup>8</sup> with the remainder interest going to their children, including Neal Freeman.<sup>9</sup> This 1953 deed states the property was held in restricted status, but it was not approved by the Secretary.<sup>10</sup> Nevertheless, the United States has treated the property as in trust or

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<sup>2</sup> See May 3, 2013, Letter from Mekko Tiger Hobia to BIA/Okmulgee Agency (*Attachment A*); June 20, 2013, Muscogee (Creek) citizenship documents (*Attachment B*).

<sup>3</sup> See *Constitution Muscogee (Creek) Nation*; Title 7 of *Muscogee (Creek) Nation Code Annotated*; *Constitution and By-laws of Kialegee Tribal Town*.

<sup>4</sup> See April 26, 2013, Memorandum from Field Solicitor, Tulsa, to Region Director, Eastern Oklahoma Region, BIA ("The subject property was a portion of the allotment of Simon Belcher, Full Blood Creek Indian. ... Census Card No. 237 reflects that Simon Belcher was listed on the Dawes Roll of the Creek Nation as Creek No. 799 and that he was previously listed on the 1890 Roll of the Coweta Town."), attached to May 2, 2013 Letter from Region Director, Eastern Oklahoma Region to NIGC Staff Attorney (*Attachment C*). See also Title Status Report 9080304705, Corrected, 4/15/2013, TAAMS (*Attachment D*).

<sup>5</sup> See May 2, 2013 Letter from Region Director, Eastern Oklahoma Region to NIGC Staff Attorney.

<sup>6</sup> See Title Status Report 9080304705, Corrected, 4/15/2013, TAAMS.

<sup>7</sup> See *Id.*

<sup>8</sup> The Kialegee Tribal Town contends that Rachel McGilberry Freeman, Neal Ernest Freeman's mother, was a full-blood member of the Kialegee Tribal Town. The documents provided by Muscogee (Creek) Nation indicate she was enrolled as a Muscogee (Creek) citizen on May 21, 1981, and designates her town membership as Kialegee. However, Rachel's membership is not a factor in our analysis given that the Freeman Parcel is part of the allotment of Creek Nation lands and an original allotment of Simon Belcher, a full-blood Creek Indian, who was previously listed on the 1890 roll of the Coweta Town.

<sup>9</sup> See Title Status Report 9080304705, Corrected, 4/15/2013, TAAMS.

<sup>10</sup> February 2, 1953, Deed to Restrict Indian Land – Special Form, No. 4295 (*Attachment E*).

restricted status.<sup>11</sup> Finally, in 1983, the Freeman Parcel was conveyed in its entirety to Neal Freeman solely, with a deed stating the property was held in trust by the United States.<sup>12</sup> The Interior Field Solicitor in Tulsa has determined that, because the Freeman Parcel has been treated as trust property since 1953 despite a deed unsigned by the Secretary of Interior, it is impliedly held in trust for Neal Freeman.<sup>13</sup>

Along with its 120-day notice letter, Kialegee provided the February 24, 1983, deed conveying the property to Neal Freeman, several letters from the Tribe to Neal Freeman, and a letter from the Tribe to the Bureau of Indian Affairs (*Attachment H*).<sup>14</sup>

As you recall, in 2011, the Tribe proposed issuing a license for a gaming facility on another property in Broken Arrow, Oklahoma. OGC opined that the property did not qualify as Kialegee's Indian lands eligible for gaming because Kialegee had not established it had legal jurisdiction over it for purposes of IGRA.<sup>15</sup>

A. Legal History of the Creek Nation.

To better understand the legal jurisdiction over the Freeman Parcel and the relationship of the Muskogee (Creek) Nation and the Kialegee Tribal Town, a review of the legal history of the Creek Nation is necessary. The District Court for the District of Columbia has explained that “[t]he Creek Nation has always been a confederacy of tribal towns.”<sup>16</sup> According to the Interior Board of Indian Appeals,

Prior to 1707, the Creek Nation occupied a large territory in what is now the States of Georgia, Alabama, and Florida. Between 1707 and 1773, tracts of this territory were ceded to Great Britain and the American colonies. Treaty cessions to the newly independent United States began in 1790. The United States entered into thirteen treaties with the Creek

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<sup>11</sup> See July 3, 1968, Memorandum Re: Status of SE1/4 of Section 4, T17N, R15E from Field Solicitor, Muskogee to Muskogee Area Director (*Attachment F*); see also April 26, 2013, Memorandum from Field Solicitor, Tulsa, to Region Director, Eastern Oklahoma Region, BIA (“The Bureau’s subsequent 60-year exercise of federal superintendence over the property is, in our opinion, sufficient implied approval of the 1953 deed to the United States in trust.”).

<sup>12</sup> See February 24, 1983, Deed to Restricted Indian Land Special Form (*Attachment G*).

<sup>13</sup> See April 26, 2013, Memorandum from Field Solicitor, Tulsa, to Region Director, Eastern Oklahoma Region, BIA.

<sup>14</sup> OGC has requested the Tribe submit a legal analysis setting forth its basis for legal jurisdiction over the Freeman Parcel. At present, we are still awaiting the analysis.

<sup>15</sup> See May 25, 2012, Letter from Chairwoman Stevens to Mekko Hobia and June 8, 2012, Letter from Chairwoman Stevens to Mekko Hobia.

<sup>16</sup> *Harjo v. Kleppe*, 420 F.Supp. 1110, 1118 (D.D.C. 1976).

Nation before 1833. Under the Creek Removal Treaty of March 24, 1832, 7 Stat. 366, [a] portion of the Creek Nation . . . was removed to an area in the present State of Oklahoma.<sup>17</sup>

The historic Creek Nation that signed treaties prior to 1833 now exists as the Poarch Band of Creek Indians in Alabama, the Muscogee (Creek) Nation in Oklahoma, and several recognized tribal towns.<sup>18</sup>

In a pre-IGRA bingo case, the Tenth Circuit analyzed the legal history of the Muscogee (Creek) Nation, explaining that in 1832 “the Creeks ceded their eastern homelands to the United States, in exchange for lands west of the Mississippi River.”<sup>19</sup> In subsequent years, federal treaties and federal legislation pertaining to the Creek Reservation in Oklahoma were exclusively with the Muscogee (Creek) Nation, not the tribal towns. According to the Tenth Circuit, “[i]n a subsequent treaty regarding these lands, the United States agreed to grant ‘a patent, in fee simple, to the Creek nation.’”<sup>20</sup> In 1866, the Creek Nation entered into another treaty with the United States, which “provided that the ‘reduced . . . reservation’ retained by the Creeks was ‘forever set apart as a home for the Creek Nation.’”<sup>21</sup> The Tenth Circuit held that “original treaty lands still held by the Creek Nation” were “the purest form of Indian Country[.]”<sup>22</sup> Thus, the Tenth Circuit was clear that the Oklahoma lands held in fee by the Muscogee (Creek) Nation had been held by the Muscogee (Creek) Nation since its removal to Oklahoma.

The United States District Court for the District of Columbia, in a case regarding which tribal entity has lawmaking power for the Muscogee (Creek) Nation, provided a comprehensive legal history of the Muscogee (Creek) Nation.<sup>23</sup> Many of the court’s findings, included below, are significant to the jurisdiction question before us. The court found:

On October 12, 1867, the Creeks adopted a constitution and a code of laws for the “Muscogee Nation.” The constitution was modeled on American federalism, with executive, legislative, and judicial branches. Legislative power was lodged in a National Council, a bi-cameral body in which each tribal town or “Talwa” was entitled to one delegate in the House of Kings

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<sup>17</sup> *Muscogee (Creek) Nation v. BIA*, 13 IBIA 211 at 2-3 (1985).

<sup>18</sup> See May 19, 2008, Letter from NIGC Chairman to Poarch Band of Creek Indians Chairman at 12.

<sup>19</sup> *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 971 (10th Cir. 1987)

<sup>20</sup> *Id.* at 971.

<sup>21</sup> *Id.* at 974.

<sup>22</sup> *Id.* at 976.

<sup>23</sup> *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976, *aff'd*, 581 F.2d 949 (D.C. Cir. 1978).

and one in the House of Warriors, plus an additional delegate in the House of Warriors for every two hundred people.<sup>24</sup>

Over the following decades, non-Indian settlement within the Oklahoma territory grew. As the court explained,

By 1890, when the Oklahoma Territory adjacent to the Indian Territory was opened and a territorial government created, the clamor for allotment had reached a new peak. . . . [O]n March 3, 1893, . . . Congress created a commission to negotiate with the Five [Civilized] Tribes [of Oklahoma] for the extinction of their communal titles and the eventual creation of a state. . . . During the next several years the Commission attempted to negotiate the dissolution of the tribes, but had minimal success . . . . [O]n June 28, 1898 Congress enacted the Curtis Act, which provided for forced allotments and the eventual termination of the tribal tenure without the Indians' consent. The Act incorporated the provisions of the tentative agreements with each of the . . . tribes, providing that if the agreement with any tribe was ratified by the tribe the provisions of the agreement would substitute for the more drastic allotment provisions of the Act. The Creeks did in fact reject their agreement, and the Curtis Act went into effect in their territory.<sup>25</sup>

Section 30 of the Curtis Act provided for the allotment of “lands owned by the Muscogee or Creek Indians in the Indian Territory to each citizen of said nation[.]”<sup>26</sup> The Curtis Act provided for the “principal chief of the Muscogee or Creek Nation . . . to deliver . . . a patent, conveying . . . all the right, title, and interest of the said nation in and to the land[.]”<sup>27</sup>

The provisions of the Curtis Act were so drastic from the Creek point of view that they soon consented to a new agreement to supersede the one contained in section 30 of [the Curtis] Act[.] The new agreement was ratified by the tribe, and by the Congress in the Act of March 1, 1901, 31 Stat. 861.<sup>28</sup>

The Act of March 1, 1901, as amended, provided for allotment of “all lands *belonging to the Creek tribe of Indians* in Indian Territory, except town sites . . .”<sup>29</sup> This

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<sup>24</sup> *Id.* at 1120.

<sup>25</sup> *Id.* at 1122.

<sup>26</sup> 30 Stat. 495, 514 (1898).

<sup>27</sup> *Id.*

<sup>28</sup> *Harjo v. Kleppe*, 420 F. Supp. at 1124.

<sup>29</sup> 32 Stat. 500 (1902)(emphasis added).

act further recognized “that until such time as the Creek national government was in fact dissolved, it would continue to function under the 1867 Constitution, as modified by this act and prior agreements.”<sup>30</sup> As the court explained,

[T]he act’s allotment scheme provided for commissions to carry out the appraisal and allotment of land, and that sale of town lots. The Principal Chief was to appoint certain members of the commissions or committees ... [and] the deeds conveying the individual allotments to members of the tribe were to be signed and delivered by the Principal Chief on forms provided by the Secretary .... In sum, then, under the agreement the Creek government through its National Council retained its general authority for dealing with tribal affairs[.]<sup>31</sup>

The district court further analyzed the federal legislation after the Act of 1901 through the present, finding that Congress “has explicitly recognized and preserved the authority of the national legislature and the basic form of government established by the 1867 constitution.”<sup>32</sup> The D.C. Circuit Court of Appeals affirmed the district court’s conclusion that “although a great deal of legislation had been passed involving the tribe and its government, ‘the basic legal framework governing the management of Creek tribal affairs, financial and otherwise, is the Creek Constitution of 1867.’”<sup>33</sup> Additionally, the D.C. Circuit affirmed the district court’s order that provided for a “referendum among all Creek adults on certain issues raised by a recently drafted proposed constitution for the tribe,” the results of which were to be incorporated into a new constitution for the Creek Nation.<sup>34</sup>

In 1979, the Muscogee (Creek) Nation adopted a constitution that was approved by Interior in accordance with the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501 *et seq.* Section 2 of the Muscogee (Creek) Nation’s approved constitution affirms that the “political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America[.]”

#### B. Legal History of the Kialegee Tribal Town.

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<sup>30</sup> *Harjo v. Kleppe*, 420 F. Supp. at 1124.

<sup>31</sup> *Id.* at 1125.

<sup>32</sup> *Id.* at 1143.

<sup>33</sup> *Harjo v. Andrus*, 581 F.2d 949, 951 (D.C. Cir. 1978).

<sup>34</sup> *Id.* at 951-952, 954.

The legal history of the Kialegee Tribal Town can now be explained in light of the Muscogee (Creek) Nation's legal history. In that regard, as the *Harjo v. Andrus* court described:

[t]he Creek Nation, historically and traditionally, is actually a confederacy of autonomous tribal towns, or Talwa, each with their own political organization and leadership. . . . Originally, there were four 'mother' towns, but the number was expanded by a transfer of town fires until, by the time of the adoption of the 1867 Constitution, there were approximately forty-four Talwa in existence. Tribal towns can also merge or dissolve, and there is at present some doubt as to the exact number of towns that are politically and socially active.<sup>35</sup>

Under the 1867 Muskogee Nation's Constitution, each tribal town was entitled to delegates in the National Council.<sup>36</sup>

In 1936, Congress passed the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 501 *et seq.* Section three of OIWA allowed "any recognized tribe or band of Indians residing in Oklahoma . . . to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe."<sup>37</sup> In 1937, the Acting Solicitor for Interior concluded that the Creek Tribal Towns could organize as bands within the meaning of section three of OIWA, separate and distinct from the Muscogee (Creek) Nation. The Acting Solicitor stated that "the Creek towns can lay a substantial claim to the right to be considered as recognized bands" within the meaning of OIWA, explaining:

That the Indians themselves recognized the existence of the Creek tribal towns i[s] clear from an examination of the constitution and laws of the Muscogee Nation. While providing that representation in the National Council shall be by towns, nowhere does it define the towns. In fact the Compiled Statutes of the Muscogee Nation nowhere provide for defining the boundaries of the towns. In other words, the towns are recognized as having an existence not derived from the constitution of the Muskogee Nation but in fact antedating and continuing alongside the constitution. Further evidence of this is provided . . . by other statutes ratifying agreements of consolidation between towns and ratifying adoptions into town membership.<sup>38</sup>

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<sup>35</sup> 581 F.2d at 951 n.7.

<sup>36</sup> 1867 Muskogee Nation Constitution, Art. I, § 2-3, *see also Harjo v. Kleppe*, 420 F.Supp. at 1120.

<sup>37</sup> 25 U.S.C. § 503.

<sup>38</sup> *Memorandum from Acting Solicitor Frederic L. Kirgis to the Commissioner of Indian Affairs*, p. 4 (July 15, 1937) (internal citations omitted).

The Acting Solicitor opined that “it [was] possible to conclude that the towns are actually bands with a recognized existence.”<sup>39</sup>

Three of the Creek Tribal Towns reorganized under OIWA, including Kialegee, which did so by ratifying a constitution in 1941. Unlike the Muscogee (Creek) Nation Constitution, the Kialegee’s Constitution does not contain any provision setting forth the geographical jurisdiction of the Kialegee Tribal Town.<sup>40</sup>

## II. DISCUSSION

IGRA’s purpose is to establish an independent federal regulatory authority and federal standards for gaming on Indian lands.<sup>41</sup> IGRA provides that an Indian tribe may engage in gaming under IGRA only on “Indian lands” that are “within such tribe’s jurisdiction.”<sup>42</sup> *Indian lands* are

- (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.<sup>43</sup>

NIGC regulations have clarified the Indian lands definition, providing that: *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.<sup>44</sup>

### A. Indian Reservation

If the Freeman Parcel is located within the limits of the Tribe’s existing reservation, the land qualifies as Indian lands eligible for gaming pursuant to 25 U.S.C. §

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<sup>39</sup> *Id.*, p. 5.

<sup>40</sup> *See Constitution and By-laws of Kialegee Tribal Town.*

<sup>41</sup> 25 U.S.C. § 2702(3) (2012).

<sup>42</sup> 25 U.S.C. § 2710(b)(1), (d)(1).

<sup>43</sup> 25 U.S.C. § 2703(4).

<sup>44</sup> 25 C.F.R. § 502.12.



2703(4)(A). Whether the Freeman Parcel is *Indian lands* eligible for gaming by the Kialegee Tribal Town because it is within the limits of the Tribe's existing reservation requires an analysis similar to the one conducted for the Broken Arrow property.<sup>45</sup> The NIGC has determined that *Indian reservation* in IGRA, 25 U.S.C. § 2703(4), means only existing federal Indian reservations.<sup>46</sup> Such determination is consistent with Interior regulations.<sup>47</sup>

However, the Kialegee Tribal Town does not claim to have an existing reservation. Rather, the Tribe asserts that the Freeman Parcel is "part of a restricted allotment within the former Creek Reservation in Oklahoma . . . ."<sup>48</sup> Interior states that the Freeman Parcel is located within the former, historic reservation of the Muscogee (Creek) Nation.<sup>49</sup> Further, former NIGC Acting General Counsel opined that certain Muscogee (Creek) Nation trust lands were eligible for gaming by the Muscogee (Creek) Nation because they were located "within the Nation's former reservation boundaries[.]"<sup>50</sup> Therefore, the Freeman Parcel cannot qualify as the Kialegee Tribal Town's existing reservation because it is located within a historic rather than existing reservation for purposes of IGRA.

In addition, to the reservation's status as former rather than existing for purposes of IGRA, the entity associated with the former reservation is the Muscogee (Creek) Nation and not the Kialegee Tribal Town. Thus, the Kialegee Tribal Town cannot claim that the Freeman Parcel qualifies as Indian lands because it is within its reservation boundaries if those reservation boundaries belong to another tribal entity.

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<sup>45</sup> See May 25, 2012, Letter from Chairwoman Stevens to Mekko Tiger Hobia; May 24, 2012, Memorandum Re: Kialegee Tribal Town Proposed Gaming Site in Broken Arrow, Oklahoma, from NIGC Office of General Counsel to Chairwoman Stevens.

<sup>46</sup> See July 21, 2011, Letter from Chairwoman Stevens to Chief Wickliffe adopting July 18, 2011, Memorandum Re: United Keetoowah Band of Cherokee Indians from NIGC Office of General Counsel to Chairwoman Stevens at 11-13.

<sup>47</sup> See 25 C.F.R. § 292.2.

<sup>48</sup> See March 4, 2013, Letter from Mekko Hobia to Chairwoman Stevens.

<sup>49</sup> See May 2, 2013, Letter from Region Director, Eastern Oklahoma Region to NIGC Staff Attorney.

<sup>50</sup> See January 6, 2009, Letter regarding Twin Hills and Kellyville sites from Acting General Counsel Penny Coleman to Principal Chief A.D. Ellis. Notwithstanding these references to the Creek Nation's territory as a 'former reservation' for purposes of IGRA, this memorandum expresses no opinion on whether the Muscogee (Creek) Nation still holds certain lands that are considered to be an informal reservation under other statutes. The Tenth Circuit in *Indian Country, U.S.A. v. Oklahoma*, expressly declined to decide whether the exterior boundaries of the 1866 Creek Nation treaty territory have been disestablished. 829 F.2d 967 (10th Cir. 1987).

Accordingly, as with the Broken Arrow property, the Freeman Parcel does not constitute *Indian lands* as an existing federal Indian reservation under 25 U.S.C. § 2703(4)(A) or NIGC regulations, 25 C.F.R. § 502.12(a).

B. Trust or Restricted Fee Land

“Indian lands” also includes lands “held in trust by the United States for the benefit of any . . . individual” or “held by any . . . individual subject to restriction by the United States against alienation over which an Indian tribe exercises governmental power.”<sup>51</sup> The Interior Solicitor’s Office has concluded that the Freeman Parcel “is held in trust by the United States for Neal Ernest Freeman” because “the property has been treated since 1953 as either trust or restricted property.”<sup>52</sup> Specifically, among other actions, the deed for the 1983 conveyance to Neal Freeman states that the property conveyed to him is held in trust by the United States for his benefit. Thus, based on the Bureau of Indian Affairs’ sixty years of federal superintendence over the property, the Field Solicitor concluded there was sufficient implied approval of the 1953 deed to the United States in trust.<sup>53</sup>

As such, the Freeman Parcel satisfies the first step of qualifying as Indian lands pursuant to 25 U.S.C. § 2703(4)(B) because the land is held by the United States in trust for an individual Indian.

C. Legal Jurisdiction and Exercise of Governmental Power Over the Parcel

When a tribe asserts that a parcel of land qualifies as Indian lands due to its status as trust land, the tribe must establish that it possesses legal jurisdiction over the land and exercises governmental power over the land. The exercise of governmental power is the second element for qualifying as Indian lands pursuant to 25 U.S.C. § 2703(4)(B).<sup>54</sup> Both the NIGC and the courts have concluded that the first requirement is a showing of tribal jurisdiction, which is a threshold requirement to the exercise of governmental power.<sup>55</sup> Therefore, first an examination of whether the Kialegee Tribal Town possesses

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<sup>51</sup> 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

<sup>52</sup> See April 26, 2013, Memorandum from Field Solicitor, Tulsa, to Region Director, Eastern Oklahoma Region, BIA.

<sup>53</sup> See *Id.*

<sup>54</sup> 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

<sup>55</sup> See 25 U.S.C. §§ 2710(b)(1), 2710(d)(3)(A) (“an Indian tribe may engage in, or license and regulate class II [and III] gaming on Indian lands *within such tribe’s jurisdiction*” (emphasis added)); *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) (“before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land”); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), *superseded by statute*, 25 U.S.C. § 1708(b), *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.

legal jurisdiction over the Freeman Parcel is required prior to considering whether the Kialegee Tribal Town exercises government power over it.

Generally speaking, an Indian tribe possesses legal jurisdiction “over both their members and their territory.”<sup>56</sup> It is well settled that a tribe retains primary jurisdiction over land that the tribe inhabits if the land qualifies as *Indian country*.<sup>57</sup> Congress defined the term *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 . . . .”<sup>58</sup> Although this definition applies directly only to federal criminal jurisdiction, the courts have also generally applied this definition to questions of civil jurisdiction.<sup>59</sup> The Office of General Counsel has opined that “[t]he context of IGRA’s prescriptions as to jurisdiction—that land be within ‘such tribe’s jurisdiction’ and ordinances adopted by ‘the Indian tribe having jurisdiction over such lands’—indicates that Congress intended that gaming on any specific parcel of Indian lands not be conducted by any Indian tribe, but only by the specific tribe or tribes with jurisdiction over that land.”<sup>60</sup>

The Freeman Parcel is Indian country, because it is an allotment, to which the Indian title has not been extinguished.<sup>61</sup> Still, the question remains whether the Kialegee Tribal Town is the tribe that “inhabits” this Indian country and thereby has legal jurisdiction over it. As described above, the Freeman Parcel is held in trust for Neal

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1998)(a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (“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”).

<sup>56</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); see also *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations’”).

<sup>57</sup> See *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (tribe and its members not subject to state tax within Indian country); *Alaska v. Native Village of Venetie Tribal Gov’t.*, 522 U.S. 520, 527 n.1 (1998); *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Dept. of Housing and Urban Development*, 567 F.3d 1235, 1240 n.5 (10th Cir. 2009) (“[A]s a general matter, Indian tribes exercise court jurisdiction over Indian country – reservations, dependent Indian communities, and Indian allotments”); *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987) (“Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands”).

<sup>58</sup> 18 U.S.C. § 1151.

<sup>59</sup> *Venetie*, 522 U.S. at 527.

<sup>60</sup> See March 14, 2005, Memorandum from NIGC Attorney to NIGC Acting General Counsel re: White Earth Band of Chippewa Indians at 10; June 30, 2005, Letter from Acting General Counsel to Judith Kammins Albietz, Attorney for Buena Vista Rancheria of Me-Wuk Indians at 12; September 27, 2005, Letter from Acting General Counsel to Pyramid Lake Paiute Tribe Chairwoman at 5.

<sup>61</sup> 18 U.S.C. § 1151(c).

Freeman, a Kialegee Tribal Town member as of June 4, 2001, as well as a citizen of the Muskogee (Creek) Nation since 1981. Further, as mentioned previously, the Freeman Parcel is part of the allotment of Simon Belcher, Creek Indian and member of the Creek Nation, who was previously listed on the 1890 Coweta Town Roll.<sup>62</sup>

The first question is whether the Kialegee Tribal Town or the Muskogee (Creek) Nation possesses legal jurisdiction over the Freeman Parcel. The legal history of the Muskogee (Creek) Nation and the Creek tribal towns demonstrates that, as a matter of federal law and pursuant to the Muskogee (Creek) Nation's Constitution, the Muskogee (Creek) Nation has legal jurisdiction over the Freeman Parcel. Prior to allotment, federal treaties vested title in the land to the Muskogee (Creek) Nation.<sup>63</sup> The courts have affirmed that title to these lands vested in the Muskogee (Creek) Nation.<sup>64</sup>

Consistent with this recognized title, a subsequent federal treaty conveyed title to part of the reservation from the Muskogee (Creek) Nation to the United States.<sup>65</sup> Later, federal law provided for allotments within the Creek Reservation to be made by the Principal Chief of the Muskogee (Creek) Nation.<sup>66</sup> The Muskogee (Creek) Nation

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<sup>62</sup> See April 26, 2013, Memorandum from Field Solicitor, Tulsa, to Region Director, Eastern Oklahoma Region, BIA.

<sup>63</sup> Treaty of 1833, 7 Stat. 417, Art. II-IV, ("The United States will grant a patent in fee simple to the Creek nation of Indians for the land assigned said nation by this treaty or convention . . . and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them. . . . It is hereby mutually understood and agreed between the parties to this treaty, that the land assigned to the Muskogee Indians by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek nation. . ."); Treaty of 1856, 11 Stat. 699, Art. II, IV, XV, ("The following shall constitute and remain the boundaries of the Creek country . . . "Creeks . . . shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within [its] respective limits."), Treaty of 1866, 14 Stat. 785, Art. XII and XIV (reaffirming prior treaty provisions not inconsistent with the 1866 Treaty).

<sup>64</sup> *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 971, 974 (10th Cir. 1987).

<sup>65</sup> Treaty of 1866, 14 Stat. 785, Art. III ("In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation.")

<sup>66</sup> Act of March 1, 1901, 31 Stat. 861, §§ 3, 23 ("All lands of said tribe . . . shall be allotted among the citizens of the tribe by said commission . . . Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment."); see also *Harjo v. Kleppe*, 420 F.Supp. 1110, 1125 (D.D.C. 1976).

continued to be the subject of federal legislation.<sup>67</sup> Every federal treaty or law relating to the Freeman Parcel recognizes the Muskogee (Creek) Nation's authority. Moreover, the Kialegee Tribal Town has not submitted any evidence that federal or Muskogee (Creek) law establishes Kialegee jurisdiction over the Freeman Parcel.<sup>68</sup>

This is not to say that the Muskogee (Creek) Nation has exclusive jurisdiction over all Indian lands within the former reservation. The Thlopthlocco Creek Tribal Town has 19 parcels of trust land within the former reservation over which it exercises jurisdiction.<sup>69</sup> Thus, the Kialegee Tribal Town would have exclusive jurisdiction over any land that the United States holds in trust for the Kialegee Tribal Town.

The title history of the Freeman Parcel further demonstrates the jurisdiction of the Muskogee (Creek) Nation over it and an absence of Kialegee jurisdiction. The Freeman Parcel is part of a larger Indian allotment that was allotted in 1903 pursuant to federal law from the Creek Nation to Simon Belcher. Simon Belcher was listed on the Dawes Roll of the Creek Nation as Creek No. 799 and was previously listed on the 1890 Roll of the Coweta Town.<sup>70</sup> When the land was allotted, it was given to a member of the Muskogee (Creek) Nation rather than a member of the Kialegee Tribal Town.

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<sup>67</sup> Act of 1970, 84 Stat. 1091.

<sup>68</sup> Because the Muskogee (Creek) Nation is a confederation of tribal towns, as an internal tribal matter the Muskogee (Creek) Nation and the federally recognized Tribal Towns could allocate jurisdiction among them over Indian lands within the former reservation. For example, the Minnesota Chippewa Tribe's Constitution allocates jurisdiction among the Tribe and member Bands, expressly providing that each Band or Reservation Business Committee has broad authority over their respective reservations. *See* Article VI, Revised Constitution and By-Laws of the Minnesota Chippewa Tribe, Minnesota.

<sup>69</sup> It appears that the Department of the Interior had originally contemplated that the reorganized Tribal Towns would be assigned separate parcels under the OIWA. *Alabama-Quassarte Tribal Town v. United States*, 2010 U.S. Dist. LEXIS 100450 at \*7 (E.D. Okla., September 21, 2010)(finding correspondence from Interior reflects an intent by DOI to purchase land for use of the Alabama-Quassarte Tribal Town and that the DOI's Land Field Agent's recommendation was "to provide these lands to 'the landless Indians of the Alabama-Quassarte Tribal Town.'"); *Muskogee (Creek) Nation v. Muskogee Area Director*, 35 IBIA 27 (2000) (finding that "[t]he materials before the Board indicate that the lands in the Hanna Project were initially intended to benefit the Kialegee Tribal Town, and that the lands in the Wetumka Project were initially intended to benefit the Alabama-Quassarte Tribal Town," but that title to all of the lands at issue was taken in trust for the Creek Nation until Interior assigned the land to a tribe or band under OIWA). One Tribal Town, the Thlopthlocco Tribal Town, has trust land within the boundaries of the former Creek reservation. *Crowe & Dunlevy, P.C., v. Stidham*, 640 F.3d 1140, 1143 (10th Cir. 2011). As to those trust lands, it is clear that the United States has set them aside for that specific tribe, confirming jurisdiction in that tribe suitable for purposes of gaming regulation as contemplated by the Secretary. *See* June 24, 2009, Decision of the Assistant Secretary - Indian Affairs in *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region* at 6; *see also* September 10, 2010 Decision of the Assistant Secretary—Indian Affairs in *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region* at 3, n.1.

<sup>70</sup> *See* April 26, 2013, Memorandum from Field Solicitor, Tulsa, to Region Director, Eastern Oklahoma Region, BIA.

Further, the Freeman Parcel is located within the territory the federal government and the Muskogee (Creek) Nation described as belonging to the Muskogee (Creek) Nation. In federal treaties with the Muskogee (Creek) Nation, in the 1867 Muskogee (Creek) Nation Constitution and laws, and in the present 1979 Constitution of the Muskogee (Creek) Nation approved by Interior, the territory of the Muskogee (Creek) Nation described encompasses the Freeman Parcel.<sup>71</sup> Therefore, it is clear that the federal government and the Muskogee (Creek) Nation view the Freeman Parcel as falling within the territory of the Muskogee (Creek) Nation.

The second question is whether the status of Neal Freeman as a Kialegee Tribal Town member creates the requisite legal jurisdiction of the Kialegee Tribal Town over the parcel. Neal Freeman became a Kialegee member on June 4, 2001 and was previously and is still a Muskogee (Creek) Nation citizen since June 17, 1981. When the parcel was conveyed to Neal Freeman on February 24, 1983, he was a citizen of the Muskogee (Creek) Nation.<sup>72</sup> Therefore, the question before us is whether Neal Freeman's change in tribal membership subsequent to the conveyance of this parcel to him impacted Muskogee (Creek) Nation's legal jurisdiction over it.

As the NIGC determined in the Kialegee's request for reconsideration of the Broken Arrow property, a change in the membership status of an allottee does not alter the legal jurisdiction of the allotment.<sup>73</sup> Tenth Circuit case law rejects the proposition that enrollment of a landowner into a tribe confers jurisdiction over his or her land upon that tribe.<sup>74</sup> Moreover, an NIGC Office of General Counsel legal opinion regarding the Iowa Tribe of Oklahoma concluded that an allotment remained within the jurisdiction of the Iowa Tribe even though some of the owners who inherited interests in the property were members of another tribe.<sup>75</sup> Here, Neal Freeman became a Kialegee member in

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<sup>71</sup> See 1867 Constitution, Art. IV, § 1 ("The Muskogee Nation shall be divided into six (6) districts, and each district shall be furnished with a judge, a prosecuting attorney and a company of light horsemen."); 1979 Constitution, Art I, § 2 ("The political jurisdiction of The Muskogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muskogee (Creek) Nation and the United States of America[.]).

<sup>72</sup> See June 20, 2013, Muskogee (Creek) citizenship documents; January 7, 1983, Order for Removal of Restrictions Conditional.

<sup>73</sup> See generally June 8, 2012, Letter from Chairwoman Stevens to Mekko Hobia.

<sup>74</sup> See *Miami Tribe of Okla. v. U.S.*, 656 F.3d 1129, 1145 (10th Cir. 2011)(finding that the Tribe's adoption of landowners as tribal members did not form a basis for tribal jurisdiction and noting that "[t]he case law does not support the proposition that adoption of landowner by a tribe confers jurisdiction."), citing *United States v. Mazurie*, 419 U.S. 544 (1975); see also *Kansas v. U.S.*, 249 F.3d 1213, 1230-31 (10th Cir. 2001) (finding that the Tribe's adoption of a tract's owners into the tribe did not alter the fact that the tribe did not have jurisdiction over the tract).

<sup>75</sup> See January 7, 2010, Memorandum Re: Iowa Tribe of Oklahoma, Whitecloud Allotment from the NIGC Office of General Counsel to the Acting Chairman at 6 – 9 (finding tribal jurisdiction over allotments does

2001 and remains a Muscogee Creek Nation member. Therefore, the enrollment of Neal Freeman into the Kialegee Tribal Town in 2001 does not change tribal jurisdiction over the Freeman Parcel.

Therefore, we opine the Muscogee (Creek) Nation, not the Kialegee Tribal Town, maintains legal jurisdiction over the Freeman parcel. Accordingly, because the Kialegee lack jurisdiction over the Freeman Parcel, the parcel is not *Indian lands* eligible for gaming under IGRA by the Kialegee Tribal Town.

### III. CONCLUSION

For all of the above reasons, it is our opinion that the Freeman Parcel is held by the United States in trust for an individual Indian but it is not within the Kialegee Tribal Town's legal jurisdiction. Because the Tribe has not demonstrated legal jurisdiction, we need not reach the subsequent issue of whether Kialegee exercises government power over the Freeman Parcel. Accordingly, the Neal Freeman parcel is not eligible for gaming under IGRA by the Kialegee Tribal Town. The Interior Office of Solicitor concurs with this opinion.