

**EXHIBIT A TO KING DECLARATION:
Second Amended Complaint**

The Honorable Myron H. Thompson

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MUSCOGEE (CREEK) NATION, a federally recognized Indian tribe, HICKORY GROUND TRIBAL TOWN, and MEKKO GEORGE THOMPSON, individually and as traditional representative of the lineal descendants of those buried at Hickory Ground Tribal Town in Wetumpka, Alabama.

Plaintiffs,

v.

POARCH BAND OF CREEK INDIANS, a federally recognized tribe; STEPHANIE A. BRYAN, individually and in her official capacity as Chair of the Poarch Band of Creek Indians (“Poarch”) Tribal Council; ROBERT R. MCGHEE, individually and in his official capacity as Vice Chair of Poarch Tribal Council; EDDIE L. TULLIS, individually and in his official capacity as Treasurer of the Poarch Band of Creek Indians Tribal Council; CHARLOTTE MECKEL, in her official capacity as Secretary of the Poarch Band of Creek Indians Tribal Council; DEWITT CARTER, in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; SANDY HOLLINGER, individually and in her official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; KEITH MARTIN, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; ARTHUR MOTHERSHED, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; GARVIS SELLS, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; BUFORD ROLIN, an individual; DAVID GEHMAN, an individual; LARRY HAIKEY, in his official capacity as Acting Poarch Band of Creek Indians Tribal Historic Preservation Officer; PCI GAMING AUTHORITY d/b/a WIND CREEK HOSPITALITY; WESTLY L. WOODRUFF, in his official capacity as board member of the PCI Gaming Authority;

2:12-cv-1079-MHT-CSC

SECOND AMENDED
COMPLAINT AND
SUPPLEMENTAL
COMPLAINT

STUART MARK ALTMAN, in his official capacity as board member of the PCI Gaming Authority; VENUS MCGHEE PRINCE, in her official capacity as board member of the PCI Gaming Authority; TERESA E. POUST, in her official capacity as board member of the PCI Gaming Authority; TIMOTHY A. MANNING, in his official capacity as board member of the PCI Gaming Authority; MARTIN CONSTRUCTION, INC., an Alabama Corporation; THE DEPARTMENT OF THE INTERIOR; TARA MACLEAN SWEENEY, in her official capacity as Assistant Secretary of Indian Affairs; DAVID BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; DAN SMITH, in his official capacity as Acting Director of the National Park Service; and AUBURN UNIVERSITY;

Defendants.

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INTRODUCTION

1. Defendant Poarch Band of Creek Indians (“Poarch”) acquired Hickory Ground, a sacred historic site of the Muscogee (Creek) Nation that is located in Wetumpka, Alabama. Poarch claimed it was buying this culturally significant site to protect it from development and repeatedly promised to preserve it. Poarch broke those promises and desecrated the holy site, removing over 57 bodies of Plaintiffs’ ancestors and thousands of sacred artifacts to build a casino with the help of a Poarch tribal member-owned construction company. The other Defendants violated statutory, common law, and contractual obligations when they failed to stop Poarch from paving over this important historic site and traditional burial ground. Plaintiffs seek redress for this greedy, tragic, outrageous, and illegal act.

2. Hickory Ground is a parcel of land located near Wetumpka, Alabama. It is sacred to the Plaintiffs: it is part of the Muscogee (Creek) Nation’s aboriginal lands, the location of the Muscogee (Creek) Nation’s last capital before the tribe was forcibly removed from Alabama, and is a historic ceremonial ground and burial site. Direct ancestors of the current members of the Hickory Ground Tribal Town lived, died and are buried there.

3. Poarch obtained Hickory Ground using federal preservation grant funds under the pretense that Poarch would protect the site from development. The site has been listed on the National Register of Historic Places since 1980.

4. In its application for the federal funds, Poarch represented to the Muscogee (Creek) Nation, the federal government, and the Alabama State Historical Commission that Poarch would use the funds to purchase Hickory Ground to *save it* from being developed, and that it would protect the site “*without excavation.*”

5. Poarch then excavated Hickory Ground to make way for a \$246 million casino resort called Wind Creek Wetumpka. Poarch exhumed at least 57 human burials and mistreated

the human remains. Some remains, and numerous archaeological artifacts have never been reburied and are being mishandled and improperly stored by Poarch and Auburn University.

6. Poarch's construction of a casino over the Plaintiffs' sacred burial grounds, its removal of the Plaintiffs' ancestors from what was intended to be their final resting place, and its mistreatment of the remains and artifacts has caused, and continues to cause, harm to the Plaintiffs, in violation of the laws of the United States and Alabama.

7. Statutes and contract impose upon the Department of the Interior ("Interior"), including the Bureau of Indian Affairs and the National Park Service, and their respective officials (listed in Paragraphs 26 to 32, *infra*) (collectively the "Federal Defendants") obligations to protect Plaintiffs' rights, including but not limited to duties to provide notice and consultation and obtain consent prior to allowing such damage to occur.

8. Poarch and its officers and agents, including the third parties it hired to conduct the excavation of Hickory Ground and construction of the casino resort, also have statutory, contractual, and common law duties to protect Plaintiffs' rights and to avoid damaging their sacred burial grounds.

9. Poarch has been unjustly enriched and continues to be unjustly enriched as a result of its wrongful and unlawful conduct. The actions of all Defendants have caused, and continue to cause, irreparable harm to the Plaintiffs, who bring this lawsuit to remedy past damage and stop further damage.

10. Poarch promised to preserve the sacred Hickory Ground site forever. It should be held to its word.

THE PARTIES

Plaintiffs

11. Plaintiff Muscogee (Creek) Nation is a federally recognized Indian tribe based in Oklahoma, with over 87,000 tribal citizens. Before its people were forced to move to Indian Territory (now Oklahoma), the Muscogee (Creek) Nation existed as a confederacy of Tribal Towns throughout what is now the southeastern United States. For thousands of years before non-Indian contact, they inhabited what is now Alabama.

12. Plaintiff Hickory Ground Tribal Town is a traditional Tribal Town and ceremonial ground of the Muscogee (Creek) Nation that is now located in Henryetta, Oklahoma. Before the Muscogee (Creek) Nation's removal from Alabama, Hickory Ground Tribal Town was located in what is now Wetumpka, Alabama.

13. Tribal Town membership is matrilineal. The members of the modern Hickory Ground Tribal Town are directly tied historically, culturally and lineally to Hickory Ground in Wetumpka.

14. Plaintiff George Thompson is the chief ("Mekko") of Hickory Ground Tribal Town. He has held that lifetime position for 42 years. He is a citizen of the Muscogee (Creek) Nation domiciled in Oklahoma, and brings this suit individually and as the traditional representative of all the lineal descendants of those buried at Hickory Ground under the Muscogee (Creek) Nation traditional matrilineal Tribal Town kinship system.

15. Under Andrew Jackson's direction, the United States forcibly removed the Muscogee (Creek) Nation and its Tribal Towns, including Hickory Ground, from Alabama in the early 1800s. Some Creek individuals (often individuals of mixed heritage not living in tribal towns) helped Andrew Jackson fight against their brethren in Alabama, and in exchange they were allowed to stay in Alabama, on the condition they renounce their tribal citizenship, as *all* tribes were to be

removed from the area.

Poarch Band

16. The Poarch Band is a group that was first recognized as an Indian tribe by the United States in 1984, after claiming to descend from a “settlement of ‘half-bloods’”¹ who lived in Tensaw, Alabama.

17. This group was not, and is not, a Muscogee (Creek) Tribal Town.

18. The Muscogee (Creek) Nation did not, and does not, have “bands.”

Poarch Council Defendants

19. Defendants Stephanie A. Bryan, Robert R. McGhee, Eddie L. Tullis, Charlotte Meckel, Dewitt Carter, Sandy Hollinger, Keith Martin, Arthur Mothershed, and Garvis Sells are members of the Poarch Tribal Council and officials of Poarch (the “Poarch Council Defendants”). They are sued in their official capacities for violations of federal and state law for which Plaintiffs seek mandamus, declaratory and injunctive relief. Certain Poarch Council Defendants are also sued in their individual capacities. *See infra* ¶ 24.

PCI Gaming Authority

20. Defendant PCI Gaming Authority is a commercial enterprise of the Poarch Band that is at least partly responsible for the gaming development and operations at Hickory Ground.

21. PCI Gaming Authority is the principal gaming entity of the Poarch Band, and runs the Wind Creek Casino and Hotel Wetumpka.

PCI Gaming Authority Board Defendants

22. On information and belief, Defendants Westly L. Woodruff, Stuart Mark Altman,

¹ The outdated term “half-bloods” in this excerpt from Poarch’s petition for federal recognition refers to individuals who possessed half Indian, half non-Indian blood as of the mid-1800s.

Venus McGhee Prince, Teresa E. Poust, and Timothy A. Manning (the “PCI Gaming Authority Board Defendants”) are members of the PCI Gaming Authority Board. They are sued in their official capacities for violations of federal and state law for which Plaintiffs seek mandamus, declaratory and injunctive relief. Timothy A. Manning is also sued in his individual capacity. *See infra* ¶ 24.

Poarch Tribal Historic Preservation Officer

23. Defendant Larry Haikey is the Tribal Historic Preservation Officer for the Poarch Band of Creek Indians (“Poarch THPO”). He is sued in his official capacity for violations of federal and state law for which Plaintiffs seek mandamus, declaratory and injunctive relief.

Individual Defendants

24. Defendants Buford Rolin and David Gehman are former members of the Poarch Tribal Council and are sued in their individual capacities for the tort of outrage that they personally committed against Mekko Thompson. Defendants Stephanie A. Bryan, Robert R. McGhee, Eddie L. Tullis, Sandy Hollinger, Keith Martin, Arthur Mothershed, Garvis Sells, and Timothy A. Manning are also sued in their individual capacities for the tort of outrage that they personally committed against Mekko Thompson. The defendants referred to in this Paragraph are collectively referred to as the “Individual Defendants.” Mekko Thompson seeks equitable and monetary relief from the Individual Defendants for outrage.

Martin Construction, Inc.

25. Defendant Martin Construction, Inc. is a corporation organized and existing under the laws of Alabama, with a principal place of business at 110 W. Louisville Avenue; Atmore, Alabama 36502.

Federal Defendants

26. Defendant United States Department of the Interior is responsible for administration and management of federal lands, historic places, and Indian Affairs.

27. The National Park Service and Bureau of Indian Affairs are agencies of the United States government, within the Department of the Interior. Among other things, the National Park Service administers and oversees historic preservation grants and delegations of historic preservation responsibilities. The Bureau of Indian Affairs is responsible for, among other things, administering and overseeing archaeological activities on Indian land and taking land into trust on behalf of Indian tribes.

28. Defendant Tara MacLean Sweeney is the Assistant Secretary for Indian Affairs within the Department of the Interior, and is sued in her official capacity.

29. Defendant Dan Smith is Acting Director of the National Park Service within the Department of the Interior, and is sued in his official capacity.

30. Defendant David Bernhardt is Secretary of the United States Department of the Interior and is sued in his official capacity.

31. Collectively, the Defendants listed in Paragraphs 26-30 are referred to herein as the “Federal Officer Defendants.”

Auburn University

32. Defendant Auburn University (“Auburn”) is an educational institution in the State of Alabama that receives federal funding and, on information and belief, exercises, and has exercised, possession or control over cultural items excavated at Hickory Ground, including possession or control of human remains at the time of the filing of this Second Amended Complaint.

JURISDICTION AND VENUE

33. Plaintiffs' claims arise under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*; the Indian Reorganization Act, 25 U.S.C. §§ 461, *et seq.*; the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 100101 *et seq.* (formerly 16 U.S.C. §§ 470 *et seq.*); the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA"), 25 U.S.C. §§ 3001 *et seq.*; the Archeological Resources Protection Act ("ARPA"), 16 U.S.C. §§ 470aa *et seq.*; the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*; the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*; 28 U.S.C. § 1361 (mandamus); federal common law; and supplemental state law claims.

34. Plaintiffs also seek their reasonable attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and the NHPA, 54 U.S.C. § 307105.

35. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 (federal question jurisdiction), 1361 (action to compel a governmental officer to perform his duty), 1362 (jurisdiction over civil actions brought by Indian tribes arising under the laws of the United States), 1367 (supplemental jurisdiction over state law claims forming part of the same claim or controversy); 25 U.S.C. § 3013 (jurisdiction over actions alleging violations of NAGPRA); and 54 U.S.C. § 307105 ("any interested person" may enforce NHPA).

36. Pursuant to 28 U.S.C. § 1391(b)(2) & (e), venue is proper in this Court because this action relates to lands located within this judicial district and a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

37. Federal Defendants have waived their sovereign immunity against civil actions alleging harm arising from such agencies' actions or failures to act as required by law and seeking relief other than monetary damages. 5 U.S.C. § 702.

38. The Court also has jurisdiction over the Federal Officer Defendants in their official

capacities because they are federal governmental officials against whom Plaintiffs seek declaratory and injunctive relief only in relation to continuing violations of federal law. *See Ex Parte Young*, 209 U.S. 123 (1908).

39. The Court has jurisdiction over the Poarch Council Defendants (listed in Paragraph 19), the PCI Gaming Authority Board Defendants (listed in Paragraph 22), and the Poarch THPO in their official capacities because they are tribal officials against whom the Plaintiffs seek declaratory and injunctive relief only in relation to continuing violations of federal law. *See Ex Parte Young*, 209 U.S. 123 (1908).

40. This Court has jurisdiction over the Individual Defendants because they committed the tortious actions alleged in this complaint in this judicial District.

41. Martin Construction, Inc. (“Martin Construction”) is subject to personal jurisdiction in this District because it has conducted, and does conduct, business in the United States and Alabama. Martin Construction is owned by a Poarch tribal member, and performed construction services to build the Wetumpka casino resort in this judicial District.

42. The Court has jurisdiction over Auburn University under NAGPRA, 25 U.S.C. §§ 3001 *et seq.*, and ARPA, 16 U.S.C. §§ 470aa *et seq.*, as Auburn receives federal funds and, on information and belief, exercised, and continues to exercise, possession or control over remains and cultural items that Auburn excavated from Hickory Ground. Auburn is listed as a Defendant solely to the extent that this Court enters orders concerning the possession, custody, control, or relocation of the cultural items at issue.

GENERAL ALLEGATIONS

A. History Of Hickory Ground.

43. For millennia before the Removal Treaty of 1832, the Muscogee (Creek) people inhabited most of what is now Alabama. The Muscogee (Creek) Nation was composed of Tribal Towns, including the Tribal Town site called *Ocevpofv* by the Muscogee (Creek) people, and known as “Hickory Ground Tribal Town” by English speakers.

44. Hickory Ground is of major importance in the history of the Muscogee (Creek) Nation, Hickory Ground Tribal Town, and the United States. It was the last tribal capital of the Muscogee (Creek) Nation prior to removal. Hickory Ground was critical to the very formation of the United States. When European nations questioned the sovereignty of the newly born United States, President George Washington lent legitimacy to the nascent country by signing treaties with Indian Nations, including the Muscogee (Creek) Nation, whose sovereignty had previously been affirmed through treaties with France, Spain, and England. Thus, in 1790, nearly two centuries before Poarch was recognized as a tribe, President George Washington executed a treaty with the Muscogee (Creek) Nation. The head of the Muscogee treaty delegation was from Hickory Ground.

45. Tribal Town affiliation is matrilineal, and the current members of Hickory Ground Tribal Town in Oklahoma are the lineal descendants of the ancestors buried at the historic Hickory Ground in Wetumpka, Alabama.

46. Each Tribal Town is led by its chief, or *mekko*. Mekko George Thompson is the *kosa mekko* of Hickory Ground, and has been since 1977. He is known as *kosa mekko*, or Coosa Chief, as Hickory Ground dates back to the first Tribal Town at the time of the beginnings, known as *kosa* or Coosa. Since time immemorial, Mekko Thompson’s ancestors have served as Mekko of Hickory Ground Tribal Town.

47. Hickory Ground is located on the east bank of the Coosa River, south of the present-day Wetumpka and approximately two miles north of Fort Toulouse.

48. Under the terms of the Removal Treaty, the Muscogee (Creek) Nation ceded all of its land east of the Mississippi River, including Hickory Ground, and a new reservation for the Muscogee (Creek) Nation was established west of the Mississippi River. 7 Stat. 366, Arts. I & XIV (1832). To stay with their tribe, the members of the Muscogee (Creek) Nation were required to remove to what is now Oklahoma and leave behind their ancient villages and the many generations of their ancestors who were buried there.

49. Hickory Ground Tribal Town, like all Tribal Towns of the Muscogee (Creek) Nation, contains a ceremonial ground (square ground), council house, plaza, burial sites, and individual graves containing human remains and funerary objects of the ancestors of the Plaintiffs. Hickory Ground has profound cultural and religious importance to the Plaintiffs.

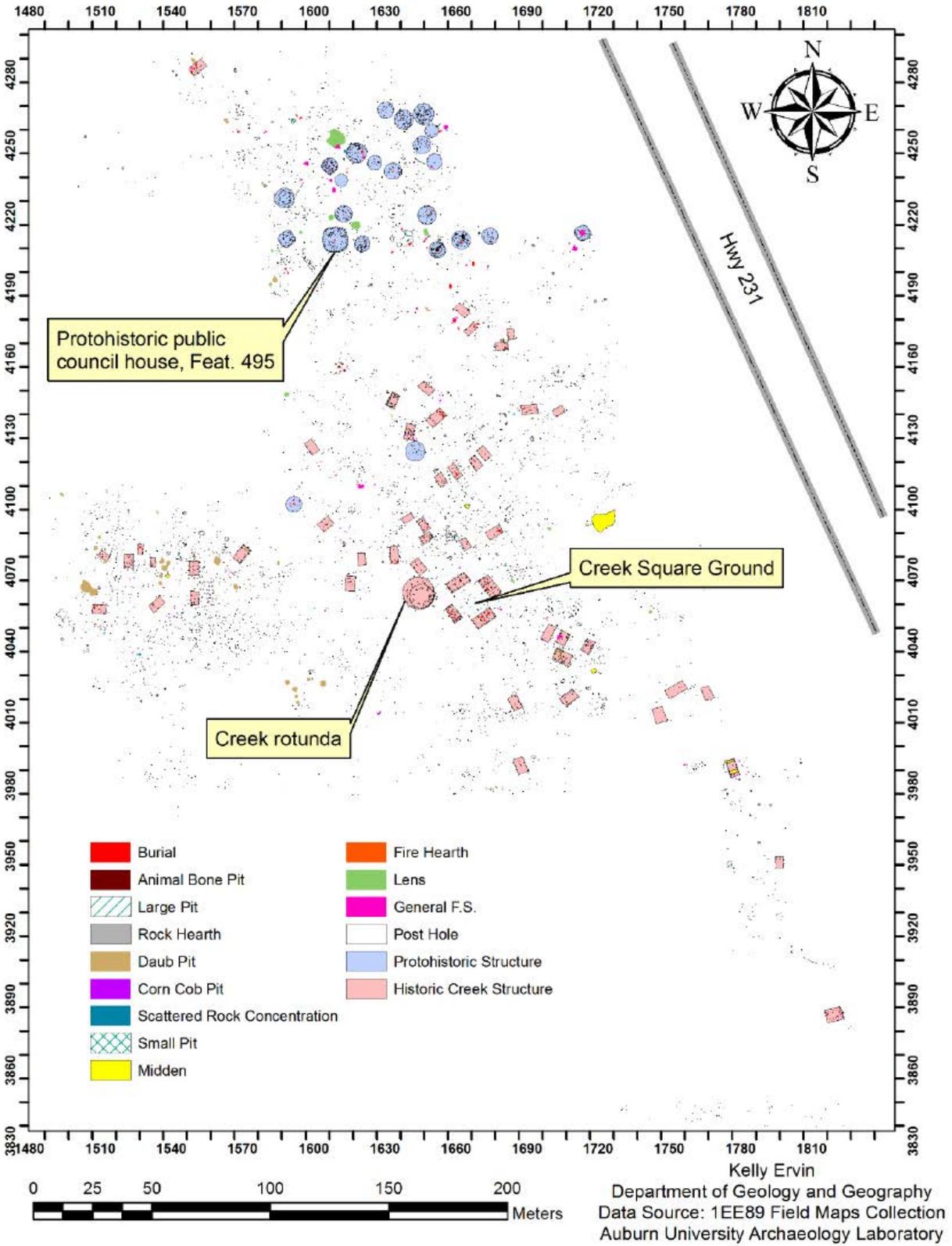
50. Hickory Ground is a state-registered archaeological site (1EE89) and is listed on the National Register of Historic Places. Hickory Ground was placed on the National Register of Historic Places in 1980, after the Alabama State Historic Commission applied for its placement on the Register on behalf of Poarch. The part of Hickory Ground listed on the National Register of Historic Places and currently considered to be trust or reservation land is referred to herein as the “Hickory Ground Site.”

51. In the Muscogee (Creek) culture and religion, there are specific burial places for those who held particular positions in Tribal Town traditional governance, and specific governance structures over Tribal Towns, including burials within those Tribal Towns.

52. For example, Hickory Ground *mekkos* are buried under the *mekkos*' arbor (the east-facing arbor) in the ceremonial grounds.

53. It was a common practice to bury family members who did not have a position in the ceremonial grounds in the earth underneath a family's home.

54. The map of archaeological features at the Hickory Ground Site on the next page shows human burials concentrated under the arbors in the square ground and under house structures:



Kelly Ervin, *A Comparative Spatial Analysis of Two Communities from the Hickory Ground Site in Wetumpka, Alabama* 26 (Auburn University Thesis, December 13, 2014).

55. It is the Plaintiffs' long-established religious belief that burial and ceremonial grounds are sacrosanct and must not be entered, let alone disturbed, without the proper religious protocol.

56. It is also the Plaintiffs' long-established religious belief that their ancestors must be left at peace in their final resting places with their possessions (funerary objects), and are not to be disturbed, mistreated, or disrespected in any manner.

57. Plaintiffs, as the living descendants and next of kin of the deceased, owe a religious duty to their ancestors to care for the graves and bodies of the deceased and to follow traditional religious protocol in such care.

58. In the Muscogee (Creek) traditional religion, certain protocols must be followed in all burials. These protocols are based on Tribal Town and Clan religion and tradition.

59. Because the *mekko* is the chief of the town, the *mekko* ultimately decides all Tribal Town issues, including treatment of the dead.

60. It is viewed as heinous and extremely disrespectful in the Muscogee (Creek) traditional religion for any persons not belonging to the Muscogee (Creek) Nation or Tribal Town to exhume or rebury Muscogee (Creek) ancestors and their funerary objects, especially where those persons mistreat the remains and perform invented and non-traditional ceremonies accompanying reburial.

B. Poarch Bought Hickory Ground With Federal Preservation Grant Funds After Promising to Preserve This Sacred Place.

61. Poarch obtained the Hickory Ground Site in 1980 with \$165,000 in federal preservation grant funds and a \$165,000 donation from the landowner.

62. In the same year, pursuant to standard terms of federal preservation grant awards, a protective covenant was placed on the property for 20 years.

63. Poarch had never occupied Hickory Ground prior to 1980. *See* Poarch Federal Acknowledgement Memo., pp. 2, 3, 16, 64, 65 of 131 (1983), *available at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/petition/013_prchr_AL/013_pf.pdf.

64. Poarch represented to the Alabama Historic Commission, the Muscogee (Creek) Nation and the United States that its purpose in acquiring the Hickory Ground Site was to preserve the historic property for the benefit of all Creek Indians, including the “existing Hickory Ground tribal town in Oklahoma,” and to preserve the Site “without excavation.” Poarch Application for Historic Preservation Grant Re U.S. Department of the Interior (HCRS [Heritage Conservation and Recreation Service]) letter 712 at 2 (2/12/1980) (“Federal Preservation Grant Application”), attached hereto as Exhibit A.

65. The Muscogee (Creek) Nation and Hickory Ground Tribal Town were the intended third party beneficiaries of Poarch’s agreement to preserve Hickory Ground.

66. In its application for the \$165,000 federal preservation grant to purchase the Hickory Ground Site, Poarch (then calling itself the “Creek Nation East of the Mississippi”), stated that “Hickory Ground (site no. 1-Ee-89) is of major importance in the history of the Muscogee (Creek) Nation. It has supplied many of the important leaders in Creek history.” *Id.* at 1. “Hickory Ground was involved in nearly all the major historic events in the southeast before the removal of Creeks from Alabama in 1836,” including significant battles fought by Andrew Jackson. *Id.* at 1-2.

67. In the section of its Federal Preservation Grant Application titled “The Use Of The Land,” Poarch unequivocally represented and promised that “[a]cquisition of the property is

principally a protection measure. Acquisition will prevent development on the property.... [P]lans will be developed to minimize continued destruction of the archaeological resources.” *Id.* at 2. “The property will serve as a valuable resource for cultural enrichment of Creek people.... The Creek people in Oklahoma pride in heritage and ties to original homeland can only be enhanced. **There is still an existing Hickory Ground tribal town in Oklahoma. They will be pleased to know their home in Alabama is being preserved.... The Hickory Ground site will continue to enhance their understanding of their history, without excavation.**” *Id.* (emphasis added).

68. In the section of Poarch’s Federal Preservation Grant Application titled “Specific Standards of Protection,” Poarch stated that the site “will be maintained almost entirely by minority groups,” including the Creek Nation Foundation, Inc. in Oklahoma, representing the Muscogee (Creek) Nation in Oklahoma. *Id.* at 3. “[T]he property will be jointly owned by both groups of Creeks.” *Id.* An attorney for the Creek Nation Office of Justice in Oklahoma would handle the legal matters for the Muscogee (Creek) Nation. *Id.* at 4. A trained anthropologist would “act as an advisor to the tribal councils on plans for permanent protection of the site.” *Id.* “Specific end products of the project is to provide protection for a particularly important site in Creek History.... **Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral home.**” *Id.* at 3 (emphasis added). “**Destruction of archaeological resources in Alabama ... destroy[s] the cultural history of Creek people.**” *Id.* at 5 (emphasis added). “In order to halt the destruction planned for the site and to insure [sic] against future destruction, funds for acquisition of fee simple title are requested. As the landowner is very much interested in developing the property for commercial purposes it is felt acquisition of fee simple title is **necessary to prevent destruction of the site.**” *Id.* at 2-3 (emphasis added).

69. Poarch corresponded with representatives of the Muscogee (Creek) Nation

regarding its preservation plans for the Hickory Ground Site.

70. Additionally, in a 1983 Congressional Hearing in which both the Chief of the Muscogee (Creek) Nation and Poarch Chairman Eddie Tullis testified regarding a bill governing disbursement of Indian Claims Commission awards, the Poarch Chairman testified that, as Poarch was “in ownership of one of the last historical sites of the Creek nation before the removal to Oklahoma,” Poarch “propose[d] to use part of this money to make that site, not only available to all of our people, but to the general public as well.” S. Hrg. 98-200 at 21-22 (5/26/1983).

71. The Poarch Chairman’s written testimony that was submitted to Congress and included in the hearing record added more detail to this proposal: “Preservation of a historical site: Along with [Poarch’s] effort to join the mainstream of American life there is a strong desire among our people to preserve and share our unique history. To this end our tribe has acquired titled [sic] to ‘Hickory Ground’, one of the most important Creek historical sites. We propose to use fifty percent of the proceeds of S. 1224 to preserve and to present to both Indian and non-Indian this unique and historical site.” S. Hrg. 98-200 at 24 (5/26/1983).

72. Relying on Poarch’s unqualified assurances that it would perpetually protect the Hickory Ground Site, the Muscogee (Creek) Nation did not object to Poarch’s acquisition of the Site, either in fee or trust.

C. Interior Illegally Takes The Hickory Ground Site Into Trust For Poarch.

73. On June 11, 1984, the Department of the Interior extended federal recognition to the Poarch Band of Creek Indians. 49 Fed. Reg. 24083 (June 11, 1984). Effective April 12, 1985, the United States wrongfully accepted legal title to a majority of the Hickory Ground Site in trust for the benefit of Poarch, 50 Fed. Reg. 15502 (April 18, 1985); 50 Fed. Reg. 19813 (May 10, 1985), purportedly pursuant to the Indian Reorganization Act of 1934.

74. Under the Indian Reorganization Act, 25 U.S.C. § 5123 *et seq.*, a tribe must have been “under federal jurisdiction” in 1934 in order for Interior to have authority to take land into trust for the tribe. *See also Carcieri v. Salazar*, 555 U.S. 379 (2009).

75. The Solicitor for the Department of the Interior has construed “under federal jurisdiction” to involve a two-part inquiry into whether (1) the United States took actions reflecting federal obligations, duties, responsibility for, or authority over a tribe in or before 1934, and (2) that relationship continued through 1934. Sol. Op. M-37029, *available at* <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

76. Poarch and the federal government have correctly and repeatedly recognized that Poarch was not under federal jurisdiction within the meaning of the Indian Reorganization Act.

- a. In 2005, Poarch submitted a letter through its legal counsel to the National Indian Gaming Commission stating that “the federal government clearly ended its relationship with Poarch Creek following removal [in 1832]. . . . [T]he historical record amply demonstrates that the federal government terminated the government-to-government relationship with the Creek in Alabama through a broad course of dealings that included express statements by top federal officials disclaiming any federal relationship with the Tribe - and that this termination of federal recognition extended back almost 150 years prior to Poarch Creek regaining federal recognition in 1984.” Letter from W. Perry, Sonosky Chambers, to K. Zebell, National Indian Gaming Commission (“NIGC”), at pp. 10-11 (June 3, 2005), attached as Exhibit B hereto.
- b. The Department of the Interior Solicitor’s Office, Division of Indian Affairs, stated in 2008 that it “does not believe that the Poarch Creek Band ever had a government-

to-government relationship with the United States until it was [recognized in 1984].... [T]he **record simply does not support the Band's existence as a separate tribal entity with a governmental relationship with the United States.**" Letter from David Bernhardt, then-Interior Solicitor, to Hogen, NIGC Chairman, p. 1 (June 13, 2008) (emphasis added), attached as Exhibit C hereto.

- c. The National Indian Gaming Commission in 2008 agreed that, after the Muscogee (Creek) Nation's removal from Alabama in the 1830s, "the United States specifically and repeatedly disclaimed any relationship with the Poarch Band" until 1984. Letter from NIGC Acting General Counsel to Bernhardt, p. 2 (July 30, 2008), attached as Exhibit D hereto.
- d. In 1951, in seeking to intervene in proceedings relating to compensation from the United States for lands ceded in past treaties with the Creek Nation, Poarch (then calling itself the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians") stated that it was "but a **newly formed** band of descendants of the original Creek nation." Perdido Band Memo. In Supp. Of Mot. To Intervene, p. 4 (1951) (emphasis added), attached as Exhibit E hereto.
- e. Later that year, Chairman Calvin McGhee and Secretary Ruby Weatherford signed a resolution changing the name of the band to the "Creek Nation East of the Mississippi." Ex. A to Mot. To Change Record Name Of One of Movants for Leave to Intervene (8/29/1951), attached as Exhibit F hereto.
- f. Poarch (by this time going by the name Creek Nation East of the Mississippi) stated in November 1951 in a United States Court of Claims appellate brief that "they possessed no territory and were **not dealt with by the United States as a group**"

since removal. Creek Nation East of the Mississippi's Appellate Br. re Intervention in Muscogee (Creek) Nation ICC Case, p. 137 (11/6/1951) (emphasis added), attached as Exhibit G hereto.

- g. The brief also stated that “**the Federal Government had no dealings with those east of the Mississippi**, as a group,” who, “unlike the Creeks in Oklahoma, had no organization, occupied no bounded grant of territory and **were not under the guardianship of the Federal Government.**” *Id.* p. 152 (emphasis added).
- h. In 1952, the United States submitted an appellate brief in the United States Court of Claims stating that “those [Creeks] who remained in the East [after removal] abandoned their tribal relationships; and **they never continued a tribal government recognized by the United States and they entered into no treaties or other political arrangements with the United States** ... and only recently organized themselves, apparently for the purpose of this suit.” US Appellate Br. Opposing Creek Nation E. of the Mississippi's Intervention in Muscogee (Creek) Nation ICC Case, p. 2 (Jan. 1952) (emphasis added and footnote omitted), attached as Exhibit H hereto.
- i. The United States' 1952 brief also stated that the Creeks who remained east of the Mississippi “are not recognized by the administrative or legislative arm of the Government....” *Id.* at 16.
- j. The Court of Claims found that the United States had “no occasion for further dealings with [those Creeks who remained east of the Mississippi] since 1832.” *McGhee v. Creek Nation*, 122 Ct. Cl. 380, 391 (1952), *cert. denied*, 344 U.S. 856 (1952).

77. Where a tribe is not “under federal jurisdiction” under the Indian Reorganization Act, Interior has no authority to take land into trust for that tribe.

78. Because Poarch was not “under federal jurisdiction” within the meaning of the Indian Reorganization Act, the Hickory Ground Site is not properly held in trust for Poarch.

D. Poarch Requests Delegation Of Federal Historic Preservation Responsibilities On The Eve Of Expiration Of The 20-Year Protective Covenant, And Then Begins To Desecrate Hickory Ground.

79. The 20-year protective covenant on the Hickory Ground Site expired in July 2000.

80. The year before the covenant expired, Poarch requested that the National Park Service delegate historic preservation responsibilities to Poarch on “all lands within the exterior boundaries of [Poarch’s] Reservation,” which included the Hickory Ground Site. The National Park Service agreed.

81. The National Park Service’s June 10, 1999 agreement with Poarch (the “NPS Agreement,” attached hereto as Exhibit I) requires that:

- a. Poarch follow Section 106 of the NHPA in accordance with the regulations codified at 36 C.F.R. § 800 *et seq.* (NPS Agreement § 5), which mandates consultation with any tribe that attaches religious and cultural significance to a historic site (*see* 16 U.S.C.S. §§ 470a(d)(6), 470f; 36 C.F.R. § 800.1 *et seq.*).
- b. The Poarch THPO “will, in accordance with Section 101(d)(4)(C) [of the NHPA], provide for ... consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation,” and “will periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program’s activities” (NPS Agreement § 7);

- c. “In any case where an action arising pursuant to the Act may affect the traditional lands of another Tribe, the [Poarch THPO] will, on an as-needed basis, seek and take into account the views of that Tribe.” NPS Agreement § 7.

82. The National Park Service could not and would not have delegated the historic preservation duties to Poarch without Poarch’s agreement to undertake the enumerated duties.

83. The Hickory Ground Site is in the traditional lands of the Muscogee (Creek) Nation.

84. The Hickory Ground Site contains the ceremonial grounds and burials of members of the Hickory Ground Tribal Town.

85. Plaintiffs were intended third party beneficiaries of the NPS Agreement.

86. Under the NPS Agreement, at least every four years the National Park Service was obligated to “carry out a periodic review of the Tribe’s program pursuant to the Act, to ensure that the Tribe is carrying out the program consistent with the agreement.” NPS Agreement § 14. NPS could terminate the Agreement if Poarch did not “carr[y] out its assumed responsibilities in accordance with this agreement, the Act, or any other applicable Federal statute or regulation.” NPS Agreement § 15; *see also* 54 U.S.C. § 302108.

87. At the time the National Park Service approved of and executed the NPS Agreement with Poarch, Poarch’s Office Of Cultural And Historic Preservation Field Methodology had a policy that “[u]nder no circumstances are the burials on the Poarch Creek Indians Reservations, or lands under their control, to be excavated, nor are they to be subjected to **any** examination or testing. Burial sites take precedence over any project or program plan.” Poarch Field Methodology Policy, p. 6 (April 1999) (emphasis in original), attached hereto as Exhibit J.

88. The Poarch Field Methodology Policy also emphasized: “AGAIN! **THE POARCH BAND OF CREEK INDIANS TRIBAL ARCHAEOLOGICAL AND HISTORIC**

RESOURCES CODE EMPHASIZES AVOIDANCE AND PRESERVATION OF FEATURES RATHER THAN EXCAVATION.” *Id.* (emphasis in original).

89. On information and belief, after the National Park Service delegated historic preservation responsibilities to Poarch, Poarch reversed these policies with respect to the Hickory Ground Site.

90. In 2001, various parties complained to the Bureau of Indian Affairs and others that Poarch was disturbing the Hickory Ground Site.

91. In response to these complaints, the Bureau of Indian Affairs Archaeologist and Federal Preservation Officer recommended that the Bureau of Indian Affairs conduct an investigation at the site to determine whether ground-disturbing activity was damaging archaeological resources in violation of ARPA. Briefing Statement to Assistant Secretary for Indian Affairs (10/1/2001).

92. The Bureau of Indian Affairs concluded as of March 2002 that no burials or archaeological resources had *yet* been disturbed on trust land.

93. The complaints—which continued through 2001 and 2002, notified the Bureau of Indian Affairs, the Secretary of Interior, and the Assistant Secretary of Indian Affairs that continued ground-disturbing activity *would* result in irreparable damage to the Site in violation of applicable law on lands that Interior considered to be trust lands.

94. The complaining parties included the Alabama Historical Commission, the Governor of Alabama, then-Senator Jeff Sessions, Dr. Craig Sheldon with Auburn University (who had authored several archaeological reports on the Hickory Ground Site), and the City of Wetumpka (via a lawsuit). *See* Letter from L. Warner, Exec. Director of Alabama Historical Commission, to Secretary of Interior (10/26/2001); Letter from D. Siegelman to Secretary of

Interior (11/14/2001); Letter from C. Sheldon to Alabama Historical Commission (1/28/2002); Letter from L. Warner, Exec. Director of Alabama Historical Commission, to Hon. Jeff Sessions (3/14/2002); City of Wetumpka Amended Complaint, Civil Case No. 01-A-1146-N (M.D. Ala. 11/9/2001).

95. The Alabama State Historic Commission also listed Hickory Ground as a “place in peril” in the year 2000, and listed yet another Poarch casino site in Montgomery as a “place in peril” in 2002, as Poarch’s construction of a casino in that location also threatened Muscogee (Creek) burial mounds.

96. Despite these warnings, Interior (including the National Park Service) failed to conduct the required reviews of Poarch’s compliance with the NPS Agreement and failed to enforce federal law.

97. Such reviews should have taken place by 2004, 2008, and 2012.

98. The National Park Service did not conduct any such reviews.

99. If it had, it would have discovered that Poarch violated the NPS Agreement and other federal laws.

E. Poarch Builds A Casino Resort Over A Muscogee (Creek) Sacred Site.

100. After the 20-year covenant expired in July 2000 and Poarch secured delegation of historic preservation responsibilities, Poarch caused a significant portion of the Hickory Ground Site to be destroyed to make way for its second casino resort (Poarch already had one in Atmore).

101. At Poarch’s direction, archaeologists affiliated with Auburn University conducted a phase III excavation of the Hickory Ground Site.

102. On information and belief, this excavation commenced in the years following delegation by the National Park Service to Poarch of historic preservation responsibilities, and

ended in 2011.

103. Phase III excavations are designed to record the data a site contains before a project proceeds and the site is lost.

104. Collecting this data involves the archaeologists disturbing remains, funerary objects, and additional cultural materials through the excavation of soil across the site. After the items are excavated and collected, they are taken to a laboratory where the materials are washed and analyzed. Analysis for the funerary objects and other cultural materials and soil may also include Accelerator Mass Spectrometry dating (carbon-14 dating), chemical analysis, organic residue analysis, and other examinations.

105. Not all cultural items are removed during a phase II excavation and before construction. Generally, the task of phase III investigators is to record archaeological information about the site before development. Archaeologists remove some material, but other cultural items are left at the site. This means that the construction at Hickory Ground likely destroyed many cultural items forever.

106. On information and belief, no phase III excavation of the Hickory Ground Site had taken place before the excavation ordered by Poarch after the protective covenant expired.

107. However, earlier investigations commissioned by Poarch concluded at least as early as 1990 that “well defined and undisturbed cultural remains,” including human burials, were abundant at the Site.

108. To perform the phase III excavation, Auburn University, at the behest of Poarch, obtained archaeological permits under the Archaeological Resources Protection Act. At least some, if not all, of these permits required that the permittee:

- a. Abide by the “Archaeological Resources Protection Act ... and its regulations ...

and interdepartmental regulations (25 CFR 261) as to Indian lands”;

- b. Abide by “the Native American Graves Protection and Repatriation Act of 1990 [and] the regulations for the curation of Federally-owned and administered archaeological collections (36 CFR 79)”;
- c. Follow special permit conditions requiring that any “[e]xcavation or removal of any Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony must be preceded by consultation or, in the case of tribal lands, consent of the appropriate Indian tribe or Native Hawaiian organization. Consultation should be conducted with the lineal descendants, tribal land owners, Native American representatives, and traditional religious leaders of all Indian tribes and Native Hawaiian organizations that can reasonably be assumed to be culturally associated with the cultural items”; and
- d. “[W]ithin approximately 6 weeks of the conclusion of field work,” submit “a preliminary report of work performed under th[e] permit, illustrated with representative photographs and listing new and significant collected materials” to the Bureau of Indian Affairs.

109. Poarch did not comply with the prerequisite conditions listed in the permits.

110. Poarch did not consult with, or obtain consent from, the Muscogee (Creek) Nation, Hickory Ground Tribal Town, or Mekko Thompson, the recognized traditional religious leader of Hickory Ground Tribal Town, before commencing the phase III excavation at Hickory Ground.

111. Nor did Poarch submit the required report of work performed under the permits to the Bureau of Indian Affairs.

112. Likewise, none of the Federal Defendants consulted with, or obtained consent from,

the Muscogee (Creek) Nation, Hickory Ground Tribal Town, or Mekko Thompson prior to granting each permit allowing the phase III excavation to take place.

113. Nor did Interior “ensure that the work was conducted in accordance with statutory and regulatory requirements and any terms and conditions stipulated in the permit,” as the permit stated it would do.

114. With the grant of each ARPA permit, Interior performed a new application of its unauthorized decision to take lands into trust for Poarch, as the ARPA permits only allowed excavations to take place “on lands under the jurisdiction of the Department of Interior.”

F. To Make Way For Its Casino Resort, Poarch Desecrates The Muscogee (Creek) Human Remains And Funerary Objects.

115. The graves at Hickory Ground are abundant and unmarked.

116. According to Auburn’s archeologists who performed initial archaeological investigations at the Hickory Ground Site on behalf of Poarch, “[i]n almost all tested areas evidence of well defined and undisturbed cultural remains were discovered.” Sheldon et al., *Additional Archaeological Investigations of the Hickory Ground Site*, p. 27 (1990). “[I]t is virtually impossible to undertake any construction activities without a high probability of seriously damaging the many irreplaceable archaeological deposits, artifacts, and human graves remaining at Hickory Ground.” Declaration of Craig Sheldon, p. 3 (9/27/2001).

117. At least 57 sets of human remains along with their associated funerary objects were exhumed during the phase III excavation.

118. These human remains represent the direct lineal ancestors of Hickory Ground members. Under Muscogee (Creek) tradition and religion, Mekko George Thompson, as Chief of Hickory Ground, represents those members, including in decisions on the appropriate actions to take with regard to the remains.

119. Numerous other artifacts were removed from the Site.

120. On information and belief, Poarch directed that the cultural items from the Hickory Ground Site be stored in a manner that caused, and is continuing to cause, further damage to the items.

121. Some cultural items, including human remains, are still in storage.

122. On information and belief, the containers and buildings in which the items were stored (and in which some items, including human remains, are still stored) did not (and still do not) have proper ventilation, did not (and still do not) have temperature controls, improperly separated (and continue to improperly separate) funerary objects from the human remains with which they were buried, and did not (and still do not) otherwise meet minimum curatorial standards.

123. This manner of storage can cause mold and accelerate decomposition.

124. This manner of storage is viewed as abhorrent in the Muscogee (Creek) religion.

125. Over 7,000 archaeological features, representing historic and ancient Muscogee (Creek) buildings, houses, ceremonial locations, and other sacred locations, were recorded during the phase III excavation and then destroyed by the excavation and later construction of the casino.

126. The remains and artifacts removed from the site were subjected to archaeological examination.

127. In the Muscogee (Creek) religion, archaeological examination violates the sanctity of tribal ancestors and destroys the ancestors' spiritual existence until they are put back at peace using appropriate religious protocol.

128. In the Muscogee (Creek) religion, the soil that surrounds a body is considered part of the body, because as the remains decompose, they are absorbed into the soil. Thus, removing

the soil from around the body is akin to removing a limb in the Muscogee (Creek) religion.

129. On information and belief, Poarch failed to instruct Auburn to treat the soil surrounding human remains as part of the body during the excavation by removing the surrounding soil along with the bones.

130. As a result, the excavations and subsequent construction resulted in parts of the bodies being permanently removed from the remains and spread across undisclosed locations.

131. The casino resort was likely built on top of these body parts.

132. Martin Construction, a construction company owned by a Poarch Band member, performed construction services to build the Wetumpka casino resort from 2012 to 2014.

133. Martin Construction undertook the majority of these activities *after* Plaintiffs filed a complaint emphasizing the religious and cultural importance of the Site, notifying Defendants of violations of applicable law, and requesting immediate injunctive relief to halt these activities. *See* Dkt. Nos. 1 & 57.

134. On information and belief, Poarch and/or Martin Construction failed to maintain adequate records of inadvertent discovery of cultural items during construction activities.

135. On information and belief, Poarch and Martin Construction failed to stop activity when cultural items were discovered.

136. Constructing a building on a site prevents non-invasive analysis of whether remains are still present under the building.

G. Plaintiffs Repeatedly Request That The Hickory Ground Site Be Preserved As Poarch Promised.

137. On information and belief, Poarch first notified the Muscogee (Creek) Nation of the phase III excavation in 2006.

138. By that time, some human remains from the Hickory Ground Site had already been

exhumed and archaeologically examined as part of the phase III excavation.

139. Beginning in 2006, Plaintiffs engaged in a years-long effort to persuade Poarch not to excavate and desecrate the remains of Plaintiffs' ancestors and other cultural items and to return any cultural items already excavated from Hickory Ground to their original resting place.

140. This leader-to-leader effort is the traditional way that the Muscogee (Creek) Nation and Hickory Ground attempt to resolve disputes.

141. This effort to negotiate methods for enforcing the common law and statutory protections of Plaintiffs' rights regarding Hickory Ground eventually failed in 2011.

142. After visitation and discussion with Poarch and Auburn University in 2006 and 2007 regarding human remains and associated funerary objects that were being exhumed at Hickory Ground, Mekko George Thompson, on behalf of Plaintiffs, sent a letter dated March 12, 2008 to the Director of the National Park Service relaying eight allegations regarding NAGPRA violations arising from disturbance and/or removal of human remains and funerary objects from the Hickory Ground Site.

143. These allegations were based upon personal observations of Mekko Thompson and other members of Hickory Ground during their visits to the Hickory Ground Site.

144. In an April 21, 2009 letter from the Department of the Interior to Auburn University, which was copied to Plaintiff Mekko Thompson, Interior conveyed its determination that Plaintiff Thompson's claims and allegations of violations under NAGPRA "have not been substantiated," based on eight factual findings and legal conclusions.

145. Interior's determination was based largely on its incorrect determination that Poarch retained legal interest in the "NAGPRA items from the Hickory Ground site." With this determination, Interior once again performed a new application of its unauthorized decision to take

lands into trust for Poarch, as the determination relied not only on an incorrect application of NAGPRA, but on the presumption that the lands were “tribal lands” belonging to Poarch within the definitions in NAGPRA.

146. However, under NAGPRA, Poarch never had either ownership or the right of control over the disposition of the excavated human remains and associated funerary objects. 25 U.S.C. §§ 3002(a), (c)(2)-(3).

147. Instead, Mekko Thompson, as the representative of all lineal descendants of the ancestors buried at Hickory Ground under the Muscogee (Creek) traditional kinship structure, has ownership and right of control over the disposition of such remains and objects.

148. Plaintiffs repeatedly requested that the remains of their ancestors and associated funerary objects be reinterred in their original resting places, that no further exhumations occur, that the construction and excavation stop, and that Hickory Ground be preserved in a natural state.

149. Poarch, through its officials, eventually refused all these requests. Upon information and belief, Poarch never intended to comply with Plaintiffs’ requests.

H. Poarch Intentionally Excludes The Muscogee (Creek) Nation And Hickory Ground From Decisions About Their Ancestors’ Reburial And Conducts The Reburial In Secret.

150. After the years-long excavations were completed, and with the knowledge that Plaintiffs’ religion required the cultural items to be placed in their original and intended final resting place, Poarch hurriedly reburied most of those remains and objects *away from* their final resting places in 2012.

151. Poarch did so while avoiding having any Muscogee (Creek) or Hickory Ground members present for the reburial.

152. Poarch accomplished this by unilaterally deciding to rebury the remains in April

2012 without consulting with the Muscogee (Creek) Nation or Hickory Ground Tribal Town, and then purposefully providing late notice of the planned reburial to Mekko Thompson and the Muscogee (Creek) Nation.

153. On Wednesday, April 4, 2012, Buford Rolin (then-Chair of the Poarch Band) sent letters via hardcopy mail to the P.O. Box addresses for Mekko Thompson and the Muscogee (Creek) Nation Principal Chief. The letters stated that Poarch council members “hope that we” (Mekko Thompson, the Muscogee (Creek) Nation, and Poarch) can “work together regarding reinterment,” and asked that Mekko Thompson and the Principal Chief “[p]lease let us know as soon as possible if you would like to join us” for the reburial. Letter to Mekko Thompson attached as Exhibit K hereto.

154. The letters made no mention of the date of reinterment.

155. The Principal Chief of the Muscogee (Creek) Nation did not receive the letter, only learning of it after Mekko Thompson brought a copy to his office.

156. Once the Principal Chief learned about the letter, representatives of the Muscogee (Creek) Nation immediately called Rolin’s office and the Poarch Band attorney.

157. On Friday, April 13, 2012, the Principal Chief of the Muscogee (Creek) Nation, on behalf of the Muscogee (Creek) Nation and Mekko Thompson, sent a response to Rolin via facsimile and mail (attached hereto as Exhibit L) requesting a “Tribal Leader to Tribal Leader” discussion “as soon as possible.”

158. On Tuesday, April 17, 2012, Rolin sent another hardcopy letter (attached hereto as Exhibit M) to Mekko Thompson and the Principal Chief of the Muscogee (Creek) Nation, stating that “[w]hen we did not immediately hear from you in response to our April 4th letter, we assumed you did not wish to participate in the reinterment process” and that “[l]ast week we proceeded with

the reinterment” of the remains and objects “in the manner to which we agreed during prior discussions.”

159. In other words, after six years of negotiations, Poarch sent ambiguous letters to Muscogee (Creek) Nation and Hickory Ground stating that it intended to rebury the remains and objects at some unidentified date in the future. Poarch then unilaterally reinterred the remains and objects without waiting for a response. It conducted the reinterment *less than 10 days* after sending the letters to Mekko Thompson and Chief Tiger.

160. At no point did any Plaintiff agree to reinterment away from the remains’ and associated funerary objects’ original resting place.

161. At the time of the reburial, Poarch was aware that Mekko Thompson and the Muscogee (Creek) Nation wanted the remains and associated funerary objects to be reinterred in their original resting place.

162. For example, in a letter to the Muscogee (Creek) Nation and Mekko Thompson in November 2010 (attached hereto as Exhibit N), Rolin acknowledged that “the beliefs and customs of the [Hickory Ground ceremonial grounds leadership]” required “reinterment in [the original resting] place,” and that Hickory Ground had requested reburial in such places.

163. At the time of the reburial, Poarch was aware that the remains and associated funerary objects that it was reburying would have to be exhumed again if they were to be reinterred in their original resting place.

164. During reinterment, Poarch officials performed ceremonies viewed as abhorrent in the Muscogee (Creek) religion because they violate religious protocol, further desecrating and disrespecting the remains of the Hickory Ground people.

165. On or about July 11, 2012, Poarch announced plans to construct a \$246 million

casino resort on Hickory Ground.

166. Poarch moved forward with casino construction in October 2012, issuing a press release (attached hereto as Exhibit O) stating that “we are being faced with demands to remove ancestral remains that have already been reinterred. . . . We cannot change the fact that remains were found and removed. Those remains are now reinterred and we cannot support disturbing those remains again. . . . [N]o one cares more about the sanctity of our land . . . than we do.”

167. The press release falsely stated that the remains “have been reinterred at Hickory Ground Town [sic] in a manner previously agreed to by traditional leaders in Oklahoma.”

168. In response to continuing objections from the Plaintiffs to the desecration of their sacred site and their ancestors’ burial sites, Defendant Stephanie Bryan, on behalf of Poarch, mailed a letter to tribal leaders nationwide.

169. On information and belief, this letter was sent in 2013.

170. In the letter (attached hereto as Exhibit P), Bryan attached a “fact sheet” containing statements indicating that Poarch believes that applicable law allows it to destroy and mistreat Muscogee (Creek) human remains and other cultural items on trust lands without notice to, consultation with, or consent from the Muscogee (Creek) Nation.

171. The letter falsely states that Poarch “is under no legal obligation to negotiate with any other sovereign Indian nation” about activities on its trust lands.

172. The letter falsely states that the “Wind Creek Wetumpka development protects our past.”

173. The letter also falsely states that “[Poarch] is in compliance with all applicable federal historic and cultural preservation laws pertaining to the property.”

174. The letter also misrepresents the importance, quality, and quantity of the

archaeological resources at the Site, falsely suggesting that they were not well-preserved or significant.

175. The letter falsely states that it was “consistent with the Muskogee [sic] Tribe’s [sic] Constitution” to reinter the remains away from their original resting places “with prayer and ceremony.”

176. The letter falsely states that the remains were “reintered [sic] with dignity and honor.”

177. The letter makes no mention of the phase III excavation or removal of human remains or funerary objects pursuant to the phase III excavation.

178. The statements listed in Paragraphs 171 to 177 are false and misleading, and highlight the outrageous disrespect with which Poarch treated the religious and cultural beliefs of the Plaintiffs.

I. Hickory Ground Today And The False Promise Of Preservation.

179. In 1988, the Hickory Ground Site looked like this:

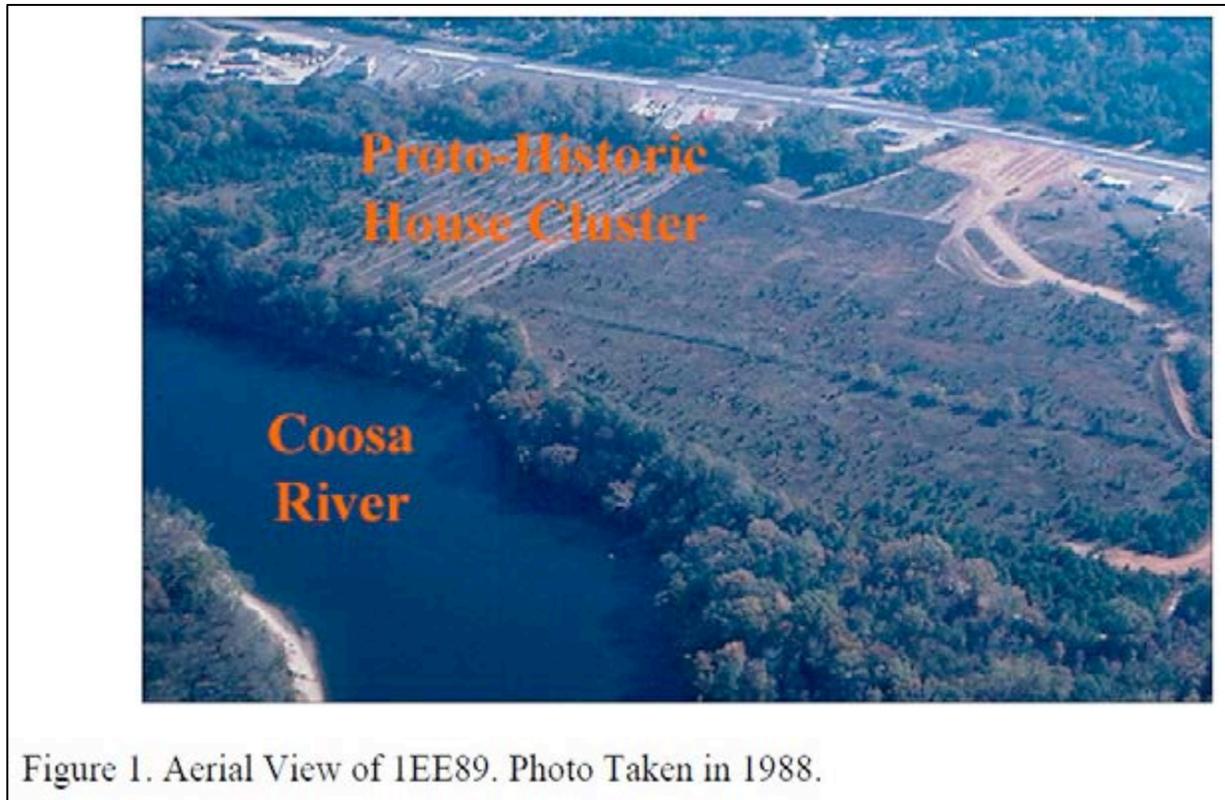


Figure 1. Aerial View of IEE89. Photo Taken in 1988.

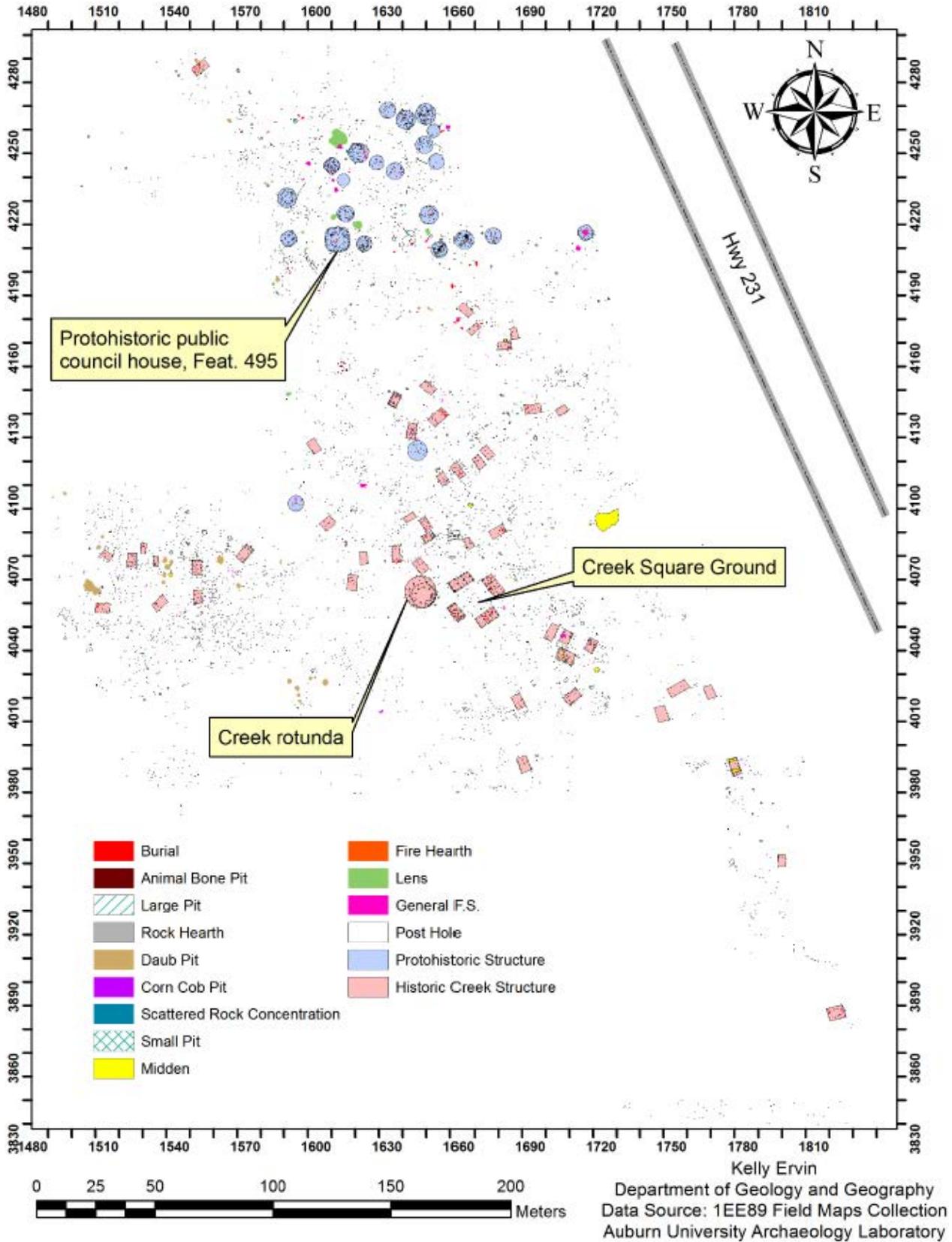
Cameron Wallace Gill, *Ceramic Analysis of Proto-Historic Domestic Structures from IEE89: A Transitional Culture on the Coosa 2* (Auburn University Thesis, December 13, 2010).

180. The Hickory Ground Site looked like this by September 2012 (see next page):



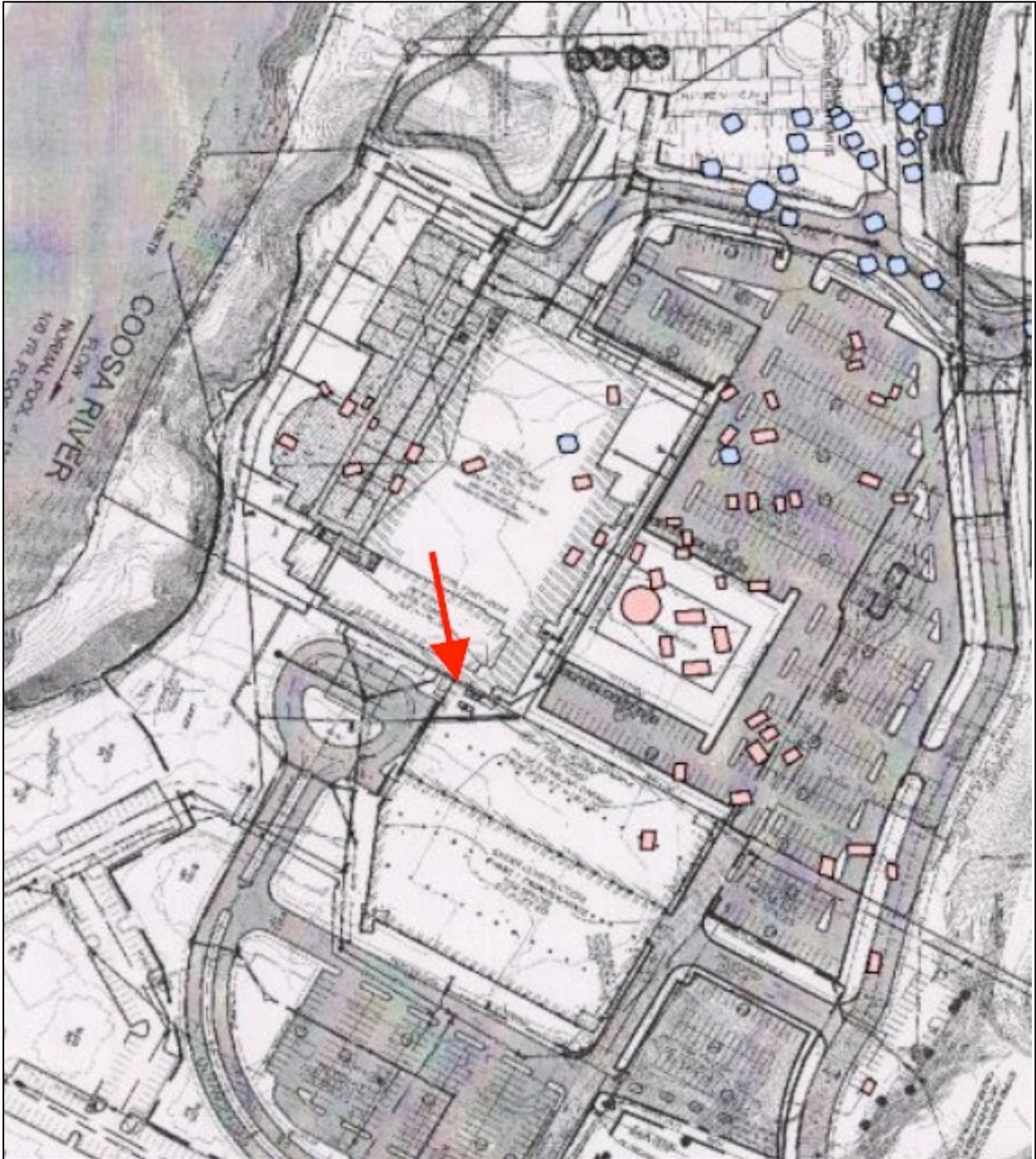
Google Earth Image (9/23/2012).

181. The numerous archaeological features and cultural items found throughout the Site are shown on the next page:



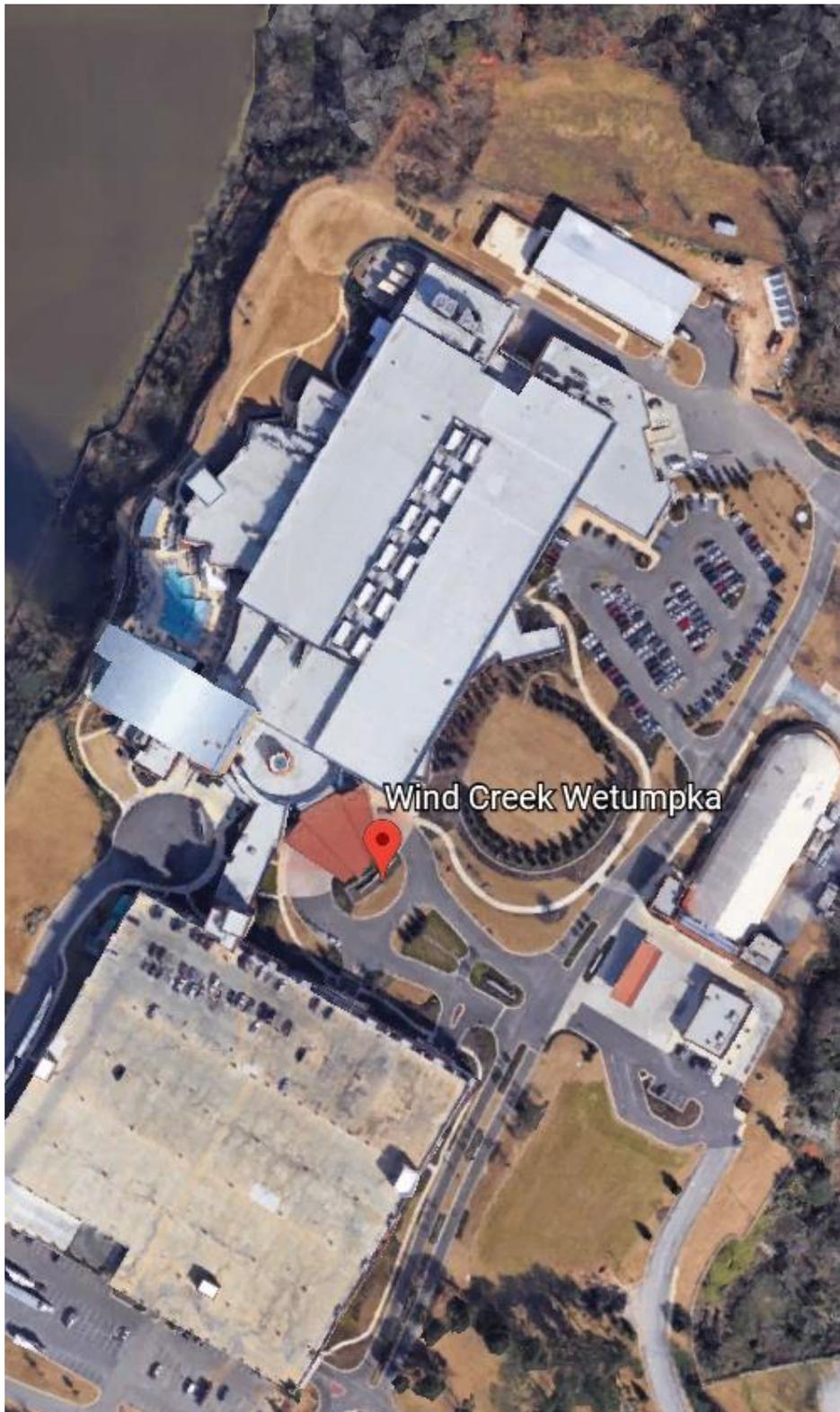
Kelly Ervin, *A Comparative Spatial Analysis of Two Communities from the Hickory Ground Site in Wetumpka, Alabama* 26 (Auburn University Thesis, December 13, 2014).

182. The archaeological features and cultural items relative to the casino resort are shown below:



Id. at 28.

183. Today, the Hickory Ground Site looks like this:



Google Maps Image (2019).

184. Poarch's wrongful actions are not only continuing, they are capable of repetition and evading review.

185. There are still Muscogee (Creek) burials, funerary objects, and other cultural items in the lands at the Hickory Ground Site.

186. There are also significant Muscogee (Creek) burials, funerary objects, and other cultural items in Poarch's Montgomery lands—which Interior also incorrectly and without authority took into trust.

187. Under Poarch's stated interpretation of the law, it can destroy these sites and any burials contained therein without notifying the Muscogee (Creek) Nation.

188. Poarch's conduct demonstrates that it is more than willing to act unilaterally, in breach of its preservation promises made to obtain the land and without regard to the requirements under the NPS Agreement and federal law. Prior to the phase III excavation, Poarch knew that Hickory Ground held historical, cultural, and spiritual significance to the Muscogee (Creek) Nation and Hickory Ground, and that any destruction or unearthing of remains at Hickory Ground would, in Poarch's own words from its preservation grant application, "destroy[] the cultural history of Creek people."

189. Plaintiffs seek to restore, to the extent possible, the Hickory Ground Site to the condition it was in before the wrongful excavation and construction of the casino resort, to compel Poarch to abide by its agreement to preserve Hickory Ground "without excavation," to hold the Defendants responsible for the outrageous harm they caused to the Plaintiffs, and to declare Defendants' responsibilities under applicable law to prevent continuing violations of the Plaintiffs' rights.

COUNT I: VIOLATION OF THE INDIAN REORGANIZATION ACT

190. Under the Indian Reorganization Act, 25 U.S.C. § 5123 *et seq.*, a tribe must have been “under federal jurisdiction” in 1934 in order for Interior to have authority to take land into trust for the tribe. *See also Carciery v. Salazar*, 555 U.S. 379 (2009).

191. Because Poarch was not under federal jurisdiction in 1934, *see* Paragraph 76, the Secretary did not have authority to take the Hickory Ground Site into trust for Poarch. Thus, the trust transaction was unlawful, *ultra vires*, and void *ab initio*.

192. Because the Hickory Ground Site was not validly taken into trust, Interior did not have authority to grant permits allowing the phase III archaeological excavations.

193. The gaming at the Hickory Ground Site is illegal under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, because such gaming can only occur on certain trust lands. Because it was taken into trust in violation of the Indian Reorganization Act, the Hickory Ground Site does not constitute trust land where gaming can legally occur.

194. The Hickory Ground Site is properly considered fee land owned by Poarch that is subject to state, not federal, law.

195. Given Poarch’s representations to the Muscogee (Creek) Nation that Poarch would always protect the Hickory Ground Site, Plaintiffs had no reason to believe they would be harmed by Interior’s acceptance of the Hickory Ground Site in trust for Poarch in 1985.

196. It was not until 2006 that Poarch notified the Muscogee (Creek) Nation that Poarch was not protecting the Hickory Ground Site from development “without excavation,” as it had promised it would do.

197. This Court should declare that Interior lacked authority to take land into trust because Poarch was not “under federal jurisdiction,” and therefore Interior’s taking of the Hickory Ground Site into trust for Poarch was void *ab initio*.

198. Because the trust transaction is void, the Hickory Ground Site is not tribal reservation or federal land. Instead, Poarch retains fee simple title to the Hickory Ground Site.

199. Gaming on the Hickory Ground Site is thus not legal under applicable Alabama law and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (authorizing gaming on “Indian lands” only).

**OPERATIVE COUNTS IF THIS COURT RULES IN FAVOR OF PLAINTIFFS ON
COUNT I AND DETERMINES INTERIOR LACKED AUTHORITY TO TAKE THE
HICKORY GROUND SITE INTO TRUST FOR POARCH**

200. Counts II-IV of this Complaint present claims that are applicable only if the Court determines that the Department of the Interior lacked authority to take the Hickory Ground Site into trust for Poarch.

COUNT II: UNJUST ENRICHMENT (ALABAMA COMMON LAW)

201. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

202. Poarch unjustly enriched itself by acquiring the Hickory Ground Site at no cost to Poarch and without objection from Plaintiffs based on promises that it would perpetually protect the Site. Instead of preserving the Site in accordance with its promises, Poarch has further unjustly enriched itself by destroying a large part of the Site to make way for a multimillion-dollar casino resort that is generating hundreds of millions of dollars in gambling and resort revenues for Poarch each year.

203. In its application for federal preservation grant funds, Poarch expressly assured that its acquisition of the Hickory Ground Site would result in the “existing Hickory Ground tribal town in Oklahoma.... know[ing] their home in Alabama is being preserved,” “without excavation”; that Poarch would provide “permanent protection of the site”; and that “Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral

home.” Poarch warned that “[d]estruction of archaeological resources in Alabama ... destroy[s] the cultural history of Creek people.”

204. Poarch continued to make promises of protection of Hickory Ground in the presence of Muscogee (Creek) Nation prior to Poarch’s recognition.

205. Poarch’s bid for federal recognition was accompanied by a proposal to take Hickory Ground into trust as part of Poarch’s initial reservation.

206. Had the Muscogee (Creek) Nation known that Poarch would desecrate Hickory Ground, it would have taken steps to prevent Poarch from acquiring the land and would have opposed Poarch’s bid for federal recognition.

207. In justifiable reliance on Poarch’s promises in the federal preservation grant application, including promises that Poarch would provide “permanent protection of the site,” “without excavation,” so that “Creeks from Oklahoma may return and visit their ancestral home,” the Muscogee (Creek) Nation did not object to Poarch’s acquisition of Hickory Ground in fee or in trust. Instead, the Muscogee (Creek) Nation supported Poarch’s bid for recognition.

208. Thus, Poarch not only acquired the Hickory Ground Site at no cost, it also gained the benefit of the Muscogee (Creek) Nation’s support in its federal recognition bid and the Nation’s lack of objection to Poarch acquiring the Hickory Ground Site.

209. Poarch further unjustly enriched itself by expediting the construction and opening of the casino through (1) knowingly and intentionally breaching the NPS Agreement by *avoiding* providing notice to, or consulting with, Plaintiffs or involving the Plaintiffs in any way with respect to the exhumation or reburial of their deceased family members; and (2) choosing to continue construction after Plaintiffs repeatedly demanded that Poarch cease all plans for development of the Site and return the human remains, funerary objects, and other cultural items to their original

resting places.

210. Poarch knew that it would not have obtained the preservation funds, the Muscogee (Creek) Nation's support and lack of objection to acquisition of the Site, or the National Park Service's Agreement to entrust it with historic preservation responsibilities if it had disclosed that it would desecrate, damage and destroy large portions of the Site in the future.

211. It would be inequitable for Poarch, who benefited from acquiring the Hickory Ground Site (at no cost) based on its promises of permanent protection, to profit to the tune of billions of dollars in gambling revenues by breaching those promises and irreparably harming those who trusted that it would keep its promises.

212. The Court should impose equitable remedies, among other things, requiring the Poarch Council Defendants, PCI Gaming Authority Board Defendants, and Poarch THPO to abide by Poarch's promises and restore the property, to the greatest extent possible, to its pre-excavation and pre-construction condition.

213. The Court should order the Federal Officer Defendants to take any actions that may be necessary to implement the above-described equitable remedies.

COUNT III: PROMISSORY ESTOPPEL (ALABAMA COMMON LAW)

214. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

215. Poarch promised the Muscogee (Creek) Nation and Hickory Ground that it would preserve the Hickory Ground Site in perpetuity.

216. The Muscogee (Creek) Nation relied on that promise to its detriment in not objecting to Poarch's acquisition of the property, either in fee or trust, and in supporting Poarch's federal recognition.

217. Poarch was aware that, had the Muscogee (Creek) Nation known that Poarch would

not protect the Hickory Ground Site as it promised and instead would destroy Plaintiffs' sacred burial grounds and religious sites, the Muscogee (Creek) Nation would have objected immediately to Poarch's acquisition of the land in any status (fee or trust) and made efforts to prevent the acquisition.

218. The injustice of Poarch enriching itself by breaking its promises and thereby causing irreparable harm to the Muscogee (Creek) Nation and Hickory Ground can only be avoided by enforcing those promises. *See Beatty v. Kurtz*, 27 U.S. 566, 584-85 (1829); *Bessemer Land & Sykes v. Payton*, 441 F. Supp. 2d 1220, 1224 (M.D. Ala. 2006); *Improv. Co. v. Jenkins*, 111 Ala. 135, 148 (1895).

219. The Court should impose equitable remedies, among other things, requiring the Poarch Council Defendants, PCI Gaming Authority Board Defendants, and Poarch THPO to abide by Poarch's promises and restore the property, to the greatest extent possible, to its pre-excavation and pre-construction condition.

220. The Court should order the Federal Officer Defendants to take any actions that may be necessary to implement the above-described equitable remedies.

COUNT IV: OUTRAGE
(Plaintiff Mekko Thompson Against The Individual Defendants
And Defendant Martin Construction)

221. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs. Plaintiff Mekko Thompson is the only Plaintiff asserting a claim under this Count.

222. Under Alabama law, outrage occurs where the defendant's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it.

223. The Individual Defendants, knowing that Hickory Ground and the human remains and funerary objects buried there were sacred in the culture and traditional religion of Mekko Thompson, intentionally and outrageously caused the desecration of Hickory Ground by ordering that the bodies and funerary objects buried there be exhumed, disassociated, dismantled, analyzed, and reinterred in a manner considered abhorrent in the Muscogee (Creek) traditional religion.

224. Plaintiffs were robbed of the promise they relied upon—that Poarch would always protect the Hickory Ground Site so that it would “be a place where Creeks from Oklahoma may return and visit their ancestral home” and so that the Muscogee (Creek) Nation and Hickory Ground members would “know their home in Alabama is being preserved.”

225. As the living descendants of the deceased, Plaintiffs, including Mekko Thompson, owe a moral and religious duty to their ancestors under Plaintiffs’ traditional religion to care for the graves and bodies of the deceased. Failing in that duty is considered to be a failure to one’s ancestors, Tribal Town, Clan, and culture. As traditional chief of Hickory Ground Tribal Town, Mekko Thompson has a heightened responsibility to fulfill this duty on behalf of all Hickory Ground Tribal Town members. The Individual Defendants’ desecration of Plaintiffs’ deceased family members at Hickory Ground has caused and is continuing to cause Mekko Thompson abject pain, sorrow, anguish, torment, suffering, helplessness, grief, and anger.

226. The remains of the Hickory Ground members’ deceased family members were placed in newspaper and plastic bins and left in a non-air conditioned shed through numerous hot Alabama summers. The Individual Defendants even authorized the bodies of infants to be exhumed. Bodies of Plaintiffs’ deceased family members were left exhumed, exposed, ill-attended, and disregarded for years before Poarch wrongfully reinterred them away from their final resting places. Some remains, funerary objects, and cultural items have not been reinterred and are still

being stored in this manner.

227. The Individual Defendants intentionally concealed what was happening to Plaintiffs' ancestors from Plaintiffs, including Mekko Thompson. The fact that such a terrible tragedy occurred without their knowledge has imposed an enduring feeling of helplessness and fear in Mekko Thompson that this will happen again. Mekko Thompson, as chief of Hickory Ground Tribal Town, has not been able to assure the children and young people of the Tribal Town, or other related Clan members or Tribal Towns, that the Individual Defendants will be held accountable for their egregious actions, or that Poarch will not commit similar atrocities in the future.

228. The Individual Defendants further caused emotional distress to Mekko Thompson by exhibiting blatant carelessness about the religious, historical, and cultural importance of the Site to Plaintiffs, and by affirmatively and repeatedly lying about what happened at Hickory Ground. It would have been unthinkable to the Plaintiffs, including Mekko Thompson, that the Individual Defendants would commit such a sacrilege against the ancestors of any people or the desecration of any people's hallowed ground.

229. The Muscogee (Creek) Nation trusted Poarch and Poarch's leadership, who claim to be Creek people, to understand the Muscogee (Creek) members' religious and cultural duties to their ancestors. Plaintiffs trusted Poarch to protect Hickory Ground forever, just as Poarch promised to do. Instead, the Individual Defendants intentionally prevented Mekko Thompson, and Plaintiffs generally, from fulfilling Plaintiffs' duties to their deceased family members and sacred grounds, and caused Mekko Thompson the irreparable anguish of knowing that the ancestors were wrenched from what was intended to be their final resting places, disrespected, and grotesquely mistreated.

230. Martin Construction, having notice of the Hickory Ground Site's religious and cultural significance to Plaintiffs and to Mekko Thompson specifically through having been served with Plaintiffs' Complaint, *see* Dkt. Nos. 1 & 57, proceeded with construction on the Hickory Ground Site.

231. On information and belief, Martin Construction desecrated Plaintiffs' ancestors' remains by dismembering them through removing and discarding soil—part of those ancestors' bodies.

232. On information and belief, Martin Construction also failed to stop construction even after cultural items were discovered, intentionally desecrating gravesites of extreme religious and cultural importance to Plaintiffs.

233. The Individual Defendants' and Martin Construction's intentional, extreme, and outrageous behavior caused Mekko Thompson emotional distress so severe that no reasonable person should be expected to endure it. The harm and emotional distress from the Individual Defendants' wrongful actions is, and will be, continuing until such time as Poarch is required to take appropriate remedial measures.

234. Plaintiffs do not seek monetary damages against any tribal or federal defendant in his or her official capacity. Mekko Thompson seeks monetary damages against the Individual Defendants in their individual capacities, and against Martin Construction, for the tort of outrage that they personally committed against him.

235. This Court should order the Individual Defendants and Martin Construction to pay damages to Mekko Thompson for the extreme emotional distress they have caused him to suffer.

OPERATIVE COUNTS IF THIS COURT RULES AGAINST PLAINTIFFS ON COUNT I

236. Counts V-IX of this Complaint present claims that are applicable if the Court determines that the Department of the Interior had authority to, and properly did, take the Hickory Ground Site into trust for Poarch.

COUNT V: UNJUST ENRICHMENT (FEDERAL COMMON LAW)

237. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

238. Because the elements of unjust enrichment under both federal and Alabama common law are substantially the same, Plaintiffs specifically incorporate the allegations in Paragraphs 202 through 213 above without repeating them here.

COUNT VI: PROMISSORY ESTOPPEL (FEDERAL COMMON LAW)

239. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

240. Because the elements of unjust enrichment under both federal and Alabama common law are substantially the same, Plaintiffs specifically incorporate the allegations in Paragraphs 215 through 220 above without repeating them here.

COUNT VII: VIOLATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

241. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

242. Enacted in 1990, NAGPRA safeguards the rights of Native Americans by protecting tribal burial sites and rights to items of cultural and religious significance to Native Americans. Cultural items protected under NAGPRA include Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3001(3). NAGPRA

was intended to protect the dignity of the human body after death by ensuring that Native American graves and remains be treated with respect.

243. NAGPRA confers jurisdiction to federal courts over “any action brought by any person alleging a violation of this Act.” 25 U.S.C. § 3013.

244. Under NAGPRA, the intentional removal or excavation of Native American cultural items from Federal or tribal lands is permitted only if:

- a. Such items are excavated or removed pursuant to a permit issued under section 470cc of Title 16, which states that, before any permit is issued, “any Indian tribe which may consider the site as having religious or cultural importance” be notified and meaningfully consulted if such issuance “may result in harm to, or destruction of, any religious or cultural site”;
- b. Such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate Indian tribe under 25 U.S.C. § 3002(c), 43 C.F.R. § 10.5, 25 C.F.R. § 262.5(d) (providing that “[d]etermination as to which tribe is the appropriate tribe shall be made in accordance with § 262.8(a)”), and 25 C.F.R. § 262.8(a) (listing lineal descendants as having the highest priority);
- c. The custody (ownership and right of control) of the disposition of such items is compliant with the priority order provided in NAGPRA, 43 C.F.R. § 10.6; *and*
- d. Proof of consultation or consent is shown to the Federal agency official responsible for the issuance of the required permit.

25 U.S.C. § 3002(c); 43 C.F.R. §§ 10.3, 10.5, 10.6; 25 C.F.R. § 262.5(d); and 25 C.F.R. § 262.8(a).

245. Sections 5 and 7 of the NPS Agreement likewise require Poarch to consult with Indian tribes on whose traditional lands the planned activity will occur, along with associated

individuals and groups who would be affected by Poarch's activity on such lands.

246. As a delegee of federal functions, Poarch and its officials performing the delegated functions are federal actors, liable as federal officials.

247. The following paragraphs allege multiple independent violations of NAGPRA and conduct which is not in accordance with law, and is arbitrary, capricious, and an abuse of discretion under the Administrative Procedures Act, 5 U.S.C. § 706.

248. Neither Poarch nor the Federal Defendants followed any of the requirements listed in Paragraph 244.

249. Likewise, Poarch violated the NPS Agreement by failing to consult with Plaintiffs prior to authorizing excavations and construction on the Hickory Ground Site.

250. NAGPRA and its associated provisions in ARPA require consent from the Muscogee (Creek) Nation, as *parens patriae* representative of the lineal descendants at the Site and as the tribe with the closest cultural and religious connection to the Site, prior to excavation of Native American cultural items from the Hickory Ground Site. *See* 25 C.F.R. § 262.5(d), 262.8(a).

251. As the traditional kinship system representative of lineal descendants of those buried at the Hickory Ground Site, Mekko Thompson has the right to custody of the human remains and associated funerary objects at the Hickory Ground Site. *See* 25 U.S.C. § 3002; 43 C.F.R. §§ 10.6, 10.14. As the tribe most closely culturally and religiously affiliated with the Hickory Ground Site, the Muscogee (Creek) Nation has the right to custody over all other cultural items at the Site. *Id.*; *see infra* Paragraphs 262-270.

252. In violation of NAGPRA and ARPA, neither Poarch nor the Federal Defendants have given custody of (1) the human remains and funerary objects excavated at the Hickory

Ground Site to Mekko Thompson; or of (2) the other cultural items found at the Site to the Muscogee (Creek) Nation. 25 U.S.C. § 3002; 43 C.F.R. § 10.3; 25 C.F.R. § 262.5(d); 25 C.F.R. § 262.8(a).

253. The National Park Service also violated NAGPRA by failing to establish a preservation program for the protection of historic properties that ensures that the agency's procedures for compliance with Section 106 of the NHPA "provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3(c) of [NAGPRA]." 25 U.S.C. § 3002(c).

254. No final inventory or report regarding the cultural items recovered at the Hickory Ground Site has been prepared, nor was the Muscogee (Creek) Nation consulted regarding such report, as required by NAGPRA.

255. Furthermore, on information and belief, Poarch and Martin Construction violated NAGPRA by failing to follow its mandatory procedures regarding inadvertent discoveries of cultural items. On information and belief, no report of such discoveries was made to the appropriate officials, and even if there were such reports, Poarch and Martin Construction failed to stop the construction activity and take reasonable steps to protect the cultural items before resuming activity. *See* 25 U.S.C. § 3002(b)-(c) and 43 C.F.R. § 10.4.

256. Had Poarch and the Federal Defendants complied with the consultation requirements of NAGPRA, they would have been informed that the Muscogee (Creek) religion requires the following:

- a. That no destructive scientific study take place on the cultural items, as such testing violates the Muscogee (Creek) religious beliefs that the dead should remain undisturbed;

- b. That, if disturbance is absolutely unavoidable, all parts of the human remains, including the surrounding soils, be removed and held together during excavation;
- c. That, if disturbance is absolutely unavoidable, the excavated remains and funerary objects be stored together in a certain fashion;
- d. That, if disturbance is absolutely unavoidable, Mekko Thompson, as religious and ceremonial leader of Hickory Ground, prescribe removal and reburial procedures that must be followed for the cultural items under Muscogee (Creek) religious protocol, including protocol for bundling of the remains and funerary objects;
- e. That, if disturbance is absolutely unavoidable, Mekko Thompson and other representatives of the Muscogee (Creek) Nation be present during handling of any remains or funerary objects, for any purpose, to ensure that such treatment conformed with, to the greatest extent possible, the Muscogee (Creek) religion.

257. Had Poarch and the Federal Defendants complied with NAGPRA, the Muscogee (Creek) Nation would have refused consent for the excavation of the Hickory Ground Site.

258. Even if the Muscogee (Creek) Nation's advance consent were not required prior to any excavation and construction (it was), NAGPRA still required Poarch and the Federal Defendants to meaningfully consult with the Muscogee (Creek) Nation prior to excavation or construction. If Poarch and the Federal Defendants had consulted with Plaintiffs as they were required to do under NAGPRA, they could have avoided tragedies such as the permanent separation of body parts from the human remains of Plaintiffs' deceased family members.

259. Further, if Poarch and Martin Construction had followed NAGPRA's procedures for inadvertent discoveries, further tragedies such as the permanent loss of remains and other cultural items could have been avoided.

260. NAGPRA gives this Court the “authority to issue such orders as may be necessary to enforce” the statute. 25 U.S.C. § 3013.

261. To enforce the statute, this Court should issue an injunction requiring Poarch Council Defendants, the PCI Gaming Authority Board Defendants, the Poarch THPO, and the Federal Officer Defendants to obtain consent from the Muscogee (Creek) Nation for the excavation and construction of the casino resort, and, if the Muscogee (Creek) Nation does not consent:

- a. Requiring the Poarch Council Defendants, Poarch THPO, and PCI Gaming Authority Board Defendants to undo, to the greatest extent possible, the unconsented-to actions and restore the Site to its prior condition, to the greatest extent possible;
- b. Requiring the Federal Officer Defendants and Auburn to make such approvals and take such actions as may be necessary to accomplish reversal of the unconsented-to actions and restoration of the Site;
- c. Requiring Poarch Council Defendants, the Poarch THPO, the PCI Gaming Authority Board Defendants, the Federal Officer Defendants, and Auburn to involve the Muscogee (Creek) Nation throughout this process, including abiding by the Muscogee (Creek) Nation’s instructions regarding how all cultural items should be handled at all stages of the process; and
- d. Ordering such relief against Martin Construction as may be appropriate given its violations of NAGPRA’s provisions regarding inadvertent discoveries and its continuation of construction despite Plaintiff’s lawsuit.

COUNT VIII: PORTIONS OF NAGPRA AND ARPA, IF CONSTRUED IN A MANNER THAT RESULTS IN A SUBSTANTIAL BURDEN ON PLAINTIFFS' RELIGION, VIOLATE THE FIRST AMENDMENT, THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT, AND THE RELIGIOUS FREEDOM RESTORATION ACT

262. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

263. The First Amendment of the United States Constitution prohibits Congress from making any law “respecting an establishment of religion, or prohibiting the free exercise thereof.”

264. Similarly, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) prohibits the government from imposing or implementing “a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C.S. § 2000cc.

265. Likewise, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, was enacted in 1993 and requires that federal governmental action that substantially burdens a tribe’s religious practice or exercise must promote a compelling interest (rather than simply having a rational basis). Its protections encompass tribal religious beliefs. *See* American Indian Religious Freedom Act, 42 U.S.C. §§ 1996, *et seq.*

266. NAGPRA and related provisions in ARPA are laws specifically directed at religion and religious practice, and establish rules governing whether intentional removal or excavation of Native American cultural items from Federal or tribal lands can take place. If such excavation *can* take place, NAGPRA establishes a priority preference regarding who should be given the excavated cultural items.

267. Specifically, excavation of Native American cultural items from tribal lands is not

permitted without the consent of the “appropriate Indian tribe.” *See supra* ¶ 244. If excavation is allowed, NAGPRA provides that the cultural items be given to, in order of priority: first, the lineal descendants; second, the tribal landowner (in the event lineal descendants cannot be ascertained); third, the tribe who aboriginally occupied the subject lands; and fourth, the tribe with the “strongest cultural relationship” with the cultural items.

268. As discussed in greater detail above, Plaintiffs owe a moral and religious duty to their ancestors under Plaintiffs’ traditional religion to ensure protection of the graves, bodies, and cultural items of the deceased. If those graves, bodies, or cultural items are disturbed, Plaintiffs are required by their religion to bring such remains or items back to peace with the appropriate religious protocol. Government action that does not allow them to do so forces them to choose between either abandoning their religious beliefs or facing civil or criminal sanctions for fulfilling their religious duty to their ancestors.

269. To the extent that the requirement of consent of the “appropriate Indian tribe” under ARPA and the related provisions in NAGPRA are interpreted to allow any tribe other than the Muscogee (Creek) Nation to provide consent for excavation or removal of cultural items with respect to the Hickory Ground Site, (1) there is no compelling governmental interest, or even rational basis, justifying the attendant burden on Plaintiffs’ religion, (2) the law does not use the least restrictive means to further the governmental interest; and (3) these provisions violate the First Amendment as applied to the Muscogee (Creek) Nation, and irreconcilably conflict with the Religious Land Use and Institutionalized Persons Act and Religious Freedom Restoration Act.

270. To the extent that NAGPRA and the related provisions in ARPA are interpreted to provide higher priority of ownership of the excavated cultural items in any entity other than Mekko Thompson or the Muscogee (Creek) Nation, (1) there is no compelling governmental interest, or

even rational basis, justifying the attendant burden on Plaintiffs' religion, (2) 25 U.S.C. § 3002(a)(2) and associated provisions do not use the least restrictive means to further the governmental interest; and (3) 25 U.S.C. § 3002(a)(2) and associated provisions (i) violate the First Amendment as applied to Plaintiffs, who have an inviolable religious and cultural right to the remains and other cultural items, and (ii) irreconcilably conflict with the Religious Land Use and Institutionalized Persons Act and Religious Freedom Restoration Act.

**COUNT IX: VIOLATION OF THE ARCHEOLOGICAL RESOURCES PROTECTION
ACT**

271. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

272. Under ARPA, “[n]o person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under [16 U.S.C. § 470cc].” 16 U.S.C. § 470ee; *see also* 25 C.F.R. § 262.3(a).

273. 16 U.S.C. § 470cc(c), 25 C.F.R. § 262.5, 25 C.F.R. § 262.7, and the permits obtained by Auburn to excavate at the Hickory Ground Site require that, at least 30 days before issuing the permit, the Federal land manager notify all Indian tribes which may consider the site as having religious or cultural importance if the permit may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager.

274. The following Paragraphs allege multiple independent violations of ARPA and conduct which is not in accordance with law, and is arbitrary, capricious, and an abuse of discretion under the Administrative Procedures Act, 5 U.S.C. § 706.

275. On information and belief, Poarch officials falsely represented that no religious or cultural site would be harmed or destroyed by the proposed work at Hickory Ground, in violation

of ARPA, 25 C.F.R. § 262.5(c); the NPS Agreement; and Poarch's agreement to perpetually preserve Hickory Ground.

276. ARPA also requires consent from the Muscogee (Creek) Nation, as *parens patriae* of the lineal descendants of those buried at the Site and as the tribe with the closest cultural and religious connection to the Site, prior to excavation of Native American cultural items from the Hickory Ground Site. *See* 25 C.F.R. §§ 262.5(d), 262.8(a).

277. The Federal Defendants did not notify, consult with, or get consent from the Muscogee (Creek) Nation prior to issuing the ARPA permits, and did not ensure Poarch notified, consulted with, or obtained consent from the Muscogee (Creek) Nation, in violation of ARPA, the permit conditions, the NPS Agreement, and the Federal Defendants' trust responsibility to the Muscogee (Creek) Nation.

278. Even if it were legal to issue such permits without the Muscogee (Creek) Nation's consent (it is not):

- a. Poarch did not meet the conditions precedent of those permits;
- b. The Bureau of Indian Affairs issued permits allowing excavation of Hickory Ground without verifying that the conditions precedent were met;
- c. Neither Poarch nor the Federal Defendants notified or consulted with the Muscogee (Creek) Nation to discuss its interests, including ways to avoid or mitigate potential harm or destruction, prior to the Bureau of Indian Affairs issuing the permits, in violation of ARPA;
- d. The activities pursuant to the permits were "inconsistent with a[] management plan"—specifically, the NPS Agreement and Poarch's agreement to perpetually preserve the Hickory Ground Site;

- e. Poarch failed to curate the archaeological resources in accordance with 36 C.F.R. § 79;
- f. The Bureau of Indian Affairs did not “ensure that the work was conducted in accordance with statutory and regulatory requirements and any terms and conditions stipulated in the permit.”

See Permit Conditions, *supra* Paragraph 108; 16 U.S.C. § 470cc(b)(4); 43 C.F.R. § 7.7; 25 U.S.C. § 3002(c).

279. Furthermore, on information and belief, Poarch (and/or Auburn at the behest of Poarch) obtained some permits under section 470cc of Title 16, but such permits did not cover the full time period during which the phase III excavations were performed under Poarch’s direction on the Hickory Ground Site.

280. Thus, Poarch also violated ARPA by causing the excavation, removal, damage, alteration and defacement of archaeological resources at the Hickory Ground Site without a valid permit, as Poarch failed to meet the permit conditions precedent listed in Paragraph 108.

281. Because the above ARPA provisions are incorporated into NAGPRA, this Court has the “authority to issue such orders as may be necessary to enforce” those provisions. 25 U.S.C. § 3013.

282. To enforce these provisions, this Court should issue an injunction requiring the Poarch Council Defendants, the PCI Gaming Authority Board Defendants, the Poarch THPO, and the Federal Officer Defendants to obtain consent from the Muscogee (Creek) Nation for the excavation and construction of the casino resort, and, if the Muscogee (Creek) Nation does not consent, issue an injunction:

- a. Requiring the Poarch Council Defendants, the PCI Gaming Authority Board

Defendants, and the Poarch THPO to undo, to the greatest extent possible, the unconsented-to actions and restore the Site to its prior condition, to the greatest extent possible; and

- b. Requiring the Federal Officer Defendants and Auburn to make such approvals and take such actions as may be necessary to facilitate reversal of the unconsented-to actions and restoration of the Site.

OPERATIVE COUNTS REGARDLESS OF RULING ON COUNT I

283. Counts X through XI present claims that are applicable regardless of how the Court rules on Count I, which relates to the authority of the Department of the Interior to take the Hickory Ground Site into trust for Poarch.

COUNT X: VIOLATION OF THE NATIONAL HISTORIC PRESERVATION ACT

284. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

285. The Hickory Ground Site is subject to protection under the NHPA because it is listed as a historic property on the National Register of Historic Places.

286. On information and belief, the Hickory Ground Site is currently considered to include both tribal land (reservation lands, 54 U.S.C. § 300319) and federally-controlled land (trust land, 54 U.S.C. § 306101) as defined in the NHPA.

287. The Secretary of Interior and the National Park Service are responsible for delegations of their historic preservation responsibilities, including consulting with tribes whose aboriginal land may be affected by such delegation. 54 U.S.C. § 302702. Despite any such delegation, the National Park Service and Bureau of Indian Affairs retain all non-delegable responsibilities arising from the trust relationship between the United States and the Muscogee (Creek) Nation. *See* 36 C.F.R. § 800.2(c)(2)(ii)(B)-(C).

288. When the National Park Service delegates its authority, the delegee carries out the delegated responsibilities on behalf of the National Park Service. Poarch's assumption of responsibility under the NHPA pursuant to federal law means that Poarch acts as a *de facto* government agency with respect to the delegated responsibilities.

289. Poarch's, the National Park Service's, and the Bureau of Indian Affairs' performance of (and failure to perform) their historic preservation responsibilities regarding the Hickory Ground Site are an "undertaking" within the meaning of 54 U.S.C. § 300320.

- a. Poarch received federal financial assistance to carry out its historic preservation responsibilities. *See, e.g.*, 2011 Preservation Grant Announcement, *available at* https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc014222.pdf (awarding Poarch over \$30,000).
- b. The excavation and construction at the Hickory Ground Site also required prior Bureau of Indian Affairs' approval under ARPA, the excavation permit conditions, NAGPRA, and the trust responsibilities arising therefrom. Furthermore, the gaming at the Hickory Ground site required the approval of gaming ordinances by Interior—an approval that is dependent on the land validly being held in trust.

290. The following Paragraphs allege multiple independent violations of NHPA and conduct which is not in accordance with law, and is arbitrary, capricious, and an abuse of discretion under the Administrative Procedures Act, 5 U.S.C. § 706.

A. Interior And Poarch Failed To Comply With Their Obligations To Meaningfully Consult With Plaintiffs.

291. The NHPA requires Interior to consult with "any Indian tribe ... that attaches religious and cultural significance to" a historic property. 54 U.S.C. § 302706.

292. This consultation duty extends through the entire NHPA Section 106 process. *See*

36 C.F.R. §§ 800.2, 800.4(a)(4), 800.4(d)(2), 800.5(a), 800.5(d)(2), 800.6.

293. Interior never consulted with the Muscogee (Creek) Nation regarding the excavation or construction of a casino resort on the Hickory Ground Site, or the reburial of the human remains and associated funerary objects, in violation of the aforementioned provisions and its trust responsibilities to the Muscogee (Creek) Nation.

294. The Federal Defendants and Poarch also failed to invite the Advisory Council on Historic Preservation to participate in the Section 106 process regarding Poarch's planned activities prior to those activities being undertaken, as required by the NHPA.

295. Poarch did not consult with the Muscogee (Creek) Nation prior to authorizing the phase III excavation; actively avoided consulting with the Muscogee (Creek) Nation regarding the reburial of the human remains and associated funerary objects; and did not meaningfully consult with the Muscogee (Creek) Nation regarding the construction of the casino resort, as Poarch made no adjustments to its plans in response to the adverse effects the construction would clearly have on the Hickory Ground Site.

296. The National Park Service has never consulted with the Muscogee (Creek) Nation regarding the continued delegation to Poarch of historic preservation responsibilities, despite the continuing threat to Muscogee (Creek) religious and cultural sites caused by the continuing delegation. These failures violate the 54 U.S.C. §§ 302702 & 302706, the NPS Agreement, and the National Park Service's trust responsibilities to the Muscogee (Creek) Nation.

B. Interior And Poarch Failed To Take Into Account The Effect On The Hickory Ground Site Of Allowing Excavation And Construction Of A Casino Resort, And Interior Failed To Take Into Account The Effect On The Hickory Ground Site Of Delegating Historic Preservation Responsibilities To Poarch.

297. The NHPA requires Interior to "take into account the effect of [any] undertaking" on any National Register-listed site, in consultation with all tribes that "attach[] religious and

cultural significance” to the site. 54 U.S.C. § 306108; *see also* 36 C.F.R. § 800.5.

298. Poarch is required to do the same under the NPS Agreement.

299. The Bureau of Indian Affairs did not take into account, or consult with the Muscogee (Creek) Nation regarding, the effect of approving/licensing Poarch’s excavation of the Hickory Ground Site before granting permits for the excavation, and did not take into account the effect of Poarch’s construction of a casino resort over the Hickory Ground Site before approving the gaming operation at the Site.

300. Poarch likewise did not take into account, or consult with the Muscogee (Creek) Nation regarding, the effect of Poarch’s excavation of cultural resources and construction of a casino resort over the Hickory Ground Site.

301. The National Park Service failed to take into account the effect of delegating preservation responsibilities to Poarch on the Hickory Ground Site before executing such delegation, and has failed to take into account the effect of *continuing* to delegate such responsibilities after Poarch failed to comply with the NPS Agreement and other applicable law.

302. The National Park Service further violated the NPS Agreement and the NHPA by failing to perform the required reviews of Poarch’s performance under the Agreement and by failing to perform required reviews of the threats to the Hickory Ground Site. *See* NPS Agreement Section 14; 54 U.S.C. §§ 302108.

303. Had the National Park Service timely performed evaluations of Poarch’s compliance with the NPS Agreement, it would have “determine[d] that a major aspect of [the tribal] program is not consistent with” the NHPA, obligating the Secretary to “disapprove the program and suspend in whole or in part any contracts or cooperative agreements ... until the program is consistent with [the NHPA].” 54 U.S.C. § 302302; *see also* NPS Agreement § 15.

C. Interior and Poarch Failed To Seek Ways To Avoid, Minimize, Or Mitigate The Harm To The Hickory Ground Site.

304. 36 C.F.R. § 800.6 required Interior and Poarch (through the NPS Agreement) “to seek ways to avoid, minimize, or mitigate the adverse effects” of the casino project on the Site through, in part, (1) consulting with the Muscogee (Creek) Nation and (2) inviting the Advisory Council on Historic Preservation to participate in the Section 106 process.

305. The excavation of, and construction of a casino resort at, the Hickory Ground Site and the reburial of excavated human remains and associated funerary objects had numerous foreseeable adverse effects, including but not limited to violations of the Muscogee (Creek) religion, physical destruction and desecration of part of a Muscogee (Creek) sacred site; a change of the character of the property’s use or of physical features within the Site’s setting that contribute to its historic significance; and introduction of visual, atmospheric, and audible elements that diminish the integrity of the Site’s significant historic features. 36 C.F.R. § 800.5(a).

306. Neither Poarch nor Interior sought ways to avoid, minimize, or mitigate the adverse effects to the Hickory Ground Site prior to commencement of:

- a. The phase III excavation;
- b. The reburial of human remains and associated funerary objects; or
- c. The construction on the Site.

307. No memorandum of agreement was executed or implemented with respect to the Hickory Ground Site. 36 C.F.R. § 800.6.

308. Even if it were legal to excavate the Hickory Ground Site without the consent of the Muscogee (Creek) Nation (it is not), the Poarch Council Defendants’, PCI Gaming Authority Board Defendants’, and Martin Construction’s decision to proceed with the casino project without first completing the required historic preservation review process foreclosed options that would

provide greater—and crucial—protection to burials and the Site, including a no-build alternative and alternative locations.

309. To the extent that Federal Defendants have concluded that any effects of the phase III excavation, construction, or reburial would be acceptable or adequately mitigated, such conclusion represents a final agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and thus a violation of the NHPA and the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

D. Poarch Violated Its Historic Preservation Responsibilities Under the NPS Agreement.

310. Poarch’s failure to notify and consult with Plaintiffs or take into account Plaintiffs’ views on its planned actions that would affect the traditional lands (i.e., the Hickory Ground Site) of the Muscogee (Creek) Nation violated Poarch’s responsibilities under Section 7 of the NPS Agreement.

311. Poarch’s failure to follow Section 106 of the NHPA in accordance with the regulations codified at 36 C.F.R. § 800, including its failure to consult with the appropriate federal agencies in accordance with Section 106, violated Poarch’s responsibilities under Sections 1(G) and 5 of the NPS Agreement.

E. Poarch’s And The Federal Defendants’ Violation Of Their Historic Preservation Responsibilities Has Caused Serious, Irreparable, And Ongoing Harm to Plaintiffs.

312. Had the Federal Defendants or Poarch timely consulted the Muscogee (Creek) Nation regarding the planned activities at the Hickory Ground Site, destruction of a holy site of cultural and religious significance to the Nation could have been avoided, or, even if the activities had continued, Plaintiffs could have in the very least instructed the Federal Defendants and Poarch regarding how to treat the cultural items excavated at the site to avoid further mistreatment of the items in violation of the law and the Muscogee (Creek) religion.

313. Had the Federal Defendants and Poarch timely involved the Advisory Council on Historic Preservation prior to excavation and construction of a casino resort over the Hickory Ground Site, the Advisory Council would have alerted the Federal Defendants and Poarch of the dire effects of the planned undertaking on Hickory Ground and the necessity of consulting with the Muscogee (Creek) Nation.

314. When the Advisory Council on Historic Preservation was finally notified of Poarch's excavation activities in 2006, it opined that the actions undertaken by Poarch had "adversely affected the National Register-listed property," and that "the archaeological surveys and data recovery were not carried out in compliance with Section 106 of the NHPA." Letter from ACHP to National Indian Gaming Commission NEPA Compliance Officer, p. 1 (Nov. 14, 2006), attached hereto as Exhibit Q.

315. The Advisory Council concluded that Section 106 had been violated because "there was no Federal agency review of the archaeological investigations carried out by the Poarch Band ... [and] no consultation with any other Indian tribe, particularly the Muscogee Creek Nation. The initial notification of the ACHP (see 36 CFR 800.6(a)(1)) did not occur until after the destruction of the site. Furthermore, there is no indication that the public has been notified about the nature of the undertaking and its effects on historic properties (36 CFR 800.3(e))." *Id.* at 2. "Since the Section 106 process must be initiated by a Federal agency *prior to* the initiation of project activities, it is unclear why the applicant, a tribe with a tribal historic preservation office approved by the National Park Service pursuant to Section 101(d)(2) of the NHPA, proceeded with project planning and archaeological investigations." *Id.* at 1 (emphasis added).

F. The National Park Service Has Illegally Continued To Award Federal Preservation Funds to Poarch.

316. Section 110(k) of the NHPA prohibits a Federal agency from granting "assistance

to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur.” 36 C.F.R. § 800.9.

317. Poarch “intentionally significantly adversely” affected the Hickory Ground Site, over which it was delegated federal historic preservation responsibilities, with intent to avoid the requirements of Section 106, and had the legal power to prevent such adverse effects but instead allowed the adverse effects to occur.

318. Interior has continued to award federal preservation grants to Poarch in violation of Section 110(k) of the NHPA. *See, e.g.*, 2019 Preservation Grant Announcement, *available at* https://www.nps.gov/orgs/1207/shpo_thpo_2019.htm (awarding Poarch \$55,000); 2018 Preservation Grant Announcement, *available at* <https://www.doi.gov/pressreleases/interior-and-national-park-service-announce-more-60-million-historic-preservation> (awarding Poarch over \$56,000); 2011 Preservation Grant Announcement, *available at* https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc014222.pdf (awarding Poarch over \$30,000).

319. This Court should order that the Federal Officer Defendants terminate their delegation of historic preservation authority to Poarch and to cease awarding any historic preservation grants to Poarch.

320. This Court should issue an injunction requiring the Poarch Council Defendants, PCI Gaming Authority Board Defendants, Poarch THPO, and the Federal Officer Defendants to comply with the NHPA and consult with the Muscogee (Creek) Nation to avoid or mitigate further adverse effects to the Hickory Ground Site during restoration of the Site in accordance with the requested relief in this Complaint.

COUNT XI: VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT

321. Plaintiffs re-allege, as if fully set forth herein, the allegations contained in the preceding Paragraphs.

322. The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, was enacted in 1993 and requires that federal governmental action that substantially burdens a tribe's religious practice or exercise must promote a compelling interest (rather than simply having a rational basis). Its protections encompass tribal religious beliefs. *See* American Indian Religious Freedom Act, 42 U.S.C. §§ 1996, *et seq.*

323. Hickory Ground is a significant and sacred place to the Muscogee (Creek) Nation, Hickory Ground Tribal Town, and Mekko George Thompson. Hickory Ground is a sacred site unique to the Plaintiffs and the religious significance of it and the activities that occur there cannot be replicated elsewhere.

324. Hickory Ground also is a significant and sacred place to Plaintiffs because the remains of their ancestors were ceremonially buried there. The ceremonial ground located there is regarded as a sacred place for prayer.

325. Under Plaintiffs' religion, they owe a moral and religious duty to their ancestors to care for the graves and bodies of the deceased. Living tribal members—descendants of the deceased—will fail in that duty if they are not permitted to complete required religious protocol and return the bodies of their ancestors, along with their funerary objects, to their intended final resting places. Government action that does not allow them to fulfill this duty forces them to choose between either abandoning their religious beliefs or facing civil or criminal sanctions for fulfilling their religious duty to their ancestors. Indeed, when Muscogee (Creek) citizens and Hickory Ground Tribal Town members tried to comply with their religious duties at the Hickory Ground Site in 2013, they were arrested and charged with crimes. *See, e.g.,* Casey Toner, *Ancient*

Indian burial ground dispute at Wind Creek Casino set for Wednesday trial, AL.com, Jan. 14, 2015, available at https://www.al.com/news/2015/01/poarch_creek_muscogee_wind_cre.html.

326. Under Plaintiffs' religion, their ancestors are not and will not be at peace unless properly buried in accordance with Plaintiffs' traditional religious protocol.

327. Under Plaintiffs' religion, the ceremonial grounds cannot be entered or altered without prior authorization and cleansing rituals. Poarch has allowed, and continues to allow, access to the ceremonial grounds by unauthorized persons who desecrate the ceremonial grounds by not following these rituals and by altering the grounds in violation of Plaintiffs' religion.

328. It is sacrilegious in the Muscogee (Creek) traditional religion to have alcohol anywhere near ceremonial grounds. In violation of this belief, the casino serves alcohol at all times the casino is open, in close proximity to the ceremonial grounds. Indeed, the front page of the Wind Creek Wetumpka site prominently features alcohol:



Wind Creek Wetumpka site, <https://windcreekwetumpka.com/> (last visited May 22, 2019).

329. Excavation and construction of the casino, buildings, parking lots, and other facilities at Hickory Ground, and Poarch's and the Federal Defendants' exclusion of Plaintiffs during the handling, treatment, and reburial of their ancestors' remains and funerary objects, substantially burden Plaintiffs' exercise of their religious practices because these actions have, and will continue to:

- a. Prevent Plaintiffs from fulfilling their ongoing religious obligations to their ancestors to ensure that their deceased family members' bodies are left at peace in their original resting places and treated with respect and the proper religious protocol;
- b. Actively desecrate the ceremonial grounds site and the bodies buried there by leaving them where (1) persons unqualified and unauthorized to bury the bodies failed to observe the required protocol and thus left the bodies perpetually disturbed; and (2) prohibited substances and practices (such as the proximity of alcohol, intoxicated patrons, and entrance into the ceremonial grounds by unauthorized persons who have not performed the required rituals) continue to desecrate the ceremonial grounds;
- c. Desecrate and damage a hallowed ground for practitioners of Muscogee (Creek) traditional religion.

330. The above-listed actions will prevent Plaintiffs—absent acts of civil or criminal disobedience—from exercising their religious obligations to their ancestors unless and until the bodies and their associated funerary objects are placed back into their final resting places following the proper religious protocol and the active desecration of the ceremonial grounds ceases.

331. No compelling government interest makes destruction of the Hickory Ground Site or continued operation of a third casino resort for Poarch necessary. The public interest, as expressed in NAGPRA, ARPA, the NHPA, the ARPA permit conditions, the NPS Agreement, is to *preserve* sites of historic, cultural, and religious importance, with paramount importance placed on consultation with affected tribes. Especially here, where Poarch's own promises to the Muscogee (Creek) Nation, the federal government and the public at large indicated that Poarch and the federal government *knew* the religious and cultural importance of Hickory Ground to Plaintiffs and indicated that Poarch had no plans to *ever* build a commercial development on the Hickory Ground Site (and instead acquired the Site to *prevent* this), there is no indicia that there is any public interest in having a commercial development at the Site.

332. The federal government has at its disposal other, less restrictive means to serve any compelling interest it has while permitting Plaintiffs' to fulfill their religious duties.

333. The Federal Defendants and Poarch have substantially burdened Plaintiffs' religious freedoms by preventing them from fulfilling their religious duties to their ancestors and by illegally allowing excavation and construction of a casino resort over a large portion of a sacred site of critical religious importance to the Plaintiffs.

334. This Court should order that the Federal Officer Defendants, Poarch Council Defendants, PCI Gaming Authority Board Defendants, and the Poarch THPO cease preventing Plaintiffs from fulfilling their religious obligations. Specifically, this Court should order that the Poarch Council Defendants, PCI Gaming Authority Board Defendants, and the Poarch THPO cause the Hickory Ground Site to be restored, to the greatest extent possible, to the condition it was in prior to the phase III excavation, construction, and reburial, and that the Federal Officer Defendants and Auburn take the necessary actions to facilitate this process.

PRAYER FOR RELIEF

WHEREFORE, incorporating, restating, and re-alleging all preceding Paragraphs, the Plaintiffs respectfully request that this Court:

- (a) Enter a judgment declaring that Interior lacked authority to take the Hickory Ground Site into trust for Poarch, and an order in the nature of mandamus requiring that Secretary Bernhardt take the Hickory Ground Site out of trust;
- (b) If this Court enters the judgment and order described in Paragraph (a):
 - i. Enter a judgment declaring that Poarch should be held to its promises to perpetually preserve the Hickory Ground Site under the Alabama common law doctrines of unjust enrichment and promissory estoppel;
 - ii. Enter an order imposing a remedy of constructive trust over the Hickory Ground Site as relief for Poarch's breach of its promises to the Muscogee (Creek) Nation;
 - iii. Enter a judgment declaring that the Individual Defendants' and Martin Construction's actions constituted outrage, and an order awarding appropriate monetary damages to Mekko Thompson;
 - iv. Enter a judgment declaring that Poarch violated the NHPA and the NPS Agreement;
 - v. Enter an order in the nature of mandamus requiring Poarch Council Defendants, PCI Gaming Authority Board Defendants, and the Poarch THPO to abide by the NHPA with respect to the Hickory Ground Site;
 - vi. Enter an order in the nature of mandamus requiring that Federal Officer Defendants comply with the NHPA by terminating any delegations of historic preservation authority to Poarch and ceasing awarding federal

preservation grants to Poarch.

(c) In the alternative, if this Court does not enter the judgment and order described in Paragraph (a), it should:

- i. Enter a judgment declaring that Poarch should be held to its promises to perpetually preserve the Hickory Ground Site under the federal common law doctrines of unjust enrichment and promissory estoppel;
- ii. Enter an order in the nature of mandamus requiring Poarch Council Defendants, PCI Gaming Authority Board Defendants, and the Poarch THPO to cause the Hickory Ground Site to be protected perpetually in accordance with its promises to the Muscogee (Creek) Nation, including through restoration of the property, to the greatest extent possible, to its pre-excavation and pre-construction condition, and requiring the Federal Officer Defendants to take any necessary actions to implement these remedies;
- iii. Enter a judgment declaring that Poarch Council Defendants, PCI Gaming Authority Board Defendants, the Poarch THPO, and the Federal Defendants violated NAGPRA, ARPA, the NHPA, RFRA, and the NPS Agreement; and that, with respect to Federal Defendants and Poarch representatives acting as federal officers under the NPS Agreement, their actions violated the Administrative Procedures Act;
- iv. Enter an order in the nature of mandamus requiring Poarch Council Defendants, PCI Gaming Authority Board Defendants, the Poarch THPO, and the Federal Officer Defendants to abide by NAGPRA, ARPA, the

NHPA, RFRA, and the NPS Agreement in the future with respect to the Hickory Ground Site;

- v. Enter an order in the nature of mandamus requiring that Federal Officer Defendants comply with the NHPA by terminating any delegations of historic preservation authority to Poarch and ceasing awarding federal preservation grants to Poarch;
- vi. Enter a judgment declaring that Martin Construction violated NAGPRA's provisions regarding inadvertent discovery of cultural items, and an order awarding such relief against Martin Construction as may be appropriate given its violations of NAGPRA and its continuation of construction despite Plaintiffs' lawsuit.

(d) Whether or not the Court enters an order and judgment consistent with that described in Paragraphs (b) or (c) above, the Court should also:

- i. issue a Permanent Injunction enjoining Poarch Council Defendants, PCI Gaming Authority Board Defendants, the Poarch THPO, and the Federal Officer Defendants from substantially burdening Plaintiffs' religious exercise by undertaking or providing assistance for any further ground disturbing, clearing, grading, leveling, or construction activity at the Hickory Ground Site, except that required to comply with (ii) below;
- ii. Issue a Permanent Injunction ordering the Poarch Council Defendants, PCI Gaming Authority Board Defendants, and the Poarch THPO to cause the Hickory Ground Site to be returned to the condition it was in prior to construction of the casino resort and the phase III excavation, including

returning the excavated cultural items to their original burial locations; requiring Poarch to consult with and involve the Plaintiffs before, during, and after this process to ensure the proper processes are followed; and requiring the Federal Officer Defendants and Auburn to fully cooperate to facilitate this process, including making the necessary approvals, returning any human remains and associated funerary objects to Mekko Thompson, returning any other cultural items to the Muscogee (Creek) Nation for reburial in accordance with the Muscogee (Creek) culture and religious protocols, and completing the archaeological report regarding the phase III excavation;

- iii. Order all Defendants except Auburn to pay for Plaintiffs' reasonable attorney's fees and costs for prosecuting this action;
- iv. Permit amendment of the pleadings pursuant to Fed. R. Civ. P. 15(b) and 54; and
- v. Order such further relief as allowed under Fed. R. Civ. P. 54(c) and as this Court may deem just and equitable.

DATED this 5th day of June, 2019.

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EXHIBITS TO SECOND AMENDED COMPLAINT

<u>Exhibit No.</u>	<u>Description</u>
A.	<u>Poarch Application for Historic Preservation Grant Re U.S. Department of Interior (Feb. 1980)</u>
B.	<u>Letter from W. Perry, Sonosky Chambers, to K. Zebell, NIGC (June 3, 2005)</u>
C.	<u>Letter from Bernhardt, Interior Solicitor, to Hogen, Chairman of the National Indian Gaming Commission (June 13, 2008)</u>
D.	<u>Letter from NIGC Acting General Counsel to Bernhardt (July 30, 2008)</u>
E.	<u>Perdido Band Memorandum In Support Of Motion To Intervene (1951)</u>
F.	<u>Motion To Change Record Name Of One of Movants for Leave to Intervene (8/29/1951)</u>
G.	<u>Creek Nation East of the Mississippi's Appellate Brief re Intervention in Muscogee (Creek) Nation ICC Case (11/6/1951)</u>
H.	<u>US Appellate Brief Opposing Creek Nation E. of the Mississippi's Intervention in Muscogee (Creek) Nation ICC Case (Jan. 1952)</u>
I.	<u>The National Park Service's June 10, 1999 Agreement with Poarch (the "NPS Agreement")</u>
J.	<u>Poarch Field Methodology Policy (April 1999)</u>
K.	<u>Letter from Buford Rolin to Mekko George Thompson (April 4, 2012)</u>
L.	<u>Letter from Principal Chief George Tiger to Buford Rolin (April 13, 2012)</u>
M.	<u>Letter from Buford Rolin to George Tiger and Mekko Thompson (April 17, 2012)</u>
N.	<u>Letter from Buford Rolin to Mekko Thompson and Second Chief Alfred Berryhill (Nov. 8, 2010)</u>
O.	<u>Poarch Press Release (Oct. 31, 2012)</u>
P.	<u>Poarch Tribal Leader Letter and "Fact Sheet" (2013)</u>
Q.	<u>Letter from ACHP to National Indian Gaming Commission NEPA Compliance Officer (Nov. 14, 2006)</u>

EXHIBIT A

Feb 12, 1980

TO: F. Lawrence Oaks
Executive Director
Alabama Historical Commission
725 Monroe St.
Montgomery, Alabama 36130

FROM: Creek Nation East of the Mississippi Inc.
Poarch Band of Creeks
Route 3, Box 243-A
Atmore, Alabama 36502

Re: U. S. Department of Interior (HCRS) letter 712

Dear Sir;

Application is hereby made for funds from the Historic Preservation Discretionary Fund Grant-in-Aid program. This application should be considered under Category #1 as the proposed undertaking both assists in preserving part of a historic district of Native Americans and results in the direct participation of Native American Groups.

Hickory Ground (1-Ee-89) is of major importance in the history of the Muscogee (Creek) Nation. It has supplied many of the important leaders in Creek history. One of particular note was Alexander McGillvray.

"O-Che-au-po-fau"; from the Muskogean "Oche-ub", a hickory tree, and "po-fau", in or among, called by the traders "Hickory Ground" (Owen 1921:1088). Hickory Ground was located on the east bank of the Coosa River, south of the present-day Wetumpka approximately two miles above the French Fort Toulouse (Pickett 1962:229, 343, 357; Owen 1921:1088; Hemperly 1969:224; Brewer 1955:25; Swanton 1952:162).

Hickory Ground was an Upper Creek town and by tradition was originally inhabited by the Coosa or Abihkas (Corkran 1967:307; Owen 1921:1088; Swanton 1922:242). It was here that Lachland McGillvray married Sehoy Marchand in 1745, and established a trading house (Brewer 1955:15; Debo 1967:38; Swanton 1922:242). Lachland and Sehoy were the parents of Alexander McGillvray an important Creek leader having special trade relationships with the Panton Leslie and Company trading house in Pensacola.

With the French established at Ft. Toulouse McGillvray's residence at Hickory Ground was the center of Spanish, French, British and American intrigue. Don Pedro Olivier, a frenchman in the Spanish Service, spent many months at Hickory Ground (Debo 1967:52; Pickett 1962:413). Hickory Ground was loyal to the British during the revolutionary war, and was a place of refuge for many loyalists (Brewer 1955:25-26; Corkran 1967:307-308). President Washington sent Col. Willett to Hickory Ground to encourage Alexander McGillvray to come to the capitol at New York for treaty negotiations (Brewer 1955:27; Pound 1951:58). Hickory Ground was visited by Benjamin

Hawkins, the first American agent to the Creeks, many times (Pound 1951:111; Hemperly 1969:224; Owen 1921:1088; Swanton 1952:154).

During the Creek War of 1813-1814, Otchiapofa was listed as a hostile Creek town, and was visited by Tecumseh. Here he was able to enlist more followers (Halbert and Ball 1969:68,79,99-100; Pickett 1962:511). As a hostile Creek town Hickory Ground was not un-noticed by Andrew Jackson. The Jackson Trace was opened primarily so Jackson could move his army to Hickory Ground (Brewer 1955:15; Pickett 1962:592).

From the above it is apparent that Hickory Ground was involved in nearly all the major historic events in the southeast before the removal of Creeks from Alabama in 1836. With the proper techniques and data recovery methods Creek involvement in these events can be studied. More importantly the effects of these activities upon the Creek Nation can be understood. Hickory Ground has the potential of measuring changes in the political, social, and economic structures of the Creek people in pre-removal times.

As outlined by the Secretary of the Interior this project is designed to meet the general and specific standards for acquisition as applies to this particular site.

THE USE OF THE LAND

Acquisition of the property is principally a protection measure. Acquisition will prevent development on the property. All historic structures on the site have been destroyed. What is left consists of below surface remains. Through proper archaeological methods and techniques these below surface features can reveal a tremendous amount of information about the Creek way of life in the late 1700's and early 1800's. Upon gaining fee-simple title to the land as called for in this proposal plans will be developed to minimize continued destruction of the archaeological resources. Prior to any type of development of the property a scientifically sound archaeological program will be conducted to mitigate or minimize effects upon the historic resources.

The property will serve as a valuable resource for cultural enrichment of Creek people. The site can serve as a place where classes of Creek culture may be held. The Creek people in Oklahoma pride in heritage and ties to original homeland can only be enhanced. There is still an existing Hickory Ground tribal town in Oklahoma. They will be pleased to know their home in Alabama is being preserved. The site may serve as an open air classroom where Creek youth can learn of their heritage. Interpretive programs can be developed around the vast array of history connected with Hickory Ground. The Creek Nation East of the Mississippi, Inc. (Poarch Band of Creeks) has already conducted CETA sponsored training in archaeological methods for Creek youth. The Hickory Ground site will continue to enhance their understanding of their history, without excavation.

SPECIFIC STANDARDS OF PROTECTION

For most cases land in the hands of Realtors and developers is viewed from the prospective of income producing property. At this location in order to have

a commercial development the land will have to be cleared and leveled. In order to halt the destruction planned for the site and insure against future destruction, funds for acquisition of fee simple title are requested.

As the landowner is very much interested in developing the property for commercial purposes it is felt acquisition of fee simple title is necessary to prevent destruction of the site. The land was scheduled for commercial development. Plans for development called for construction of Recreation facilities and multi-family dwellings.

To the immediate east of the property is existing commercial property. These commercial properties include a Hardees and local restaurant. To the immediate south adjoining the land of the site, a contract has been entered into with an option to be agreed upon between Aeronov Corporation and the landowner, Mr. W. D. DeBardleben. This agreement is based upon Aeronov's plans for construction of a Kmart store upon the property.

Mr. Gary Skaret and the landowner have plans for constructing apartments for low-income and handicapped persons upon the land to the immediate west of the proposed Kmart and to the immediate south of the Hickory Ground site.

From the forgoing it is evident that the surrounding area, and indeed the land, the site itself, is prime development land and may very well be bulldozed and cleared soon.

The property is in the process of being nominated to the National Register of Historic Places. The Alabama State Historic Preservation Officer has determined the property eligible and the required forms are now being processed by the Keeper of the National Register.

Project does conform to Secretary of Interior Standard for Historic preservation projects. Specific end products of the project is to provide protection for a particularly important site in Creek History, while providing a foundation for innovative educational programs. Hickory Grounds may also be a place where Creeks from Oklahoma may return and visit their ancestral home.

Upon approval of the proposal the site will be maintained almost entirely by minority groups. One half the appraised value will be donated to Creek Nation Foundation, Inc. in Oklahoma. The grants-in-aid proposal is designed to be awarded to Creek Nation East of the Mississippi, Inc. (Poarch Band of Creeks). Both are Native American groups. The Creek Nation Foundation, Inc. represents western Creeks that were removed to Oklahoma from Alabama. While Creek Nation East of the Mississippi, Inc. (Poarch Band of Creeks) represents a group of Creeks that were excluded from removal and remained in Alabama in the Mobile Region.

Under this plan the property will be jointly owned by both groups of Creeks. They will be equally responsible for the protection and care of the site. This is an opportunity for the Creek people to enter into cultural resource management by guarding and preserving a site directly connected with their culture history.

The significant aspect of this project is the protection by acquisition of a historic Creek site by Creeks. Archaeological resources, directly related to Native Americans have for the most part been managed and investigated by non-Native Americans. This is an opportunity for Native Americans to manage their archaeological records. Presently on staff with the Creek Nation East of the Mississippi, Inc. (Poarch Band of Creeks) is Larry D. Haikey who has a Master's degree in Anthropology. Mr. Haikey is well trained and aware of the proper management of archaeological resources. He will act as advisor to the tribal councils on plans for permanent protection of the site.

Time for complete acquisition of the site is not expected to take longer than forty-five days. This time schedule includes time necessary for mailing contracts between Oklahoma and Alabama. Both tribal groups will have adequate time for review by respective lawyers and approval of council meetings.

The Creek Nation East of the Mississippi, Inc. (Poarch Band of Creeks) agrees to the provisions of covenants and letter of agreements. They are also aware of the information needed for an acquisition Project Completion Report. A detailed completion report will be the responsibility of Creek Nation East of the Mississippi, Inc., and will be done by Mr. Haikey as a part of his normal job activities, at no cost to the Heritage Conservation and Recreation Service (HCRS) Project.

Consultant and technical assistance will be in the nature of legal services. The property deed and other agreements will need to be legally sound with respects to the by-laws and intents of the corporations. These legal services will be the responsibilities of the respective tribal groups.

Mr. John Charloe, Attorney for Creek Nation Office of Justice, will handle legal matters for Creek Nation Foundation, Inc. in Oklahoma. Mrs. Hollis Geer, Legal Services Corporation of Alabama, will handle matters for Creek Nation East of the Mississippi, Inc. Technical advice concerning the site as to maintaining its archaeological integrity will be handled by Larry Haikey and other archaeologists with interest in Creek cultural history.

Hickory Ground fits in a historic preservation district which includes the area of Wetumpka, Alabama. There have been numerous maps of Creek sites referenced in historic documents as being located in this area (Swanton 1922; Owen 1921). Swanton (1922) provides numerous maps of Creek Tribal town locations at various times in their history. One, (Appendix A) is partially reproduced for enclosure with this proposal, it shows the location of Hickory Ground as concerns this project and in the time period for which the site has been dated. As is evidenced by the other town locations on the map the area was heavily populated by Creek in the pre-removal period. Some of the other towns have been located and are on record in Alabama archaeological site files. An item of importance concerning Hickory Ground is the immediacy of its near destruction. The others that have been located are not as close to destruction at this time.

A matter of great importance about this project is the involvement of Creek People through their government in the management and protection of their

archaeological resources. It can be safely said that anthropology and archaeology have had a bad name among Native American groups. This has stemmed from the archaeologists being more concerned in the research potential of the sites rather than the significance as they relate to Native Americans. The excavation and research has been carried out without very much returned to the Indian community, causing Native Americans to distrust the motives of archaeologists.

The Creek Nation is attempting to take an active role in management of their cultural resources. In the winter of 1978 and 1979 the Creek Nation East of the Mississippi cooperated with the University of Alabama in Birmingham on an archaeological excavation to test an area of burial remains. Attention was called to the site after treasure hunters removed a couple of burials.

In the summer of 1979 the Creek Nation East of the Mississippi conducted a CETA Title VI training program in archeology. The main emphasis of this program was to train young Creek people in the proper techniques of archaeology. It was hoped that some of these young people would continue into the field and help preserve Creek archaeological resources.

Destruction of archaeological resources in Alabama adversely effects the profession of Archaeology, while destroying the cultural history of Creek people. There is an increased recognition in the field of archaeology of the need for Native Americans and archaeologists to work together in the cultural resource management area (Lipe 1977:22-23; Schiffer and Gumerman 1977:586). Creek People feel that this proposed project would do a great deal toward bridging the communication gap between archaeology and Native Americans.

Enclosed appendix contains information documenting the two Creek groups as legal entities:

- Appendix A Map of towns of the Creek confederacy, 1818
- Appendix B Organizational chart of Creek Nation East of the Mississippi and list of Tribal Council
- Appendix C Articles of Incorporation of Creek Nation East of the Mississippi
- Appendix D Constitution of the Muscogee (Creek) Nation in Oklahoma
- Appendix E Minutes of Creek Nation East of the Mississippi, Inc., (PBC) tribal council meeting giving approval to apply for HCRS grant
- Appendix F Certificate of Assurances & Certifications
- Appendix G Budget

EXHIBIT B

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Re: Poarch Band of Creek Indians – Tallapoosa Site

Dear Ms. Zebell:

In connection with our request for a restored lands determination for the Tallapoosa Site, you have asked that we provide to the NIGC evidence that the federal government took affirmative action, at a time prior to acknowledgment, to terminate its relationship with the Poarch Band of Creek Indians.¹ Your request, which you indicated relates to the issue of whether Poarch Creek is a “restored” tribe under section 20 of IGRA, seemed to focus on the question of whether there was a specific document (or set of documents) in which the federal government expressly “terminated” the Tribe. This letter responds to your request by addressing three points: 1) the proper test for determining whether a tribe is a “restored” tribe under IGRA, 2) the significant

¹ The Tribe’s request to the NIGC was submitted on March 29, 2004. Supplemental submissions, responding to NIGC requests for additional information, were provided to the NIGC on September 3, 2004 and November 2, 2004.

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differences between the circumstances regarding Poarch Creek and those that were involved in the *Karuk* case, and 3) the documentation demonstrating that, based on the totality of the circumstances, Poarch Creek clearly is a “restored” tribe.

I. The proper test for determining whether a tribe lost its federal recognition.

We understood the premise of your request to be that additional documentation of the kind you referenced, if available, could strengthen Poarch Creek’s submission to the NIGC regarding the status of the Tallapoosa Site. While we agree with that proposition, and we provide such documentation along with this letter, we do so in support of our strongly held view that a determination of whether a tribe is “restored” to federal recognition under section 20 of IGRA depends on the totality of the circumstances. While documentation of a federal action expressly disavowing the federal relationship with a tribe can be probative in this regard, that is not the only way to demonstrate that a tribe is “restored.” It is the broadly defined course of dealings by the federal government with regard to a tribe – and not simply whether there is an express disclaimer of a federal-tribal relationship – that controls the determination of whether a tribe lost its federal recognition. No particular written document, and certainly no magic words by the federal government, are necessary. If the government failed, on a continuing basis, to treat the tribe as it treats other recognized tribes – in terms of providing benefits to tribal members based on their membership in the tribe and other factors – the tribe lost its recognition. Such a tribe, when it regains federal recognition (by administrative or congressional action), is a “restored” tribe under section 20 of IGRA.

To the extent your inquiry is intended to suggest a per se rule – to the effect that a tribe could be a “restored” tribe under section 20 of IGRA only if it can provide documents expressing termination of the tribe by the federal government – we respectfully submit that such a rule is not warranted under IGRA. Most fundamentally, the language of section 20 contains no such requirement. To the contrary, section 20 neither speaks in terms of termination, nor mandates that a tribe provide an express statement of any kind from the federal government regarding the loss of the tribe’s recognized status.

Instead, the relevant provision states that gaming is permitted on lands acquired after the effective date of IGRA where those lands are part of the “restoration of lands for

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an Indian tribe that is restored to Federal recognition.” 25 U.S.C. § 2719(b)(1)(B)(iii). As noted in our March 29, 2004 letter to NIGC Chairman Hogen and U.S. Attorney Canary, it is well settled that these terms are to be given their normal meaning. March 29, 2004 letter, at 6-9. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney*, 369 F.3d 960, 965 (6th Cir. 2004). The term “restore” has ordinary, dictionary meanings including: “to give back, return, make restitution, reinstatement, renewal and reestablishment.” *Id.* at 967. The term “federal recognition,” in the context of federal dealings with Indian tribes, means an entity that is eligible for special programs and services, and that enjoys certain privileges and immunities under federal law, by virtue of being an Indian tribe. *See, e.g.*, 25 U.S.C. § 479a-1(a) (“Publication of list of recognized tribes”); 25 U.S.C. § 476(f) (privileges and immunities). So, under section 20 of IGRA, for a tribe to be “restored to federal recognition,” it must meet three requirements – it must have been previously recognized, it must have lost its recognized status, and then it must be returned to recognized status. *See Grand Traverse Band*, 369 F.3d at 967 (a restored tribe is one that has a “history of governmental recognition, withdrawal of recognition, and then reinstatement of recognition”).

The courts have rejected all arguments seeking to limit “restored” tribes to those which lost or regained their recognized status only in particular ways. For example, the courts have soundly rejected the contention that only those tribes that regain their recognized status through an Act of Congress can be “restored” tribes under section 20. *E.g.*, *Grand Traverse Band*, 369 F.3d at 970; *TOMAC v. Norton*, 193 F. Supp. 2d 182, 194 n.8 (D.D.C. 2002). This is so, notwithstanding the fact that section 20 contains a separate provision to enable after-acquired land to be taken into trust as “the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process.” 25 U.S.C. § 2719(b)(1)(B)(ii). Concluding that “nothing in the statute suggests that Congress prohibited such a result,” the courts give full effect to the plain meaning of the restored lands provision, while harmonizing it with the “initial reservation” provision. *E.g.*, *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d at 933. The courts have uniformly been unwilling to put any gloss or construction on the word “restored” that would have the effect of excluding tribes that fit within the normal meaning of the term.

Just as a tribe can regain its recognized status in various ways, so a tribe can lose its recognized status – for purposes of section 20 analysis – by legislative or

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administrative means. In *Grand Traverse*, the State argued that a tribe that claimed to have lost its recognized status through an action of the executive branch could not be a “restored” tribe under section 20, because only Congress has the authority to extinguish the trust relationship. *Grand Traverse Band*, 369 F.3d at 967. In rejecting the State’s argument, the Court stated:

There is no dispute that only Congress had the *legal* right to terminate the Band’s recognition because Congress originally had recognized the Band. But the relevant question is whether a termination nevertheless took place because the executive branch of the government *illegally* acted as if the Band’s recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years.

Id. at 968. Having framed the question to include the possibility that a tribe may lose its recognized status by federal government inaction (that is, by the government’s “refusal to carry out” its obligations to the tribe), the Court further noted that:

A prominent treatise on federal Indian law states that federal recognition of a tribe requires (1) a legal basis for recognition (i.e. Congressional or Executive action) *and* (2) the empirical indicia of recognition, namely, a “continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs.” Cohen, *Handbook of Federal Indian Law* 6 (1982). . . . The implication of Professor Cohen’s two-part test, which we adopt today, is that the empirical acts that are tantamount to the termination of tribal recognition are analytically distinct from the legality of those acts, just as the empirical act of terminating an individual’s employment (e.g., being told to leave the workplace and never to return) is distinct from the legality of that act (e.g., breach of contract).

Id. The Court thereby endorsed the understanding that recognition (and loss of recognition) is based on the totality of the circumstances (“empirical indicia”) – the most

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basic of which is whether the federal government provided services to the tribe. Applying this analysis to the facts of that case, the Court found that:

The State has conceded that “[t]he United States unilaterally ceased to treat the Band as a federally-recognized tribe commencing in 1872, when Secretary of the Interior Columbus Delano improperly severed the government-to-government relationship between the United States and the Band.” In other words, acting through the Secretary of the Interior, the federal government terminated the political relationship with the group, in particular, the provision of services. Because the Department of Interior refused to recognize the Band as a political entity, “the Band experienced increasing poverty, loss of land base and depletion of the resources of its community,” particularly when compared to those tribes that appeared on the Department of Interior’s list of federally recognized tribes. *Grand Traverse Band II*, 198 F. Supp. 2d at 924. Thus, the undisputed facts show that the federal government withdrew the Band’s recognition in 1872 under the second factor of the Cohen test.

Id. at 968-969.

As *Grand Traverse* makes clear, the key to determining whether a tribe is recognized is whether it has a continuing political relationship with the federal government – the best evidence of which is whether the federal government is providing services to the tribe and its members. Likewise, in determining whether a tribe has had its recognition taken away, the fundamental question is whether the political relationship and, “in particular, the provision of services” have ceased. *Id.*

While it is true that in the case of *Grand Traverse*, there was an express repudiation of the government-to-government relationship by the Secretary of the Interior in 1872, that can not properly be viewed as the only circumstance under which tribal recognition can be lost by administrative means. As the Sixth Circuit framed it, the question in *Grand Traverse* was not whether the Secretary had expressly disclaimed the tribe’s recognized status, but was instead whether the executive branch had conducted

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itself “as if the Band’s recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years.” *Id.* at 968. As this language underscores, it is the broad course of conduct of the government over time, and not the presence or absence of a particular document stating how the government is viewing the tribe’s status, that is central to the inquiry. Thus, as the Sixth Circuit found, a tribe “which has had its federal recognition terminated by administrative action or inaction, can be restored to federal recognition through the administrative acknowledgment process.” *Id.* at 970 (emphasis supplied). In short, *Grand Traverse* supports the proposition that the way in which the federal government relates to a tribe – whether through actions and express statements or through inaction and neglect – determines whether the tribe has lost its recognized status. What federal officials say in the form of express disclaimers of tribal recognition can be probative in this regard, but it is what the federal government does (or fails to do), and not just what it says, that in the end is determinative.

This principle – that loss of federal recognition can be demonstrated by federal action or inaction – finds further support in the purpose of the restored lands provision. The provision of section 20 concerning restored lands along with the provision regarding initial reservations for acknowledged tribes

appear to be intended to place tribes that are belatedly acknowledged or restored in the same or similar position as tribes recognized by the United States earlier in their history. The statute expressly provides that lands located within or contiguous to the tribe’s reservation on the effective date of the IGRA are exempt from the procedures of § 2719(b). *See* 25 U.S.C. § 2719(a)(1). Tribes which are belatedly recognized or acknowledged, however, have not had the ability to have lands placed in trust by the Secretary for the purpose of establishing or preserving a reservation. As a result, the statute appears to allow belatedly recognized tribes to have lands exempted by way of certain other exceptions.

Grand Traverse Band, 198 F. Supp. 2d at 931. So, the restored lands provision is intended to authorize tribes that have been “belatedly recognized” – and that therefore in the absence of some special provision would not benefit from the IGRA’s general

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application to Indian tribes with Reservations that pre-dated IGRA – to participate reasonably in the economic development benefits of IGRA. That purpose would be undermined if some of the tribes that meet the ordinary definition of “restored” were excluded simply because they lost their recognized status by an unbroken course of federal inaction and neglect, rather than through an express document purporting to terminate the tribe’s federal recognition.

Moreover, it would be unreasonable to ascribe to Congress an intent to make such a distinction in the restored lands provision. This is illustrated by the following example. Assume that there were two tribes. Each tribe entered a treaty with the United States and had a full government-to-government relationship with the federal government into the mid-nineteenth century. Each tribe, from the same date in the mid-nineteenth century, was consistently treated by the federal government as though it was no longer a tribe. Among other things, no services were provided to either tribe from that day forward, for over 150 years. In all respects, except one, the entire course of dealings between each of these tribes and the federal government was essentially the same for over 150 years. The only difference was that one tribe had a letter from the Secretary of the Interior stating that it was no longer recognized as a tribe – while the other Tribe had no such letter. Each Tribe was, in the late twentieth century, recognized through the administrative process under 25 C.F.R. § 83. It strains credulity to suggest that Congress, in enacting section 20 of IGRA, somehow intended that one of these tribes could be a “restored” tribe, while the other could not. There is simply no foundation for ascribing to Congress such an absurd result.

II. NIGC’s lands opinion on the Karuk Tribe arose in very different circumstances than those here.

The governing principle – that loss of federal recognition depends on the totality of the circumstances and can be supported by evidence of both federal action and inaction – is not undermined by the NIGC’s lands ruling on the Karuk Tribe of California. *See* Letter from Penny Coleman, Acting General Counsel, NIGC to Bradley G. Bledsoe Downes, Esq. of Oct. 12, 2004 (hereafter “Karuk Opinion”). Rather, the Karuk Opinion simply suggests that, in the particular circumstances involved there, that tribe did not show that its recognition had been terminated. But the circumstances in Karuk were very different than those here.

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First, while Poarch Creek was recognized through the rigorous Federal Acknowledgment Process under 25 C.F.R. § 83, the same was not true for the Karuk Tribe. Rather, in seeking to establish eligibility as a “restored” tribe under section 20 of IGRA, the Karuk Tribe pointed to a one-page Interior Department memorandum from 1979. *See* Memorandum of the Assistant Secretary for Indian Affairs to the Sacramento Area Director 1 (Jan. 15, 1979), Exhibit 61. That memorandum indicates that based on a staff-level field trip by BIA personnel, “the continued existence of the Karoks [sic] as a federally recognized tribe of Indians has been substantiated.” *Id.* The language of that memorandum – speaking in terms of “revitalization” and “continued existence” – is consistent with the view that the Karuks never lost their recognized status. At a minimum, the language of that 1979 memorandum is ambiguous in this regard and does not provide solid evidence of the Karuk tribe’s prior loss of recognized status.

In contrast, Poarch Creek – although it applied for federal recognition prior to the effective date of the Department’s regulations on federal recognition² – was considered under the Department’s regulations in 25 C.F.R. § 83. As the regulations in effect at the time of Poarch Creek’s recognition make clear, recognition is a “prerequisite to the protection, services and benefits from the Federal Government available to Indian tribes.” 25 C.F.R. § 83.2 (1983), Exhibit 24. Further, by the time Poarch Creek gained recognition pursuant to the regulations, the Department had been publishing, on an annual basis, a list of recognized tribes – and Poarch Creek was not on the list until after its recognition petition was granted. *Compare* Exhibits 4 and 5.³ The Department’s consideration of Poarch was extensive, as reflected in the Summary of Evidence and Technical Reports issued by the Department. *See* Exhibits 25 and 26. Thus, in connection with Poarch Creek’s recognition, the Department’s course of conduct – not listing Poarch Creek on its list of all recognized tribes, allocating substantial resources to apply the part 83 regulations, and determining that Poarch Creek met the standards for recognition – all reflect action by the Department that only makes sense if Poarch Creek had previously lost its recognized status. Unlike the situation in Karuk, the Department took actions with

² The effective date was October 2, 1978. *See* Exhibit 62.

³ At the time of the Department’s “Revitalization” memo on Karuk, Exhibit 61, the Interior Department’s practice of officially listing tribes was just beginning – so Karuk, unlike Poarch Creek, had no ongoing history of being left off of a list of recognized tribes.

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respect to Poarch Creek which reflect the Department's unambiguous understanding that Poarch Creek had earlier lost its recognized status.

Second, while prior to recognition in 1984 Poarch Creek members received no benefits or services from the federal government, the same was not true for the members of the Karuk Tribe prior to the 1979 "Revitalization" memo. As described below, once the majority of Creek were removed from Alabama in the 1830's and 1840's, the Creek who remained in Alabama were not provided with ongoing federal services that the United States provided to recognized tribes. In contrast, the record before the NIGC reflected that the opposite was true for Karuk, as to which "the United States provided benefits to individual tribal members." Karuk Opinion at 4. Since the provision of federal services and benefits to tribes and their members is among the most significant factors relating to federal recognition, the fact that Karuk received federal benefits and Poarch Creek did not strongly supports the view that Karuk is not controlling (or even persuasive) on the issue of whether Poarch Creek lost its recognized status.

Third, Karuk arose in the unique circumstances of the California Indians – who, from the time gold was discovered in 1848, were dealt with by the federal government harshly and unevenly. With regard to many California tribes, that special history left considerable uncertainty regarding federal recognition. That special history of the California Indians provides a backdrop for the Karuk Opinion, but is not properly part of the analysis of Poarch Creek.

Based on an unusual confluence of circumstances, the record before the NIGC regarding Karuk apparently did not clearly establish whether the Karuk Tribe had ever lost its federal recognition at all. The peculiar history of the California Indians, the preservation over time of federal benefits for the members of the Tribe, and the absence of any formal administrative process regarding recognition all added to the uncertainty in this regard. In that context, the NIGC stated that:

the Tribe provided no evidence of any affirmative action by the United States to terminate the relationship with the tribe. In other words, we have no evidence supporting a conclusion that the United States withdrew its recognition of the Tribe.

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Karuk Opinion at 4. Thus, the Karuk Opinion means that where the record before the NIGC points toward a Tribe having never lost its recognized status, the NIGC needs clear evidence in the other direction to support a finding that the Tribe lost its recognized status and can therefore (if other requirements are met) be deemed a “restored” tribe.

The Karuk Opinion does not suggest that such a finding would have been impossible to make in the Karuk case itself – if the Tribe had provided appropriate evidence that on balance outweighed the evidence that was already in the record (such as continued federal benefits) suggestive of continued, never-terminated federal recognition. Further, Karuk does not suggest that other ways of demonstrating the loss of federal recognition – in addition to evidence of affirmative action by the United States – are not properly part of the analysis. Rather, Karuk simply reinforces the point that where the record is devoid of any clear indication that a tribe lost its federal recognition – and, to the contrary, all factors in the record are consistent with continued federal recognition – such a tribe has not been shown itself to be a “restored” tribe under IGRA. Accordingly, the Karuk Opinion both suggests the need for a factual basis in the determination by the NIGC, and supports the notion that the loss of tribal recognition depends on the totality of the circumstances for that tribe. As we discuss below, Poarch Creek clearly meets this test.

III. Evidence demonstrating that Poarch Creek’s status as a recognized tribe was lost prior to 1984.

As we demonstrate above, the determination of whether a tribe lost its recognized status is a fact-based inquiry, and the facts arising in the Karuk Tribe’s case are far removed from the facts here. Accordingly, in our view the proper analysis here regarding the loss of federal recognition by Poarch Creek turns not on how the NIGC viewed Karuk (or any other tribe), but rather on consideration of the federal course of dealings with Poarch Creek – including both federal action and inaction. Under this standard, the federal government clearly ended its relationship with Poarch Creek following removal, as we show below. In any event, even if a narrower view of the proper inquiry is taken – such that consideration would be limited only to affirmative actions or statements by federal officials indicating an intent to “terminate” relations with the Tribe – Poarch Creek would easily meet that test as well. This is so because the historical record amply demonstrates that the federal government terminated the government-to-government

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relationship with the Creek in Alabama through a broad course of dealings that included express statements by top federal officials disclaiming any federal relationship with the Tribe – and that this termination of federal recognition extended back almost 150 years prior to Poarch Creek regaining federal recognition in 1984.⁴

The 1832 Treaty between the United States and the Creeks underscored the intent of the federal government to end, within a few short years, its relationship with the Creek in Alabama. Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366, Exhibit 3. As the Treaty recited, “[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi, and join their countrymen there” *Id.* at Art. XII. To facilitate this goal of removal of the Creeks from Alabama, the Treaty provided for a cession by the Creeks of all land east of the Mississippi. *Id.* at Art. I. The Treaty also provided various payments for those Creek who removed to Oklahoma – for removal expenses and subsistence expenses for a year, *id.* at Art. XII, for rifles and blankets, *id.* at Art. XIII, and for education and blacksmiths, *id.* Perhaps most tellingly in this regard, the 1832 Treaty expressly provided for permanent federal protection of Creek Tribal lands in Oklahoma:

The Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them.

Id. at Art. XIV.

In contrast, the Creek who stayed in Alabama received no payments for subsistence, rifles, blankets, education or blacksmiths. Moreover, the Treaty provided not for federal protection but rather for the cession of all Creek lands in Alabama, with only

⁴ We note that, despite the federal government’s longstanding treatment of Poarch Creek as not federally recognized, the Tribe maintained its continuous political existence as a Tribe throughout this period as demonstrated and confirmed by the acknowledgment decision the Tribe received in 1984. *See* Exhibits 1 and 25.

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parcels of fee land to be conveyed to principal Chiefs and the heads of families. *Id.* at Art. II. Those fee lands could be conveyed by the Indians. *Id.* at Art. III. Intruders were to be removed from these land selections, but only for five years. *Id.* at Art. V. Nothing in the 1832 Treaty provided any ongoing federal role with respect to the Creek in Alabama, beyond that five-year period.

Further, while the Treaty expressly recognized the right of the Creek in Oklahoma “to govern themselves,” no such recognition appears in the Treaty with respect to the Creek in Alabama. So, under the 1832 Treaty, permanent federal protection and federal acknowledgment of Tribal self-government were promised to the Creek who moved to Oklahoma, but not the Creek who remained in Alabama. In expressly mentioning these rights but only for the Oklahoma Creek, the Treaty clearly suggests the absence of such rights to the Alabama Creek.

Furthermore, to the extent the 1832 Treaty might be viewed as suggesting a vestigial federal role associated with the fee lands conveyed to Creek Indians in Alabama, Congress later expressly disclaimed such a construction of the Treaty. In 1912, Congress enacted a measure releasing all possible federal interest in these lands. The 1912 Act stated:

That the United States of America hereby forever relinquishes, releases, and quitclaims all right, title, and interest in and to all the lands now held under claim or color of title by individual or private ownership or municipal ownership and situated in the State of Alabama which were reserved, retained, or set apart to or for the Creek Tribe or Nation of Indians or any member or members thereof, under and by virtue of the treaties entered into between the United States of America and the Creek Tribe or Nation of Indians on the ninth day of August, eighteen hundred and fourteen, and at Washington on the twenty-fourth day of March, eighteen hundred and thirty-two, by which all the lands of said Creek Tribe or Nation of Indians east of the Mississippi River were ceded to the United States of America

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Act of June 4, 1912, ch. 151, Pub. L. No. 62-177, 37 Stat. 122, Exhibit 63. This Act was intended to remove all doubt about the status of lands that were conveyed under the 1832 Treaty, but as to which, for whatever reason, patents had not issued. *See* H. R. Rep. No. 62-357 (Feb. 26, 1912) (Title to Creek Indian Lands in Alabama), Exhibit 64. The Act negated any notion that the federal government had an ongoing role regarding Creek lands in Alabama arising from the 1832 Treaty.

While the 1832 Treaty was unquestionably an instrument of the federal government's removal policy, it nevertheless stopped short of mandating the immediate removal of all Creek from Alabama. As the Treaty stated, "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." Exhibit 3 at Art. XII. Despite this provision, the federal government in fact soon removed most of the Creek from Alabama by forced, military action. First, the government failed to protect the individual Creek fee lands conveyed under the 1832 Treaty:

Despite its promises to evict intruders, the federal government in fact was unwilling or unable to do so, and the Creek lands were quickly overrun. Moreover, the Indians, unused to handling financial matters, were victimized by speculators, who moved in to gain title to the allotments and force the Indians off the land. The frauds were spectacular and widespread, making a mockery of the treaty intentions, and the government seemed impotent to stem the speculators' chicanery. The commissioner of Indian affairs, on receiving the report of a commission sent to investigate, declared in exasperation in 1838: "It is shocking to reflect on the disclosures elicited. They embrace men of every degree. Persons, heretofore deemed respectable, are implicated in the most disgraceful attempts to defraud those who are incapacitated from protecting their own interests; whose presence, as far from being any interruption to the plundering of themselves, was sometimes sought, as their instrumentality was used to effect their own ruin. This conduct, derogatory to civilized men, was not inaptly termed 'land stealing.'"

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F. Prucha, *The Great Father*, at 222, Exhibit 12. These gross land frauds soon erupted into violence, with the U.S. Army being sent into Alabama against the Creeks to “subdue them, and force their removal to the West.” *Id.* at 223. The Army succeeded in its objective, leading to the harsh removal of most of the remaining Creeks in Alabama:

The subdued Creeks were now removed to the West. Dejected warriors, handcuffed, chained, and guarded by soldiers, left Fort Mitchell on July 2, followed by wagons and ponies carrying the children and old women and the sick . . . [and] embarked at Montgomery and conveyed down the Alabama River to Mobile, thence to New Orleans and up the rivers to the western lands of the Creeks. The remainder of the hostiles left Montgomery on August 2. The friendly Creeks soon followed their brothers west.

Id. Surely any notion that the federal government continued to recognize the Creeks in Alabama was effectively terminated by the military action physically removing the Creeks to Oklahoma. Forced removal is inconsistent with continued federal recognition for those Creek who remained.

This point – that upon completion of removal, the federal government ended its governmental relationship with the Creeks in Alabama – has been reaffirmed by the statements and conduct of the federal officials most responsible for Indian Affairs. For example, this termination of the federal recognition of Poarch Creek is reflected in the Annual Reports of the Commissioner of Indian Affairs.⁵ These Reports summarize, generally on a state-by-state (or territory-by-territory) basis, the activities of the federal government with respect to all recognized tribes. The Reports describe both the manner in which federal Indian policy was implemented, and the general conditions of each recognized tribe, during that year.

⁵ We have examined the Annual Report of the Commissioner of Indian Affairs for each year from 1841 – 1912. The one exception was the 1907 Annual Report which was not available in the library of the Interior Department.

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During the 1840's, the Annual Reports note the diminishing number of Creeks remaining in Alabama, and the imminence of their removal to Oklahoma. *E.g.*, 1845-1846 Annual Report of the Commissioner of Indian Affairs at 1 (“The few remaining Creeks in Alabama . . . , amounting in number to about one hundred and sixty, including slaves, are prepared to remove.”). By 1849, the removal policy regarding the Creek was deemed essentially completed, and the Commissioner reported that, from the next year forward, the federal government would not be responsible for Creek Indians who remained in Alabama:

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 (1849) at 948, Exhibit 65 (emphasis added). This is an explicit statement, from the highest federal official in Indian affairs, disclaiming any further federal role (“all further proceedings and expenses should be terminated”) with respect to the Creek in Alabama.

Subsequent Annual Reports confirm that the 1849 Report accurately depicted the end of federal recognition of the Creek in Alabama. The Annual Reports from 1850 to 1912 (the years we reviewed) all report on the Creek – but only with regard to the Creek

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in Indian territory (Oklahoma). There are no separate reports, in any Annual Report in this period, regarding the Creek in Alabama.⁶ Indeed, after 1871, the Annual Reports contain no mention at all of the Creek in Alabama. There simply could not have been a recognized tribe that escaped the notice of the Commissioner in his comprehensive reports to Congress over such an extended period of time. This unbroken record of no federal involvement for a long period of time – following a clear statement in 1849 indicating that no further federal involvement was to take place – clearly shows that the federal government terminated its relationship with Poarch Creek.

This pattern – federal neglect of Poarch Creek, coupled with express federal disclaimers of any federal relationship with Poarch Creek – was a recurring theme in the Tribe’s history thereafter. For example, in 1906 an attorney named John D. Beck wrote to the President of the United States seeking federal help for the Creek Indians in Alabama. The letter was forwarded to the Office of Indian Affairs. The Acting Commissioner of Indian Affairs responded to Beck’s letter by stating

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

⁶ During this entire period, there were only two instances in which the Annual Reports even mention the Creeks outside of Oklahoma. In one instance, there is a passing reference to the sale of 34 sections of lands of Creek Indians, presumably the fee lands conveyed under the 1832 Treaty. 1856 Annual Report at 19. In one Report, the Commissioner noted “It is reported to me that there are also some indigent Creeks remaining in Alabama, who would like to be again incorporated with their tribe in its western home.” 1871 Annual Report at 576. This reference both suggests that the Commissioner has no direct dealings with the Creek in Alabama (“it is reported to me”), and underscores that the Commissioner views a Creek being “incorporated” in their “Tribe” as being something that could only take place in Oklahoma.

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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 that State and are entitled to no consideration not due to other citizens who may be of white blood.

Letter to John D. Beck from Acting Commissioner of Indian Affairs (Dec. 31, 1906) at 1-2, Exhibit 66 (emphasis added). The Acting Commissioner's point was clear – as of 1906 the federal government recognized no Tribe in Alabama, and the federal relationship with individual Creeks in Alabama was no different than its relationship with non-Indians.

Even during the era of the Indian Reorganization Act – when federal policy overall sought to promote Tribal self-sufficiency and self-government – the federal government continued to refuse requests to help Poarch Creek. In 1931, Reverend Edgar Van W. Edwards, an Episcopal clergyman who was working among the Creek near Atmore, Alabama, wrote to the Commissioner of Indian Affairs stating “I have become interested in a small tribe of Indians located near here, and I want to make an appeal to you and through you to the Indian Bureau to see if something of a permanent nature can be done for them.” Letter to Charles J. Rhoads, Commissioner of Indian Affairs, from Rev. Edgar Van W. Edwards (Sept. 10, 1931), Exhibit 67. Reverend Edwards asked for land for the Creek and for “some reliable person who would act as agent, to protect them.” *Id.* The Assistant Commissioner of Indian Affairs replied that, with regard to Reverend Beck's reference to 200 acres of Creek land in Alabama, “[n]o record has been found of a tribal reserve of 200 acres having been set apart by the Government for these Indians.” Letter to Rev. Edgar Van W. Edwards from Henry J. Scattergood, Assistant Commissioner of Indian Affairs (Sept. 25, 1931), Exhibit 68. Further, since the June 4, 1912 Act, “we [the federal government] have had little or nothing to do with any Creek Indians in Alabama.” *Id.* Scattergood concluded that the federal government is “not in a position to grant the relief requested.” *Id.*

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Despite this clear rebuff, Reverend Edwards continued his efforts to gain federal assistance for the Poarch Creek. On March 19, 1936, Reverend Edwards again wrote, this time to the Bureau of Indian Affairs. In his letter, Reverend Edwards stated “[o]ff and on for nearly six years I have been writing to the Indian Affiars [sic] Depart. To our Senators and others, in behalf of a small group of Indians near here, and it seems impossible to get action.” Letter to Hon. Willard Walcott Beatty from Rev. Edgar Van W. Edwards (March 19, 1936), Exhibit 69. Reverend Edwards again asked whether the Bureau would “help me help these helpless people?” *Id.*

John Collier, the Commissioner of Indian Affairs, responded to Edwards. Although he was a strong advocate for tribal rights and improving tribal social and economic conditions, Collier stated that “[t]here is reason to doubt whether this Office has authority to assume jurisdiction over the affairs of the Indians of Alabama” Letter to Rev. Edgar Van W. Edwards from John Collier, Commissioner of Indian Affairs (April 21, 1936), Exhibit 70. With regard to the Bureau's delay in replying to Reverend Edwards' previous requests, John Collier said:

We assure you of our appreciation of the good work you are doing, and that the delay in replying to your letter is because at present we would have to refuse all help on the basis of information now available. We are withholding a decision in order that all the possibilities may be thoroughly reviewed and we may be sure that our final decision is in accordance with the law and its fairest interpretation.

Id. (emphasis added). While holding out the possibility that someday something could be done, Collier's answer – like that of every other federal official – was no. Federal assistance was not available for Poarch Creek.

Similarly, in 1938, in response to more requests for assistance for Poarch Creek, the BIA's Director of Education, Willard W. Beatty, wrote to Reverend Edwards expressing unwillingness to aid the Indians in Alabama. Letter to Rev. Edwin [sic] Edwards from Willard W. Beatty, Director of Education, Bureau of Indian Affairs (May 27, 1938), Exhibit 71. According to Mr. Beatty:

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rejected on the ground that there was no federally recognized tribe in Alabama. Federal officials uniformly told all those who asked that, as far as the federal government was concerned, there was no Poarch Band of Creeks in Alabama, and that the educational and other needs of the Tribe had to be met through non-federal sources.

This pattern continued until the Tribe gained recognition in 1984. As the Tribe's long-time Chairman, Eddie L. Tullis, notes:

I have been active in the political, social and economic activities of the Tribe since 1964. From 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 the Indian Health Service, and the Tribe received no federal funding to run its own health programs. Further, the Tribe received 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 – further demonstrating the government's understanding that Poarch Creek's recognition had previously been removed and that work was needed to restore the Tribe to recognized status. So, based on my own experience and knowledge of the Tribe's dealings, 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. In fact, 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.

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Supplemental Affidavit of Eddie L. Tullis at ¶ 2 (May 26, 2005), Exhibit 73.

Even a 1975 request by Governor George Wallace urging the federal government to take land into trust for Poarch Creek – for a school – did not spur any action by the federal government:

In 1975, Governor George C. Wallace of Alabama wrote to Morris Thompson, the Commissioner of Indian Affairs of the U.S. Department of the Interior. Governor Wallace stated that Alabama wished to transfer a parcel of land in Escambia County to the Tribe – and specifically requested that the parcel be held in trust for the Tribe by the United States. No action was taken on this request at the time, because the Tribe was not federally recognized. In 1980, Governor Fob James wrote to William E. Hallet, the new Commissioner of Indian Affairs. Governor James addressed the same request to have land taken into trust for the Tribe, stating that “we would like to see them [Poarch Creek] extended Federal recognition and this land [that is, the parcel Governor Wallace offered to transfer in trust for the Tribe] in their possession.” The parcel involved in this correspondence was finally taken into trust – but only after the Tribe gained federal recognition. The parcel is referred to as Parcel 1, and it is the site of a school house and pow-wow grounds. This example regarding the State’s attempt to transfer land in trust to the Tribe – and the federal government’s refusal to accept the land in trust prior to recognition – further demonstrates that during this period the federal government treated the Tribe as an unrecognized tribe.

Id. at ¶ 3.⁷

⁷ See letter to Morris Thompson, Commissioner of Indian Affairs from George C. Wallace, Governor of Alabama (Sept. 15, 1975), Exhibit 74; letter to William E. Hallet, Commissioner of Indian Affairs from Fob James, Governor of Alabama (May 27, 1980), Exhibit 75.

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Conclusion

In sum, long before it recognized the Tribe in 1984, the federal government terminated its relationship with Poarch Creek. The 1832 Treaty promoted removal and provided funds and permanent protection only for those Creek who removed to Oklahoma. Those Creek who remained in Alabama received no promise of an ongoing federal role and, to the contrary, the 1832 Treaty provided for no continuing federal role regarding the Poarch Creek after 5 years. The Treaty's intent to remove the Creek from Alabama was implemented by the U.S. military – an overt action fundamentally at odds with continued federal recognition for Poarch Creek. By 1849, the Commissioner of Indian Affairs had expressly disclaimed any federal responsibility for the Poarch Creek. This was followed by a lack of dealings by the federal government and the absence of federal services for the Tribe and its members for well over a century. During this long time period, whenever they were asked to provide assistance to Poarch Creek, federal officials uniformly declined – on the ground that the federal government recognized no tribe in Alabama. This was true, as the documents referenced here demonstrate, in 1849, 1906, 1931, 1936, 1938, 1975 and 1980.

The totality of these circumstances – federal action, inaction and express statements – convincingly demonstrates that the federal government terminated its relationship with Poarch Creek and that the Tribe remained unrecognized for almost 150 years. Having been federally recognized in Treaty times, having had that recognition removed by the federal government as described here, and having regained it in 1984 through the Federal Acknowledgment Process, Poarch Creek is a “restored” tribe under IGRA. We urge NIGC to so find.

Respectfully submitted,

/s/ William R. Perry
William R. Perry

cc: Eddie L. Tullis, Chairman

EXHIBIT C

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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JUN 13 2008

Honorable Phillip N. Hogen
Chairman, National Indian Gaming Commission
1441 L St., NW
Suite 9100
Washington, DC 20005

Dear Chairman Hogen,

I am writing in regard to your May 19, 2008 letter to former Assistant Secretary – Indian Affairs Carl Artman and Deputy Associate Solicitor, Division of Indian Affairs, Edith Blackwell enclosing your May 19, 2008 Indian lands opinion for the Poarch Band of Creek Indians, which purports to recognize the Band's right to game on the Tallapoosa Site in Alabama. In the letter, you informed Mr. Artman and Ms. Blackwell that you were issuing the Indian lands opinion despite the fact that your Office of General Counsel (OGC) and the Solicitor's Office Division of Indian Affairs (DIA) had not reached agreement on whether the Tallapoosa Site is restored lands and thus covered by an exception to the general prohibition on gaming on lands acquired after October 17, 1988.

On January 14, 2008, the Deputy Associate Solicitor provided your Acting General Counsel with a letter of non-concurrence in the National Indian Gaming Commission's (NIGC's) draft Indian lands opinion. The January 14, 2008 letter provided specific details as to why DIA disagreed with the draft opinion. The non-concurrence focused on the restored tribe analysis. Generally, DIA does not believe that the Poarch Creek Band ever had a government-to-government relationship with the United States until it was acknowledged through the Part 83 process in 1983. The Deputy Associate Solicitor concluded that the record simply does not support the Band's existence as a separate tribal entity with a governmental relationship with the United States, nor does it support that the United States terminated this governmental relationship. The Deputy Associate Solicitor also questioned the Band's relationship with the Creek burial grounds located at the Tallapoosa Site. Your May 19, 2008 opinion does not address any of the concerns raised in our January 14, 2008 letter.

Given that the legal conclusions reached by OGC are inconsistent with the legal views of the Office of the Solicitor, and that, as discussed below, NIGC has no statutory mandate to issue Indian lands opinions independently, the Secretary has directed me to inform you that he is invoking his authority referenced in 43 C.F.R. § 4.5 to review your decision and has asked me to assist him in that review. Accordingly, in accordance with 43 C.F.R. § 4.5(c), please provide me with the administrative record supporting your May 19, 2008

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decision. Pending this review, you may not take any further action to implement your May 19, 2008 decision.

I understand that the matter concerning the Poarch Creek Band first arose in November 2003, when the Assistant Attorney General for the State of Alabama questioned the Band's gaming activities on three parcels. From what I understand, NIGC reviewed two of those parcels and determined that they met the initial reservation exception in 25 U.S.C. § 2719(b)(1)(B)(ii). The third gaming location, the Tallapoosa Site, remained at issue, however, because the land was taken into trust in 1995 and is not within the Band's initial reservation. The Band has continued its gaming operation on the Tallapoosa Site during the pendency of NIGC's review.

While the request from the Assistant Attorney General came to NIGC in November 2003, it was not until January 2006 that the DIA received OGC's first draft of its Poarch Creek Indian lands opinion. Attorneys in DIA expressed their concern with the Poarch draft as early as February 2006. OGC attorneys and DIA attorneys met in May, October, and December 2006 to discuss DIA's concerns with the draft opinion. After the December 12, 2006 meeting, OGC agreed to revise the January 2006 draft opinion. DIA attorneys and OGC attorneys met together with the Tribe on March 13, 2007 to discuss the unresolved issues. On March 26, 2007, the Band's attorneys provided OGC and DIA with their response to the restored lands issues raised at the March 13 meeting. It was not until September 24, 2007 that OGC provided DIA with a revised draft dated July 18, 2007.

After receipt of the July 18, 2007 draft, attorneys in OGC and DIA tried to reach consensus on the legal position. On December 27, 2007, OGC notified DIA that it wanted DIA's response prior to December 31, 2007. On January 3, 2008, the Deputy Associate Solicitor sent OGC a short letter expressing DIA's non-concurrence with the July 18, 2007 draft. On January 7, 2008, you, the Deputy Solicitor, and attorneys from OGC and DIA met via a conference call to discuss the unresolved issues. At that time, OGC requested a detailed written non-concurrence.

On January 14, 2008, the Deputy Associate Solicitor provided a six-page letter that detailed most of the rationale for the non-concurrence to OGC's July 18, 2007 opinion. Since its receipt of the January 14, 2008 letter, OGC has made no efforts to resolve the issues raised by DIA. As previously noted, the May 19, 2008 opinion you signed made no reference to the concerns raised in the January 14, 2008 letter.

Generally, the Office of the Solicitor and the OGC have worked cooperatively on Indian lands opinions since the inception of your Office of General Counsel. In March 2000, the cooperative process was memorialized in a Memorandum of Understanding signed by the Associate Solicitor, DIA and General Counsel, NIGC. In 2006, it became apparent that a new Memorandum of Understanding needed to be negotiated. I signed a Memorandum of Agreement (MOA) on May 31, 2006, for a six-month period. That agreement was renewed in February 2007 for another six-month term. While it expired in August 2007 and has not been renewed, OGC and DIA have both expressed a willingness to continue

to abide by its terms. Inexplicably, the NIGC took no steps after receiving the January 14, 2008 non-concurrence to attempt to follow the MOA's process for resolution of non-concurrence issues. For example, no effort was made to have further discussions with DIA or senior Solicitor's Office officials, including discussions whether to refer the matter to the Office of Legal Counsel, as was expressly provided in the MOA.

Generally, when OGC attempts to draft an Indian lands opinion, it typically writes a broad and wide-ranging opinion that touches on issues not unique to gaming. NIGC Indian lands opinions discuss a tribe's jurisdiction over lands, a tribe's governmental authority, the boundaries of a tribe's reservation, and the history of a tribe. In NIGC's Indian lands opinion regarding the restored land for a restored tribe exception, OGC extensively delves into the history of the tribe's relationship with the United States, especially with the Secretary of the Interior. OGC also looks at the history of the tribe's occupation of certain lands and communications between the Department of the Interior and the tribe. DIA has in the past questioned the need for delving into such issues that are not specific to gaming. While the Solicitor's Office and OGC have reached consensus on all Indian lands opinions prior to the Poarch Creek decision, it has not been without controversy. DIA has on several occasions agreed with NIGC's conclusions but not with its analysis. For the Poarch Creek decision, as the January 14, 2008 letter sets out, my Office did not agree that the Poarch Creek Band is a restored tribe for Indian Gaming Regulatory Act (IGRA) purposes.

As the chief legal officer for the Department of the Interior, it is incumbent on me to ensure that all legal opinions are consistent and sound. Nothing in IGRA changes my role as the principal legal adviser to the Secretary and the chief legal officer of the Department. Congress expressly placed the NIGC "within the Department of the Interior."¹ It is my responsibility to supervise the legal work of the Department.²

What is at issue is only the Poarch Creek Band's Indian lands opinion and the prospective drafting, review, and approval of Indian lands opinions.³ The Department is not seeking to review previously issued NIGC Indian lands opinions through this process. In addition, DIA and OGC worked together to draft language in the 25 C.F.R. Part 292 regulations that provided that the regulations do not apply to final agency actions based on legal opinions issued prior to the effective date of the regulations. Nor is the Department calling into question the overall good work of the NIGC. NIGC's role in the regulation of Indian gaming has been and will continue to be positive and important. The Secretary has no desire to intrude in NIGC's statutory role for the regulation of Indian gaming.

¹ 25 U.S.C. § 2704(a).

² See 109 DM 3.1, 110 DM 2.2, 209 DM 3.

³ My Office defines Indian lands opinions as legal opinions that analyze whether gaming is authorized on particular lands. These include opinions on whether lands meet the definition of Indian lands; whether a tribe is exercising jurisdiction and governmental authority over those lands; whether gaming is authorized under 25 U.S.C. § 2719; and a legal analysis of 25 C.F.R. Part 292.

However, IGRA does not vest all authority for Indian gaming in one entity. IGRA is not an example of a statute that transferred all responsibility out of the Department. The scope and parameters of the NIGC's power are established and limited by the language of IGRA, the NIGC's sole source of statutory authority. In the purpose section of IGRA,⁴ Congress clearly stated its intent to establish the NIGC as a commission to regulate Indian gaming. However, the scope of the power granted to the NIGC is not determined by the ultimate purpose of regulating Indian gaming. Rather, the scope of the NIGC's power is based upon the specific means prescribed by Congress to achieve that ultimate purpose.⁵ IGRA sets out in detail the specific means to be employed by the NIGC to carry out its discrete powers to issue orders of temporary closure of gaming activities, levy and collect civil fines; approve tribal ordinances or resolutions, approve management contracts for Class II and Class III gaming,⁶ and monitor, inspect, and examine Class II gaming activities.⁷

IGRA grants authority over other aspects of Indian gaming to the Secretary, Indian tribes, and the States. Therefore, it is evident from the plain language of IGRA that, although Congress established the NIGC as a commission for the purpose of regulating Indian gaming, it did not grant the NIGC the power to regulate, interpret, or decide all aspects of Indian gaming or matters related to Indian gaming.

As with the NIGC, it is clear that Congress did not grant the Secretary the power to regulate, interpret, or decide all aspects of Indian gaming. The Secretary has limited authority over those aspects of gaming that are assigned by IGRA to the NIGC, Indian tribes, or the States. Unlike the NIGC, the Secretary has authority for Indian gaming matters and matters related to Indian gaming that are not expressly assigned to any entity under IGRA. This authority is based upon statutes other than IGRA that give the Secretary broad authority to manage matters of Indian affairs and implement the laws governing Indians, and specific authority over Indian lands and tribal governments. Thus, the scope of the Secretary's authority is much broader than that of the NIGC and includes many general matters.

The authority of the NIGC is strictly limited to the discrete powers that are expressly assigned to it by Congress in IGRA. While it may interpret the statute and fill gaps with respect to its specific powers, the NIGC has no general authority over the regulation of Indian gaming based on the ultimate purpose of its authorizing statute. By contrast, the scope of the Secretary's authority extends broadly to most matters of Indian affairs and includes implementing many of the laws governing relations with tribes and individual Indians. Moreover, based on longstanding and specific authority under the Indian Reorganization Act and other generally applicable Indian law, the Secretary has the specific authority and subject matter expertise to decide issues concerning Indian lands and tribal jurisdiction. Thus, it is the Secretary, not the NIGC, who has the implicit authority to interpret any ambiguities and fill any gaps in IGRA, particularly with respect

⁴ 25 U.S.C. § 2702(i).

⁵ See *MCI v. AT&T Co.*, 512 U.S. 218, 231 (1994).

⁶ 25 U.S.C. § 2705(a).

⁷ 25 U.S.C. § 2706(b).

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to ambiguities or gaps that concern what constitutes Indian lands and the scope of tribal jurisdiction

Indian lands opinions are by definition legal opinions that analyze whether lands are eligible for gaming. Indian lands opinions include issues such as whether lands meet the definition of Indian lands; whether a tribe is exercising jurisdiction and governmental authority over those lands; whether gaming is authorized under 25 U.S.C. § 2719; and a legal analysis of 25 C.F.R. Part 292. Resolution of these questions has not been delegated to the NIGC. Moreover, resolution of these issues relies on the particular expertise of the Solicitor's Office regarding overall Indian issues and not just Indian gaming concerns.

I am sending a copy of this letter to all parties copied on your May 19, 2008 opinion.

Sincerely,



David L. Bernhardt
Solicitor

cc: Buford L. Rolin, Tribal Chairman
William Perry, Sonosky, Chambers, Sachse, Endreson, & Perry
Cindy Altimus, Region Director
Troy King, Attorney General, State of Alabama

EXHIBIT D



July 30, 2008

David L. Bernhardt, Solicitor
United States Department of the Interior
Office of the Solicitor
Mail Stop 6352
Washington, DC 20240

Dear Mr. Bernhardt:

We received your June 13, 2008 letter that seeks to review the National Indian Gaming Commission (NIGC or Commission) Chairman's decision to continue regulating the Poarch Band of Creek Indians' (Tribe) gaming facility in Tallapoosa, Alabama. You also request a copy of the administrative record on which the Chairman relied. We will provide the record to you as a matter of courtesy under separate cover. I respectfully and categorically reject, however, your assertions that the Secretary of the Interior (Secretary) has the authority to review and approve or disapprove the Chairman's decision. I also strongly disagree with your characterization of the respective authorities of the NIGC and the Secretary under the Indian Gaming Regulatory Act (IGRA).

Background

This matter began when the State of Alabama wrote to the NIGC expressing concern over the eligibility of the Tallapoosa site for gaming. *See* Letter from Jack Park, Assistant Attorney General for the State of Alabama to Penny Coleman, Acting General Counsel (Nov. 20, 2003). The Tribe operates a Class II gaming facility regulated by the NIGC. That regulation includes, among other things, conducting site visits to determine compliance with IGRA, processing fingerprints and reviewing background investigation reports for key employees and primary management officials, accepting fees for regulating, accepting and reviewing audit and agreed upon procedures reports, and providing such technical assistance as may be required.

Upon receipt of the State's inquiry, the Chairman reviewed the Tallapoosa site's status to determine its eligibility for gaming and whether an enforcement action might be necessary. To accomplish this review, NIGC sought records and documentation from the Department of the Interior (Department), particularly focusing on information the Department had relied on to recognize the Tribe and to acquire the Tallapoosa site into trust. Unfortunately, the Department was not able to timely comply with NIGC's record request. Therefore, the Commission's review was delayed. The factual record, which was ultimately compiled by NIGC, was extensive and included the Department's acknowledgement and land-into-trust records; Bureau of Indian Affairs' (BIA) land records; historical records, maps, archaeological reports; and other documentation from the Tribe.

that record reflects a long and difficult history. It established that the Poarch Band was a part of a large confederacy that was the historic Creek Nation, most of which was moved out of what is now the State of Alabama in the first half of the nineteenth century. Before the forced resettlement to the Indian Territory, ancestors of the Poarch Band allied with the United States to fight against the other Creeks. Thereafter, they were rewarded with land grants and were allowed to remain in Alabama. As a result of the forced resettlement, what was once the Creek Nation of Alabama now exists as the Poarch Band, the Muskogee (Creek) Nation in Oklahoma and certain recognized tribal towns.

The Tribe's government-to-government relationship with the United States ended under the terms of an 1832 treaty, which terminated United States' protection over the Tribes's lands in 1837. Subsequently, the United States specifically and repeatedly disclaimed any relationship with the Poarch Band. It was not until the Tribe was recognized under the Department of Interior's recognition regulations in 1984 did the Tribe once again enjoy a government-to-government relationship with the United States.

Because of the complexity of the issues presented by the Band's history, the Commission's review was careful, comprehensive, and included many discussions with the Office of the Solicitor, Division of Indian Affairs (Division). As the review progressed and issues were raised, both the Office of General Counsel (OGC) and the Division asked the Tribe to provide additional documentation and views to address these issues. Given the different views presented and the extensive factual record compiled, the OGC exercised great care in its restored lands analysis.

In the end, the OGC's last draft legal opinion sent to the Division supported a conclusion that the Tribe could conduct gaming on the Tallapoosa site. That opinion was based specifically on a theory recommended by the Department's attorneys. OGC was dismayed, therefore, when the same attorneys then refused to concur with the draft opinion. OGC requested the non-concurrence in writing.

In reviewing the non-concurrence, we determined that the Division's analysis failed for several reasons. The analysis (1) failed to remain consistent with previous interpretations of the Indian Gaming Regulatory Act; (2) failed to take into account the Indian canon of construction, which requires that an ambiguous statute must be interpreted in favor of tribes; (3) was inconsistent with case law that the NIGC cited in previous determinations; and (4) was contrary to case law because it recognized only Congressional termination and not administrative termination of the government-to-government relationship. We also realized that there were weaknesses in the General Counsel's draft and addressed those issues during the first few months of 2008. Regrettably, as we struggled with those weaknesses, we did not continue to collaborate as we developed our views.

During that time, we were advised by tribal representatives that the Commission's hesitation was adversely affecting the Tribe's business dealings. The Department of the Interior also indicated its intent to issue regulations governing the applicability of 25 U.S.C. § 2719 when the Secretary acquires lands into trust. Those regulations were not immediately effective, and the Chairman recognized that if he relied upon them, he might have to start the review process over again.

Therefore, because the Tribe had waited for over four years for the Commission's views and because the Chairman believed that he had a thoroughly researched and well-reasoned basis for a decision, the Chairman chose to issue his decision. Consequently, on May 19, 2008, the Chairman concluded that he would not take an enforcement action against the Tribe, and the Commission would continue to regulate the Tallapoosa Entertainment Center.

Additionally, I note that throughout your June 13, 2008 letter, you refer to the decision as an "opinion," suggesting that it was merely advisory and issued by the OGC. On the contrary, the May 19, 2008 letter was a decision by the Chairman pursuant to the enforcement authority granted to him under IGRA, 25 U.S.C. § 2713. As such, his decision is an agency action with legal effect. It is reviewable only by the Commission and the federal courts. Further, even if his May 19 decision had been an opinion of the OGC, the opinion would be reviewable only by the Chairman.

ANALYSIS

I. The Secretary's authority under IGRA is strictly limited.

Your statements that the "Secretary has authority for Indian matters and matters related to Indian gaming that are not expressly assigned to any entity under IGRA" and that the Secretary has the power to "fill any gaps in IGRA" ignore the plain and unambiguous language of IGRA. It is well settled that the proper interpretation of an unambiguous statute requires nothing else. *Hartford Underwriters Ins. Co. v. Union Planers Bank, N.A.*, 530 U.S. 1, 6 (2000) ("when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms".) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))). Contrary to your claims, section 2709 of IGRA specifically and unambiguously transfers all of the Secretary's powers over gaming to the NIGC, 25 U.S.C. § 2709. Accordingly, the Secretary retains only those powers that he has been specifically delegated under IGRA.

Section 2709 states that the Secretary's general authority over gaming was expressly taken from him and given to the Commission:

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations.

This section is clear and unambiguous. The Secretary was able to exercise his authority over gaming until the Commission prescribed the bulk of its regulations in 1993. See 57 Fed. Reg. 12382 (April 9, 1992) and 58 Fed. Reg. 5802 (January 2, 1993). Consequently, any authority the Secretary may have had over gaming vested with the Commission by 1993.

To the same effect is section 2711(h), which removed from the Secretary the power to approve management contracts under 25 U.S.C. § 81 and vested it in the Commission:

The authority of the Secretary under section 81 of this title [25 U.S.C. § 81], relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

25 U.S.C. § 2711(h).

Therefore, when Congress granted the Department authority under 25 U.S.C. § 2719(b)(1), it was not a general grant of authority. Rather, under § 2719, Congress granted the Secretary authority to act only in specifically delimited circumstances: to determine whether gaming on certain parcels may be in the best interest of an Indian tribe and not detrimental to the surrounding community, 25 U.S.C. § 2719(b)(1)(A); to identify the former reserves in Oklahoma 25 U.S.C. § 2719(n)(2)(A)(i); and to determine reservation status, 2002 Dep't of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001). In the balance of IGRA, the Secretary's authority is limited to approving tribal revenue allocation plans so as to allow per capita payments from net gaming revenue, 25 U.S.C. § 2710(b)(3)(B); approval of tribal-state compacts, 25 U.S.C. § 2710(d)(8); and issuance of procedures in lieu of a tribal-state compact under specified conditions, 25 U.S.C. § 2710(d)(7)(B)(vii).

Contrary to your claim, it is the NIGC and not the Department that administers IGRA, and it is the NIGC and not the Department that fills any "gaps" that exist in IGRA. This, the courts have made abundantly clear, is why Congress delegated to the Commission and not to the Department the authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions" of IGRA, 25 U.S.C. § 2706(b)(10). "NIGC is the agency expressly charged by Congress with administering the IGRA" by virtue of 25 U.S.C. 2706(b)(10). *Citizens Against Casino Gambling in Erie County (CACGEC) v. Kempthorne*, 471 F. Supp. 2d 295, 321 (W.D.N.Y. 2007). *See also, Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1023 (10th Cir. 2003) ("NIGC's broad powers include inspecting tribes' books and records, . . . levying and collecting civil fines, monitoring and shutting down unauthorized tribal games, and promulgating regulations and guidelines to implement IGRA."); *Shakopee Mdewakanton Sioux Community v. Hope*, 16 F.3d 261, 263 (8th Cir. 1994) ("IGRA established the Commission to regulate Indian gaming, and specifically authorized the Commission to promulgate regulations and guidelines necessary to implement the provisions of the Act."); *CACGEC*, 471 F. Supp. 2d at 322 (grant of rulemaking authority carries with it "the primary authority to interpret any ambiguous phrases or terms contained in the IGRA.").

What is more, NIGC's role as the administrator of IGRA carries with it the ability to make Indian lands determinations. *See, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. United States Atty.*, 46 F. Supp. 2d 689, 707 (W.D. Mich. 1999) (the question of restored land is within the NIGC's "special competence."); *County of Amador, California v. United States DOJ*, 2007 U.S. Dist. LEXIS 95715 at *17, n. 7 (E.D. Cal. Dec. 12, 2007) ("[O]utside the context of the trust application, NIGC retains the authority for determining whether the restored lands exception applies."); *CACGEC*, 471 F. Supp. 2d at 303 ("the Indian lands determination is one that

Congress placed in the NIGC's hands..."). As shown more fully below, the language of IGRA makes this so.¹

II. Congress specifically delegated to the NIGC the authority to determine the status of Indian lands as part of its oversight of Indian gaming.

That NIGC is responsible for administering IGRA means, under IGRA's plain terms, that NIGC has oversight authority over Indian gaming. *Kansas v. United States*, 249 F.3d 1213, 1218 n. 1 (10th Cir. 2001) ("Although the NIGC is nominally part of ... Interior, Congress has given the NIGC exclusive authority to regulate Indian gaming conducted pursuant to IGRA"); For example, IGRA provides NIGC with the authority to monitor and inspect the premises on which gaming takes place. 25 U.S.C. § 2706(b)(1)-(2). Moreover, IGRA specifically requires the Chairman to review and approve tribal gaming ordinances that authorize gaming on Indian lands. 25 U.S.C. § 2710(b)(2) and (d)(1)(A). It also requires the Chairman to review and approve management contracts for tribal gaming operations. 25 U.S.C. § 2711. Further, IGRA permits the Chairman to take enforcement action against the operators of tribal gaming facilities that violate any section of IGRA, NIGC regulations, or approved tribal gaming ordinances. 25 U.S.C. § 2713; 25 C.F.R. parts 573 and 575. Appeals from the Chairman's actions are heard by the full Commission, which is authorized to hold hearings on appeal and to request all witnesses and documents needed to make its decision. 25 U.S.C. §§ 2715 and 2716; 25 C.F.R. parts 539 and 577; 25 U.S.C. §§ 2706(b)(4), (8), 2713(a)(2-3), and 2715(a) and (d). Finally, the Chairman's enforcement actions are reviewable only by the Commission or the courts. 25 U.S.C. §§ 2713(c), 2714.

That said, Indian gaming is only permissible on *Indian lands*, which IGRA defines as:

All lands within the limits of an Indian reservation; and any lands title to which is either held in trust by the United States for the benefit of 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). In other words, IGRA expressly provides for Indian gaming only where land qualifies as *Indian lands* under the Act. *See, e.g., State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994) (finding that the Act's key provisions are limited to any Indian tribe having jurisdiction over Indian lands and to Indian lands within such tribe's jurisdiction). IGRA's "on Indian lands" requirement is integrally woven throughout the regulatory tapestry of the Act. 25 U.S.C. § 2710(a)(1-2), (b)(1), (d)(1), (d)(3)(A-B)(permitting Class II and Class III gaming *only* on Indian lands). As Congress established NIGC to oversee:

¹ We do not mean to suggest, however, that the Secretary cannot decide the status of Indian lands under his own separate authority to acquire land into trust. *County of Amador*, 2007 US Lexis 95715 at *7-*8 ("While NIGC regulates gaming, DOI analyzed whether gaming would be permissible on the land, because, under regulations implementing Section 5 of the IRA, DOI must take into account the purpose for which the land will be used. 25 C.F.R. §151.11. This is not to suggest, however, that DOI's analysis is subsequently binding upon the NIGC.")

Indian gaming, the regulatory authority of the Chairman and the Commission may only be exercised on Indian lands.

As the agency head specifically tasked under the statute with the duty to monitor gaming, approve management contracts, approve ordinances, and take enforcement action, the Chairman must have the power to first determine the extent of his agency's jurisdiction. As that jurisdiction is necessarily coextensive with Indian lands, IGRA necessarily grants the Chairman the authority to make Indian lands determinations in the process of exercising these powers. It is beyond question that administrative agencies have the authority to determine their own jurisdiction prior to taking action. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938). See also *United States v. Morton Salt Co.*, 338 U.S. 632, 641-643 (1950) ("When investigative duties are delegated by statute to an administrative body, it . . . may . . . inform itself as to whether there is a probable violation of the law."); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 476 (7th Cir. 1999) (agency's determination of its own jurisdiction not entitled to *Chevron* deference upon judicial review).

Put slightly differently, where a statute vests an administrative agency with authority to oversee a particular industry or subject matter, it necessarily confers on that agency the authority to determine whether particular activities, actions or entities fall within its jurisdiction. See, e.g., *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-509 (1943) (Secretary of Labor empowered to determine which employees and government contracts fall within Walsh-Healey Public Contracts Act, mandating minimum wages in government contracts and allowing sanctions for violations and non-compliance.); *Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003) (whether sprinkler heads are "consumer products" within statutory jurisdiction of Consumer Products Safety Commission).

A. The NIGC Chairman has exclusive authority to make, and is required to make, an Indian lands determination when presented with a tribal gaming management contract.

Congress gave the NIGC Chairman the authority to review and approve gaming management contracts, 25 U.S.C. § 2711, which he is required to do before such a contract is valid. Again, in giving the Chairman this power, Congress stripped it from the Secretary, 25 U.S.C. § 2711(h).

Management contracts have certain submission and content requirements set forth in IGRA and NIGC regulations, 25 U.S.C. § 2711(a)-(c), (g); 25 C.F.R. §§ 531.1, 533.1, and 533.3. Among these requirements is that a management contract must relate to a specific gaming site that qualifies as Indian lands. To determine whether to approve a management contract, therefore, the Chairman must determine whether the desired gaming will occur on Indian lands that meet IGRA's requirements, 25 U.S.C. §§ 2703(4), 2719. To make this determination, the Chairman must conduct an Indian lands analysis prior to contract approval. In light of this, your suggestion that the Chairman must request land opinions from your office when reviewing a management contract is inconsistent with federal law.

In fact, the District Court of Kansas emphasized this point:

The IGRA created the NIGC to, among other things, review management contracts for class II gaming.... Part of that responsibility included determining whether or not a tribe exercises governmental authority over the land on which it seeks to conduct gaming...

Miami Tribe of Oklahoma v United States, 927 F. Supp. 1414, 1423 (D. Kan. 1996).

The Ninth Circuit Court of Appeals echoed this sentiment in *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 902 (9th Cir. 2002), when it addressed the Chairman's approval of a management contract for a tribal telephone lottery:

The NIGC is statutorily obliged to reject any lottery proposal that does not conform to IGRA... In fact, the NIGC has previously refused to approve management agreements when it believed the proposed gaming activity will not be conducted "on Indian lands" for IGRA purposes.

295 F.3d at 909 (citing *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1218 (D. Kan. 1998)). Thus, the NIGC Chairman has the exclusive authority to determine Indian lands for the purpose of gaming when he reviews and approves management contracts.

- B. The NIGC Chairman has exclusive authority to make, and is required to make, an Indian lands determination when presented with a site-specific tribal gaming ordinance.**

Next, as with management contracts, Congress gave the Chairman the authority to review tribal gaming ordinances to determine whether they meet IGRA's requirements. The Chairman must approve an ordinance before it is valid. 25 U.S.C. §§ 2710(b)(2) and (d)(1)(A). While IGRA requires ordinances to include certain provisions, 25 U.S.C. § 2710(b)(2)-(4); 25 C.F.R. § 522.4, and parts 556 and 558, tribes often exercise their sovereign legislative powers and include additional provisions that are not mandated by IGRA. A common additional provision is a clause authorizing gaming on a specific parcel of land creating a so-called *site-specific ordinance*. To date, the Chairman has reviewed over 23 site-specific ordinances and continues to receive such requests for approval. The plain and unambiguous language of IGRA requires the Chairman to make an Indian lands determination when faced with a site-specific ordinance authorizing Class II gaming:

The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of Class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that

25 U.S.C. § 2710(b)(2). By incorporating this language by reference for Class III gaming, IGRA requires this same determination for a site-specific Class III ordinances. 25 U.S.C. § 2710(d)(1)(A)(ii).

That is, IGRA only authorizes the Chairman to approve a site-specific ordinance if it authorizes gaming on *Indian lands*, as IGRA defines the term. Without confirmation that the site-specific ordinance authorizes gaming on Indian lands eligible for gaming, the Chairman would have to disapprove the ordinance. To approve an ordinance that specifically permitted gaming on ineligible lands would authorize a tribe to offer gaming that IGRA prohibits. *AT&T Corp.*, 295 F.3d at 908 (“the statutory framework suffices to demonstrate that the NIGC must consider the legality of Class III gaming before approving compacts, resolutions, ordinances, and management contracts . . .”).

Federal courts recognize the NIGC’s authority to issue land opinions in connection with ordinance reviews:

The NIGC is charged with interpreting and applying the IGRA to Indian lands for gaming. See *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1422 (D. Kan. 1996) (holding that NIGC had the authority to determine whether particular lands were within the tribe’s jurisdiction for purposes of determining whether they constituted “Indian lands” within the meaning of the statute).

Grand Traverse, 46 F. Supp. 2d at 707. Further, the District Court for the Western District of New York insisted that the Chairman must complete such a determination as part of his duties:

Having fully considered the purpose and structure of the IGRA, and the authority delegated to the NIGC by Congress, this Court rejects Defendants’ contention that the NIGC Chairman is not required to make “Indian lands” determinations when he acts on a tribal gaming ordinance. To the contrary, whether Indian gaming will occur on Indian lands is a threshold jurisdictional question that the NIGC must address on ordinance review to establish that: 1) gaming is permitted on the land in question under the IGRA, and 2) the NIGC will have regulatory and enforcement power over the gaming activities occurring on that land.

CACGEC, 471 F. Supp. 2d at 303. In fact, the court in *CACGEC* vacated the Chairman’s ordinance approval because the Chairman did not make an Indian lands determination on a site-specific compact: “Because the Indian lands determination *is one that Congress placed in NIGC’s hands*, the NIGC’s 2002 ordinance approval is vacated . . .” *Id.* at 303 (emphasis added).

The statutory obligation to review and approve site-specific ordinances grants the NIGC Chairman the exclusive authority in those instances to determine Indian lands for the purpose of gaming.

- C. The NIGC Chairman has the exclusive authority to make, and is required to make, an Indian lands determination prior to the initiation of an enforcement action.

Lastly, Congress gave the Chairman authority to bring enforcement actions against any tribal gaming operator or manager that violates IGRA's provisions, NIGC regulations, or tribal gaming ordinances. 25 U.S.C. § 2713. To assist the Chairman in an enforcement investigation, the Commission may use its power to request witnesses and documents and issue subpoenas. 25 U.S.C. § 2715(a). Additionally, the Commission may order depositions with proper notice to the parties. 25 U.S.C. § 2715(d). For violations of IGRA, the Chairman may assess civil fines of up to \$25,000 per day or closure of all or part of a gaming operation. 25 U.S.C. § 2713(a)-(b).

IGRA's specific language is:

The Chairman shall have the authority to levy and collect appropriate civil fines, not to exceed \$25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 and 2712 of this title.

25 U.S.C. § 2713(a).

The Chairman may only bring enforcement actions against those operations that come within the Commission's jurisdiction, and as explained above, the Commission's jurisdiction extends only to Indian lands. Accordingly, the Chairman must have the ability to determine whether the operations are on Indian lands in order to be able to bring an enforcement action in the first place.

Once again, courts recognize this. The District Court for the Western District of Washington recently held that "tribal gaming under IGRA must occur on 'Indian lands' and the NIGC is the agency charged with ensuring this happens." *North County Community Alliance v. Kempthorne*, No. C07-1098-JCC, slip op. at 14 (W.D. Wash. Nov. 16, 2007).

Again, then, the Chairman's statutory authority to bring enforcement actions for IGRA violations necessarily gives him the exclusive authority in those instances to determine Indian lands for the purpose of assessing his jurisdiction. For the same reasons, the Chairman also has exclusive authority to make an Indian lands determination as part of investigating whether a tribe is gaming on Indian lands where gaming is prohibited under IGRA. This was the essence of the Chairman's Pouch Band determination. He acted under the authority expressly granted to him under IGRA, 25 U.S.C. §§ 2705(a)(1)-(2), 2713(a), and responded to the State of Alabama's concern that the Tribe was gaming on lands in violation of IGRA. The Chairman issued a decision concluding that no enforcement action was warranted because the Tribe was gaming in compliance with IGRA. The Chairman's decision was squarely within this statutory enforcement authority.

III. Due to its status as an independent regulatory agency, the Secretary does not have the authority to order the NIGC to take actions on whether to regulate gaming.

All of that said, the Secretary lacks the authority to oversee the Chairman's Poarch decision for other, equally sufficient reasons. NIGC's nominal placement "within" the Department of the Interior is insufficient to give the Secretary any authority over NIGC decisions. Congress, courts, and other federal agencies have all acknowledged NIGC as an independent agency. Your analysis ignores this. It also ignores IGRA's language and legislative history, case law that specifically addresses the NIGC's independence, the course of dealing between the Department and NIGC that treated the NIGC as independent, and the history of the treatment of the NIGC as independent by other offices of the Executive branch and the Congress.

A. The NIGC Meets All of the Characteristics of Independent Agencies

Justice Sutherland described the independent agency:

[It is] a body of experts who shall gain experience by length of service — a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

Humphrey's Ex'r v. United States, 295 U.S. 602, 624, 625-626 (1935) (internal citations omitted), cited in Breger & Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1112, 1113 (Fall 2000).

Numerous other law review articles and treatises have been written on the subject of independent agencies and their identifying characteristics. See, e.g., *Symposium: The Independence of Independent Agencies*, 1988 DUKE L.J. 215; *A Symposium on Administrative Law: The Unclear Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); and Bernard Schwartz, *Administrative Law* § 1.10 at 20 (3d ed. 1991). The Breger & Edles article is noteworthy here, however, not only because it explains those identifying characteristics but also because it analyzes the NIGC as part of its survey of 32 independent agencies. Breger & Edles at 1139, 1272-1273.

The following are the fundamental characteristics of agencies that are independent of executive authority:

- A multi-member commission whose members serve fixed terms.
- Protection against removal except "for cause."

The defining characteristic of the 32 agencies discussed in Breger and Edles's article is that at least one member of the agency is appointed by the President to a full-time, fixed term position with the advice and consent of the Senate.

and has protection against summary removal by some form of “for cause” restriction on the President’s authority. *Id.* at 1113.

This “for cause” removal feature continues to be a critical criterion by which scholars typically distinguish between “independent” and executive branch agencies. *See, e.g.,* Davis & Pierce, *Administrative Law* § 2.5 at 46 (3d ed. 1994) (“The characteristic that most sharply distinguishes independent agencies is the existence of a statutory limit on the President’s power to remove the head (or members) of an agency.” Schwartz, §1.10 at 20 (“The key to independence is security of tenure.”); and Peter L. Strauss, *An Introduction to Administrative Justice in the United States* 15 (1989) (“Because [independent commission] members are appointed for fixed terms from which they cannot be dismissed without formal cause, they are more remote from presidential influence and control than the more usual ‘executive’ agency.”).

- Possess a combination of rulemaking, enforcement, and adjudication powers and functions.
- Members generally appointed by the President with the advice and consent of the Senate.

This is not always the case as Breger and Edles noted with the NIGC: “For example, the chairman of the National Indian Gaming Commission is appointed by the President with the advice and consent of the Senate, but the other two members are appointed by the Secretary of the Interior. All members serve three-year terms and can only be removed from office for good cause.” Breger and Edles at 1139.

- Typically, agency statutes require political balance, *i.e.* no more than a bare majority of members may come from the same political party.
- Agency has specialized mandate directing it to focus either on particular industry or on specific cross-cutting problems.
- Agency makes its own submissions to Congress.
- Agency chairperson is the chief executive and appoints and supervises staff and prepares the agency’s budget and expenditure of funds.

Id. at 1112, 1138-1142, 1115 and 1165.

The NIGC possesses all of these hallmarks of an independent agency:

- The Commission is a multi-member body whose members serve fixed terms. 25 U.S.C. § 2704 (b)(4)(A).

- Commission members enjoy secure tenure. Commissioners are removable only for cause 25 U.S.C. § 2704(b)(6).
- The Commission possesses a combination of rulemaking, enforcement and adjudication powers and functions. *See, e.g.*, 25 U.S.C. § 2706(b)(10) (the Commission “shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act”); 25 U.S.C. § 2706(b)(1)-(4) (Commission to monitor gaming, inspect gaming facilities, conduct background investigations and audits); 25 U.S.C. § 2715(a) (subpoena and deposition authority for any matter under investigation); 25 U.S.C. §§ 2705(a)(2), 2713(a) (Chairman has authority to assess civil fines of \$25,000 per day); 25 U.S.C. § 2705(a)(1), 2713(b) (Chairman has authority to order temporary closure of casino); 25 U.S.C. § 2706(b)(8) (Commission may hold hearings and take testimony as necessary); 25 U.S.C. § 2713(a)(2) (appeal of Chairman’s civil fine assessment to full Commission); and 25 U.S.C. § 2713(b)(2) (appeal of Chairman’s closure order to full Commission).
- The Chairman is appointed by the President with the advice and consent of the Senate. 25 U.S.C. § 2704(b)(1)(A).
- Appointments to the Commission are limited by political party and tribal membership. Specifically, no more than two commissioners may be from the same political party and at least two commissioners must be enrolled members of an Indian tribe. 25 U.S.C. § 2704 (b)(3).
- Congress delegated powers to the Commission in furtherance of a specific mandate, namely the oversight and protection of Indian gaming and the promotion of tribal economic development, tribal self sufficiency, and strong tribal government. 25 U.S.C. §§ 2701, 2702.
- The Commission is required to submit its own report to Congress with information on its funding, recommendations for amendments to IGRA, and any other matters considered appropriate by the Commission. 25 U.S.C. § 2706(e).
- The Chairman is the chief executive of the NIGC. He appoints the General Counsel. 25 U.S.C. § 2707(a), and appoints and supervises other staff of the Commission. 25 U.S.C. § 2707(b). At the request of the Chairman, “the head of any federal agency is authorized to detail of the personnel of such agency to the Commission” 25 U.S.C. § 2707(d). The Chairman and the Commission prepare and adopt the agency’s budget. 25 U.S.C. § 2706(a)(1).

Moreover, other executive departments have independent agencies “within” or “in” them. For example, the Federal Energy Regulatory Commission’s (FERC) enabling legislation describes it as an “independent regulatory commission” within the Department of Energy. Notwithstanding its location, courts treat FERC as an entity independent of the Department of Energy. *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 472 (D.C. Cir. 1982) (identifying FERC as

functionally independent of the Executive Branch due to tenure of commissioners and finding that the Supreme Court has upheld “the constitutionality of such agency independence”). Additionally, the legislation creating the Surface Transportation Board states that “[t]here is hereby established within the Department of Transportation the Surface Transportation Board.” 49 U.S.C. § 701(a). *See also Commonwealth of Pennsylvania v. Surface Transportation Board*, 290 F.3d 522, 524 (3rd Cir. 2002) (“The Surface Transportation Board is the independent federal agency established by Congress within the Department of Transportation and has the responsibility for the economic regulation of the country’s railroads.”). Likewise, the legislation creating the United States Parole Commission provides that “[t]here is hereby established an independent agency in the Department of Justice. . . .” 18 U.S.C. § 4202. *See also U.S. v. Cover*, 732 F.2d 196, 200 (1984) (describing the Parole Commission as “an independent agency of the Executive subject to the supervisory oversight of the Congress . . .”).

B. IGRA’s Statutory Provisions and Legislative History Show that NIGC is an Independent Agency

Congress explicitly made the NIGC an independent agency. IGRA states, “the purpose of this chapter is . . . to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands . . . and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.” 25 U.S.C. § 2702(3)). While this language could be construed to create authority independent of tribes and states rather than to create a regulatory body independent of the Executive, a review of the legislative history dispels this notion.

Again, where “the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.” *Toibb v. Radloff*, 501 U.S. 157, 162 (1991), *citing Blum v. Stevenson*, 465 U.S. 886, 896 (1984). Here, the Senate report accompanying the passage of IGRA provides Congress’s intention clearly and unambiguously: the bill “established a National Indian Gaming Commission as an independent agency within the Department of Interior.” S. Rep. No. 100-446, at 1 (1988). This language clarifies, beyond any doubt, Congress’s intention to create the NIGC as an independent agency. Lest there be any doubt, however, Congress reiterated its intention when it amended IGRA in 2005:

Additionally, it is to be noted that the NIGC is an independent regulatory agency. This status has ramifications, including, that the agency is not governed by Executive Order 13175, which compels agencies other than independent regulatory agencies to consult tribal officials in the development of regulatory policies that have tribal implications. The Executive Order encourages independent agencies to observe its precepts, however, and the Committee notes with approval that the Commission, through its current consultation policy, has endeavored to do so.

S. Rep. No. 109-122 at 3 (2005).

C. Courts Recognize the NIGC as an Independent Agency

Several courts have held that NIGC is an independent agency. In 1991, shortly after IGRA was passed and before the NIGC was fully functional, the Tenth Circuit Court of Appeals recognized that under IGRA, gaming “is subject to the supervision of a newly created, independent regulatory authority – (the National Indian Gaming Commission – established to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.” *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1176 (10th Cir. 1991), quoting 25 U.S.C. §§ 2702(3), 2704. IGRA was described by this court as “a comprehensive and pervasive piece of legislation that in many respects preempts other federal laws that might apply to gaming.” *Id.*, quoting *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 648 (D.Wis. 1990). Likewise, in two separate cases, the Seventh Circuit noted NIGC’s independence. *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208 (7th Cir. 1995) (the NIGC is a “three-member independent agency within the Department of Interior.”); *United States ex rel. Mosay v. Buffalo Bros. Management*, 20 F.3d 739 (7th Cir. 1994) (“Congress enacted the Indian Gaming Regulatory Act, which establishes a three-member independent agency within the Department of Interior, the National Indian Gaming Commission, to supervise Indian gambling.”).

D. The Course of Dealing Between the Department and NIGC Supports NIGC’s Independent Authority.

I note that the your current claim stands in stark contrast not only to the court opinions discussed above, but to the Department’s own position as stated in *Sac and Fox Nation v. Norton*, 240 F.3d 1250, 1265 n. 12 (10th Cir. 2001) (“Although the Commission is nominally part of the Department of the Interior, the Secretary conceded at oral argument that the Commission functions as an independent entity.”).

You cite to the Departmental Manual for support of your new claim that the Department must supervise the work of the NIGC. See Letter from Bernhardt to Hogen of 6/13/08. This fails to acknowledge the true nature of the relationship: the Department is obligated through contractual relationship to provide NIGC with administrative services. By statute, the NIGC is free to contract elsewhere for such services, though the Department is obligated to provide them upon request. 25 U.S.C. § 2707(e).

In particular, NIGC contracts with the Department for support services such as personnel services and hearing officials for administrative appeals before the Commission. The NIGC pays for all services it receives, and the Department provides these services at NIGC’s request because it is required to do so under IGRA. 25 U.S.C. § 2707(e). If the NIGC were simply part of the Department, a Congressional mandate of services would be unnecessary. Thus, despite this relationship of contractual service, IGRA indicates that the NIGC is independent from the Secretary, and it stretches the imagination to think this relationship could give the Secretary any authority over the NIGC.

Further, contrary to your assertion that the Commission must seek its legal advice from the Department, IGRA specifically directs the Chairman to appoint a General Counsel. 25 U.S.C. § 2707(a). If Congress had intended the Chairman to rely on the Department for advice, it would not have provided for a separate General Counsel who is answerable only to the Chairman. In fact, Congress underscored the importance of independent legal advice by making the General Counsel the only staff position specifically designated within IGRA. What is more, given that IGRA gives to the Chairman the authority to appoint a general counsel, the legal advice given by the general counsel's office is for the use and approval of the Chairman and the Commission alone. They, and only they, are OGC's clients. As such, even if the Chairman's May 19 Poarch Band decision was an opinion of the OGC, neither the Secretary nor your office has the ability to review, approve, or reject it.

Looked at slightly differently, Congress has tasked the NIGC with providing technical assistance to the tribes. 25 U.S.C. § 2706(d)(2). Technical assistance encompasses a broad range of activities, and one particular way that the Commission meets this obligation is to provide legal opinions through the OGC on matters over which the Commission exercises jurisdiction. These opinions may clarify various matters under IGRA from game classifications to Indian lands status. The Secretary's interpretation of IGRA, however, would deny the Commission's ability to opine on Indian lands generally. This runs afoul of the requirement to provide technical assistance and would improperly prevent NIGC from fulfilling its statutory mandates.

On occasion, the NIGC does require legal advice in matters of general law. Pursuant to a memorandum of understanding with the Office of the Solicitor, the NIGC formally requests advice and pays for the service. See Memorandum of Understanding, from Tadd Johnson, Chairman of NIGC, to Robert More, Director of Administration, Department of the Interior (undated). As with the administrative services, the Department provides occasional legal advice only through a contractual relationship and the NIGC is free to adopt such advice or obtain it elsewhere. As such, when the NIGC seeks to do business with the Department of Interior, it frequently does so through a memorandum of understanding or other cooperative agreement, not through any perceived chain of command.

E. Congress Treats the NIGC as an Independent Agency

After all these years of functioning as an independent agency, one would think Congress would let the NIGC know if it did not intend for it to be one. To the contrary, however, Congress interacts with the NIGC as an independent agency and recently reiterated its independence. Again, in 2005, when Congress raised the cap on the amount of fees the NIGC can collect from tribal gaming revenue, the Senate report accompanying the legislation noted the NIGC's status as an independent regulatory agency. S.Rep. No. 109-122 at 3 (2006).

Further, NIGC makes its own submissions to Congress. Pursuant to IGRA, the NIGC issues its own biannual reports to Congress. 25 U.S.C. § 2706(e). The Commission has submitted reports for fiscal years 1998, 1999, 2000, 2003 and 2004. Since passage of NIGC fees legislation in 2005, the NIGC is required to comply with the Government Performance and Results Act of 1993 (GPRA), 31 U.S.C. § 1115 *et. seq.* Furthermore, the NIGC Chairman testifies directly

before the Senate Indian Affairs Committee and the House Natural Resources Committee when it holds NIGC oversight hearings.

F. The Department of Justice and the National Archives and Records Administration Treat the NIGC as an Independent Agency

The Department of Justice (DOJ) also recognizes the NIGC as an independent agency. The NIGC is involved in litigation in its own name. *See, e.g., Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 2007 U.S. App. LEXIS 1651 (D.C. Cir. Jan. 23, 2007); *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1021 (10th Cir. 2003); *JPW Consultants, Inc. v. Nat'l Indian Gaming Comm'n*, 1999 U.S. App. LEXIS 11022 (D.C. Cir. Apr. 29, 1999); *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 304 U.S. App. D.C. 335 (D.C. Cir. 1994); *Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 45 (D.D.C. 2006).

Furthermore, in the Unified Agenda listing published twice a year by the National Archives and Records Administration, which summarizes the rules and proposed rules that each federal agency expects to issue during the next six months, the NIGC is listed separately from the Department and with all of the other independent agencies. *See* <http://www.gpoaccess.gov/ua/browse1204.html>. Congress, the courts, the Department, and other federal agencies have all acknowledged NIGC's independence from the Department. Therefore, the Secretary's claims of authority over NIGC are unfounded.

V. The Secretary cannot grant himself more power through regulation than Congress has granted through statute.

Finally, you claim that the Secretary has power to review Commission decisions under the Department's regulation 43 C.F.R. § 4.5(a). Yet IGRA specifically states that decisions of the Chairman are reviewable only by the Commission and federal courts. 25 U.S.C. §§ 2713, 2714. You may not interpret 43 C.F.R. § 4.5 in a way that allows you to usurp the authority that Congress expressly granted to the Commission. "An agency literally has no power to act . . . unless and until Congress confers power upon it . . . An agency may not confer power upon itself." *La. Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Section 4.5 gives the Secretary the authority "to review any decision of any employee . . . of the Department . . . or to direct any such employee . . . to reconsider a decision . . ." In carrying out this authority, the Secretary will issue a written notice, request the administrative record, and subsequently issue a new written decision on the matter. 43 C.F.R. § 4.5(c). While this rule clarifies the Secretary's authority to review decisions made by his subordinate divisions, it does not grant him power to review the decisions of those outside his chain of command. *MCI Telecom. v. AT&T*, 512 U.S. 218, 231 (1994); *see also Massachusetts v. EPA*, 127 S.Ct. 1438, 1462 (2007). Thus, the Department's regulation in section 4.5 (or any other regulation) does not give the Secretary the authority to review or overturn decisions of the NIGC Chairman.

The Secretary may only review those decisions under section 4.5 that he has the authority to review. The Chairman is expressly granted enforcement authority over IGRA violations. 25

U.S.C. §§ 2705, 2713. The Chairman's decision in the Poarch matter was not an opinion but a determination of NIGC jurisdiction and a conclusion that the Tribe was not violating IGRA. To decide whether the Tribe was violating IGRA, the Chairman had to determine whether the lands constituted Indian lands on which the Tribe could conduct gaming. The Chairman's decision was a precursor to an enforcement action over which the Secretary can claim no authority.

Allowing the Secretary to review the Chairman's exercise of his statutory powers would directly contravene the express will of Congress. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." *Lu. Public Serv. Comm'n v. FCC*, 476 U.S. at 374-375.

CONCLUSION

After thorough review of your letter, statutes, and case law, I conclude that the Secretary does not have the broad authorities you claim. Congress created the NIGC as an independent agency to administer IGRA and thereby vested regulatory authority for Indian gaming with the Chairman. The Department's authority under IGRA is limited to that expressly authorized by statute. Where IGRA is silent in delegation, that authority must necessarily rest with the administrator of the statute, the NIGC. Further, IGRA grants NIGC the power to determine its jurisdiction to monitor Indian gaming and to take action on site-specific ordinances, management contracts, and enforcement. This necessarily grants the agency the power to issue Indian lands decisions in those contexts. The Chairman acted within his statutory enforcement authority when he investigated the complaint of the State of Alabama and ultimately determined that the Poarch Band was properly gaming on lands within the definition of IGRA. The Chairman's decisions are reviewable only by the Commission and the federal courts. Any review by the Secretary would fail to account for NIGC's status as an independent agency and directly contravene express statutory language transferring the Secretary's authority over gaming to the Commission.

For all these reasons, you do not have the authority to review the Chairman's Poarch Band decision or to order the Commission not to act in compliance with that decision. Consequently, the Commission will continue to regulate the Tallapoosa site as mandated under IGRA.

Sincerely,



Penny J. Coleman
Acting General Counsel

cc: Buford L. Kohn, Poarch Band Tribal Chairman
William Perry, Sonosky, Chambers, Sachse, Endreson & Perry
Troy King, Attorney General, State of Alabama

EXHIBIT E

RG279 Records of the Indian Claims
Commission

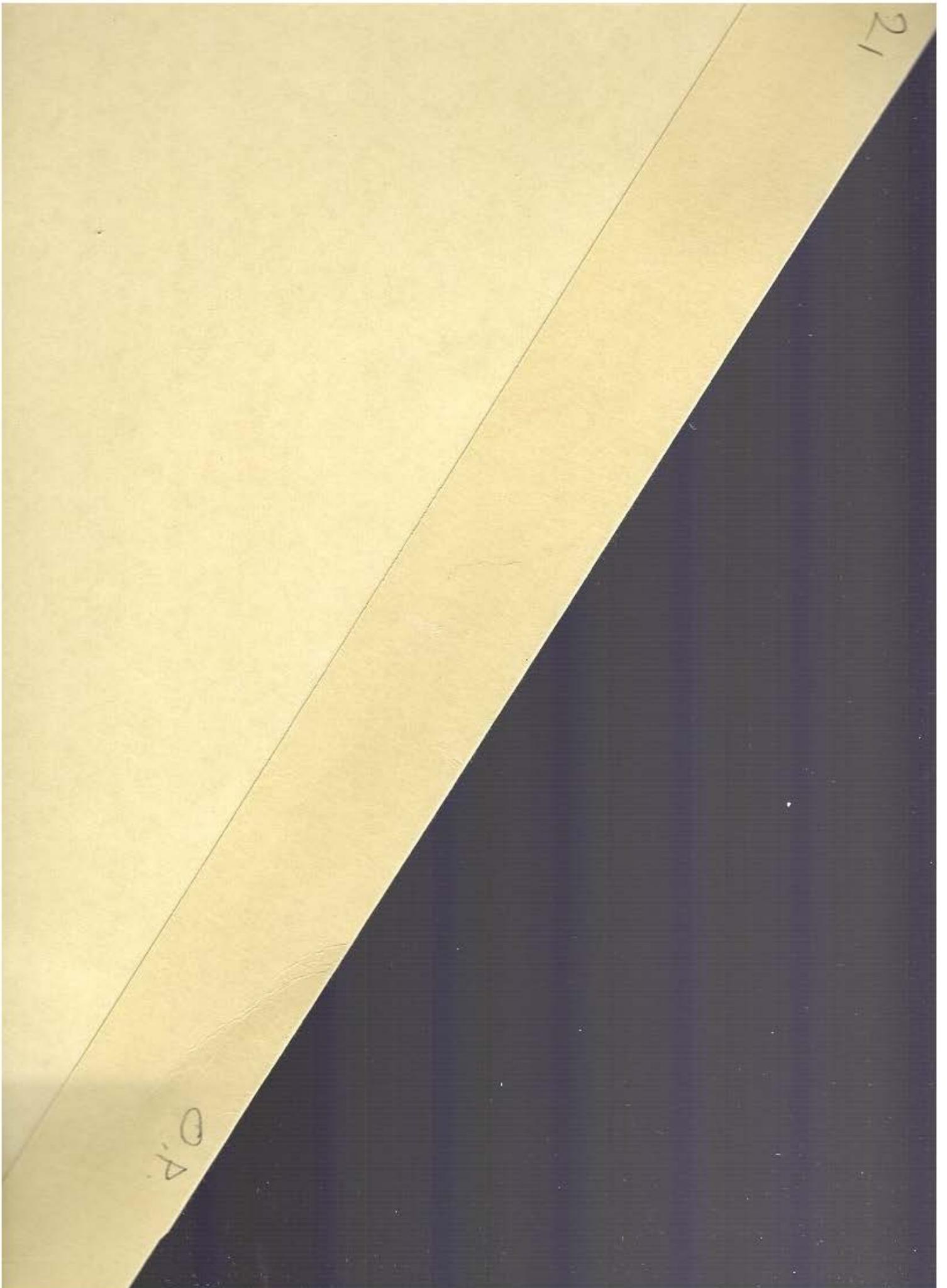
Closed Docketed Case Files, 1947-82

Docket # 21

Box 319

Entry 11UD

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BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,
 Petitioner,
 VS.
 THE UNITED STATES,
 Defendant.

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(TITLE OMITTED)

DOCKET NO. 21

STATEMENT OF SPECIFIC POINTS OF LAW AND AUTHORITIES
 IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE.

I.

THIS COMMISSION CAN AND SHOULD GRANT INTERVENTION IN PROCEEDINGS BEFORE
 IT ON A PROPER SHOWING.

1. The right to intervene is one well-recognized by federal tribunals as a fundamental right; no express statutory authority is required.

a. While in some jurisdictions the authority of courts to allow intervention is not recognized in the absence of statute, it has been recognized for many years in federal tribunals as a fundamental power of courts not dependent on statute. See Moore, Federal Practice and Procedure, Section 24.

b. Rule 24 of the Federal Rules of Civil Procedure now provides for intervention in federal district courts as follows:

(a) "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action. (1) When

a statute of the U. S. confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of moneys in the custody of the court or of an officer thereof.

- (b) "Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) When a statute of the U. S. confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

c. While the Federal Rules are not directly applicable to procedure before this Commission, Rule 24 is a clear statement of the rule in all federal tribunals, even in the absence of statute or any specific rule of court. For, as the Committee Note, written at the time of promulgation of the Rules, states concerning Rule 24:

"This rule amplifies and restates the present federal practice in law and in equity".

2. In line with its broad jurisdiction and powers, this Commission has the authority to grant intervention.

a. The Act creating this Commission gives it an exceedingly broad jurisdiction over Indian claims, with the avowed purpose, as shown by the language of the Act and by the Committee Reports, of enabling the Commission to determine finally all claims of Indian groups. (Act of August 13, 1946, 60 Stat. 1049; Report No. 1466 of the Committee on Indian Affairs of the House of Representatives, 79th Congress, 2d Session; Report No. 1715 of the Senate

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Committee on Indian Affairs, 79th Congress, 2d Session).

b. The grant of this broad jurisdiction necessarily implies the grant of authority to permit these claims to be brought and adjudicated in the most expeditious and just manner.

c. The Act gives the Commission the power to establish its own rules of procedure. (Act of August 13, 1946, 60 Stat. 1049, Section 9). The Commission is thus the master and not the servant of its written rules of procedure, which were doubtless promulgated by the Commission for its convenience and that of claimants, and not to define the limits of the procedural authority of the Commission.

3. The Commission should grant intervention where it will avoid multiplicity of actions or prevent injustice.

a. It is obviously to the interest of the Commission as well as of claimants before it to apply rules of procedure granting intervention, everywhere recognized by statute or court decision as promoting a just, equitable and expeditious handling of causes.

II.

APPLICANTS FOR INTERVENTION HEREIN ARE A TRIBE, BAND OR OTHER IDENTIFIABLE GROUP WITHIN THE MEANING OF THE INDIAN CLAIMS COMMISSION ACT.

1. Applicants are members of, claiming on the relation of, the Perdido Band, a band of Creek Indians, duly organized.

2. Applicants claim under the rights of the Creek nation as constituted at the time of the injury, prior to the migration of a number of its members.

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3. While the Perdido Band is but a newly formed band of descendants of the original Creek nation, the effect of granting intervention will be to place before this Commission the claim of the entire Creek nation as it existed in 1814, and the right of all living descendants of its members to recover.

4. The original Creek nation of Indians is a readily identifiable tribe or nation whose aboriginal territory was in Alabama, Georgia and Florida. An official census of its members, known as Parsons' and Abbott's census, was taken in 1832.

III.

APPLICANTS FOR INTERVENTION HAVE SUCH AN INTEREST IN THE CONTROVERSY THAT THEY SHOULD BE ALLOWED TO INTERVENE.

1. Where the interest of a party is of such direct and immediate character that he will either gain or lose by the direct legal operation and effect of judgment, he is entitled to intervene. (39 Am. Jur 935).

2. The injury for which relief is sought in this proceeding is one inflicted on the Creek nation in 1814 by the taking of its lands. (Petition, Paragraphs 4 to 19, inclusive).

3. These lands were held as communal property. (U. S. vs. the Cherokee Nation, (1906) 202 U. S. 101, 26 S. Ct. 588, 599, affirming (1905) 40 Ct. Cl. 252.).

4. The right of compensation for the taking belonged to all then members of the nation. U. S. v. Cherokee Nation, supra, 26 S. Ct. at p 599, quoting with approval from the opinion of the Court of Claims, as follows:

2 { "While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall

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join in the conveyance of cession of the land. From the necessities of the case, negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration per capita. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and head men of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it."

7-11 [5. Any recovery was distributable per capita to these members. (U. S. v. Cherokee Nation, supra, 26 S. Ct. at p. 600).

6. The organization of the Creeks in what is now Oklahoma has never been recognized as the full successor to the original Creek nation. The fact that this organization represents only those Creeks migrating westward and settling in the Indian Territory in what is now Oklahoma is commonly recognized in treaties and Acts of Congress.

a. In the Treaty of February 14, 1833, adjusting the boundaries of the Creek lands in the west, it was recognized that the Creek representatives signing the Treaty were authorized to act only for Creeks west of the Mississippi. The contracting Creeks were described as those "west of the Mississippi" and it was stated that their Chiefs had "full power and authority to act for their people west of the Mississippi". The parties to the Treaty also recognized that the greater body of the Creek nation as of that time remained "on the east side of the Mississippi." (7 Stat. 417).

b. The description of the organization of the Creeks of the Indian Territory appearing in treaties and statutes has commonly recognized the limited

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character of petitioner by describing it as the Creek tribe "west of the Mississippi River" (Treaty of August 7, 1856, 11 Stat. 699), or as the "Creek Nation in the Indian Territory" (Act of June 28, 1898, 30 Stat. 495; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500).

7. This right passed to their descendants regardless of whether they became members of the part of the nation residing in Indian Territory. U. S. v. Cherokee Nation, supra, 26 S. Ct. at p. 600, quoting with approval from the opinion of the Court of Claims, as follows:

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation, and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the West, in the \$5,000,000 fund which was the consideration of the cession, so far as it was to be distributed per capita. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the \$5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the nation, and the nation properly made no distinction when parting with the Outlet, but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the nonfulfilment of the treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners."

8. Recognition by the United States of the tribal organization of the migrating Creeks as the political body of the Creek nation could not constitutionally operate to deprive your applicants and others similarly situated of their rights.

9. These rights were specifically guaranteed by the Act of February 8, 1887 and the Act of May 8, 1906 (24 Stat. 388, Section 6; 34 Stat. 182). The latter act amended the earlier act to read in part as follows:

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"Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *****"

"And provided further, That the provisions of this act shall not extend to any Indians in the Indian Territory." *****
 (34 Stat. 137)

10. Applicants, as Creek Indians and descendants of members of the original Creek nation, are entitled to share per capita in any recovery with all others similarly situated.

11. Applicants therefore have a direct and immediate interest in this proceeding.

12. This interest is not being adequately represented by Petitioner, representing Oklahoma Creeks, which claims exclusive right for its enrolled members and their descendants to any recovery obtained.

IV.

THIS MOTION FOR LEAVE TO INTERVENE IS TIMELY.

1. 39 Am. Jur. 943 states:

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"In the absence of statute, if the trial of a suit will not be delayed thereby, a person may, with leave of court, intervene at any time before the issues are fully determined between the plaintiff and the defendant, and it is said to be within the discretion of the court to permit an intervention, even though the defendant is in default, where the application is made at the earliest possible opportunity. The tendency of the courts, however, is to exercise their discretion in favor of the diligent only."

2. In fact, intervention will be granted even after judgment were it in the interest of justice. (39 Am. Jur. 943). The defense of laches is expressly denied to the United States in claims before this Commission (60 Stat. 1049, Section 2).

3. The claim for which recovery is sought originated in 1814.

4. It is thus the sense of the Congress and the logic of the claim before this Court that your applicants should not be penalized for any delay in prosecuting their claim.

5. No party will be prejudiced by any delay in applicants' having presented their claim.

a. The basic issue in the proceeding remains the same.

b. No new trial of this issue is sought or will be required.

c. Any issues presented concerning the interest of applicants in the recovery will not require extensive additional proof.

6. Applicants have acted with due diligence to bring this motion upon learning of the claim of the Petitioner.

V.

A SERIOUS INJUSTICE WILL RESULT IF INTERVENTION IS NOT GRANTED.

1. Since the unlined right asserted is one belonging to the entire Creek

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nation, great injustice will result if applicants are not permitted to intervene and assert the right of all Creeks to participate per capita in the recovery which should properly be granted to the original Creek nation.

EXHIBIT F

RG279 Records of the Indian Claims
Commission

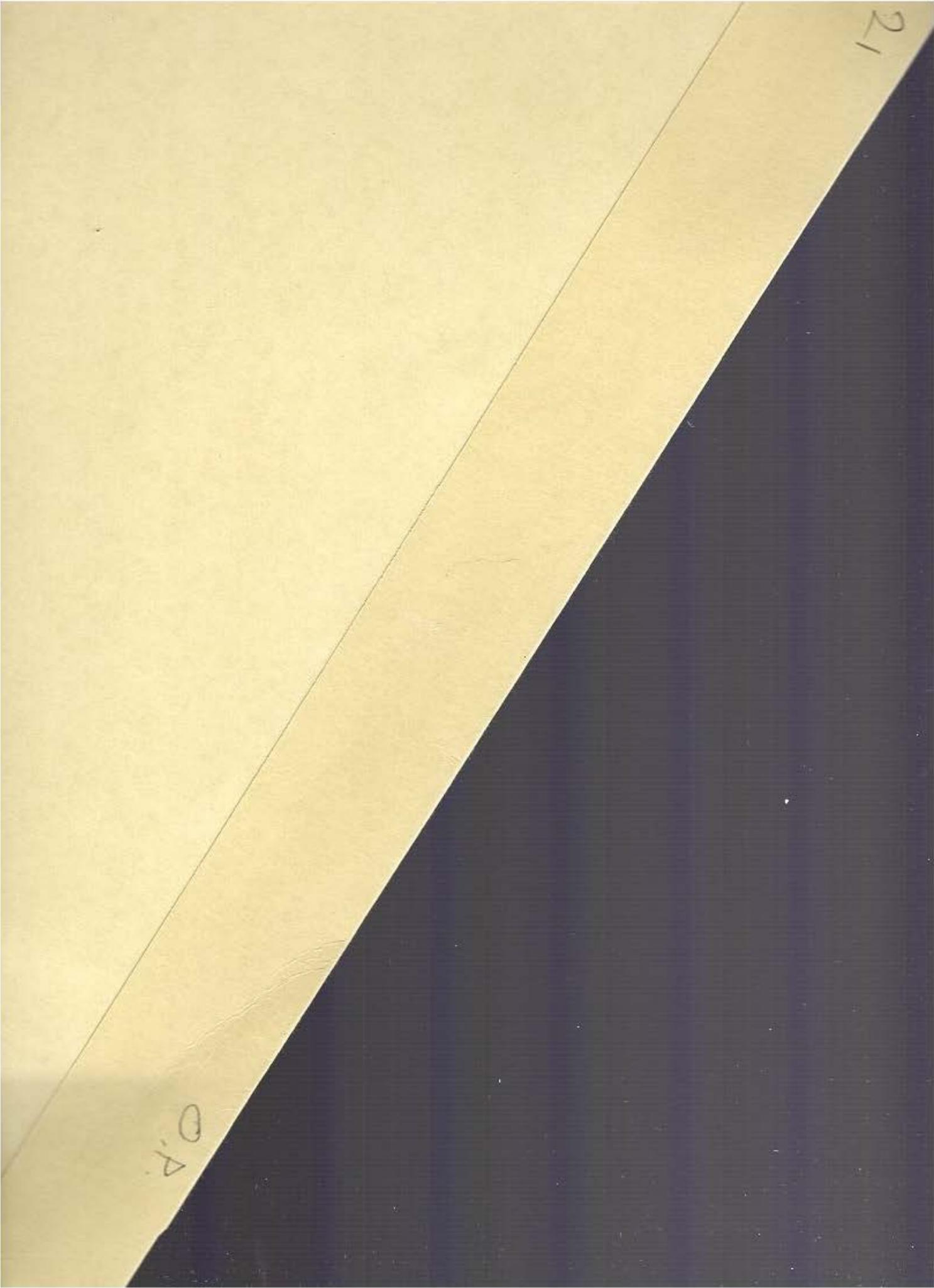
Closed Docketed Case Files, 1947-82

Docket # 21

Box 319

Entry 11UD

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FILED
AUG 29 1951

(FILE ENDORSEMENT OMITTED)

James H. Thompson
INDIAN CLAIMS COMMISSION

BEFORE THE INDIAN CLAIMS COMMISSION

(TITLE OMITTED)

THE CREEK NATION,
Petitioner,

vs.

DOCKET NO. 21

THE UNITED STATES,
Defendant.

MOTION TO CHANGE RECORD NAME OF ONE
OF MOVANTS FOR LEAVE TO INTERVENE - Filed Aug. 29. 1951

Come now C. W. MCGHEE, RUBY Z. WEATHERFORD, JOHN V. PHILLIPS and JOHN WILLIAMS, as members of and on the relation of The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians, by their attorney, C. LeNoir Thompson, and move this Commission that the group on the relation of which said individual movants are appearing before this Commission be changed on the records of this Commission so as henceforth to appear as: THE CREEK NATION EAST OF THE MISSISSIPPI, and as grounds for said motion state that:

1. Prior to August 4, 1951, the group on the relation of which the individual movants are appearing was known by the name of "The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" which name had been duly adopted by the members of said group.

2. On August 4, 1951, at a general meeting of the members of said group, the members of said group, by unanimous resolution duly passed in accordance with the by-laws of said group, changed the name of said group to "THE CREEK NATION EAST OF THE MISSISSIPPI".

3. At this meeting the membership confirmed, ratified and adopted all actions taken by the group occurring prior to the change of name.

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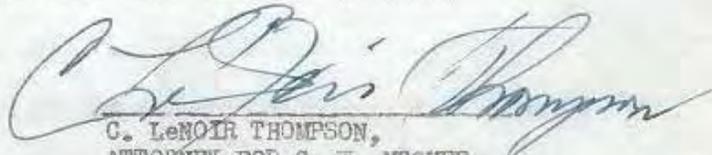
4. A certified copy of the minutes of said meeting, including the two above described resolutions, is attached hereto as Exhibit "A" and made a part hereof.

5. No change in the organization or composition of the group resulted from or accompanied the change in name.

6. A change in the record in this proceeding is necessary in order to reflect the above described change of name.

7. No hearing is requested on this Motion for the reason that it appears to be one which may be acted upon ex parte under Section 5 (c) of the rules of this Commission.

WHEREFORE, it is prayed that this motion be granted.



C. LENOIR THOMPSON,
ATTORNEY FOR C. W. MCGHEE,
RUBY Z. WEATHERFORD, JOHN V.
PHILLIPS AND JOHN WILLIAMS,
AND THE CREEK NATION EAST OF
THE MISSISSIPPI, FORMERLY THE
PERDIDO FRIENDLY CREEK INDIAN
BAND OF ALABAMA AND NORTHWEST
FLORIDA INDIANS
Bay Minette, Alabama

✓ Exhibit "A" to Motion

BE IT REMEMBERED THAT THIS DAY upon the call of Calvin McChes, permanent chairman, the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida, has assembled in a meeting duly and regularly called.

That on a motion made by J. C. Webb, AND SECONDED BY John Williams, the following resolution authorizing the name of the band be changed from the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida, to the Creek Nation East of the Mississippi, was voted upon and was unanimously adopted.

And that on a motion made by Willie B. Olsen, and seconded by Thelma Webb, adopting, ratifying and confirming the present officers and attorneys and all actions, agreements, contracts and proceedings of the band by its former name, and of its Council, was voted upon and unanimously adopted.

Ruby Weatherford
Secretary to Council.

Approved:

C. W. McChes
Permanent Chairman.

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Be it hereby resolved that we as members of The Creek Nation East of the Mississippi do hereby accept, adopt and confirm those actions done, contracts made and agreements entered into by the band under its former name of The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida and we do hereby accept, adopt and confirm those actions, agreements and contracts entered into or done by the Permanent Chairman and by the Council of the band under its former name and we do hereby adopt confirm and ratify the designation of the four members of the band designated and authorized to represent the band in the several courts of the United States which members are Ruby L. Weatherford, C. W. McGhee, John Williams and John V. Phillips.

And be it further resolved that we do hereby adopt confirm and ratify the agreement entered into by the said authorized representatives of the band under its former name with the following named attorneys: C. LeNoir Thompson, Hugh Hazelle, and Frank Horne, which agreement was authorized on the 9th day of January, 1951 at a Council meeting regularly called in which the attorneys herein named were authorized and empowered to associate by assignment the Honorable Claude Pepper as an attorney of record in behalf of the band.

That we do authorize and empower each of our duly named officers and representatives and our specifically named attorneys to continue all proceedings instituted in the name of the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida by amending such proceedings and continuing them in the name of The Creek Nation East of the Mississippi.

That we do authorized our chairman and secretary to forward copies of the resolutions adopted here at this meeting to the proper officials of the United States Government and we do instruct our several officers named herein to lend all aid and service possible toward furthering our claims against the United States Government under that special act of Congress approved August 13, 1946 (60 Stat. 929, 25 U.S.C. 70).

Done at Peach, Escambia County, Alabama on this the 4th day of August, 1951.

C. W. McGhee
Permanent Chairman

MU001706

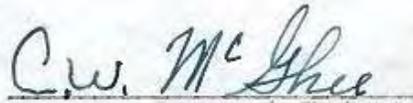
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Done at Beach, Escambia County, Alabama on this the 4th day of August, 1951.


Permanent Chairman


Secretary of Council.

3267

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Be it hereby resolved that we, descendants by blood of the original Creek Nation which resided in what is now known as the states of Alabama, Georgia and Florida having on the 19th day of October, 1950 organized ourselves into a band in accordance with and in compliance with a certain act of Congress approved August 13, 1946 (60 Stat. 959, 25 U. S. C. 70) which band was known as the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida and that we have here met in an official meeting of the band after having given due notice to those on the membership rolls of said band for the purpose of changing the name of our band from that of the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida to the name, "The Creek Nation East of the Mississippi," which was our original name and the name of our Indian forefathers. Which meeting is now held this 4th day of August at the consolidated Indian School at Poarch Community, seven miles from Atmore, Alabama.

Be it further resolved that we do hereby change our name as of this date to be known henceforth and hereafter as "THE CREEK NATION EAST OF THE MISSISSIPPI," and our band shall by this name be hereafter known and called.

Adopted this August 4, 1951 at a general meeting assembled on the grounds of the consolidated Indian School in the Poarch Community, Escambia County, Alabama, and that having adopted as our proper and official name the designation "The Creek Nation East of the Mississippi" and unanimously confirm their election as such officials. Those who were elected by the band under its former name of the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida, and that said officials and their offices are as follows: Calvin McGhee, permanent chairman, Ruby L. Weatherford, Secretary of Council, Roberta Sells, Recording Secretary, Council Members: Ruby Weatherford, Leola Manac, Kensie McGhee, John Williams, Dave Presley, Arthur Reid, John Phillips, J. S. Webb, Tom Weatherford, Brooks Holin, Claude Colbert, and Roberta Sells.

C. W. McGhee
Permanent Chairman.

MU001708

Creek Nation which resided in what is now known as the states of Alabama, Georgia and Florida having on the 19th day of October, 1950 organized ourselves into a band in accordance with and in compliance with a certain Act of Congress approved August 13, 1946 (60 Stat. 959, 25 U. S. C. 70) which band was known as the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida and that we have here met in an official meeting of the band after having given due notice to those on the membership rolls of said band for the purpose of changing the name of our band from that of the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida to the name, "The Creek Nation East of the Mississippi," which was our original name and the name of our Indian forefathers. Which meeting is now held this 4th day of August at the consolidated Indian School at Poarch Community, seven miles from Atmore, Alabama.

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Adopted this August 4, 1951 at a general meeting assembled on the grounds of the consolidated Indian School in the Poarch Community, Escambia County, Alabama, and that having adopted as our proper and official name the designation "The Creek Nation East of the Mississippi" and unanimously confirm their election as such officials. Those who were elected by the band under its former name of the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida, and that said officials and their offices are as follows: Calvin McGhee, permanent chairman, Ruby A. Weatherford, Secretary of Council, Roberta Sells, Recording Secretary, Council Members: Ruby Weatherford, Leola Manac, Kensie McGhee, John Williams, Dave Presley, Arthur Reid, John Phillips, J. C. Webb, Tom Weatherford, Brooks Rolin, Claude Colbert, and Roberta Sells.

C. W. McGhee
Permanent Chairman.

Ruby Weatherford
Secretary of Council.

EXHIBIT G

*Received by mail.
Nov. 7, 1951.*

IN THE
United States Court of Claims

Appeal Docket No. 14.

C. W. MCGHEE, RUBY Z. WEATHERFORD, JOHN V. PHIL-
LIPS AND JOHN WILLIAMS, as Members of and on
the Relation of the Creek Nation East of the Mis-
sissippi, *Appellants*,

v.

THE CREEK NATION AND THE UNITED STATES,
Appellees.

BRIEF FOR APPELLANTS.

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PRINTED BY BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE
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LIPS AND JOHN WILLIAMS, as Members of and on
the Relation of the Creek Nation East of the Mis-
sissippi, *Appellants*,

v.

THE CREEK NATION AND THE UNITED STATES,
Appellees.

BRIEF FOR APPELLANTS.

This proceeding is one of brother against brother. Creeks in Oklahoma, suing to repair an injury inflicted upon the common ancestor, seek to deny the right of their brother Creeks elsewhere to share in the recovery.

This appeal is from an Order of the Indian Claims Commission entered June 4, 1951, in its docket number 21, *The Creek Nation v. The United States*, denying appellant Creeks' Amended Motion for Leave to Intervene as parties plaintiff therein. The proceeding be-

low, in which intervention was sought and denied, was one brought against the United States before the Indian Claims Commission under the Indian Claims Commission Act (60 Stat. 959, 25 U. S. C. 70) by "The Creek Nation", a political body of Creek Indians inhabiting the Creek reservation in Oklahoma, to recover damages for the wrongful taking of lands in what is now Alabama and Georgia in 1814 from the original Creek nation of Indians.

STATEMENT OF FACTS.¹

Appellants, C. W. MCGHEE, RUBY Z. WEATHERFORD, JOHN V. PHILLIPS, and JOHN WILLIAMS, are Creek Indians, descendants of Creeks who were members of the Creek nation of Indians on August 9, 1814, when by a certain treaty between the United States and the Creek nation the latter ceded to the United States a vast tract of land in what is now Alabama and Georgia, and members themselves by blood of that nation. (R. 88).

The original Creek nation of Indians, once known as the Muskogee Confederation was a great and powerful confederation of Indian tribes who were the aboriginal inhabitants of a large area in what is now the southeastern United States, including nearly all of Alabama and Georgia and parts of Florida and Mississippi. (R. 2, 89) On August 7, 1790, the Creek nation entered into a treaty of friendship with the United States, whereunder it placed itself under the protection of the United States, ceded certain lands to the United States,

¹ Since no findings of fact have been made in this proceeding, no evidence taken on appellants' amended motion, and the evidence in the principal proceeding is not a part of the record on appeal, the facts are taken from undenied allegations of the pleadings and motions herein, from the Commission's opinion and from the United States Statutes-at-Large. Much that is historical appears a proper subject of judicial notice.

and in return was guaranteed all its lands within boundaries defined in that treaty. (R. 89, 7 Stat. 35)

During the War of 1812, certain of the Creeks were persuaded to assist the British. Much the greater number of the Creeks remained loyal to the United States, and in fact, fought against the rebellious Creeks, incurring great casualties, much suffering, and serious losses. Finally, of course, with the assistance of the United States, the uprising was put down. (R. 4, 5, 6)

In purported retaliation for this incident, the United States sent its emissaries to complete a new treaty with the Creek nation under which, on August 9, 1814, the Creek nation was compelled, by duress and threats of force, to convey to the United States 23,267,600 acres of its domain without receipt of any consideration therefor. (7 Stat. 120) (R. 6, 7, 8, 89)

It is the claim of petitioner-appellee "The Creek Nation" of Oklahoma, as well as of appellants, that the taking of these lands by the United States under this treaty was an unfair imposition by the United States upon the Creek nation and inflicted an injury upon it for which recovery is authorized under the Indian Claims Commission Act. (R. 13, 93)

Subsequent to this treaty, as the white settlers of the United States desired more and more room for expansion, it became the policy of the United States to move as many Indians as possible westward. (R. 90)

As the Commission found: "On January 24, 1826, 7 Stat. 286, the Creek Nation concluded a treaty with the United States by which it ceded an area of its domain located in Georgia and lying on the east side of the Chattahoochee river. A portion of the tribe wished to move west of the Mississippi river and the treaty pro-

vided (Art. 6) for a 'deputation of five persons' to select a country west of the river as a home for that part of the Creek Nation desiring to move west." (R. 114) The area, located in what shortly became the Indian Territory and is now part of Oklahoma, was duly selected and a number of the members of the tribe migrated.

The pressure of the Federal Government on the Creeks to move westward continued. As the Commission found: "On March 24, 1832, 7 Stat. 366, by treaty of that date, the Creeks ceded 'all their land, East of the Mississippi river' to the United States. This treaty contained this provision (Art. XII):

'The United States are desirous that the Creeks should remove to the country west of the Mississippi, and join their countrymen there; and for this purpose it is agreed, that as fast as the Creeks are prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes— Provided however, *that 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.*' (Italics added.)

"Article II thereof required the United States to survey the ceded area and allowed '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 a term of five years, unless sooner disposed of by them.' Provisions were also made for taking a census of the persons making selections and for making selection of twenty sections for the benefit of or-

phan children of the Creeks. Article III authorized the sale of the selections, and Article IV provided:

'At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee simple, from the United States.'

"Article XII of this treaty quoted above discloses the desire of the United States to move all Creeks west of the Mississippi river, and as an inducement to move, agreed to pay the expenses of removal, provide subsistence during removal and for a year after their arrival west. However, such removal was not compulsory as to individual Creeks, for the article, as shown above, contained the proviso 'that 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.'" (R. 115, 116)

On February 14, 1833, the "Muskogee or Creek nation of Indians, west of the Mississippi" represented by "chiefs and head-men of the said Muskogee or Creek Indians, having full power and authority to act for their people west of the Mississippi," entered into a treaty with the United States in which title to the territory in Oklahoma was confirmed and guaranteed by the United States. The treaty provided that these lands "be taken and considered the property of the whole Muskogee or Creek nation, as well as of those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi." Only those settling in the territory have ever derived any benefit from these lands. Grants of money also agreed upon in the treaty were expressly stated to be "intended solely for the use and benefit of that

portion of the Creek nation, who are now settled west of the Mississippi." (7 Stat. 417)

History does not record how many Creeks migrated to Oklahoma and how many remained in the Southeast, but it appears that the number staying behind was so substantial that it might fairly be said that the Creek nation was divided by the migration. (R. 91, 92)

The migrating Creeks formed an organization for the management of their affairs in the Indian Territory and were first called in treaties "the Creek tribe of Indians west of the Mississippi" (Treaty of August 7, 1856, 11 Stat. 699), sometimes simply "The Creek Nation" (Treaty of June 14, 1866, 14 Stat. 785) and later generally, in treaties and Acts of Congress, "The Creek Nation in the Indian Territory" (Act of March 1, 1889, 25 Stat. 757; Act of June 28, 1898, 30 Stat. 495; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500). All of these treaties and laws related to affairs of the Creeks in Oklahoma.

Commencing in the 1880s, in preparation for the admission of Oklahoma to statehood, it became the policy of the United States to do away with the local self-government of the tribes in the Indian Territory, as well as the communal ownership of lands by these tribes. By a series of laws commencing with the Act of February 8, 1887, Congress provided for eventual citizenship of the Indians who were members of these tribes and for the allotment of the tribal lands to the individual members. The Act of 1887, in granting citizenship to Indians leaving their tribes, expressly guaranteed the existing rights to tribal or other property of all Indians, including those who had theretofore left their tribes. (24 Stat. 388, Section 6.)

In pursuance of the federal policy to extinguish tribal rights in lands in the Indian Territory, a Com-

mission to the Five Civilized Tribes was created by Act of March 3, 1893 (27 Stat. 645). By Act of June 10, 1896, this Commission was empowered and directed to make rolls of the citizens in the Indian Territory of these tribes to afford the basis of allotment of the tribal lands in the Indian Territory and division of tribal moneys arising from the sale of lands. (29 Stat. 321) This allotment was further implemented by the Act of June 28, 1898, which made additional provisions for enrollment, and provided that, for the purpose of this allotment, "No person shall be enrolled who has not heretofore moved to and in good faith settled in the nation in which he claims citizenship." (30 Stat. 495)

A subsequent agreement of March 8, 1900, between the United States and "The Creek Nation in the Indian Territory," confirmed by the Act of March 1, 1901, prescribing further terms for the allotment of Creek lands in the Indian Territory, restricted enrollment to those persons living in the Creek area in the Indian Territory. (31 Stat. 861.)

By Act of May 8, 1906, Congress re-affirmed its guarantee of the rights of Indians who had left their tribes and become citizens of the United States, amending the Act of February 8, 1887, to provide in part:

"Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits

of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: * * *

"And provided further, That the provisions of this act shall not extend to any Indians in the Indian Territory. * * * * " (Italics ours.) (34 Stat. 137.)

This series of agreements and Acts of Congress provided for eventual abolition of the jurisdiction of the Indian tribes over the local affairs of their members, and of the tribal title to lands, abolished the enforcement of tribal laws, did away with the power of the tribes to collect money for account of the members or for their account and in general diminished and provided for eventual abolition of the power and authority of the tribal organizations. All moneys awarded on claims to be distributed per capita to members or descendants of members of tribes are distributed directly to these members by the Secretary of the Interior. (Act of June 28, 1898, 30 Stat. 495) (R. 91, 92)

"The Creek Nation" of Oklahoma still maintains its tribal organization. (R. 2)

Appellants and the thousands of other Creeks they represent are descended from that portion of the Creek nation which remained East of the Mississippi. Because they possessed no territory and were not dealt with by the United States as a group, they did not retain a general tribal organization, although various groups of them have resided together in small close-knit communities and preserved their tribal ties and certain of their customs. (R. 83)

Appellants and other Creeks in the Southeastern States have recently joined together for their common benefit in an organization known first as the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians"; its name has now been changed to "The Creek Nation East of the Mississippi" as more appropriate to its scope. The sole requirement for membership is that one be a lineal descendant of a member of the original Creek nation and be not enrolled in petitioner-appellee. (R. 88, 120)

STATEMENT OF THE CASE.

The Indian Claims Commission is a statutory tribunal; proceedings before it are based upon the Indian Claims Commission Act (60 Stat. 959, 25 U.S.C. 70) which authorizes the Commission to hear and determine all claims of "any Indian tribe, band, or other identifiable group of American Indians" against the United States for injuries inflicted upon them by the United States.

The proceeding below was begun by "The Creek Nation" of Oklahoma on January 29, 1948, by the filing of a petition with the Indian Claims Commission, claiming damages for the taking of lands of the Creek nation by the United States under the Treaty of Au-

gust 9, 1814. (R. 55) A trial of the issues on the merits was held on October 17 and 19 and November 16, 1949, and January 24, 1950, and arguments were heard on November 29, 1950, and the issues are now awaiting decision by the Commission.

On January 5, 1951, the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" filed a "Motion to Intervene", with a "Petition for Leave to Intervene" attached. (R. 65, 67) Thereafter, on January 15, 1951, petitioner-appellee "The Creek Nation" filed its objections to this motion and on January 23, 1951, defendant-appellee, the United States, filed its objections. (R. 72, 81) On April 4, 1951, appellants, as members of and on the relation of the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians, filed an "Amended Motion for Leave to Intervene", attaching a "Petition of Interveners" and a "Statement of Specific Points of Law and Authorities in Support of Motion for Leave to Intervene". (R. 83, 88, 95) Objections to said amended motion were duly filed by petitioner-appellee, "The Creek Nation" of Oklahoma, on April 17, 1951. (R. 104) The amended motion was argued on April 18, 1951, before the Indian Claims Commission. Appellants filed a "Supplement to Statement of Specific Points of Law and Authorities in Support of Motion for Leave to Intervene" on May 14, 1951. On June 4, 1951, the Commission entered its Order denying the amended motion, and filed its *per curiam* opinion. (R. 112, 113)

Thereafter, on appellants' motion, an Order was entered noting in the record the change of the name of the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" to "The Creek Nation East of the Mississippi". (R. 125)

On September 4, 1951, appellants filed their Notice of Appeal with the Indian Claims Commission and on September 6, 1951, the record on appeal was duly filed with the Clerk of this Court. (R. 126, 128)

The grounds upon which appellants sought to intervene as parties petitioner in the proceedings below are stated in their Amended Motion, Petition and Statement of Points and Authorities. Appellants' basic premise is that the injury inflicted by the United States in 1814 was to the Creek nation as then constituted and that the right to recover therefor belongs to that nation, to be enjoyed by all its members. Their position is that petitioner-appellee "The Creek Nation" of Oklahoma, whose membership is restricted to Creeks in Oklahoma, is not identical with or the full successor of the Creek nation, and that it improperly claims to be, thus denying rather than representing the rights of appellants. Appellants brought their amended motion to intervene on the relation of the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" now "The Creek Nation East of the Mississippi", whose rolls are open to all those who can prove lineal descent from the members of the original Creek nation, as the appropriate way of assuring that the original Creek nation be in effect made the petitioner in the proceeding below, so that judgment may be entered in its favor rather than petitioner's. In appropriating for this judgment and providing for its distribution, Congress may then appropriately direct that rolls be created of all those now members by blood of the original Creek nation or succeeding to the rights of its members.

The position of petitioner-appellee "The Creek Nation" of Oklahoma is that it is identical with the orig-

inal Creek nation, the successor to its rights, and solely entitled to recover for the injury. It further contended below that intervention was procedurally impossible before the Commission, that the motion was not timely, and that appellants are not members of a "tribe, band or other identifiable group" entitled under the Indian Claims Commission Act to have their claims determined by the Commission.

The reasons given by the Commission in its *per curiam* opinion for its denial of appellants' amended motion may be summarized as follows:

1. Appellants are not members of a "tribe, band or other identifiable group" within the meaning of the Indian Claims Commission Act in that they do not have a "common claim".

2. Petitioner-appellee has the exclusive right to prosecute the claim for the 1814 injury to the Creek nation.

3. The jurisdiction of the Commission does not extend to defining identity of the group entitled to recover on any claim placed before it.

It is appellants' position that the denial of the motion was error and that all of the above grounds for it are erroneous.

QUESTIONS PRESENTED.

1. Are appellants members of a "tribe, band or other identifiable group of American Indians" within the meaning of the Indian Claims Commission Act?

2. Do appellants have a "common claim" within the meaning of the decisions imposing this requirement for jurisdiction of the Commission?

not true qm

3. Is Petitioner-appellee "The Creek Nation" of Oklahoma the proper petitioner solely entitled to assert the claim for the injury inflicted upon the Creek nation under the authority of the Treaty of 1814?

4. Did the Indian Claims Commission have jurisdiction to determine whether petitioner-appellee is the party entitled to recover on the claim asserted or whether another group should be added or substituted as petitioner for the purposes of judgment?

ARGUMENT.

THE INDIAN CLAIMS COMMISSION COMMITTED REVERSIBLE ERROR IN DENYING APPELLANTS' AMENDED MOTION FOR LEAVE TO INTERVENE.

I.

The Indian Claims Commission Erred in Determining that "The Petitioner In This Case [The Creek Nation' of Oklahoma] Has the Exclusive Right to Prosecute the Claim Here Asserted."

A. *The Injury Inflicted by the United States in Exacting and Enforcing the Treaty of 1814 was Suffered by all Creeks, Not Simply Those Now in Oklahoma.*

cannot split Creek Nation -

One hundred thirty-seven years ago when a grievous wrong was done to the Creek nation in depriving it of a large part of its territory in Alabama and Georgia without compensation, it was a homogeneous people. It is doubtful if there was anyone of the Creek blood anywhere who was not privileged to call himself a member of the nation and to share in the enjoyment of its common lands and goods. It enjoyed independence

and sovereignty. While the encroachments of the white settlers had begun, only 24 years had passed since the United States had guaranteed its boundaries and promised protection. (7 Stat. 35)

The burden of the taking of over 23 million acres fell upon all the Creeks equally, because of their common ownership. It made all of them and all of their descendants poorer, by depriving them of their enjoyment of the land and of the fruits of its use or sale through the succeeding years down to the present generation.

The time has at last come when it appears that the United States may make reparation for its mistreatment of the Creeks, as well as of other Indian groups. There would appear to be no question that the repayment must be for the benefit of all Creeks, since all Creeks were injured. Yet petitioner-appellee contends that it alone is entitled to the relief for the injury to all, for the benefit of its members, and the Indian Claims Commission has agreed that it alone can prosecute the claim.

Those now members of "The Creek Nation" of Oklahoma are not all, or even nearly all, the members by blood of the original Creek nation. They are simply those whose ancestors decided to migrate to the Indian Territory and were there granted new lands and allotments, and who have since enjoyed the bounty and guardianship of the federal government. They are, if anything, less injured because of the wrong and less deserving of recompense than the thousands of others whose ancestors stayed behind to make their own way on the small allotments parcelled out to them and accepted the responsibilities of full citizenship.

Compelling arguments should be required to support the denial of relief for this ancestral wrong to the nation as a whole and the granting of relief only to those Creeks who happened to reside on a reservation in Oklahoma on certain dates in the early 1900s when a roll was made of those so residing.

The Commission appears to have reached this inequitable decision as a result of three erroneous conclusions. The first is that "The Creek Nation" of Oklahoma is nothing but the original Creek nation transplanted to Oklahoma. The second is that, because it has maintained a continuous organization, dealt with by the Federal Government, and because it bears the name "The Creek Nation", it is the sole representative of Creek people qualified to present their claims to the Commission. The third is that, conversely, because appellants have been members of no continuous political organization of Creeks recognized by the government, they must be denied the right to present claims.

B. Petitioner-appellee "The Creek Nation" of Oklahoma Is Not Identical With the Original Creek Nation Which Existed at the Time of the Asserted Injury.

The Indian Claims Commission was apparently misled by the identity of the name of the present "Creek Nation" of Oklahoma with that of the original Creek nation into stating in its opinion that appellants, in effect, concede petitioner-appellees' exclusive right to prosecute the claim in issue by asking that "the members of the Creek Nation" be granted recovery. (R. 117). Appellants did and do ask that the Creek nation be granted relief but strongly affirm that petition-

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Correct
Correct

not misled

er-appellee is *not* the Creek nation in a generic sense nor the Creek nation which sustained injury in 1814.

The Creek nation, as a national entity, was disorganized and divided as a result of events occurring shortly after the Treaty of 1814. These events are related in detail in the statement of facts, *supra*. They resulted from the pressure of the inland movement of the whites along the eastern seaboard. In 1814 the Creek nation had ceded land to the United States. In 1826 it ceded more land, and a group of its members, desiring to move westward to avoid the white man, obtained permission to send 5 delegates to the West to select land, which the United States promised to give them and to which it promised to move them within 24 months. (7 Stat. 286) In 1832 the Creek nation ceded all its land east of the Mississippi, and encouragement was offered all Creeks to emigrate to the territory west of the Mississippi. At the same time, it was expressly agreed that they were not compelled to go, and detailed provision was made for a survey, a census and for allotment of sections and half-sections of land to those electing to remain. (7 Stat. 366)

As might be expected, many chiefs and heads of families elected to remain in their native surroundings. One need only to check Parsons & Abbotts' Census of the Creeks in 1832 in the National Archives, subsequent censuses of the Southeastern States and local land and birth records, or the membership rolls of "The Creek Nation East of the Mississippi", to gain an idea of their great number, alleged in appellants' original motion to be approximately 10,000.

In the first treaty made by the United States with those migrating westward, the latter were identified as "the Creek nation of Indians west of the Mississippi",

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it being stated that the signatory chiefs had "full power and authority to act for their people west of the Mississippi". It was also recited in the treaty that the great body of the Creek nation as of that time remained "on the east side of the Mississippi".

The political organization of the Creeks in the area granted to them in the Indian Territory used the name "The Creek Nation", but this name was almost always accompanied by restrictive language limiting it to those Creeks in the Indian Territory (Treaty of August 7, 1856, 11 Stat. 699; Act of June 28, 1898, 30 Stat. 495; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; Act of April 26, 1906, 34 Stat. 137.)

The rolls of "The Creek Nation" of Oklahoma were closed in 1907.

The rolls made at that time were created for the express purpose of effecting the allotment of the Creek lands in the Indian Territory in Oklahoma. (Act of June 28, 1898, 30 Stat. 495.) Appellants and other Creeks like them cannot now be enrolled. They were never entitled to gain enrollment, except by taking up residence in the Creek territory in Oklahoma, for enrollment was expressly restricted to those residing in the Creek reservation or who moved to it prior to a given date. (Act of June 28, 1898, 30 Stat. 495.) Thus the very limitations on membership prove the limitations of the organization, which was for the purpose of governing affairs of the Creek Indians in Oklahoma, the division of lands located there and the handling of other administrative and financial matters pertaining to that group. This, together with the repeated recognition in treaties and Acts of Congress of the restrictive character of petitioner-appellee, conclusively

proves that "The Creek Nation" of Oklahoma is not the same as the original Creek nation or even a full successor to it, but a restricted organization for the government of those Creeks in Oklahoma.

To make this restricted organization the successor to all rights of parent nation and membership in it the basis of enjoyment of relief granted for the wrong to the parent not only will ignore the history of the Creek nation, but will work a grave injustice upon many of those who are blood members of it.

C. *Appellants and Other Creeks Did Not Lose Their Rights in the Claim in Issue by Not Emigrating to Settle in Oklahoma.*

Petitioner-appellee urged very strongly in its objections to appellants' original and amended motions that appellants and other similar descendants of members of the injured Creek nation had forfeited their rights in the claim by electing not to go west and become members of the group there whose descendants comprise petitioner-appellee. (R. 75-78, 106-110) In support of this position it cited and quoted *Eastern Band of the Cherokee Indians v. United States*, 117 U. S. 288 (1886) (R. 77). The language quoted might be somewhat persuasive were it not for the fact that the facts there are so easily distinguishable from those at issue here. In that case, unorganized Eastern Cherokees who had failed to migrate westward were attempting to claim a share in funds arising from the sale of the lands in *Oklahoma* which the migrating Cherokees had settled, and from commutation of annuities granted in exchange for surrender of those *Oklahoma* lands. They were properly denied the right to share. Obviously appellants would have no right,

nor do they claim any, to share in lands or moneys or claims arising out of the affairs of petitioner-appellee in *Oklahoma*. But appellants have not, simply by not going to *Oklahoma*, surrendered their rights to the claim in issue, arising out of an injury to their nation in the east prior to the migration. This is made clear in *United States v. Cherokee Nation*, 202 U. S. 101, 26 S. Ct. 588 (1906) wherein the unorganized eastern Cherokees were claiming to be entitled to share in funds owing by the United States to the Cherokee Nation under the Treaty of New Echota of May 23, 1836. The Supreme Court said (26 S. Ct. at 599-600), quoting with approval from the opinion of this Court:

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration *per capita*. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and head men of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation, and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the West, in the \$5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita*. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the \$5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the nation, and the nation properly made no distinction when parting with the Outlet, but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the nonfulfillment of the treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners."

The rights of those in the position of appellants were expressly saved and guaranteed by the Act of February 8, 1887, 24 Stat. 390, as amended March 3, 1901, 31 Stat. 1447 and May 8, 1906, 34 Stat. 182:

"Every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has

voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, *whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.*" (Italics ours)

In discussing this statute and the general trend of government policy toward the Indians and Indian tribes, the Court of Appeals of the District of Columbia, in *United States ex rel. Besaw v. Work*, 6 F. 2d 694, 698 (1925), quoting with approval from *Oakes v. United States*, 172 F. 305 (C.C.A. 8th, 1909), said:

"On this point the court said: 'For many years the treaties and legislation relating to the Indians proceeded largely upon the theory that the welfare of both the Indians and the Whites required that the former be kept in tribal communities separated from the latter, and while that policy prevailed, effect was given to the original rule respecting the right to share in tribal property; but Congress later adopted the policy of encouraging individual Indians to abandon their tribal relations and to adopt the customs, habits, and manners of civilized life, and, as an incident to this change in policy, statutes were enacted declaring that the right to share in tribal property should not be impaired or affected by such a severance of tribal relations, whether occurring theretofore or thereafter.'

"After citing and quoting from a number of the acts of Congress, the court said: 'These acts dis-

close a settled and persistent purpose on the part of Congress so to broaden the original rule respecting the right to share in tribal property as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing, in that regard, as though they had maintained their tribal relations. Not only this, but these acts, omitting that of 1865, are general and continuing in their nature, and therefore are as applicable to the Chippewas in Minnesota as to other Indians, unless the act of 1889 discloses, either expressly or by necessary implication, that Congress intended otherwise. In our opinion that act does not thus disclose such an intention.' "

* * * * *

"Confusion seems to have arisen through failure to distinguish between membership in an Indian tribe and the mere severance of tribal relations. The breaking or severance of tribal relations occurs where a member of the tribe abandons the tribal life, removes from the tribal habitation, and by marriage, exercise of the homestead right, or otherwise, establishes a residence elsewhere and adopts the habits and customs of civilized life. But membership in an Indian tribe is based upon the firm foundation of right by blood inherited from Indian ancestry.

"Nor is the test one of citizenship. In the absence of a treaty or an act of Congress conferring citizenship upon Indians, who already had, or who would in the future, abandon tribal life and adopt the habits and customs of civilized life, expressly reserved to such Indians all their rights in tribal property held in common for the benefit of the membership of the tribe. Hence the mere transfer of citizenship is not important, so far as the question of the rights in tribal property is concerned. * * * "

Thus neither in fact nor in legal fiction is petitioner-appellee the full successor to the Creek nation, entitled to exclude descendants of its members not presently enrolled in petitioner-appellee from participation in any recovery.

D. *Petitioner-appellee "The Creek Nation" of Oklahoma Is Not Entitled to Represent the Entire Creek Nation in Prosecuting Claims Before the Indian Claims Commission.*

Petitioner-appellee, the political organization of the Creeks in the Creek territory of Oklahoma, is not representative of all the Creek nation, as demonstrated above. It removes any lingering possibility of its being considered the organization entitled to represent all by expressly disclaiming the right or obligation. It denies, in its "Objections to Amended Motion to Intervene", that the portion of the Creek nation including appellants is entitled to representation before the Commission, or to participate in any recovery. (R. 104-111)

The Commission appears to have determined that the long-continued existence of petitioner-appellee and its record of dealings with the federal government, as contrasted with appellants' lack of formal organization for many years and lack of treaty dealings, vested it with the right to represent the nation. In determining that "the petitioner in this case has the exclusive right to prosecute the claim here asserted," the Commission states that after 1833:

" * * * all dealings of the Federal Government were made with the Creeks in Oklahoma, and we find no treaties, contracts or other transactions with those members of the tribe who remained

east, or that defendant ever recognized those remaining east as the Creek Nation.

"There are other instances by which the United States recognized the tribal government of the Creeks in Oklahoma, notably the Act of April 26, 1906, 34 Stat. 137, section 28, of which 'continued in full force and effect for all purposes, authorized by law' the Creek tribal government." (R. 117)

It is interesting that the Commission selected the 1906 Act as an instance of recognition by the United States of petitioner-appellee. For that act is entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes *in the Indian Territory*, and for other purposes" (Italics ours), petitioner-appellee is referred to as the "Creek Tribe *in the Indian Territory*" (Italics ours) and the act deals exclusively with matters relating to the Indian Territory.

The fact that the Federal Government recognized and dealt with the political organization of the *Creeks in Oklahoma* in regard to *Oklahoma affairs* is of course no indication that it regarded it as representative of *all Creeks*. Furthermore, the fact that the Federal Government had no dealings with those east of the Mississippi, as a group, is equally of no significance, since the latter, unlike the Creeks in Oklahoma, had no organization, occupied no bounded grant of territory and were not under the guardianship of the Federal Government.

The fact that petitioner-appellee is recognized by the Federal Government, whereas appellants can point to no organization recognized as representing *all Creeks*, is certainly no basis for granting petitioner-appellee the representation of all Creeks, or denying appellants

the right to appear and represent themselves and that portion of the nation *not* represented by petitioner-appellee. If there existed a recognized organization representative of the entire Creek nation, it would doubtless have exclusive right of representation. But certainly the existence of a recognized organization representative of only part of the nation, which, moreover, takes the position that the remaining unorganized portion has no claim, cannot preclude the remaining unorganized portion of the larger group from being represented.

II.

The Commission Erred in Determining that Appellants are not Members of a "Tribe, Band, or Other Identifiable Group of Indians" Entitled to Have Their Claim Determined by the Commission.

The Commission Determined that Appellants Are Not Members of Any "Tribe, Band, or Other Identifiable Group". In doing so, the Commission ruled that in order to be an identifiable group under the Act, it is necessary that petitioners have "a common claim." The Commission held that appellants have no common claim but present instead "a common suit for individual claims." (R. 118)

The Commission's ruling that the essential for suit before the Indian Claims Commission is that the Indians suing have a common claim was in accordance with its earlier decisions. *The Loyal Creek Band or Group of Creek Indians*, Ind. Cl. Com. Dkt. No. 1, opinion entered May 6, 1949; *Lewis et al. ex rel. the Creek Freedmen Association*, Ind. Cl. Com. Dkt. No. 25, opinion entered August 4, 1949; *Thompson et al. ex rel. Indians of California*, Ind. Cl. Com. Dkt. No. 31, opin-

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ion entered December 15, 1950. But it committed clear error in holding that appellants are not members of a group having a common claim.

The Commission itself has held an individual claim to be one for a direct injury to an individual, sustained in his individual capacity. In *The Fort Sill Apaches*, Ind. Cl. Com. Dkt. No. 30, opinion entered May 6, 1949, in denying the petitioner the right to sue for the alleged false imprisonment of 450 of its members, the Commission said:

" * * * The rights violated were those of the individuals and who in turn experienced the 'harm, suffering and humiliation' as a result of the alleged wrong. Thus it would seem that a personal or individual wrong has been inflicted on each Indian which damaged him individually and even though all the individual members sustained their respective injuries by the same common incident (arrest and imprisonment at the same time and place), the rights of each individual for the injury so sustained would be and remain several and independent of each other."

On the other hand, a common claim is one for injury to a group right as distinguished from an individual right. The Commission has repeatedly held that a claim for the taking of tribal lands is a common claim. *The Choctaw Nation*, Ind. Cl. Com. Dkt. No. 16, opinion entered July 14, 1950; *McCauley ex rel. the Kaw Tribe of Indians*, Ind. Cl. Com. Dkt. Nos. 33, 34 and 35, opinion entered September 17, 1951; *Pawnee Indian Tribe of Oklahoma*, Ind. Cl. Com. Dkt. No. 10, opinion entered July 14, 1950.

On the basis of these cases, there can be no question that the Indian Claims Commission is wrong and that appellants have a common claim of a group character.

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The claim presented is one for injury to the Creek nation as it existed in 1814 from the taking of its communal lands. Any judgment of the Indian Claims Commission must therefore be in favor of the Creek nation. Appellants are thus not asserting individual claims of themselves or the other Creeks, but are asserting as descendants of members of the Creek nation the common claim possessed by the nation which, because of the lack of present organization, can only be presented in a representative suit by individuals.

It does not matter whether the Creek nation be regarded as still in existence through blood ties or whether, because of the scattering of many of its members, it be regarded as having ceased to exist as a nation. In one event, appellants and those similarly situated whom they represent, who have for common protection formed "The Creek Nation East of the Mississippi", are members of the nation; in the other event they are members of an identifiable group in that they prosecute the common claim of the Creek nation descended to the present Creeks through lineal descent.

One of the Commission's own decisions, entered subsequent to its decision on appellants' amended motion, demonstrates this conclusively. In *Red Lake, Pembina and White Earth Bands*, Ind. Cl. Com. Dkt. No. 18-A, opinion entered September 17, 1951, one of the claims was that of the "Pembina Band" for the taking of lands under an 1863 treaty. The United States defended on the ground that it was not a "tribe, band or other identifiable group" at the time of the suit, although it had been at the time of the injury. The issue, the facts and the Commission's decision are best presented in its own language:

"The defendant takes the position that a tribe, band or other group must be an existing political

entity in order to have its claim determined by this Commission. Counsel for defendant does not deny the existence of the Pembina Indians as an organized band and its recognition as such by the United States at the time the treaty of October 2, 1863 was concluded with said band and the lands involved in this claim were ceded by it to the Government, but counsel contends that such a band of Indians as the Pembina Band no longer exists and has not existed since 1891, at which time its members were merged with either the Red Lake or White Earth Bands of Chippewa Indians, and are enrolled as members of those bands.

"A similar contention was made by the defendant in the case of *The Loyal Creek Band or Group of Creek Indians v. The United States*, Docket No. 1, decided May 6, 1949. In that case this Commission decided that the three classes of *claimants who are permitted to assert claims under the Indian Claims Commission Act, namely, a 'tribe, band, or other identifiable group' do not have to be existing political groups in order to be heard by the Commission. The controlling question is whether the claimant group can be identified and have a common claim.* We believe that the decision in that case applies to the contention made by the defendant in the present suit.

"As the plaintiffs concede that the Pembina Indians are no longer organized as a band, *the question then is whether members, or descendants of members of the Pembina Band as it existed and was recognized at the time of the 1863 treaty, can be identified.* If they can be so identified, then any one of their group is authorized by express statute to present this claim as a representative of all the members, as provided by Section 10 of the Indian Claims Commission Act (25 U.S.C. 70a), which provides that: 'any claim within the provisions of this Act may be presented to the

Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members. * * *'" (Italics ours)

Similarly, in the instant case, the Creek nation was organized and recognized at the time of the Treaty of 1814, it now lacks a comprehensive organization, but the descendants of its members can be identified through blood lines.

III.

The Commission Erred in Determining that it did not Have Jurisdiction to Define the Group Entitled to Recovery on a Claim Before it.

The Commission appears to have misunderstood the basic question it was called upon to decide on appellants' motion. In doing so it abrogated a necessary part of its jurisdiction, which is part of the jurisdiction of any tribunal authorized to hear and determine claims. In performing its duty to determine claims of any Indian "tribes, bands or other identifiable group" against the United States, it must determine not only whether a claim exists against the United States and in favor of someone, but whether the group suing is, in fact, the injured group or has otherwise acquired title to the claim. The United States defended petitioner-appellee "The Creek Nation's" case on the ground that no injury had been inflicted on anyone. It could as well have asserted the additional defense that "The Creek Nation" of Oklahoma was not the proper claimant, not being the full successor of the original Creek Nation nor entitled to recover full damages for any injury to it, nor properly representative of the entire

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Creek Nation, the proper claimant. If this had been done, we doubt that the Commission would have questioned its own power to determine this issue. Cf. *The Kaw Tribe of Indians ex rel. Keenan Pappan et al.*, Ind. Cl. Com. Dkts. Nos. 33, 34, 35, opinion entered September 26, 1950.

In *The Fort Sill Apaches*, Ind. Cl. Com. Dkt. No. 30, opinion entered May 6, 1949, this precise question was presented on motion to dismiss of the United States, on the ground that necessary parties had been omitted. The Fort Sill Apaches, formerly members of the Chiricahua and Warm Spring bands of Apaches, were suing on a claim for the taking of the reservation of the Warm Springs band. The United States contended that other descendants of the Chiricahua and Warm Spring bands were living at Mescalero reservation and were entitled to a portion of the claim. While declining to determine the question on the United States' motion because of the issues of fact presented, the Commission recognized the materiality of the issue and its obligation to determine it, saying:

“ * * * This contention of the Respondent may be correct in the event the petitioner fails to establish by its proof that it is the legal successor of the two bands, but we believe that it is only after proof of all the relevant facts and circumstances has been received on this issue that the Commission may, in view of the allegations of the petition, determine petitioner's right to maintain this action for the claim of the Warm Spring band of Apache Indians.”

Since the United States failed to raise this question in the instant proceeding, it became necessary for appellants to do so. This they might appropriately do, since

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their interests are those affected. Their amended motion and petition raised this question and presented an issue which the Commission should have determined, probably, in the light of the foregoing decision, by granting appellants' motion and taking evidence on the issue presented by its petition and the answers to be filed to it by the other parties as to “petitioner's right to maintain this action for the claim of ‘the Creek nation’.” Yet the Commission appears to have doubted its power to determine whether the entire Creek nation or only petitioner-appellee and its members were entitled to prosecute the claim. For it stated that by its amended motion “the Perdido Band is in reality asking us to determine the individual Indians who may participate in any award that may be made.” (R. 118)

Appellants contributed to the Commission's error in requesting, in the prayer for relief of the “Amended Petition of Interveners”, that “Interveners be declared entitled to share in said recovery on a per capita basis with all others who come before this Commission and establish that they are descendants of the members of the original Creek nation or, in the alternative, that a commission be created to determine and make a roll of the living descendants of members of the original Creek nation, in order to determine who shall be entitled to share in any recovery.” It is doubtful that the Commission possesses the power to do this or that it is a part of its function to determine the specific individuals to whom an award is to be distributed. This may be left to the Secretary of the Interior under the direction of Congress once a judgment has been entered making it clear that the claim and consequent judgment are the property of the original

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Creek nation to be enjoyed by their descendants. It will then be a matter for each individual to establish his descent.

But even if erroneous, this prayer of appellants does not, under established rules of pleading, deprive them of the right to that relief to which they are entitled. The allegations of appellants' amended motion tendered an issue as to the proper petitioner to prosecute the claim before the Commission:

"5. The injury for which relief is sought in this proceeding is the taking of lands in Alabama and Georgia by the United States from the Creek nation under the Treaty of August 9, 1814 between the United States and the Creek nation.

"6. The injury was thus one to the Creek nation, as then constituted, and the right to recover therefor passed to the descendants of all its members, who possessed communal rights to its lands, and the right to participate in any recovery for their taking.

"7. Because of the division of its members, and the present lack of any formal organization representing all members of the Creek nation, it must be regarded for the purpose of claims before this Commission under the Act of August 13, 1946, arising out of events prior to the westward migration of a portion of its members, as an unorganized tribe or other identifiable group of Indians.

"8. Even if the organization of the Oklahoma Creeks be regarded as the political successor of the earlier Creek nation, and thereby entitled to sue in a representative capacity for wrongs inflicted on the Creek nation, any recovery would be the rightful property of the original Creek nation, distributable to the descendants of those who were its members as of the time of the Treaty of 1814.

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"9. The organization of the Oklahoma Creeks, petitioner herein, does not purport to represent any Creeks other than those of the Indian Territory. It claims that its members and their descendants, as shown by its rolls, are entitled to recover and keep the full damages for the 1814 injury to the Creek nation. Its interests are thus to this extent adverse to those of your Applicants for leave to intervene, who claim the right, with all other descendants of the original Creek nation, to participate in any recovery.

"10. The interest of the Perdido Band and its members and other Creeks similarly situated, not enrolled or descendants of those enrolled in the organization of the Oklahoma Creeks, are thus not presently represented in this proceeding, in which they have a direct and immediate financial interest." * * *

Consistent with its own later decision in the *Fort Sill Apaches* case, *supra*, the Commission possessed the power to determine the issue presented as to the right of appellants to representation, and should have done so.

CONCLUSION.

The unsatisfied claims of Indians for abuses practiced by the United States upon them have been a source of discontent among Indians everywhere and a source of proper shame to our government for many years. In creating the Indian Claims Commission, Congress' avowed purpose was to provide a forum for the remedy of all wrongs done to Indian groups, whether legal wrongs or simply those based upon a breach of principles of "fair and honorable dealings." (60 Stat. 959, 25 U.S.C. 70)

Appellants and the claim they assert surely fall within this Congressional purpose.

They are Creek Indians. They are descendants of those who were the Creek nation at the time of the unconscionable treaty which took its lands. They are not a few stragglers, but thousands. They present not a bundle of individual claims, but a claim for injury to the nation. Theirs is a claim which, but for the existence of petitioner-appellee, the Commission, consistent with its decision in *Red Lake, Pembina and White Earth Bands, supra; Loyal Creek Band and Group of Creek Indians, supra, and Snake or Piute Indians of the Former Malheur Reservation in Oregon, Ind. Cl. Com. Dkt. No. 17*, opinion entered December 29, 1950, would certainly have heard.

Why, then, should the existence of petitioner-appellee be a bar to appellants' rights? Certainly membership or non-membership in a group in Oklahoma cannot have been intended by Congress to be a ground for distinction among those who are all commonly descended from the injured group. Certainly petitioner-appellee cannot be held solely entitled to represent the Creeks when it disclaims its representation of appellants and the very existence of their claim.

The decision of the Commission violates the purposes of the Indian Claims Commission Act and its own precedents. It should be reversed and appellants permitted to intervene so that the rights of all descendants of members of the injured nation not members of petitioner-appellee can also be represented and a determination made of the group entitled to recover.

CLAUDE PEPPER,
Cafritz Building,
Washington, D. C.,
Attorney for Appellants.

APPENDIX.

BEFORE THE INDIAN CLAIMS COMMISSION

Dockets No. 21

THE CREEK NATION, *Petitioner,*

v.

THE UNITED STATES, *Defendant.*

Order Denying Motion to Intervene.

On the 5th day of January, 1951, a group of Indians, designated as the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida," filed a motion in the above-entitled cause for leave to intervene therein, and thereafter, and on April 4, 1951, the same petitioners filed an amended motion accompanied by a changed petition of intervention, and a hearing was had upon said amended motion and the petition attached thereto, on April 18, 1951, and after argument of counsel for the applicant, the petitioner and the defendant before the Commission, the same was taken under advisement, and the Commission being now fully advised in the premises adjudges that said amended motion for leave to intervene in the above-entitled cause should be denied.

IT IS THEREFORE ORDERED AND ADJUDGED by the Commission that the amended motion for leave to intervene, filed herein on the 4th day of April, 1951, by said "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida," be and the same is hereby denied.

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Dated at Washington, D. C., this 4th day of June, 1951.

EDGAR E. WITT
Chief Commissioner
 LOUIS J. O'MARR
Associate Commissioner
 W. M. HOLT
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 21

THE CREEK NATION, *Petitioner,*

v.

THE UNITED STATES, *Defendant.*

Opinion of Commission.

PER CURIAM. On January 5, 1951, a group of Creek Indians, designated as the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida," filed a motion in the above-entitled cause for leave to file a petition of intervention, which accompanied the motion. Thereafter, and on April 4, 1951, the same petitioners, who will hereafter be referred to as the Perdido Band, filed an amended motion accompanied by another, considerably changed petition of intervention, and a hearing was had on the amended motion and the petition attached thereto, on April 18, 1951.

The Perdido Band, according to the statements contained in the amended motion and the petition accompanying it, is composed of descendants of members of the Creek Nation of Indians who remained in Alabama, Georgia and North Florida under the treaties of January 4, 1826 and March 24, 1832, between the United States and the Creek Nation. Neither the peti-

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tioner, the Creek Nation, nor defendant denies these statements.

The petition of intervention also states that enrollment in the Perdido Band is limited to those Indians who are descendants of members of the original Creek Nation, and this allegation is not questioned.

The Perdido Band is not asking for an award independently of that sought in the above case; on the contrary, they are supporting the pending claim. What they are demanding is that they and all other descendants of members of the original Creek Nation be recognized as having the right to participate in any award that might be made in the above case even though they are not enrolled as members of the petitioner, Creek Nation, as now constituted.

Without going into the history of the Creek Nation in much detail, it may be stated that this tribe was one of the larger Indian tribes and originally occupied a large territory in Georgia, Alabama and Florida. On January 24, 1826, 7 Stat. 286, the Creek Nation concluded a treaty with the United States by which it ceded an area of its domain located in Georgia and lying on the east side of the Chatahoochee river. A portion of the tribe wished to move west of the Mississippi river and the treaty provided (Art. 6) for a "deputation of five persons" to select a country west of the river as a home for that part of the Creek Nation desiring to move west. The country was selected and the selection confirmed by treaty, as will be shown later. Treaty of Febr. 14, 1833, 7 Stat. 417.

On March 24, 1832, 7 Stat. 366, by treaty of that date, the Creeks ceded "all their land, East of the Mississippi river" to the United States. This treaty contained this provision (Art. XII):

"The United States are desirous that the Creeks should remove to the country west of the Mississippi, and join their countrymen there; and for this purpose it is agreed, that as fast as the Creeks are prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes—Provided however, *that 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.*" (Italics added.)

Article II thereof required the United States to survey the ceded area and allowed "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 a term of five years, unless sooner disposed of by them." Provisions were also made for taking a census of the persons making selections and for making selection of twenty sections for the benefit of orphan children of the Creeks. Article III authorized the sale of the selections, and Article IV provided:

"At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee simple, from the United States."

Article XII of this treaty quoted above discloses the desire of the United States to move all Creeks west of the Mississippi river, and as an inducement to move, agreed to pay the expenses of removal, provide subsistence during removal and for a year after their arrival west. However, such removal was not compulsory as to individual Creeks, for the article, as shown above, contained the proviso "that 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."

The treaty of Febr. 14, 1833, 7 Stat. 417, confirmed the selection of land authorized by the 1826 treaty (Art. VIII), and Article III thereof provided for a patent in fee simple to be issued to the "Creek Nation." Article IV made it unmistakably clear that the land ceded under this treaty in what is now Oklahoma was for the benefit and use of the entire Creek people, for it provided:

"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, as well of those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi; and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this country is provided for by their treaty with the U. S. dated May 9th, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek nation; and they (the Seminoles) will hereafter be considered a constituent part of said nation, but are to be located on some part of the Creek country by themselves—which location will be selected for them by the commissioners who have signed these articles of agreement or convention." (II Kapp. 390.)

The 1826 treaty did not, at least by its terms, contemplate a removal of the entire tribe west, but the 1832 treaty discloses a purpose to recognize those who migrated to the west as the main governing body of the tribe since provision was made for enabling indi-

vidual chiefs and heads of families wishing to do so to remain east and select tracts in their aboriginal land which was reserved for that purpose in said treaty of 1832. This purpose was confirmed by the treaty of 1833, which was made with the Creek Nation at Fort Gibson in Indian Territory, and in which the territory ceded by the United States was assigned to the whole Muskogee or Creek Nation—those residing east and those residing west of the Mississippi. Thereafter, all dealings of the Federal Government were made with the Creeks in Oklahoma, and we find no treaties, contracts or other transactions with those members of the tribe who remained east, or that defendant ever recognized those remaining east as the Creek Nation.

There are other instances by which the United States recognized the tribal government of the Creeks in Oklahoma, notably the Act of April 26, 1906, 34 Stat. 137, section 28 of which "continued in full force and effect for all purposes, authorized by law" the Creek tribal government. We are of the opinion the petitioner in this case has the exclusive right to prosecute the claim here asserted. In fact, the Perdido Band does not really question the right of petitioner to maintain the action, for, as before stated, it asked that the members of the Creek Nation be awarded the amount prayed for, insisting, however, that the award be for the benefit of all Creek descendants and not confined to those enrolled under the various agreements with the Creek Nation, confirmed by Acts of Congress.

This Commission decided in the Loyal Creek case, Docket No. 1, and the Western Cherokee case, Docket No. 24, that an "identifiable group," under the Indian Claims Commission Act, must have a common claim, and that a common suit for individual claims does not

create an identifiable group. It is plain from the statements in the amended motion and the allegations of the petition accompanying it that the Perdido Band has no common claim, and is therefore not an "identifiable group" under said Act.

Furthermore, the Perdido Band is in reality asking us to determine the individual Indians who may participate in any award that may be made. They pray in their petition that the members of the Perdido Band be declared entitled to share in the recovery or that a Commission be created to make a roll of the living descendants of the original Creek Nation in order to determine who shall be entitled to share in any recovery. Counsel for applicants mistake the powers of the Indian Claims Commission. The Act authorizes us to determine claims of Indian tribes, bands or identifiable groups. We have no power to determine the membership of the groups who may successfully prosecute their claims, for that is an administrative function over which we have no control.

For the reasons stated above, the amended motion of the Perdido Band must be denied.

The Commission now has under advisement for decision only the issue of fact and law relating to the petitioner's right to recover. (Sec. 22(b) of Rules of Procedure). Ordinarily, we would postpone the determination of the amended motion of the Perdido Band until after we had determined that issue, but for fear longer delay might cause embarrassment to the Band because of the expiration of the time for filing claims on August 13, 1951, we concluded an earlier determination of the amended motion proper.

Dated this 4th day of June, 1951.

EXHIBIT H

Appeals Docket No. 14

In the United States Court of Claims

C. W. MCGHEE, RUBY Z. WEATHERFORD, JOHN V.
PHILLIPS AND JOHN WILLIAMS AS MEMBERS OF
AND ON THE RELATION OF THE CREEK NATION EAST
OF THE MISSISSIPPI, APPELLANTS

v.

THE CREEK NATION AND THE UNITED STATES,
APPELLEES

BRIEF FOR THE APPELLEE, THE UNITED STATES

WM. AMORY UNDERHILL,
Assistant Attorney General.

RALPH A. BARNEY,
Attorney.

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In the United States Court of Claims

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C. W. MCGHEE, RUBY Z. WEATHERFORD, JOHN V. PHILLIPS AND JOHN WILLIAMS AS MEMBERS OF AND ON THE RELATION OF THE CREEK NATION EAST OF THE MISSISSIPPI, APPELLANTS

v.

THE CREEK NATION AND THE UNITED STATES, APPELLEES

BRIEF FOR THE APPELLEE, THE UNITED STATES

I. The Facts

Insofar as they relate to this appeal the facts are not in dispute. Prior to 1812 the Creek Indians were living east of the Mississippi River.

In that year they joined with Britain for its second war with the United States. On August 9, 1814, a treaty of peace, amity, and cession was signed at Fort Jackson. It is the land ceded by this treaty that is the basis of the case now pending before the Indian Claims Commission in which the Interveners seek to join. As the result of a series of treaties thereafter concluded with the Creek Nation it ceded all of its lands east of the Mississippi River and acquired a new domain in what is now Oklahoma.

(1)

The majority of the Creeks went West, but many stayed behind and continued to live in or around their old homes.¹ Those who moved West took with them their form of government and were recognized by the United States as "The Creek Nation."² Those who remained in the East abandoned their tribal relationships; and they never continued a tribal government recognized by the United States and they entered into no treaties or other political arrangements with the United States³ or with other Indian tribes or groups, and only recently organized themselves, apparently for the purpose of this suit.⁴

On January 29, 1948, "The Creek Nation" filed its claim with the Commission. The evidence is in, the case has been briefed, argued and submitted. It is now awaiting decision. On January 5, 1951, the appellants, then calling themselves "The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" filed a motion to intervene which was objected to by "The Creek Nation," the original petitioner, and by the Government as the defendant. An amended motion to intervene

¹ Provision was made for a reservation for each out of the lands ceded. Opinion of Commission, appellants' brief, p. 166.

² See treaties of August 24, 1835, 7 Stat. 474; November 23, 1838, 7 Stat. 574; January 4, 1845, 9 Stat. 821; June 13, 1854, 11 Stat. 599; and June 14, 1866, 14 Stat. 785.

³ In their brief they say: "Furthermore, the fact that the Federal Government had no dealings with those east of the Mississippi, as a group, is equally of no significance, since the latter, unlike the Creeks in Oklahoma, had no organization, occupied no bounded grant of territory and were not under the guardianship of the Federal Government." [Italics supplied.] Br. p. 152. See also Br. p. 155.

⁴ Op. Commission, appellants' Br. p. 168. In their brief appellants say they "have recently joined together for their common benefit * * * ." *Id.* p. 137.

was filed and presented to the Commission and on June 4, 1951, an order⁵ was made by the Commission denying The Perdido Band the right to intervene. From that order the appellants, now calling themselves the "Creek Nation East of the Mississippi" appeal.

According to their brief⁶ their "basic premise is that the injury inflicted by the United States in 1814 was to the Creek nation as then constituted and that the right to recover therefor belongs to that nation, to be enjoyed by all its members." No contention is made that the claim filed by "The Creek Nation" is improper, nor has it been suggested that the case was improperly tried; in fact, it was specifically stated before the Commission that there was no desire to reopen the case. In its opinion⁷ the Commission said:

The Perdido Band is not asking for an award independently of that sought in the above case; on the contrary, they are supporting the pending claim. What they are demanding is that they and all other descendants of members of the original Creek Nation be recognized as having the right to participate in any award that might be made in the above case even though they are not enrolled as members of the petitioner, Creek Nation, as now constituted.

Thus it appears that appellants actually are seeking only to have it determined that they are entitled to participate in any judgment ultimately awarded in this case. This is not the function of the Indian Claims Commission.

⁵ Appellants' Br. p. 163.

⁶ *Id.* p. 139.

⁷ Appellants' Br. p. 165.

II. The Issue

On the foregoing facts this appeal presents to this Court a single but important question of law concerning the administration of the Indian Claims Commission Act. The issue may be formulated this way:

Where a claim is filed in the name of an historic Indian tribe by the group commonly recognized by the United States, may individuals who claim a right to share with and participate in any recovery intervene in the action?

The Government contends that under the law and the Rules of the Commission the intervention sought is unauthorized and that the practice ought not to be countenanced nor permitted in the interests of orderly procedure.⁵

III. Argument

The appellants present their argument under three main contentions. We will follow this arrangement.

A. Exclusive right to sue.

Section 10 of the Indian Claims Commission Act provides as follows:

Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the represen-

⁵In this connection we think the words of Mr. Justice Frankfurter in the recent case of *Cook v. Cook*, U. S. (decided Dec. 3, 1951) are applicable: "I am not one of those who think that procedure is just folderol or noxious moss. Procedure—the fair, orderly and deliberative method by which claims are to be litigated—goes to the very substance of law."

tative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

To make this statute effective the Commission, under its "power to establish its own rules of procedure,"⁶ has provided in Rule 1 as follows:

(b) Claims by Indian tribes, bands, or groups which have tribal organizations recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group shall be filed and presented by the duly appointed or elected officers of such organization, except as provided in paragraph (c) of this section.

(c) Where by virtue of fraud, collusion, or laches on the part of a recognized tribal organization a claim has not been presented (or has not been included as part of a presented claim), any member of such tribe, band, or group may file claim on behalf of all the other members of such tribe, band, or group upon complying with the provisions of section 8 (b).

(d) Claims on behalf of any unorganized tribe, band, or other identifiable group may be filed by any member of such tribe, band or identifiable group as the representative of all its members.

Rule 8 reads as follows:

Sec. 8. *Capacity.* (a) Petitions filed by any tribal organization recognized by the Secre-

⁶ Act Aug. 13, 1946, sec. 9.

tary of the Interior as having authority to represent a tribe, band, or group need not aver the capacity of such organization to sue except to the extent required to show the jurisdiction of the Commission. When the United States desires to raise an issue as to the capacity of such a recognized tribal organization to sue, it shall do so by specific negative averments, which shall include supporting particulars.

(b) If a petition is filed by one or more members of a tribe, band, or other identifiable group having a tribal organization which is recognized by the Secretary of the Interior because the tribal organization has failed or refused to take any action authorized by the act, the petition shall be verified and shall aver that the petitioner is a member of the tribe, band, or group. The petitioner shall also set forth with particularity the efforts of the petitioner to secure from the duly constituted and recognized officers of said tribal organization such action as he desires and the reasons for his failure to obtain such action (such as fraud, collusion, or laches) or the reasons for not making such effort.

(c) Petitions filed by one or more members on behalf of an unorganized tribe, band, or other identifiable group shall be verified and shall aver (1) that the petitioner or petitioners are members of the tribe, band, or group (2) a description of the unorganized tribe, band, or group of sufficient comprehension to identify the tribe, band, or group on whose behalf the petition is filed.

On January 29, 1948, "The Creek Nation" filed this case before the Indian Claims Commission. It was alleged that "The Creek Nation" was a tribe within the meaning of the Indian Claims

Commission Act and it was further alleged that the attorney who filed the suit was authorized to do so by a contract approved by the Secretary of the Interior. The defendant, recognizing the historic fact that a group of Indians known as "The Creek Nation" has existed since the first settlement in southeastern United States, and still exists today, took no exception to the filing of the claim.

The case had been fully tried, briefed, argued, and submitted for decision to the Commission when, on January 5, 1951, the appellants, calling themselves "The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida," sought to intervene in the case. Admittedly¹⁰ they were not an organized group of Indians recognized by the Secretary of the Interior; they charged no fraud, collusion, or laches on the part of the petitioners in the filing of the case; they made no complaint concerning the manner in which the case was presented to the Commission, and they specifically denied any desire to reopen the case;¹¹ apparently all they wanted was an adjudication by the Commission that the persons who composed the so-called "Perdido Band" had the right to participate in the distribution of any award.

As between the petitioner—"The Creek Nation"—and the appellants, there can be no question that the former met the requirements of section 10 of the

¹⁰ Appellants' Br. p. 152. In the Amended Motion for Leave to Intervene it is said (p. 2): "Said Perdido Band has not yet been recognized by the Secretary of the Interior."

¹¹ Amended Motion to Intervene (p. 14): "13. Applicants do not seek to alter or expand in any way in this proceeding the claim of the Creeks against the United States * * *. They do not seek to re-open the record for the taking of additional evidence on these issues * * *."

act. The United States has consistently recognized the duly elected or appointed officials of "The Creek Nation" as having authority to represent the Creek Indians both prior¹² and subsequent¹³ to their removal west of the Mississippi River. We believe that in enacting section 10 the Congress intended to extend the recognition previously accorded to the existing tribal organization into the field of Indian claims.

The reasons are both obvious and practical. In authorizing the recognized tribal organizations to bring the action the Congress had some assurance that tribal claims would be presented and it would avoid a multiplicity of suits by a variety of groups each contending that it was the true representative of the tribe. That is now what has happened in this case.

Appellants now seek to divert the inquiry of the Commission from a determination of whether the Creek Indians have a recognized claim against the United States to a determination of whether "The Creek Nation" or the "Creek Nation East of the Mississippi" has the right to present this claim. They say:¹⁴

Their amended motion and petition raised this question and presented an issue which the Commission should have determined, probably, in the light of the foregoing decision, by granting appellants' motion and taking evidence on the issue presented by its petition and the answers to be filed to it by the other parties as to

¹² See treaties of August 7, 1790, 7 Stat. 35; June 29, 1796, 7 Stat. 56; June 16, 1802, 7 Stat. 68; November 14, 1805, 7 Stat. 96, etc.

¹³ See fn. 2, *supra*.

¹⁴ Br. p. 159.

"petitioner's right to maintain this action for the claim of 'the Creek nation'."

The purpose of section 10 clearly was to avoid such excursions into secondary questions if that could be done without harm to the tribe. The contingencies provided by Congress were where fraud, collusion, or laches was shown on the part of the recognized organization. None of these conditions have been suggested by the appellants, nor have they complied with the rules of the Commission. Since the case was filed on January 29, 1948, laches certainly cannot be charged, nor is it suggested that fraud or collusion exists. It seems clear, therefore, that both under the statute and the rules of the Commission the intervenors are not entitled, as against the recognized organization of the Creek Nation, to maintain this action.

The question of whether appellants and other Creeks did or did not lose their rights in the claim by not emigrating to Oklahoma¹⁵ was not before the Commission and is not before the Court now. The Commission has no power to determine the manner in which any award will be disbursed or the persons entitled to receive it. Section 22(a) of the act provides merely that when the report of the Commission has been filed with Congress "there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission."

The contention by appellants that the rights of those Creeks who did not remove to Oklahoma have been fully preserved by the Act of February 8, 1887, 24 Stat. 390, as amended, does not aid appel-

¹⁵ Appellants' Br. p. 146.

lants now. On the contrary, assuming the position to be legally correct—concerning which we express no opinion—it proves that it is wholly unnecessary for them to intervene to protect their rights.

Since the Commission has no authority to determine the names of persons who would be entitled to participate¹⁶ in any distribution, the mere fact that the appellants were made parties to the proceeding would not determine their right to participate. This Court has just recently pointed out that as long as Indian funds are tribal in character Congress has full power to legislate concerning citizenship and to deal with such property without infringing on individual rights. *Choctaw Nation v. United States*, decided Oct. 2, 1951.

And so it is in this case. We do not know, nor do we pretend to say, what disposition Congress will make of any judgment which might be rendered in favor of the Creeks. But we do know that under *Wallace v. Adams*, 204 U. S. 415; *Gritts v. Fisher*, 224 U. S. 640, and *Lowe v. Fisher*, 223 U. S. 95, the Congress is free to make such disposition of any such judgment as may seem best to it, without in any way making the Government liable to appellants.

B. Appellants are not a tribe, band, or other identifiable group of Indians.

At the present stage of the proceedings appellants have no standing before the Commission or this Court. Admittedly they are not enrolled members of the Creek Nation. They are merely an aggregation of individuals who *claim* to be Creek

¹⁶ This is now apparently admitted by appellants. See Br. p. 159.

Indians, descendants of Creeks who were members of the Creek Nation of Indians on August 9, 1814, when the lands were ceded to the United States. Thus we have the situation of an aggregation of people who *say* they are Creek Indians seeking to enter a lawsuit without an adjudication that any of them is, in fact, a Creek Indian. Thus this case differs from the *Red Lake* case, No. 18-A, decided by the Commission on September 17, 1951, and cited in appellants' brief.¹⁷ There the Commission found as a fact that the individual petitioners were enrolled members of the Pembina Band. The Commission, therefore, held that they had authority to maintain the action on behalf of an historic band which no longer maintained a separate tribal existence but whose members were identified. The language of the decision is:¹⁸

As heretofore stated, the Pembina Band of Indians was recognized as a separate and distinct band of Chippewa Indians and was dealt with as such by the Government at the time the 1863 treaty was negotiated. The record shows that some years thereafter the United States officials moved the members of the band and settled them on a portion of the White Earth Reservation. They were listed separately on the census rolls at that reservation as Pembina Indians until 1923—the 1922 roll showing 519 of them. But apparently due to a change in the method of making the census rolls, no separate roll appears to have been maintained of these Indians as Pembina Indians after 1922. However, regardless of how these Pembina Indians were listed on the census rolls after 1922, we believe the evidence

¹⁷ P. 155.

¹⁸ 1 Ind. Cls. Comm'n pp. 575, 589.

shows quite conclusively there is a group of Pembina Indians now living who are descendants of members of the Pembina Band that was a party to the October 2, 1863, treaty out of which the present claim arose, and they can be identified and have a group claim which they are entitled to have determined by this Commission. The existence of such a group having been established, and our conclusion is that it has been, we do not consider it necessary for jurisdictional purposes to determine who are all the individual members of said group. (*Indians of California v. United States*, Docket No. 31.) The plaintiffs have alleged in the petition and satisfactorily established by the evidence that the named individual plaintiffs, Rosetti Villebrun and Katherine Carl Barrett, are members of this group of Pembina Indians who are descendants of the original members of the Pembina Band and they are therefore entitled, under Section 10 of the Act, to maintain this action in a representative capacity on behalf of themselves and all other members of the claimant group.

This is not the case now under consideration. Intervenors have never been identified as members of the Creek Nation, and the Commission is without jurisdiction to determine that they are members of the Creek Nation entitled to participate in any judgment. As to this point, a somewhat analogous situation arose in *Kohpay v. Chapman, Secretary of the Interior*.¹⁹ There the plaintiff sued for her pro rata distribution of the Osage tribal funds on the ground that she was an Osage Indian although her name did not appear on the approved roll. The court of appeals, in affirming

¹⁹ 190 F. 2d 666.

the district court and denying the relief sought, held that enrollment was a prerequisite to participation in the distribution, and that the plaintiff must first apply to the Secretary of the Interior for enrollment:

Then under the *Jump case* [73 App. D. C. 141, 117 F. 2d 769] if the appellant considers the action of the Secretary arbitrary or capricious, he may apply to the federal courts for relief. The relief which the appellant requests here flows as a natural consequence of having her name on the roll, but we cannot grant the requested relief in a mandamus suit which itself by-passes the steps which must be taken.

The principle is the same here. In the absence of a previous determination that appellants are Creek Indians they quite obviously have no right to prosecute this action. The Commission does not have jurisdiction to determine the question of membership in an Indian tribe. This is a question which Congress has always reserved to itself.

The Congress has never recognized the Creek Indians, who failed to go West, as an entity. Thus the case differs from that of the Loyal Creeks,²⁰ who were recognized by the Creek Nation and the United States in the Treaty of June 14, 1866, 14 Stat. 785, and the agreement between the Creek Nation and the United States of March 8, 1900, ratified by Act of Congress of March 1, 1901, 31 Stat. 861, and whose identity was determined by the roll prepared in accordance with the provisions of the treaty of 1866. In the present case there has been no recognition by Congress and there has

²⁰ 1 Ind. Cls. Comm'n p. 122.

been no identification of the persons who compose the group.

This disposes of the argument that appellants have a common claim. We quite agree that a claim for tribal lands under the Indian Claims Commission Act is a common claim, and we have so recognized that fact in this case in the suit filed by "The Creek Nation." The difficulty with appellants' position is that the persons seeking to intervene have not shown themselves capable of maintaining the action for that common claim.

The situation is completely analogous to a stockholders' suit on behalf of a corporation. Admittedly under proper circumstances a stockholder may sue on behalf of a corporation, *but he must be a stockholder.*²¹ The case of *Scanlon v. Snow*, 2 App. D.C. 137, is quite analogous to the present situation. The court in its statement of facts said:²² "In the course of the testimony, or at the end of it, a petition was filed on behalf of Charles E. White, asking to be made a party complainant, which was agreed to and allowed. He claimed to be a stockholder and adopted the averments of the bill."

²¹ See generally 13 Fletcher Cyclopaedia, Corporations, see, 5972. In the case of *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp.*, 73 F. Supp. 721 (1947), Judge Holtzoff apparently considered the matter so well settled he did not consider it necessary to cite any authority for his statement: "In view of the fact that a stockholders' suit may be brought solely by persons who were stockholders of the corporation at the time that the cause of action accrued and who are still stockholders at the time of the institution of the suit the plaintiff, Mayflower Hotel Stockholders Protective Committee, has no right to bring this action, since the Committee is not and never has been a stockholder, insofar as appears from the allegations of the complaint."

²² P. 146.

Mr. Justice Morris, in delivering the opinion of the Court, said:²³

It is very clear to us that the petitioner White has no standing in this case. * * * In his petition filed in this cause, Mr. White alleged that he was a stockholder of the present company; but in the stipulation entered into with reference to the petition and which served for an answer to it, this allegation was explicitly denied, as well as the other allegations of the petition, and no proof whatever was taken to overcome this denial. On the contrary, the proof adduced on behalf of complainants showed conclusively that he was not a stockholder in fact, whether he was entitled so to be or not. And the dismissal of his bill, as already stated, would seem to indicate that he was not entitled to any interest whatever in the new organization. His petition, therefore, in this cause was very properly dismissed.

With the exception of a previous determination that White had no interest in the corporation the facts in that case and the present one are the same. Admittedly the names of appellants are not on the rolls of the Creek Nation. They are not, therefore, recognized members of the nation and, hence, are not entitled to prosecute this action.

It may be that some tribunal of competent jurisdiction may determine that they are legally members of the Creek Nation and, therefore, entitled to participate in an award if there is one. But the Indian Claims Commission has no jurisdiction to determine that question. That is a matter for Congress or such tribunal as Congress may

²³ P. 147.

create.²⁴ Since the appellants admittedly are not recognized by the administrative or legislative arm of the Government, they cannot, collectively, be said to be a "tribe, band, or other identifiable group" within the meaning of the Indian Claims Commission Act.

C. Jurisdiction of Commission

Under this heading appellants say that the Commission must determine "not only whether a claim exists against the United States and in favor of some one, but whether the group suing is, in fact, the injured group or has otherwise acquired title to the claim."²⁵

The defendant might be willing to concede that this position was correct if there were two recognized groups competing with each other for the right to maintain this action. But that is not this case.

The appellants have not been recognized by anyone. As a matter of fact they do not pretend to say just who they are. They say²⁶ that their "rolls are open to all those who can prove lineal descent from the members of the original Creek nation." They thus seek to usurp the functions of Congress. Congress may, or may not, adopt this criterion for "membership" in a reconstituted Creek Nation; but the appellants certainly have no authority to define membership in the Creek Nation and to determine that all who come within this definition constitute "The Creek Nation" or even an "identifiable group" within the meaning of the Indian

²⁴ *Wallace v. Adams*, 204 U.S. 415.

²⁵ Appellants' Br. p. 157.

²⁶ Br. p. 139.

Claims Commission Act. Certainly, unless the Commission and this Court are to restrict the term "other identifiable group" to those groups which have received recognition by some branch of the Government or by the Indians themselves,²⁷ the term "identifiable group" is meaningless and amounts to nothing more than an aggregation of persons voluntarily associating themselves together and giving themselves a name. This was not the intention of the authors of the Indian Claims Commission Act.

During the 74th Congress three bills were introduced to create an Indian Claims Commission,²⁸ all of which authorized the Commission to investigate claims "of any Indian tribe, band, or other communal group of American Indians." Hearings were held on both H. R. 7837 and S. 2731. In the hearings on S. 2731 considerable discussion ensued concerning the meaning of the words "or other communal group." The following colloquy between Senator Steiwer and the Commissioner of Indian Affairs makes it clear that the claimants must not only have a historic identity, but that their claim must be of the "common" or "group" type:²⁹

Senator Steiwer. * * * While I have interrupted, may I ask what is the significance of the word "communal" in line 12.

Mr. Collier. It simply means a community. It is an attempt to go beyond the limitations of the meaning of "band" which has been imposed by this single definition, and to take a

²⁷ *Montoya v. United States*, 180 U.S. 261, 265; *Tully v. United States*, 32 C. Cls. 1.

²⁸ S. 2731; H. R. 6655, and H. R. 7837.

²⁹ Hearings on S. 2731, 73d Cong., 1st sess., p. 40.

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simple group of Indians who have a common interest, who have suffered a common injury, but who may not heretofore have been recognized by any branch of the Government.

* * * * *

Mr. Collier. Yes; because I doubt if there is a case anywhere where an Indian has a claim that he cannot find another Indian that has that kind of claim. We do not want these innumerable, heterogenous Indian claims put on the doorstep of the court if we can help it. *Some qualifying word—maybe “communal” is not the right word—which indicates a historic identity, or an identity of habitat, makes the thing a communal group, a group with historic identity, and not just a detached group of people who got together and made out they were a group so as to get into this court.*

Senator Steiwer. The essential thing is that they have a common claim, is it not?

Mr. Collier. Yes; a common claim of a group character. [Italics supplied.]

Thus it appears that Commissioner Collier recognized that the group must have a “historic identity” and that he did not have in mind “just a detached group of people who got together and made out they were a group so as to get into this court.”

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CONCLUSION

For all of these reasons we say that the order of the Commission dated June 4, 1951, denying appellants leave to intervene in this case was correct and should be affirmed.

WM. AMORY UNDERHILL,
Assistant Attorney General.

RALPH A. BARNEY,
Attorney

JANUARY 1952

EXHIBIT I

AGREEMENT BETWEEN
THE NATIONAL PARK SERVICE, U. S. DEPARTMENT OF THE INTERIOR
AND THE POARCH BAND OF CREEK INDIANS OF ALABAMA
FOR THE ASSUMPTION BY THE TRIBE OF CERTAIN RESPONSIBILITIES
PURSUANT TO THE NATIONAL HISTORIC PRESERVATION ACT (16 U.S.C. 470)

WHEREAS, sovereign Indian tribes are uniquely suited to make decisions about historic resources on tribal lands; and

WHEREAS, enhancing the role of Indian tribes in the national historic preservation partnership will result in a stronger and better national effort to identify and protect historic and cultural resources for future generations of all Americans; and

WHEREAS, Section 101(d)(2) of the National Historic Preservation Act provides that, "A tribe may assume all or any part of the functions of a State Historic Preservation Officer in accordance with subsections (b)(2) and (b)(3), with respect to tribal lands;" and

WHEREAS, for the purposes of this agreement tribal lands means all lands within the exterior boundaries of the Poarch Band of Creek Indians Reservation and any dependent Indian communities formally recognized as such by the Department of the Interior; and

WHEREAS, in accordance with Section 101(d)(2)(A), the chief governing authority of the Poarch Band of Creek Indians has requested approval to assume certain of those functions; and

WHEREAS, in accordance with Section 101(d)(2)(B), the Poarch Band of Creek Indians has designated a tribal preservation official to administer the tribal historic preservation program; and

WHEREAS, in accordance with Section 101(d)(2)(C), the Tribe has provided to the Secretary of the Interior acting through the National Park Service a plan that describes how the functions the tribes propose to assume will be carried out; and

WHEREAS, the National Park Service, on behalf of the Secretary, has reviewed the Tribe's plan for conformance with the following applicable Federal regulations: 36 CFR 60 and 36 CFR 61; and has determined that the plan meets the requirements of those regulations; and

WHEREAS, the National Park Service, on behalf of the Secretary, has reviewed the Tribe's plan and has determined in accordance with Section 101(d)(2)(D)(i) that the Poarch Band of Creek Indians is fully capable of carrying out the functions specified in the Tribe's plan; now, therefore,

THE NATIONAL PARK SERVICE AND THE POARCH BAND OF CREEK INDIANS OF ALABAMA DO HEREBY AGREE AS FOLLOWS:

1. The Poarch Band of Creek Indians assumes responsibility on tribal lands for the following functions set out in Section 101(b)(3) of the Act:

- A. Direct and conduct a comprehensive, Reservation-wide survey and maintain an inventory of historic and culturally significant properties;
- B. Identify and nominate eligible properties to the National Register of Historic Places and otherwise administer applications for listing historic properties on the National Register;
- C. Develop and implement a comprehensive, Reservation-wide historic preservation plan;
- D. Advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;
- E. Cooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal agencies, State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development;
- F. Provide public information, education and training, and technical assistance in historic preservation;
- G. Consult with the appropriate Federal agencies in accordance with Section 106 of the Act on:
 - i. Federal undertakings that may affect historic and culturally significant properties on tribal lands;
 - ii. the content and sufficiency of any plans to protect, manage, or to reduce or mitigate harm to such properties;
- H. Cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified pursuant to subsection (c) of the Act;
- I. Advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for Federal assistance, such as the historic preservation income tax credits.

2. In accordance with the Tribe's plan noted above, the Alabama State Historic Preservation Officer (SHPO) retains no responsibility on tribal land for the functions in Section 101(b)(3).

3. The Poarch Band of Creek Indians will consider nominations to the National Register of Historic Places in accordance with 36 CFR 60. The Tribe's process is set out in the Tribe's plan and includes review of nominations by the Historic Preservation Office, by the Poarch Band of Creek Indians Cultural Resources Board, and by the Tribal Council. The Cultural Resources Board will have access to appropriately qualified individuals in carrying out its review of nominations.

4. Because all Poarch Band of Creek Indians tribal land is under the direct control of the Tribal Council, the Tribal Historic Preservation Officer, in accordance with 36 CFR 60, will provide written notice to the Tribal Council of his intent to bring a National Register nomination before the Cultural Resources Board and the Tribal Council for consideration. The notice shall be sent at least 30 but not more than 75 days before the meeting of the Cultural Resources Board, unless the Tribal Council agrees to an expedited review period. In submitting a nomination to the Keeper of the National Register, the Tribal Historic Preservation Officer shall also forward to the Keeper all comments received by the Tribe concerning that nomination. Because Poarch Band of Creek Indians tribal land includes no privately owned property, the provisions of the Act and of 36 CFR 60 concerning private owner objections to nominations are not applicable.

5. The Tribe will carry out its responsibilities for review of Federal undertakings pursuant to Section 106 of the Act in accordance with the regulations (36 CFR Part 800) of the Advisory Council on Historic Preservation. In the event that the Tribe seeks to substitute its own review procedures for those established by the Council, such substitution is subject to a separate negotiation with the Council, pursuant to Section 101(d)(5) of the Act.

6. As directed by Article 25 of the Poarch Band of Creek Indians Historic Preservation Code, the Tribal Historic Preservation Office, relying on its special knowledge, training, and experience, will evaluate the significance of, and impact on, all properties surveyed within the reservation. This will be done with regard to historic, architectural, archeological, anthropological, religious, and cultural considerations. The Historic Preservation Office will, as it deems proper and as it deems needed, consult with recognized authorities meeting the Secretary of the Interior's Professional Qualifications Standards.

7. The Tribal Historic Preservation Officer will, in accordance with Section 101(d)(4)(C), provide for the appropriate participation in the historic preservation program by the Tribe's traditional cultural authorities, and for consultation with representatives of any other tribes whose traditional lands may have been within the Poarch Band of Creek Indians Reservation, and for consultation with the interested public.

Concerning the involvement of traditional cultural authorities, the Tribe has officially recognized William Day, William Bailey, and Gayle Thrower as official spokespersons in matters concerning tribal culture and historic preservation. These three individuals also serve as staff of the Tribe's Historic Preservation Department. In addition, the Preservation Officer will periodically solicit and take into account comments on the program from all those individuals and groups who may be affected by the program's activities, as the tribe deems appropriate and consistent with the practice of other tribal programs. In any case where an action arising pursuant to the Act may affect the traditional lands of another Tribe, the Preservation Officer will, on an as-needed basis, seek and take into account the views of that Tribe.

8. As of the date of this Agreement, there is no land within the Reservation boundaries that is not held in trust for the Tribe or owned by a non-tribal member. In the event that this condition changes, the Tribal Historic Preservation Officer will, in accordance with Section 101(d)(2)(D)(iii), ensure that, for properties neither owned by tribal members nor held in trust for the Tribe by the Secretary of the Interior, the property

owners are aware that they may request the participation of the State Historic Preservation Officer, along with the Tribal Historic Preservation Officer, in decisions pursuant to the Act that may specifically affect their property.

9. As directed by the Poarch Band of Creek Indians Historic Preservation Code, the Tribal Historic Preservation Office shall prepare and submit to the Tribal Council an annual report on historic preservation and educational activities carried out under its authority, a copy of which will be provided to the National Park Service at the end of each calendar year. Included in that report, and specifically under the authority of this agreement, the Tribal Historic Preservation Office will report the number of properties surveyed and added to the tribe's inventory and the number of Federal undertakings reviewed pursuant to Section 106 of the National Historic Preservation Act. The National Park Service is authorized to use this information and similar data from other Tribes assuming formal responsibilities under section 101(d) of the Act to report annually to the Administration, the Congress, and other interested parties on the national accomplishments of this program.

10. As of the date of this agreement, the Poarch Band of Creek Indians' Tribal Historic Preservation Officer is William Day. The Tribe will notify the National Park Service whenever there is a vacancy in the position and whenever a successor is designated by the Tribe.

11. The National Park Service will, in accordance with Section 101(d)(2)(A) of the Act foster communication, cooperation, and coordination among the Tribe, the State Historic Preservation Officer, and Federal agencies in the administration of the national historic preservation program. All such efforts by NPS will be on an as-needed basis and will be based on consultation with the Tribe to ensure that tribal values are fully respected.

12. The National Park Service, upon execution of this agreement, will notify all Federal Preservation Officers, the Advisory Council on Historic Preservation, and the Alabama State Historic Preservation Officer, that the Poarch Band of Creek Indians has assumed formal responsibility on tribal lands for all of the functions set out in Item 1 above. In particular, such notice shall make clear that the Tribe has assumed the role of the State Historic Preservation Officer on tribal lands for the purposes of consultation on Federal undertakings pursuant to Section 106 of the National Historic Preservation Act.

13. The National Park Service will consult with the Poarch Band of Creek Indians to determine what technical assistance the Tribe needs and wants in order to enhance its participation in the national historic preservation program. Based on that consultation, NPS will make available to the Tribe such technical assistance as is appropriate and feasible. Nothing in this Agreement requires the National Park Service to provide financial assistance to the Tribe to carry out the functions it has assumed under this agreement. Only a separate grant agreement, cooperative agreement, or contract obligates the National Park Service to provide funding for tribal activities.

14. The National Park Service, pursuant to Sections 101(d)(2) and 101(b)(2) of the Act, and in direct consultation with the Tribe, will carry out a periodic review of the Tribe's program pursuant to the Act, to ensure that the Tribe is carrying out the program consistent with this agreement. The review will be a collegial process that involves both NPS and the Tribe in a mutual evaluation and assessment of the program. Generally, such a review will occur every four years.

15. The Poarch Band of Creek Indians may terminate this agreement for any reason by providing the National Park Service sixty days' written notice of such termination. The National Park Service may terminate this agreement upon determining that the Tribe has not carried out its assumed responsibilities in accordance with this agreement, the Act, or any other applicable Federal statute or regulation. Unless circumstances warrant immediate action, NPS will not terminate the agreement without first providing the Tribe a reasonable and appropriate opportunity to correct any deficiencies.

16. This agreement may be amended by the mutual consent of the Poarch Band of Creek Indians and the National Park Service.

17. This agreement shall become effective upon signature by the Director of the National Park Service or his designee, which signature shall not occur until after the Chairman of the Poarch Band of Creek Indians has signed the agreement.

FOR THE NATIONAL PARK SERVICE:


Director Date 06/10/99

FOR THE POARCH BAND OF CREEK INDIANS:


Chairman Date 5-24-99

EXHIBIT J

**POARCH BAND OF CREEK INDIANS OFFICE OF CULTURAL
AND HISTORIC PRESERVATION
FIELD METHODOLOGY**

P.L.E.
Approval
4-13-99
Date

POARCH BAND OF CREEK INDIANS OFFICE OF CULTURAL AND HISTORIC PRESERVATION

FIELD NOTES

Day notes should be taken every day the crew is in the field regardless of the situation or type of fieldwork. These notes should be taken only on the front of the page. The first page of the day notes must include the following information.

Site name, number, project, and date

Crew members

Objectives

A narrative description should be given of each crew member of the field activity during the course of the day. When surveying, note the transect assignments, approximate acreage covered, lengths and orientation of transects, and areas where tests were not excavated and why. Also, note any and all important finds, in terms of artifacts found and whether they were found in a shovel test. The exact locations of sites will be noted and plotted on the appropriate quad immediately. Similarly, note the vegetation, ground cover, terrain, and slope. If defining a site, sketch a site map. This map will include positive and negative tests, artifact counts for these tests. Site maps will always include pertinent natural and manmade features, a scale, north arrow, date, and site name and number.

UNIT NOTES

Unit notes must include the following;

Site name and number and date

Excavation Unit number and coordinates

When a unit is opened record:

- a) grid location
- b) location of unit datum and measurement of line level above ground surface
- c) depths of ground surface in four corners and center
- d) method of excavation
- e) locations of, and rationales for, unit extensions

For each level record the following:

- a) level number and depth below datum (surface or unit datum)
- b) excavation techniques (include screening technique)
- c) draw plan views and profiles and note any changes in stratigraphy
- d) feature locations and types
- e) the Munsell soil colors and texture
- f) the strata number or letter
- g) artifacts found
- h) inclusions
- i) whether or not soil or float samples were taken
- j) draw profiles and plan views

SURVEY METHODOLOGY

The survey methodology will vary under most circumstances. Under most circumstances, shovel tests and parcels will be spaced at 30m intervals

At the start of a new parcel, the Project Manager or Crew Chief will determine the proper orientation of the parcels. In most instances, the parcels will be orientated in a north/south or east/west direction. However, parcels may follow natural or manmade features such as roads or natural levees. While surveying, it is important for the crew members to stay within sight of one another or in radio contact.

Shovel tests are to be excavated with a spade or "round-headed" shovel, and will measure 30 x 30 cm in diameter. The depths of these shovel tests will generally be 30 cm. All shovel tests are to be screened with 1/4" mesh hand-held screens, or troweled or checked by hand for the presence of artifacts.

When a positive shovel test is excavated, bag the artifact and label bag with the proper transect number, shovel test number or grid coordinate, date, and site designation. In case of a surface find, the location of the find must be noted on the bag, along with the site designation and other relevant information. Surface scatters located during survey are to be flagged and left in the field until site definition can be conducted.

SITE DEFINITION

Site definition's procedures will be undertaken at each positive shovel test or surface find in order to determine the extent of subsurface and surface artifact deposits. A site datum will be established at the location of a positive shovel test, or in the approximate center of surface scatter. Shovel tests are to be excavated in 10 m intervals from the datum. The shovel tests will be excavated until two negative shovel tests have been excavated. If the surface scatter continues beyond this point, the shovel test line will be extended to the edge of the scatter.

A surface scan for artifacts is to be conducted at every positive locale in order to determine the presence or absence of surficial artifacts. Only diagnostic artifacts are to be collected during a general surface collection. Dense patches of artifacts will noted on the site map. Also, a 2 x 2 m collected during a 2 x 2 m collection. Label the bad and place the 2 x 2 m area on the site map. Recovery of five or more artifacts is evidence for a site. Less than five artifacts represents an isolated find. A 50 x 50 cm test unit is to be excavated during site definition. This unit will be excavated in 10 cm arbitrary levels, and continued until two culturally sterile levels have been excavated. Munsell colors and depths will be taken of all sites. Black and white photographs and color slides will be taken of one wall profile.


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Date

A detailed map will be drawn of the site. All shovel test, the 50 x 50 cm unit, the 2 x 2 m surface collection, and extent of surface scatter will be shown on the map. Positive shovel tests will be shown as an filled in circle on the map. Negative shovel tests will be shown with an open circle. The extent of the surface scatter will be shown with a dotted line. The 50 x 50 cm unit will be shown as a filled in square, while the 2 x 2 m collection will be shown as an open square.

During site definition, photographs should be taken of the four cardinal directions from datum. If these are important cultural or natural features they will be photographed as well and this information will be recorded on the site map and in the field notes. A "Site Bag" will be kept at each site. All bags (e.g. shovel test bags, 50 x 50 cm level bags, general surface collection, etc.) will be kept in the site bag. The site bag will be labeled with the appropriate site number, the date the site was defined, and the number of bags inside.

EXCAVATION METHODOLOGY

The placement of excavation units on site can be determined through random selection or high probability selection. In the former, grid locations are chosen randomly. During high probability selection, the placement of the units is determined by the likelihood of recovering artifacts or exposing features.

Once the units have been selected and laid out on the grid, the units must be enclosed with nylon string. Elevations of all four corners and of the center of the unit will then be taken with transit and recorded in the field notes and on the level form. Opening photographs are necessary. All photographs should be recorded in the photo-log.

Once the opening photographs have been taken, a unit datum will be established. This datum should be placed in the highest corner of the unit. The unit datum is a fixed elevation, usually shot with the transit, used to determine the depths of each level. If the unit is placed on level ground, then the datum can be positioned in the northeast corner (where the unit designation is taken). A string will be strung from the unit datum. A line level will then be placed on the string approximately half way up the string, then take a measurement with a folding rule from the string to the ground as a measurement below datum.

Two crew members will excavate a single unit. One person in charge of screening while the other digs. The excavator will work in conjunction with the screener in filling out the level form and accompanying notes. Excavations should proceed in 10 cm (or less) levels within natural strata. Levels of 20 cm may be used under certain circumstances. The level should be halted if there is a soil color or texture change. The level form should include the appropriate information (including the reason for the halting at a specified depth).


Approval
4-13-99
Date

The level bag must include the following information:

- Project name
- Site number
- Grid coordinates
- Level number and depth
- Date
- Excavator Initials

It is necessary to take photographs when a new stratum or feature is encountered. All photographs will be recorded in the photo-log. A plan view (sketch of the floor) will be drawn at the end of each level or the first appearance of a feature. The plan view should include a scale. Munsell colors and soil textures will be included on the plan view. Place a key on the plan view. Elevations will be taken at the top of each new strata with the transit.

Before beginning the plan views, record the following information in the upper right hand corner of the graph paper:

- Site name and/or number
- Your initials
- The date
- Excavation unit designation
- Depth of plan view
- North arrow
- The scale (if you usually write the ratio (e.g. 1:10), be sure to also draw a bar indication 1 cm = 10 cm)

Draw the outline of the unit on graph paper. Outline any features that are recognizable in the floor of the unit. Lay one folding rule parallel to one of the walls. Hold a plumb bob over the point being measured. Use the second tape to measure the distance from the point to the first folding rule to establish x and y coordinates of the point. Plot the point on the graph paper. Record the Munsell color, soil type, and texture for every different soil in the plan view.

A profile should be drawn at the end of the excavation.

Set up a paper level over the area to be profiled. Mark this line on graph paper, and measure and record the elevation of this line in relation to unit datum. Set one folding rule above the area to be profiled with the "O" aligned with one edge of the profile. Outline the visible strata with the point of a trowel. Measure the depth of the level line of the ground surface, the interface of each of the strata, and the base of the unit at the corner of the area profiled. Mark these points on the graph paper. Repeat the process at regular intervals (as measured on the folding rule at the top of the profile). Take spot coordinates on individual artifacts, lenses, etc. Connect the dots to delineate the strata.


Approval

4-13-99

Date

FEATURES

Features should be assigned a feature number in the field. In some cases, they may be assigned a catalogue number as well. When a feature is encountered, the feature should be photographed, planned (in relation to the unit), and Munsell readings and elevations should be taken. A decision will be made at this time as to excavate, or leave the feature in tact. No excavation will be undertaken until such a decision is made final by the Office of Cultural and Historic Preservation (see Poarch Band of Creek Indians Archaeological and Resources Code). Under most circumstances the feature should be cross-sectioned and profiled. The excavator will fill out a separate form for the feature. A center line should be drawn across the feature and center string strung across the feature at approximately 2 cm above the ground surface. Once the first half of the feature has been taken out, a profile sketch will be made. The second half of the feature will then be excavated. The soil from the feature should be screened separately or floated. After the feature has been removed, a final elevation should be taken. **AGAIN! THE POARCH BAND OF CREEK INDIANS TRIBAL ARCHAEOLOGICAL AND HISTORIC RESOURCES CODE EMPHASIZES AVOIDANCE AND PRESERVATION OF FEATURES RATHER THAN EXCAVATION.**

Soil will be screened through 1/4" wire mesh screen. A bag will be labeled before any soil is screened for a particular level.

Once sterile soil has been reached, a profile sketch will be made of two separate but adjacent wall. Photographs will be taken and recorded in the phot-log. Notes on the unit will be finalized.

HUMAN REMAINS

If human remains are encountered on the surface of the site, they are **not** to be collected. Similarly, if you find them while digging a shovel test, backfill without disturbing them. If you find them while excavating a unit, cover them up and do not dig any further. Document the site, and place red field flags in a circle 2 m from the remains or burial.

Under no circumstances are the burials on the Poarch Creek Indians Reservations, or lands under their control, to be excavated, nor are they to be subjected to **any** examination or testing. Burial sites take precedence over any project or program plan.

Do not open any additional holes.

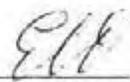

Approval
4-13-19
Date

EXHIBIT K



POARCH BAND OF CREEK INDIANS

5811 Jack Springs Road • Atmore, Alabama 36502
 Tribal Offices: (251) 368-9136 • Administrative Fax: (251) 368-4502
www.poarchcreekindians-nsn.gov

April 4, 2012

George Thompson, Jr.
 Mekko, Hickory Ground
 P.O. Box 903
 Henryetta, OK 74437

Re: Reinterment at Hickory Ground

Dear Mekko Thompson:

I write to you to provide additional information regarding the re-interment at Hickory Grounds. As you know, our tribal Nations have been in good faith discussions regarding the issue of re-interment since May 2006. Over the past five years, we have had numerous formal and informal discussions including large delegation meetings of the principals on at least five occasions. Throughout this time, our Tribe has attempted to address your delegation's concerns and demonstrated our commitment to finding a mutually agreeable resolution by, among other things, amending our original plans for a memorial garden and interpretative center in the northern half of the property in favor of leaving the area in a natural state, developing security plans for the area of re-interment, and proposing to fully participate in joint preservation efforts throughout this region. Most significantly, both our Nations agreed to preserve the Hickory Ground ceremonial site in perpetuity and jointly participated in these critical efforts.

The last official meeting of our delegations was in September 2010, and we have attempted to coordinate a follow-up meeting on several occasions since that time. You responded to our last proposal in March 2011 and expressed a desire to schedule another official meeting. Although our Nations' delegations intended to meet last August, we were unable to do so due to scheduling conflicts. Nonetheless, your delegation visited the site in any event, and introduced a new member of your delegation, John Beaver, Muscogee Nation Museum Director and Curator, to Robert Thrower, our Tribal Historic Preservation Officer. Since that time, on your behalf, Mr. Beaver has been communicating with Mr. Thrower regarding the final inventory and potential follow-up visits.

Given the five and a half years of good faith negotiations and the recent productive exchanges between Mr. Beaver and Mr. Thrower regarding the final inventory, we were disappointed to learn that the Muscogee Nation/Hickory Ground delegation sought to introduce a resolution at the National Congress of American Indians Annual Convention this past November, which did not name us but clearly related to our land. We were further dismayed to hear that, despite continued communications from your delegate Mr. Beaver with our THPO, you appeared in front of the Senate Committee on Indian Affairs during a roundtable discussion in early March with the same allegations. You indicated during those comments that you wished to take

Seeking Prosperity and Self Determination

possession of the remains. In all of our discussions, you have never requested that we allow the Muscogee Nation or Hickory Ground to take possession of the remains.

We regret that there appears to have been a breakdown in our communications and we hope that these recent actions are not indicative of a more adversarial approach on the part of the Muscogee Nation. We continue to stand prepared to continue a good faith and cooperative approach.

In furtherance of a good faith approach, we wanted to inform you that we have obtained the final inventory and are currently preparing for re-interment. With the hope that we can continue to work together regarding re-interment and restore the relationship between our sister Nations, we welcome your participation in this process. Please let us know as soon as possible if you would like to join us.

Best regards,



Buford L. Rolin
Tribal Chairman
Poarch Band of Creek Indians

cc: George Tiger, Muscogee Nation Principal Chief
John Beaver, Muscogee Nation Museum Director/Curator
✓ Marcella Giles, Attorney for Muscogee Nation & Hickory Ground
Poarch Band of Creek Indians Tribal Council
Robert Thrower, Poarch Band of Creek Indians THPO
Venus McGhee Prince, Poarch Band of Creek Indians Attorney General

EXHIBIT L

13-12



Muscogee (Creek) Nation

George P. Tiger
Principal Chief

Executive Office

Roger Barnett
Second Chief

April 13, 2012

VIA U.S.P.S and Facsimile (251) 368-4502

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

Re: Hickory Ground

Dear Chairman Rolin:

I am in receipt of your letter dated April 4, 2012 addressed to Mekko Thompson and copied to me and other individuals. I would like to thank you for keeping me apprised during this sensitive cultural matter.

In the past, Second Chief, Roger Barnett and I have met with the Poarch Band of Creek Indians as Representatives of the National Council for the Muscogee (Creek) Nation. Now, we would like to meet with you as Chief and Second Chief to discuss past and future negotiations and communications between your delegation and the Muscogee Nation/Hickory Ground delegation.

As you are aware, we both are newly elected, and we are requesting the opportunity to have a discussion from Tribal Leader to Tribal Leader. We are aware that time is of the essence for this sensitive issue, and we are willing to meet with you in Alabama.

Please call me to discuss arranging a meeting, and if you would like for us to come to Alabama or if we could make arrangements for you to visit the Muscogee (Creek) Nation. I look forward to seeing you and hope that we can meet as soon as possible.

Sincerely,

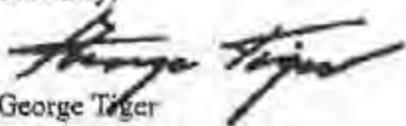

George Tiger
Principal Chief

EXHIBIT M



POARCH BAND OF CREEK INDIANS

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April 17, 2012

George Tiger
Principal Chief
Muscogee Nation
P.O. Box 580
Okmulgee, OK 74447-0580

George Thompson, Jr.
Mekko, Hickory Ground
P.O. Box 903
Henryetta, OK 74437

Re: Reinterment at Hickory Ground

Dear Principal Chief Tiger and Mekko Thompson:

Thank you for your response by letter dated April 13, 2012 regarding Hickory Ground, which was brought to my attention this morning. When we did not immediately hear from you in response to our April 4th letter, we assumed that you did not wish to participate in the reinterment process. Last week we proceeded with the reinterment of our ancestors' remains and associated funerary objects in the manner to which we agreed during our prior discussions. We will preserve the area of reinterment in perpetuity. We welcome you to visit the ceremonial site and area of reinterment and hope that we will work together on further preservation efforts. Please contact me if you would like to visit and/or discuss future communications.

Best regards,

Buford L. Rolin
Tribal Chairman
Poarch Band of Creek Indians

- cc: Roger Barnett, Muscogee Nation Second Chief
John Beaver, Muscogee Nation Museum Director/Curator
Marcella Giles, Attorney for Muscogee Nation & Hickory Ground
Poarch Band of Creek Indians Tribal Council
Robert Thrower, Poarch Band of Creek Indians THPO
Venus McGhee Prince, Poarch Band of Creek Indians Attorney General

Seeking Prosperity and Self Determination

EXHIBIT N



POARCH BAND OF CREEK INDIANS

5811 Jack Springs Road • Atmore, Alabama 36502
Tribal Offices: (251) 368-9136 • Administrative Fax: (251) 368-4502
www.poarchcreekindians-nsn.gov

November 8, 2010

George Thompson, Jr.
Mekko, Hickory Ground
P.O. Box 903
Henryetta, OK 74437

Alfred Berryhill
Second Chief, Muscogee Nation
P.O. Box 580, Highway 75 & Loop 56
Okmulgee, OK 74447

Re: Reinterment at Hickory Ground

Dear Mekko Thompson and Chief Berryhill:

Thank you for your letter dated October 8, 2010. Our Tribal Council and I were also greatly encouraged by our September 9th meeting. At the same time, we are now somewhat discouraged by the decision to require reinterment in place for all human remains and associated funerary objects for Hickory Ground.

Our proposal at the September 9th meeting consisted of two parts:

- (1) Reinterment. We proposed to reinter the remains and funerary objects in a pristine area to the northern end of our trust property at Hickory Ground and in a natural fashion (i.e., wrapped in muslin cloth and no markers or the like). We emphasized that we believed that this approach was an appropriate compromise.
- (2) Joint Preservation Efforts. We proposed a joint effort to locate and purchase significant areas of land within the State of Alabama in order to reinter any remains and associated funerary objects from all tribal towns that may be repatriated to either of our Tribes. We could also potentially place a joint THPO office at one of the sites to coordinate our joint efforts.

We were hopeful that a compromise could be reached on the issue of reinterment on Hickory Ground, so that we could pursue the joint preservation efforts. We believe the joint preservation efforts could set historical precedent for both of our Nations and could be followed or joined by other tribes. We are extremely excited about the possibility of working together now and in the future.

We respect the beliefs and customs of the Tusteneggi. However, we cannot agree that reinterment in place at this point in time is the best way to honor our ancestors. We plan to prepare for reinterment in the northern part of our trust property and, as always, welcome your participation in this process. As you mention, we would also like to schedule a planning session with Dr. Cottier and Auburn University to obtain the final inventory pursuant to NAGPRA and take possession of the remains and associated funerary objects. Please let us know your availability for such a meeting during December and January.

Seeking Prosperity and Self Determination

We know that these conversations about such sensitive issues are difficult ones. But we are guided by the fundamental idea that in the end we are sister Nations and we must work together for the benefit of our peoples past, present and future. We appreciate your continuing willingness to work with us, and we are optimistic that we can reach an accord. We look forward to seeing you soon.

Best regards,

A handwritten signature in cursive script, appearing to read "Buford L. Rolin".

Buford L. Rolin
Tribal Chairman
Poarch Band of Creek Indians

cc: Poarch Band of Creek Indians Tribal Council
Robert Thrower, Poarch Band of Creek Indians THPO

EXHIBIT O



FOR IMMEDIATE RELEASE

CONTACT: Sharon Delmar
251-368-9136
sdelmar@pci-nsn.gov

POARCH CREEK RESUMES DEVELOPMENT OF WETUMPKA PROPERTY

Poarch Creek Indian Nation, Alabama – October 31, 2012 - The Poarch Band of Creek Indians has resumed its development plans for a hotel and casino on land it owns in Wetumpka, Alabama. This decision comes after suspending construction of the project in a show of good faith so that leadership from Poarch Creek and the Muscogee Nation in Oklahoma could once again meet to discuss the concerns of both tribes. Poarch Creek made the decision to resume construction after meeting in Oklahoma this week with elected leaders of the Muscogee Creek Nation and traditional leaders of Hickory Ground Town (a traditional Indian town within the Muscogee Nation). After careful consideration of the Muscogee Nation's views, Poarch Creek believes the decision to move forward with its plans represents a fair and balanced approach to the development and preservation of the property.

Tribal Council Member Arthur Mothershed remarked, "We have been extremely careful to plan a development that is culturally sensitive while ensuring the economic well-being of our Tribal members, our community, and our State. It is a balanced, reasonable approach for using land that we own, which has been met with increased opposition from some in Oklahoma. Now, we are being faced with demands to remove ancestral remains that have already been reinterred. We can ensure that no more remains will be excavated. It has been almost eight years since any remains have been unearthed. We cannot change the fact that remains were found and removed. Those remains are now reinterred and we cannot support disturbing those remains again."

The Poarch Band of Creek Indians is the only federally recognized Indian tribe in Alabama. Its tribal members have lived continuously in the region for centuries, specifically near present day Atmore, Alabama, since the early 1800's. As a recognized sovereign nation, Poarch Creek is under no legal obligation to negotiate with any other government about the use of its own land. However, out of respect for their shared cultural and familial ties, Poarch Creek leadership began conversations with the Muscogee Nation about the development of the Wetumpka property in 2006. Discussions continued for several years, but opposition by some members of Hickory Ground and Muscogee Nation to Poarch Creek's plans to develop the Wetumpka site reached a crescendo when Poarch Creek announced its plans to build a hotel and casino on the property this summer.

"We are indeed saddened by the outcome of this recent trip to Oklahoma made by representatives of our Tribal Council," said Buford L. Rolin, Poarch Creek's Tribal Chairman. "Since 2006, we have reached out to the Muscogee Nation with the hope that they would be open to understanding the facts about the 21st century conditions of what was once Hickory Ground Town and would recognize that our development in Wetumpka does not alter that. Unfortunately we have reached an impasse."

Wetumpka is one of several Alabama communities that originated on the site of Hickory Ground Town, a historic Creek Indian community that, at one time, covered more than 1000 acres. While both the Poarch Creek and the Muscogee Nation have cultural ties to the land, it was the Poarch Creek that purchased approximately 34 acres of the original site in 1980.

At the time of the sale, the land had been used for agricultural purposes and was zoned for commercial use. The Poarch Creek had limited financial resources and had to apply for a grant to buy the property. Poarch Creek invited the Muscogee Nation to partner with it on the grant application, but the Muscogee Nation did not commit before the grant deadline.

“We have taken great effort to make sure the original Hickory Ground ceremonial site is preserved, and the remains that were removed in earlier years have been reinterred at Hickory Ground Town in a manner previously agreed to by traditional leaders in Oklahoma. The remaining acreage located on the northern part of Hickory Ground will be preserved in a pristine, natural state for posterity,” said Robert McGhee, who heads the Tribe’s Governmental Affairs Office and is a Poarch Tribal Council Member.

The Tribe is in compliance with applicable federal laws, including historic preservation laws, pertaining to the property. The expansion, in no way, compromises the site as construction plans do not call for any further excavation. Despite Muscogee claims to the contrary, there will be no expansion in other areas at the Hickory Ground site.

The development originally included a cultural center as well as a hotel and casino, but Poarch Creek modified the plans after Muscogee Nation and Hickory Ground representatives expressed concerns about the site on which the center would be located. Poarch Creek leadership is now reviewing those plans and has made a commitment to build a center on a nearby site as it moves forward with the hotel and casino development.

Poarch Creek’s Tribal Council will also set aside appropriate acreage of pristine land that has never been subject to agricultural use or development that can be used by Poarch Creek, as well as by other Tribes who may be facing sensitive issues of reinterment. The Tribal Council is establishing a historical and cultural preservation fund that will be made available to other tribes to support their preservation efforts.

Chairman Rolin said, “We respect the past, acknowledge the present, and recognize the challenges of the future. This development is a reasonable approach to land use; and no one cares more about the sanctity of our land and the well-being of our people and our neighbors than we do.”

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EXHIBIT P



POARCH BAND OF CREEK INDIANS

5811 Jack Springs Road • Atmore, Alabama 36502
Tribal Offices: (251) 368-9136
www.poarchcreekindians-nsn.gov

Dear Tribal Leader,

As the leader of one sovereign nation to another, I am writing to make sure that you have accurate information concerning the development of the Poarch Band of Creek Indians' Wetumpka, Alabama trust land. Poarch Creek has taken the utmost care to preserve our tribal history and culture while undertaking projects that assure the financial stability of our Tribal government and jobs for our people.

Development of Poarch Creek trust lands near Wetumpka is the subject of an increasingly belligerent misinformation campaign run by a handful of individuals from Hickory Ground town and the Muskogee Nation in Oklahoma. These men have made violent threats toward our tribal members, employees, customers and property. They have also attempted to intimidate, threaten, and humiliate our Tribal leadership at national gatherings in Indian Country.

One of the leaders of this group was arrested on Poarch Creek trust property last year after he threatened to burn down our casino. He was subsequently convicted of disorderly conduct and trespassing in an Alabama state court. Even after this incident, this individual and other members of his group have harassed and accosted Poarch Creek tribal leaders at multiple national Indian gatherings. Clearly, these are threats to our reputation and our safety that we take very seriously.

Attached is a Fact Sheet to help clarify this issue. If you would like to discuss any of these issues or have additional questions, I and other Members of the Poarch Creek Council would be happy to talk more with you.

We think it is important to remember that, first and foremost, no one is more aware of the importance of preserving Poarch's history and culture than we are. We remain committed to the integrity of our Tribe and are actively involved in ensuring the future of Indian Country. We are proud that Chief Calvin McGhee helped craft the Declaration of Indigenous Purpose and that he had the honor of presenting this document to President Kennedy. Former Chairmen Buford L. Rolin and Eddie Tullis continue to provide leadership roles throughout Indian Country in their work on Healthcare, Aging, and Sovereignty. Our Tribal Council Vice Chairman Robbie McGhee serves on the boards of the Native American Rights Fund, the Center for Native American Youth, the National Indian Child Welfare Association and our entire Tribal Council continuously advocates to strengthen national tribal Indian policy on issues related to education, VAWA, health care, child welfare, taxation, trust lands protection and other areas of importance to all Tribes.

In closing, we remain hopeful that these individuals who are now involved in unproductive and divisive activities will come to understand that our strength, as sovereign Indian nations, depends on our ability to work together on solving the problems and meeting the challenges that affect us all while maintaining the crucial tenets of sovereignty and self-determination. It's a dangerous road for all of Indian country to take when one sovereign seeks to enforce its will on the trust lands of another.

Sincerely,

Stephanie A. Bryan, Tribal Chair
Poarch Band of Creek Indians

Seeking Prosperity and Self Determination

Fact Sheet: Poarch Band of Creek Indians' Wind Creek Development In Wetumpka, Alabama

- Many years ago the Poarch and Muscogee Creek Tribes were separated by historical events. Today, we are separate sovereign nations with completely separate lands.
- We, the Poarch Band of Creek Indians, have continually lived on our Alabama Tribal lands and survived years of poverty.
- The Poarch Band's Wetumpka trust property (approximately 34 acres) is a small portion of what had been a large Indian town called Hickory Grounds. The land had been farmed and developed by others for decades.
- When the property came up for sale, we had no gaming operation and few resources. However, we believed that we should make every effort to purchase the property because it was an opportunity to regain some of our historical lands, protect our ancestors and history, and provide for our people and our communities.
 - We asked the Muscogee Nation to jointly apply for a grant to purchase the property. They did not respond.
 - The land was in a part of the country that had been farmed and developed for well over a century.
 - In fact, the current town of Wetumpka, Alabama is built on what was once the Indian town of Hickory Ground.
 - We still believed that the site was historically significant as a center of Creek Indian trade, government, and economic development.
- Unbeknownst to us, a small part of the property we acquired was the site of Creek Ceremonial Grounds. The Ceremonial Grounds have never been disturbed, remain protected, and we have memorialized and preserved the site to this day.
 - Northern 17 acres of our trust property is preserved in perpetuity as a memorial to the historical significance of the site.
 - Remains found within the Ceremonial Grounds were never removed.
 - In accordance with Poarch Creek Tribal Law and consistent with the Muscogee Tribe's Constitution, remains found outside the Ceremonial Grounds were interred adjacent to the Ceremonial Grounds with prayer and ceremony.
 - The previously disturbed and fragmented remains found scattered across the other 17 acres have been reinterred with dignity and honor.

- In the 1990's, Alabama archeologists asked to study the site and we agreed. At the time:
 - There was no visible evidence of a burial ground.
 - The site was eroding because of farming and lack of maintenance.
 - We had limited finances and limited technology.
 - When evidence was discovered, the archeologists' work stopped and their discoveries were stored for several years. The remains and funerary objects were reinterred according to Indian tradition in April of 2013.
- The Tribe is in compliance with all applicable federal historic and cultural preservation laws pertaining to the property.
- Poarch Creek is, and was, under no legal obligation to negotiate with any other sovereign Indian nation about the use of our own land. However, out of respect for our shared cultural and familial ties, Poarch began discussions with the Muscogee about planned development of the Wetumpka property in 2006.
- Since 2006, Poarch regularly reached out to the Muscogee Nation in the hopes that its leadership would be open to understanding the 21st century conditions of the Poarch land in Wetumpka. Negotiations continued for several years, but the Muscogee Nation's opposition to Poarch Creek's plans to develop the land reached a crescendo when plans were announced to expand the existing gaming facility into a resort on the property in the summer of 2012.
- We have continued to be open to dialogue with the Muscogee elected leadership and have expressed our desire for a good relationship between the two nations.
- We are encouraged that these efforts are making a difference as evidenced by the visit of over 150 Muscogee tribal members to our Wind Creek Wetumpka resort. They visited the memorial site, were served refreshments, and shared pleasant conversation with Poarch tribal members.
- The Wind Creek Wetumpka development protects our past and helps provide for the future of our tribal members.

EXHIBIT Q



Preserving America's Heritage

November 14, 2006

Mr. Brad Mehaffy, REM
NEPA Compliance Officer
National Indian Gaming Commission
1441 I Street, N.W., Suite 9100
Washington, D.C. 20005

REF *Proposed Approval of a Management Contract for the Expansion of Existing Gaming Facility by the Poarch Band of Creek Indians Wetumpka, Alabama*

Dear Mr. Mehaffy:

On October 3, 2006, the Advisory Council on Historic Preservation (ACHP) received the additional documentation regarding the referenced undertaking. ACHP requested this information in response to your notification that the National Indian Gaming Commission (NIGC) was reviewing the Poarch Band of Creek Indians' (Poarch Band) proposed management contract for expansion of the existing gaming facility on Hickory Ground, a property listed in the National Register of Historic Places. Based upon this documentation, it is apparent that activities undertaken by the Poarch Band prior to the completion of the review required by Section 106 of the National Historic Preservation Act (NHPA) have adversely affected the National Register-listed property.

According to the documentation provided, the Poarch Band sponsored extensive investigations and ultimately data recovery at Hickory Ground between 1988 and the present. The investigations included archaeological site identification surveys within the approximately 16-acre trust property and the approximately 5-acre tract of fee land. As a result, a multi-component archaeological site, Hickory Ground, was delineated, boundaries expanded, and finally, extensive archaeological data recovery was undertaken, including the removal of numerous human burials. As we understand, the recovered remains, artifacts, and site documentation are in various stages of analysis and curation by the Poarch Band's consultants.

Regrettably, the archaeological surveys and data recovery were not carried out in compliance with Section 106 of the NHPA. Since the Section 106 process must be initiated by a Federal agency prior to the initiation of project activities, it is unclear why the applicant, a tribe with a tribal historic preservation office approved by the National Park Service pursuant to Section 101(d)(2) of the NHPA, proceeded with project planning and archeological investigations. As you know, the Federal agency must consult with the State Historic Preservation Officer (SHPO), any Indian tribes that attach religious and cultural significance to historic properties affected by the undertaking, and other appropriate stakeholders, and provide adequate notification to the public in carrying out the steps of the Section 106 review.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 809 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@acnp.gov • www.achp.gov

Based on the information provided, there was no Federal agency review of the archaeological investigations carried out by the Poarch Band; no consultation with the Alabama SHPO prior to excavation of the portion of the site on fee lands, and no consultation with any other Indian tribe, particularly the Muscogee Creek Nation. The initial notification of the ACHP (see 36 CFR 800.6(a)(1)) did not occur until after the destruction of the site. Furthermore, there is no indication that the public has been notified about the nature of the undertaking and its effects on historic properties (36 CFR 800.3(e)).

In your correspondence, you indicate that the Poarch Band completed more than 90% of the archeological data recovery within the area of potential effect for the proposed project. In the initial letter to the ACHP regarding this project, you invited us to participate in consultation to resolve the potential adverse effects of the undertaking. You have also indicated that NIGC intends to invite the Alabama SHPO to participate in any further Section 106 consultation, and have outlined steps NIGC will take to complete the Section 106 review process for any areas where there has been no land disturbance. NIGC has indicated that it proposes to develop a memorandum of agreement with all parties following consultation.

Please note, however, that Section 110(k) of the NHPA requires that

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant (16 U.S.C. 470h-2(k)).

While NIGC has provided documentation regarding archeological work conducted to date, we have no indication of NIGC's views regarding the applicability of Section 110(k) and no record of the views of the Alabama SHPO and others, specifically the Muscogee Creek Nation regarding this matter. In accordance with Section 800.9(c)(2) of the ACHP's regulations, NIGC must determine whether or not the Poarch Band's actions were undertaken with the intent to avoid the requirements of Section 106. If NIGC determines that this did occur, NIGC should notify the ACHP and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the historic property. This documentation must include any views obtained from the applicant, SHPO, and other parties known to be interested in the undertaking. Within thirty days of receiving such information, unless otherwise agreed to by NIGC, the ACHP will provide the agency with its opinion as to whether circumstances justify NIGC granting its approval to the applicant and any possible mitigation of the adverse effect. If, after considering the views of the ACHP, NIGC determines to grant its approval, NIGC should consult further with the ACHP and other consulting parties to conclude a memorandum of agreement for treatment of the remaining effects to historic properties resulting from the project.

Should you have any questions or wish to discuss this matter further, please contact Valerie Hauser, Native American Program Coordinator at 202-606-8530, or by email at vhauser@achp.gov

Sincerely,


John L. Klima

Director

Office of Federal Agency Programs