



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

OCT 31 2002

Penny J. Coleman, Esq.  
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National Indian Gaming Commission  
1441 L Street, NW (Suite 9100)  
Washington, DC 20005

Re: Whether the Maria Christiana Reserve No. 35 is "Indian lands"  
for Purposes of Gaming under the Indian Gaming Regulatory Act?

Dear Ms. Coleman:

I am writing to you regarding whether the Maria Christiana Reserve No. 35 (Reserve), a restricted Indian allotment located in the State of Kansas (State), constitutes "Indian lands" under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. As you know, this issue has been litigated several times with three district court decisions and a court of appeals decision.

In the last round of litigation over our opinion issued on November 10, 1998, (1998 Opinion) to the National Indian Gaming Commission (NIGC), the Department of Interior (DOI) acknowledged that it did not completely address whether the jurisdiction of the Miami Tribe of Oklahoma (Tribe) existed, thereby enabling the Tribe to exercise governmental authority over the Reserve. The 1998 Opinion set forth in part our analysis of whether the Reserve constituted "Indian lands" as defined by the IGRA as "any lands title to which is . . . held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4).

While the DOI agreed to address this issue in its briefings before the courts, given the strong language in the opinion of the Court of Appeals for the Tenth Circuit that Congress abrogated the Tribe's jurisdiction long ago, we believe this remaining issue has been decided. We nevertheless issue this opinion to assist in the NIGC's review of the management contract submitted for re-approval by the Tribe and the Butler National Service Corporation (Butler) and to ensure a complete record of this decision. Thus, for the following reasons, we find that the Tribe does not possess jurisdiction over the Reserve and, therefore, the Reserve is not "Indian lands" for purposes of gaming under the IGRA.

## I. PROCEDURAL BACKGROUND

In Miami Tribe of Oklahoma v. United States, 927 F. Supp 1419 (D. Kan. 1996) (Miami I), the Tribe sought judicial review of the NIGC's disapproval of the

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management contract between the Tribe and Butler. The Tribe appealed the initial disapproval of the contract and the NIGC affirmed the disapproval on April 4, 1995. On June 9, 1995, the NIGC supplemented its decision with the May 23, 1995, opinion of the Associate Solicitor, Division of Indian Affairs (1995 Opinion).

In his 1995 opinion, the Associate Solicitor concluded that the Tribe did not exercise the requisite governmental powers over the Reserve; thus it was not “Indian lands” as defined by the IGRA. The **Miami I** court thoroughly reviewed the history of the Reserve and determined that Congress had expressly abrogated the Tribe’s jurisdiction over the Reserve. *Id.* at 1426. The court further noted that, after the NIGC’s decision in the case, the Tribe amended its constitution, enabling it to approve membership of the current Reserve owners. The court left the door open for the Tribe to resubmit its management contract to the NIGC with evidence of the constitutional amendment and the current owners’ consent to Tribal jurisdiction.<sup>1</sup> The court did not opine, however, on whether the NIGC would approve the management contract with this new information. *Id.* at 1429 n.8.

The Tribe did not appeal this decision. Instead, the Tribe resubmitted the management contract and the NIGC again sought an opinion from our office. In a second opinion dated May 12, 1997, the Acting Solicitor found that the changes made by the Tribe did not provide enough evidence of tribal jurisdiction to bring the Reserve within the definition of “Indian lands” for the purposes of the IGRA. The NIGC adopted this opinion and disapproved the management contract. The Tribe again sought judicial review of the NIGC Chairman’s disapproval, given the circumstances of the constitutional amendment and the new membership status of the owners of the Reserve.

In *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213 (D. Kan. 1998) (**Miami II**), the Court was faced with the Tribe’s “facially sound” contention that it had established jurisdiction by the actions it had taken. *Id.* at 1218. The court made clear the following:

If jurisdiction were established, based on these subsequent events, the court would find that the history of the parcel, at least that part dealing with the cession of the land and the Tribe’s receipt of compensation is irrelevant; the only inquiry under the statutory definition of “Indian Lands” would be whether the tribe exercises--in the present--governmental power over the land.

*Id.* The court reversed the Chairman’s disapproval of the management contract and remanded the case to the NIGC to provide a better record, particularly with regard to factors that would illuminate the issue of whether or not the Tribe is “actually and concretely” exercising governmental power over the Reserve. *Id.* at 1219.

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<sup>1</sup> In leasing the Reserve to the Tribe, the owners/new members specifically consented to Tribal jurisdiction.

As a result of this remand, the DOI conducted an inquiry into the issue of the Tribe's exercise of governmental power. The Associate Solicitor determined, as a matter of fact and law, that the Tribe's exercise of governmental power was enough to satisfy the requirement in 25 U.S.C. § 2703(4) and that the Reserve was "Indian lands" of the Tribe.

Consistent with the NIGC's policy in 1998,<sup>2</sup> the NIGC adopted the Associate Solicitor's opinion. Based upon this advice, the Tribe and NIGC settled **Miami II** with a "Stipulation and Agreement" filed on January 15, 1999, that the NIGC Chairman would treat the Reserve as "Indian lands" for the purpose of his review and approval or disapproval of the gaming management contract between the Tribe and Butler. In exchange, the Tribe agreed to dismissal with prejudice of its claim.

Pursuant to this stipulation, the Chairman of the NIGC began another review of the proposed management contract between the Tribe and Butler and the necessary background investigations were conducted. Based upon such review and investigation, the NIGC Chairman determined that the contract met the requirements for approval under 25 U.S.C. § 2711 and that the persons with a financial interest in, or management responsibility for, the contract were suitable. Treating the Reserve as "Indian lands" pursuant to the **Miami II** stipulation, the Chairman approved the management contract on January 7, 2000.

Meanwhile, the State filed suit under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701, *et seq.* against the United States, various agencies and officials challenging the 1998 Opinion that the Reserve constituted "Indian lands" and seeking a preliminary and permanent injunction against facilitating any gaming on the Reserve. *Kansas v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd* 249 F.3d 1213 (10<sup>th</sup> Cir. 2001) (**Miami III**). The United States moved to dismiss the case and objected to the State's Motion for a Temporary Restraining Order (TRO). The **Miami III** district court concluded that the NIGC's "Indian land determination was undertaken in an arbitrary and frivolous manner," 86 F. Supp. 2d at 1099, and that the NIGC did not address the threshold issue of whether the Tribe had jurisdiction over the Reserve. *Id.* at 1098.

The district court denied the United States' Motion to Dismiss and granted the preliminary injunction<sup>3</sup> from which the United States sought interlocutory appeal to the Court of Appeals for the Tenth Circuit. The Court of Appeals for the Tenth Circuit subsequently characterized the NIGC's conduct in determining whether the Tribe

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<sup>2</sup> In February 2000, the NIGC and the DOI executed a Memorandum of Understanding (MOU) that provided for a collaborative process in the development of legal opinions relating to "Indian lands." The MOU alters the prior NIGC practice of requesting DOI to determine "Indian land" matters under the IGRA and deferring to such determinations.

<sup>3</sup> The State filed a Motion for TRO and withdrew it. The State later renewed its Motion for TRO. At the hearing on the TRO, the district court decided to treat the TRO as a request for a Preliminary Injunction.

exercises governmental power over the Reserve, without first determining the jurisdictional basis for that power, as putting “the cart before the horse.” 249 F.3d at 1229.

The Court of Appeals for the Tenth Circuit discussed the actions undertaken by the Tribe to demonstrate the existence of jurisdiction and the exercise of governmental power over the Reserve.

None of these recent events, however, alters the conclusion that Congress abrogated the Tribe’s jurisdiction over the tract long ago, and has done nothing since to change the status of the tract. An Indian tribe’s jurisdiction derives from the will of Congress, not from the consent of the fee owners pursuant to a lease under which the lessee acts.

*Id.* at 1230-31. The Court of Appeals for the Tenth Circuit remanded for further proceedings consistent with its opinion.<sup>4</sup> The Federal Defendants moved the district court to vacate the NIGC’s approval of the management contract and remand the matter to the agencies. On June 24, 2002, the district court remanded the matter for “further proceedings not inconsistent with the [district court’s] opinion and Tenth Circuit’s decision.” 2002 U.S. Dist. LEXIS 12392. After evaluating this matter on remand, as more fully discussed herein, I find that the courts have decided this matter and left no room for a contrary conclusion.

## II. FACTUAL BACKGROUND

### A. Statutory History

Most of the history of the Reserve is reviewed in detail in **Miami I** and need not be repeated here in its entirety. For purposes of this analysis, the first key event was the Treaty of June 5, 1854, 10 Stat. 1093, which identified two groups of Miami Indians: the Western Miamis who had emigrated to Kansas<sup>5</sup> and those who remained in Indiana (Indiana Miamis). Article 2 of the 1854 Treaty implicitly reserved jurisdiction to the Tribe with respect to certain civil issues.

When selections are so made, or attempted to be made, as to produce injury to, or controversies between, individuals, which cannot be settled by the parties, the matters of difficulty shall be investigated and decided

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<sup>4</sup> It should be noted that neither the district court nor the Court of Appeals for the Tenth Circuit addressed whether the State had standing to seek review of a gaming management contract, nor did the Courts discuss the basis for the NIGC to revisit the issue of the Reserve’s status in the context of a management contract review, in light of the stipulation and agreement that was signed in the settlement of **Miami II**.

<sup>5</sup> As discussed *infra*, the present-day Miami Tribe of Oklahoma consists of Western Miamis who moved to Oklahoma under the terms of a subsequent treaty.

on equitable terms, by the chiefs of the Tribe, subject to appeal to the agent, whose decision shall be final.

10 Stat. at 1094. Article 2 also provided that the lands not ceded to the United States were reserved for use by the Tribe and that members could make selections of two hundred acres each. The patents that would issue for these selected lands would be

subject to such restrictions respecting leases and alienation as the President or Congress of the United States may impose; and the lands so patented shall not be liable to levy, sale, execution, or forfeiture: *Provided*, That the legislature of a State within which the ceded country may be hereafter embraced, may, with the assent of Congress, remove these restrictions.<sup>6</sup>

Under the 1854 Treaty, the Indiana Miamis were not to receive any compensation for lands in Kansas ceded by the Western Miamis, although payments required by the Treaty of November 28, 1840, 7 Stat. 582, would go to the Indiana Miamis who were identified on a list of 302 names. This list did not include the DeRome family; however, the 1854 Treaty allowed the Indiana Miamis to add to the list. The Senate ratified the 1854 Treaty on August 4, 1854, with an amendment which limited the annuity roll of the Indiana Miamis to only those individuals that were on the list of 302 names, “the increase of the families of the persons” on that list, and those persons “added to said list by the consent of the said Miami Indians of Indiana, obtained in council, according to the custom of the Miami tribe of Indians.” 12 Op. Att’y Gen. 236, 242 (1867).

In the Act of June 12, 1858, 11 Stat. 329, Congress directed that 68 (later 73) names be added to the list of 302 names; members of the DeRome family, including Maria Christiana, were added at this time. The leaders of the Indiana Miamis opposed the inclusion of these individuals. See H.R. Rep. No. 3852, 51<sup>st</sup> Cong., 2d Sess. (1891); H.R. Exec. Doc. No. 23, 49<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 14 (1886). The 1858 Act also directed the Secretary to pay these individuals annuities for past years and to allot to each of them 200 acres to be taken from lands within the remaining Miami reservation. The Act of March 3, 1859, 11 Stat. 430, authorized the Secretary to issue restricted patents for these lands pursuant to the 1854 Treaty. The land, known as the *Reserve*, allotted by restricted

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<sup>6</sup> On February 1, 1865, the Kansas Legislature enacted the following legislation: “[A]ll members of Indian tribes to whom lands have been granted by the United States, in this State, and who have received patents therefore, are hereby authorized to sell or convey the same by deed in fee simple, or to mortgage the same, with the like effect and under the same restrictions and limitations as are provided by law for conveyances in other cases. Kansas Laws 164-65 (1865). The Court of Appeals for the Tenth Circuit in **Miami III** noted that in a March 1, 1872, Kansas Joint Resolution, Kansas removed restrictions on the alienability of the Kansas Reserves (available through the Kansas State Historical Society, 6425 SW 6<sup>th</sup> Avenue, Topeka, KS 66615). **Miami III**, 249 F.3d at 1230. By Act of January 23, 1873, 17 Stat. 417, Congress subsequently assented to the Kansas legislature’s authorization of removal of restrictions against alienation on fee-patented land, “in all cases in which the title has legally passed to citizens of the United States other than Indians.”

fee patent dated, December 15, 1859, to Maria Christiana DeRome was indisputably inside the Tribe's Kansas reservation.

These individuals drew annuities at the designated places in Indiana from 1859 until 1867. The Appropriations Act of March 2, 1867, 14 Stat. 492, 502, 515, authorized appropriations for the Indiana Miamis "as may be, upon the opinion of the Attorney General, legally entitled to the same, under the provisions of the treaty with said Indians of June 5, 1854 and Senate amendments thereto, regardless of any subsequent legislation."

In 1867, the United States Attorney General issued an opinion stating that the names of the 73 individuals had been improperly added to the annuity roll, as the names had been added without the consent of the Indiana Miamis. 12 Op. Att'y Gen. 236 (1867); S. Misc. Doc. No. 131, 53<sup>rd</sup> Cong., 3d Sess. (1895). The Attorney General reasoned that the 1867 Appropriations Act directed him to disregard "subsequent legislation," that is, any legislation enacted after the 1854 Treaty and its Senate amendment dated August 4, 1854. This "subsequent legislation" included the Act of June 12, 1858, which added the DeRome family to its list of 302 names.

Thus, any future annuity roll would include, and subsequent annuities would be designated for, only those Indiana Miamis who were either on the list of 302 names, part of "the increase of the families of persons" on the list of 302 names, or added with the consent of the Indiana Miamis, notwithstanding the Act of June 12, 1858. As noted earlier, the Indiana Miamis had already objected to the inclusion of these individuals, so the DeRome family would no longer be included on the annuity rolls.

After these individuals were dropped from the annuity roll of the Indiana Miamis, Congress instructed the Secretary of the Interior to include these individuals on the rolls of the Miami Indians in Kansas if he found them entitled to be included. See Act of March 3, 1873, 17 Stat. 631. However, the Secretary of the Interior found that the 73 individuals were not eligible to be included on the roll of the Western Miamis because they remained in Indiana instead of emigrating. See H.R. Rep. No. 3852, 51<sup>st</sup> Cong., 2d Sess. (1891).<sup>7</sup>

The United States and the Miami Tribe entered the Treaty of February 23, 1867, 15 Stat. 513, in which the Miamis would move from Kansas to Oklahoma. Those Miamis who remained in Kansas could become United States citizens and surrender tribal membership after fulfilling certain conditions. Act of March 3, 1873, 17 Stat. 631.

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<sup>7</sup> The Tribe disputes whether the DeRome family failed to emigrate from Indiana to Kansas. The Tribe has alleged that the DeRomes were in Kansas at the time of the allotment, but may have returned to Indiana, then returned again to Kansas. The Tribe has also alleged that the burial sites of Maria Christiana's brothers and sisters are located in the vicinity of the Reserve, although the burial site of Maria Christiana DeRome is unknown.

The Western Miamis ceded their remaining land in Kansas and Congress directed the Secretary of the Interior to determine which individuals were entitled to share in the resulting funds, including “those persons of Miami blood or descent for whom provision was made by the third section of the act of [June 12, 1858], if in the opinion of the Secretary of the Interior the said Indians are entitled to be so included under treaty stipulations.” 17 Stat. 631, 632.

By letter dated February 11, 1873, the Secretary of the Interior forwarded to Congress a report from the Superintendent of Indian Affairs that determined that none of the individuals who had received an allotment pursuant to the 1858 Act were entitled to share in the proceeds from the sale of the Tribe’s land in Kansas. The Commissioner opined that these individuals had not been “recognized as Miamis, either by the tribe in Kansas or by those residing in Indiana, who . . . have never joined the tribe in Kansas, and until now have claimed no benefits from their annuities.” See J.R. Exec. Doc. No. 199, 42<sup>nd</sup> Cong., 3d Sess. (1873). Maria Christiana DeRome had been included in this group and had received her allotment despite the lack of tribal membership in either group.

In 1882, the Attorney General opined that only those Miamis who moved to Kansas were entitled to receive allotments or proceeds from the sale of the allotments, 17 Op. Att’y Gen. 410, 412 (1882), and that the 1858 Act [adding the DeRome family to the list of persons receiving allotments] was “virtually repealed.” Id. at 415. The Western Miamis petitioned Congress in 1884, asking that the Western Miamis be reimbursed for the money and lands taken from them and given to the 73 individuals on the 1858 list. H.R. Rep. No. 3852, 51<sup>st</sup> Cong., 2d Sess. at 2 (1891). Following referral from Congress, the Court of Claims concluded that the Western Miamis were entitled to recover the amount of money erroneously paid as back annuities for the 73 individuals, as well as the value of the land allotted to those individuals. See The Western Miami Indians v. United States, Ct. Cl. No. 1349, Jan. 9, 1891, in H.R. Misc. Doc. No. 83, 51<sup>st</sup> Cong., 2d Sess. (1891). In 1892, the United States compensated the Western Miami, 281 F.2d at 212 (citing 26 Stat. 1000), and provided additional compensation in 1960 when the Western Miami sought payment of interest on the compensation. Id.

## B. Subsequent History

### 1. **Tribal actions**

More recently, the Tribe engaged in several activities intended to demonstrate that it uses its alleged jurisdiction to exert governmental powers over the Reserve. Tribal Resolution 93-12 (Jan. 5, 1993) expressly reaffirmed the Tribe’s governmental jurisdiction over the Reserve. In Tribal Resolution 94-48 (August 3, 1994), the Tribe requested assistance from the Bureau of Indian Affairs (BIA) concerning the escheat to the Tribe of interests in the Reserve. Tribal Resolution 95-13 (December 6, 1994) enacted a code governing the descent and distribution of trust or restricted lands over which the Tribe has jurisdiction and specifically included the Reserve. Tribal Resolution 95-48 (May 9, 1995) set out the terms by which the Tribe purportedly agreed to accept a

one percent undivided interest in the Reserve from heir-owner Earline Smith Downs, although this transaction was never completed.

The Tribe has assumed the physical maintenance of the property and has taken steps to discourage trespass on the Reserve. Activities observed during a site visit in 1998 by DOI personnel included the operation of an “outreach center” in a mobile home building on the property and the presence of a construction trailer. The Tribe has issued a license to a Tribal member to operate a smoke shop on the Reserve. Water, telephone, and electricity services are available on the Reserve. Tribal Police regularly travel to Kansas to conduct surveillance of the Reserve.

Although neither Maria Christiana DeRome nor her heirs elected to move with the Tribe to Oklahoma, the Tribe proposed to amend its constitution in 1996 to authorize membership specifically for the heirs of Maria Christiana DeRome:

(f) Any person of Miami Indian blood and/or blood descendent thereof, who relocated to Kansas, who has been issued restricted land patents to land within the Miami Reservation in Kansas territory as stipulated under the second Article of the treaty with the Miami, dated June 5<sup>th</sup>, 1854, and approved by the third section of an Act of Congress dated June 12<sup>th</sup>, 1858, or any persons listed in the La Cygne Journal, in 1871, whose names appear as an Indian headright, who makes application, may be admitted to membership in the Miami Tribe of Oklahoma.

The constitutional amendment was approved by Tribal election and submitted to DOI. The Secretary of the Interior approved the amended constitution on January 18, 1996. Numerous heirs of Maria Christiana DeRome were later granted tribal membership when the Tribe passed an ordinance approving their membership. In addition, the heirs specifically consented to tribal jurisdiction in leasing the Reserve to the Tribe.

## **2. Bureau of Indian Affairs actions**

The BIA has issued letters regarding the status of the Reserve. In 1974, the BIA Acting Director, Office of Trust Responsibilities, notified the Anadarko Area Director by letter of his conclusion that the Reserve remained in restricted fee status and under the jurisdiction of the BIA. The Realty Specialist, BIA Miami Agency, informed the Tribal chief in a 1993 letter that the Reserve was held in restricted status, would be subject to the escheat provisions of the Indian Land Consolidation Act of 1983, and other tribes had not challenged the jurisdiction of the Tribe. In a 1994 letter, the Superintendent, BIA Miami Agency, noted that the Reserve was held in trust/restricted title by the United States. The BIA has also continued to administer probates of the Reserve. See Brief of Amici, Bureau of Indian Affairs, U.S. Department of Interior, filed in *The Matter of Estate of James Dallas McHenry, Deceased Miami of Oklahoma*, IP OK 274 P 93.



### III. APPLICABLE LAW

#### A. The Indian Gaming Regulatory Act (IGRA)

In the IGRA, Congress designed a comprehensive statutory scheme for the conduct of gaming activities on Indian lands. Congressional findings indicate the following:

[T]he establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards 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). On the basis of these findings and to fulfill several statutory responsibilities, Congress established the NIGC and gave it jurisdiction to regulate several aspects of Indian gaming. 25 U.S.C. § 2704(a). That authority includes the review of management contracts that are defined as “any contract ... between an Indian tribe and a contractor ... if such contract or agreement provides for the management of all or part of a gaming operation.” 25 C.F.R. § 502.15.

For tribes to conduct gaming under the IGRA, such gaming must be conducted on “Indian lands” over which the Tribe has jurisdiction, as defined by the IGRA. The IGRA defines “Indian lands” as follows:

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

25 U.S.C.A. § 2703(4).

#### B. Statutory Interpretation

##### 1. **Deference to agency construction**

The legal analysis of the IGRA must occur within the framework of principles of statutory interpretation. An agency must give effect to the unambiguous intent of Congress, although it must take a different approach in circumstances where the statute is susceptible to more than one meaning. See Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843-45 (1984). Under such circumstances, the agency must utilize its specialized expertise and attempt to apply the statute in a rational manner.

## 2. The Indian canon of interpretation

If it is determined that the language of a statutory provision is ambiguous,<sup>8</sup> federal courts have an obligation to construe statutes enacted for the benefit of Indians “liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 718 (10th Cir. 2000); NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1194-5 (10<sup>th</sup> Cir. 2002). Indeed, as the Court of Appeals for the District of Columbia has ruled, “if [an ambiguous law] can reasonably be construed as the Tribe would have it construed, it *must* be construed that way.” Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (emphasis in original).

But the courts are not entirely in agreement as to the effect of this rule of construction on interpretations by a federal agency like the DOI or by the NIGC. Compare Ramah Chapter of the Navajo Nation v. Lujan, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997) (canon of construction of liberal interpretation trumps agency interpretations) with Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9<sup>th</sup> Cir. 1990) (deference due expert agencies makes application of canons of construction inappropriate). Very limited authority exists in the legislative history of the IGRA for applying this canon of construction. See 134 Cong. Rec. H8153 (daily ed. Sept. 26, 1988) (Rep. Udall, IGRA’s primary House sponsor, calling on courts to apply “the Supreme Court’s time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.”)

## IV. METHOD OF ANALYSIS

This discussion will focus solely on the question of the Tribe’s jurisdiction over the Reserve. The Court of Appeals for the Tenth Circuit instructed that the inquiry focus on the intent and purpose of Congress concerning the present-day status of the Reserve. In examining this question, the DOI had the benefit of reviewing the pleadings and opinions in the litigation over this Reserve and each of the parties had ample opportunity to develop and refine its legal and factual positions. Thus, the DOI was able to review information or submissions from the United States Department of Justice, the State of Kansas, and the Tribe. The DOI also reviewed expert reports and other documents and materials recently submitted by the State of Kansas and attorneys for the Tribe.

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<sup>8</sup> Provisions of the IGRA have been found ambiguous by the Court of Appeals for the Tenth Circuit in this case. Kansas v. United States, 249 F.3d 1213, 1228 (10<sup>th</sup> Cir. 2001) (noting that the “IGRA sheds little light on the question of whether under the [circumstances of the case] the tract constitutes “Indian lands”), and in Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10<sup>th</sup> Cir. 2001) (noting that the IGRA does not define the term, “reservation;” therefore, Chevron deference would apply to any Commission construction of that term).

## V. LEGAL ANALYSIS

Analysis of the “Indian lands” definition is not necessary if the Tribe does not possess the requisite jurisdiction over the Reserve. “Tribal jurisdiction” is a threshold requirement to the exercise of governmental power. See, e.g., Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 701-703 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994), superseded by statute as stated in Narragansett Indian Tribe v. National Indian Gaming Comm’n, 158 F.3d 1335 (D.C. Cir. 1998); **Miami II**, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998); (A tribe must have jurisdiction in order to be able to exercise governmental power); **Miami I**, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.) This interpretation is consistent with IGRA’s language limiting the applicability of its key provisions to lands over which a tribe has jurisdiction. 25 U.S.C. §§ 2703(7)(D); 2710(a)(1), (a)(2), (b)(1), (b)(4)(A), & (d)(1)(A)(i); and 2713(d); see also Narragansett Indian Tribe, 19 F.3d at 701-703.

A. The principle of res judicata requires a finding of no Tribal jurisdiction over the Reserve.

A review of the opinions in this matter demonstrates that the courts have left no room for a finding that the Tribe possesses jurisdiction over the Reserve. The Court of Appeals for the Tenth Circuit affirmed the **Miami I** district court’s opinion that the Tribe did not have the requisite jurisdiction:

The difficulty with the Government’s position is that the district court in Miami Tribe I thoroughly analyzed the question of the Tribe’s jurisdiction over the tract based upon the United States’ treatment of the tract. The court concluded that no lawful basis existed to suggest the Tribe presently had jurisdiction over the tract. Miami Tribe I, 927 F. Supp. at 1424-27 . . . Rather, Congress years ago “unambiguously intended to abrogate the Tribe’s authority of its lands in Kansas and move the Tribe to new lands in Oklahoma.”

249 F.3d at 1230-31. In addition, the Court of Appeals for the Tenth Circuit included a summary of the findings and conclusions of the **Miami I** district court opinion:

The Reserve is located inside the original boundaries of the Tribe’s reservation in Kansas. In 1873, the Tribe agreed to sell its unallotted lands in Kansas; Congress legislated the purchases of the lands in 1882. In 1884, the Tribe sought reimbursement for the land allotted to, among others, Maria Christiana DeRome. In essence, the Tribe claimed that the Maria Christiana allotment should be treated as unallotted land and sold to the United States. The Court of Claims agreed and compensated the Tribe for the land in 1891. The Court of Claims concluded that . . . 1858 legislation had unlawfully taken funds and land designated for the Tribe

[including Reserve No. 35], and awarded interest on the 1891 payments. The court in [Miami Tribe I] concluded from this series of events that the Tribe has unmistakably relinquished its jurisdiction over the Reserve. Moreover, in 1873, Congress expressly abrogated the Tribe's jurisdiction [over its former lands in Kansas], which was effective no later than 1924 when any members of the Tribe remaining in Kansas – and their heirs – became naturalized citizens.

249 F.3d at 1230-31, citing Kansas v. U.S., 86 F. Supp. at 1095-96.

The Court of Appeals for the Tenth Circuit affirmed these conclusions and went on further to hold:

Because the Tribe did not appeal Miami Tribe I, the district court's findings and conclusions regarding the status of the tract, including its construction of the relevant legislation and treaties, are now *res judicata* and we need not revisit them here. . . . Notably, none of the Defendants have ever challenged Miami Tribe I's findings and conclusions regarding the status of the tract. Rather, they rely solely on the Tribe's activities subsequent to Miami Tribe I to claim tribal jurisdiction over the tract – namely (1) the Tribe's adoption of the tract's twenty-plus owners into the Tribe, (2) those owners' consent to tribal jurisdiction pursuant to a lease with the Tribe, and (3) the Tribe's recent development of the tract. None of these recent events, however, alters the conclusion that Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the tract. An Indian tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts. We conclude that the State of Kansas has a substantial likelihood of success on the merits of this cause.

249 F.3d at 1230-31.

The Court of Appeals for the Tenth Circuit affirmed the preliminary injunction issued by the district court and remanded the matter for further proceedings. This decision was not appealed.

In this circuit, the doctrines of *res judicata* and collateral estoppel bar litigation on issues that could have been, but were not raised previously in state court litigation. Reed v. McKune, 298 F.3d 946 (10<sup>th</sup> Cir., 2002). In this case, the Court of Appeals for the Tenth Circuit looked to Kansas law and observed that an issue is *res judicata* when there is "concurrence" of four conditions: (1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made. Id. at 950 (citations omitted). The Court of Appeals for the Tenth Circuit found all of these conditions to be present in the instant case.

The doctrine of collateral estoppel prevents a second litigation of the same issues between the same parties or those in privity with the parties. Under Kansas law, the conditions require the following: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment; (2) the parties must be the same or in privity; (3) the issue litigated must have been determined and necessary to support the judgment. *Id.* (citation omitted). These conditions also appear to be present in this matter.

The related doctrine of the “law of the case” also has applicability here. This doctrine provides that where the judgment from which relief is sought was the subject of appellate review, the lower court is bound, under the law of the case, by the court of appeals’ prior ruling and may not deviate from the appellate decision. *Corex Corp. v. United States*, 638 F.2d 119, 122 (9<sup>th</sup> Cir. 1981) (“When a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court.”), citing *Firth v. United States*, 554 F.2d 990, 993 (9<sup>th</sup> Cir. 1977).

The *Corex* court of appeals reversed a trial court’s grant of a new trial under Rule 60(b) of the Federal Rules of Civil Procedure based upon the ground that new evidence had been discovered. However, since the “new” evidence concerned events that had occurred after the end of the trial, the *Corex* court held that it was not new evidence for the purposes of Rule 60(b). The Court of Appeals for the Federal Circuit noted that courts uniformly adhere to this view. *Halas v. Quigg*, 914 F.2d 270 (Fed. Cir. 1990).

Although the district court in this case is free to consider “intervening circumstances” not previously known to the court and can reopen to modify the judgment, it may do so only in a manner that is consistent with the original ruling or that does not change the opinion in any material respect. See nn. 22-23 Wright, Miller & Kane, Federal Practice and Procedure § 2873. In its decision to remand, the district court instructed that further proceedings were not to be inconsistent with its previous opinions or those of the Court of Appeals for the Tenth Circuit. A DOI opinion concluding that the Tribe possesses jurisdiction over the Reserve would contradict the opinion of the Court of Appeals for the Tenth Circuit in *Miami III*. By suggesting that the district court should reverse its previous finding of no jurisdiction, such an opinion would require the district court to change in a very material aspect the decision of the Court of Appeals for the Tenth Circuit. The district court does not have this authority, much less the DOI. See *Corex*, 638 F.2d 119; *Firth*, 554 F.2d 990.

The situation in *Firth* is closely analogous to the one which was before the district court. In that personal injury case, the district court on remand applied the mandate of the court of appeals as to certain facts at issue, even though it disagreed with the court of appeals. The defendant-government appealed, contending that the district court improperly construed the mandate. The court of appeals disagreed:

Our prior decision and mandate in this case, whether correct or in error, was based on a thorough review of all of the evidence and consideration

of the same arguments pressed here, and we concluded that the evidence did not support a finding of contributory negligence. Contrary to the government's assertion, this court had before it and considered on the first appeal all of the evidence on the issue of contributory negligence, and the resulting mandate did not leave the matter open for reappraisal or clarification by the district court. Thus, the lower court correctly refused to reevaluate the issue on remand.

554 F.2d at 994. The same is true here: the Court of Appeals for the Tenth Circuit had before it all of the available evidence considered by the district court supporting the Tribe's claim to jurisdiction over the Reserve and issued a ruling on those facts in a manner that was not open to revision, much less reversal. Were the district court to reverse itself and disagree with the ruling of the Court of Appeals for the Tenth Circuit, it may not reevaluate the issue on remand.<sup>9</sup>

B. Recent Tribal membership cannot overcome Congress' abrogation of Tribal jurisdiction over the Reserve.

The courts in **Miami I** and **Miami II** did not address the question of whether Tribal jurisdiction over the Reserve might arise from the actions taken by the Tribe to extend membership to the present-day owners of the Reserve. The **Miami I** court left the door open for the Tribe to resubmit its management contract to the NIGC with evidence of the constitutional amendment and the current owners' consent to Tribal jurisdiction. In his 1997 Opinion, the Acting Solicitor found that these events did not provide enough evidence of tribal jurisdiction to bring the Reserve within the definition of "Indian lands" for the purposes of the IGRA. The **Miami II** court found "facially sound" the Tribe's contention that the subsequent actions established jurisdiction and required the federal agencies to provide a better record on the jurisdiction issue.

1. The Tribe can determine its own membership.

An attribute of the sovereignty of an Indian tribe is its right to determine its own membership. Montana v. U.S., 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (Indian tribe has "complete authority to determine tribal membership except in specific instances."); Martinez v. Southern Ute Tribe, 249 F.2d 915, 920 (10<sup>th</sup> Cir. 1957) ("a tribe has complete authority to determine all questions of its own membership"); Smith v. Babbitt, 100 F.3d 556 (8<sup>th</sup> Cir. 1996), cert. denied sub nom., Feezor v. Babbitt, 522 U.S. 807 (1997) (Tribes' retained sovereignty includes authority to determine tribal membership). Further, tribal membership is a bilateral political

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<sup>9</sup> The Acting Solicitor, in the 1997 Opinion, observed the following: "The Miami Tribe of Oklahoma did not exercise governmental powers over the land in 1995 and, in our opinion, the admission of the owners of the land into the Tribe is alone not sufficient evidence of tribal authority to bring the land within the definition of "Indian lands" under IGRA." *1997 Opinion at 2.*

relationship, Masayesva v. Zah, 792 F. Supp. 1178, 1181 (D. Ariz. 1992), and a tribe exercises retained sovereignty over Indians who consent to be tribal members. Duro v. Reina, 495 U.S. 676 (1990).

As we noted in Section II.B.1 of this Opinion, the Tribe amended its Constitution in 1996 to authorize membership specifically for the heirs of Maria Christiana DeRome. That amendment was approved by Tribal election and by the Secretary of the Interior on January 18, 1996.<sup>10</sup> The heirs of Maria Christiana DeRome, after becoming tribal members, specifically consented to tribal jurisdiction in their lease with the Tribe for the Reserve dated September 30, 1998:

“The undersigned Indians being members of the Miami Tribe of Oklahoma consent to the Jurisdiction and governing powers of the Miami Tribe of Oklahoma over all real property held in Indian Country by the undersigned Indians including undersigned Indians’ interests in Maria Christiana Miami Reserve No. 35.”

Thus, the Tribe exercised its inherent power to determine its own membership when it extended tribal membership to the Reserve owners; the Reserve owners specifically submitted to Tribal jurisdiction in the lease agreement. However, tribal jurisdiction cannot extend to the Reserve, but only to Tribal owners/members of the Reserve, because Congress abrogated Tribal jurisdiction over the Reserve. The Tribe asserts that it has jurisdiction over Indian Country which includes restricted Indian allotments. Because the Reserve owners are now members and this Reserve is a restricted Indian allotment, the Tribe believes it now has jurisdiction. This argument does appear “facially sound” as the **Miami II** court noted. But we cannot infer solely on the basis of the restricted status of a parcel that jurisdiction necessarily inures particularly in light of a Congressional abrogation.<sup>11</sup> The Tribe cannot by its unilateral actions override the intent of Congress as expressed in numerous Acts.

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<sup>10</sup> Pursuant to the Oklahoma Indian Welfare Act (OIWA) of 1936, 25 U.S.C. §§ 501-510, the Tribe adopted its Constitution and By-laws that were ratified by the Secretary of the Interior on January 6, 1938. The Constitution enabled the Tribal governing body to enact measures necessary to exercise jurisdiction over territory and members. In the OIWA, Congress intended to reestablish the Oklahoma tribes and provide for the establishment of tribal governments.

<sup>11</sup> The Court in Mustang Production Co. v. Harrison, 94 F.3d 1382 (10<sup>th</sup> Cir. 1996), upon which the Tribes relies for its conclusion, noted that Congress had not divested the Cheyenne-Arapaho Tribe of jurisdiction over the tribal member trust allotment. Thus, Mustang Production is distinguishable and does not support the Tribe’s conclusion.

2. Congress exercised its plenary power over Indian matters when it abrogated Tribal jurisdiction over the Reserve and has taken no subsequent action to reinstate that jurisdiction.

The Supreme Court has held that Congress may impose limits on tribal sovereignty. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896). However, such limits cannot be imposed unless Congress makes its intent to limit sovereignty clear. See, e.g., Fletcher v. United States, 116 F.3d 1315, 1327 (10<sup>th</sup> Cir. 1997). In this case, through treaties, statutes and compensation paid to the Western Miamis for annuities paid and the value of lands allotted to Maria Christiana DeRome, Congress clearly abrogated the Tribe's jurisdiction over the Reserve.

The **Miami I** court also concluded that:

even if Maria Christiana DeRome was a member of the tribe by fiat of Congress, that membership (as well as the membership of her heirs) ended in 1867. Any jurisdiction stemming from Maria Christiana DeRome's abbreviated membership ended in either 1884, when it was unmistakably relinquished or in 1924, when Congress' abrogation became indisputably effective.

927 F. Supp. at 1427.

As we have noted previously, the Court of Appeals for the Tenth Circuit concluded that the history points to the unmistakable conclusion that the Tribe's jurisdiction has been abrogated. But what is most problematic for the Tribe is that the Court of Appeals for the Tenth Circuit emphatically stated that Congress has done nothing subsequently to reinstate the Tribe's jurisdiction over the Reserve. The Tribe has not provided any relevant arguments to counter the prior abrogation.

The Tribe has alleged that Pub.L. 97-344, 96 Stat. 1645 (Oct. 15, 1982), as amended by Pub.L. 97-428, 96 Stat. 2268 (Jan. 8, 1983), would support restoration of the Tribe's jurisdiction. This legislation was enacted to partition the Reserve because the tangled restricted and non-restricted fractional interests in the Reserve made it unmarketable and the Secretary could only partition "trust", not restricted, lands. See S.R. 97-107, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4-5 (1981). The relevant section of Pub.L. 97-344 provides:

[A]ny owner of an interest in the following lands ... (3) the east half, southwest quarter, section 13, township 19 south, range 24 east, sixth principal meridian, Kansas, containing 80 acres and known as the Maria Christiana Miami Allotment, lands derived from a patent under Act of March 3, 1859 (11 Stat. 430) may commence an action in the United States District Court for Kansas to partition the same in kind or for the sale of such land in accordance with the laws of the State of Kansas .... For the purposes of such action, the Indian owners shall be regarded as vested with an unrestricted fee simple title to their interests in the



land and the United States shall be a necessary party to the proceedings. Any conveyance ordered by the court in such proceedings will be made in unrestricted fee simple to non-Indian grantees and in a restricted fee to Indian grantees.

96 Stat. 1645.

This legislation does not address the Miami Tribe's authority over the Reserve or subject the partitioning or distribution actions to the Miami tribal courts. The legislation does not repeal the prior 1873 Act, or any prior Act, even though it references the statute under which Maria Christiana DeRome received her allotment. We find that in enacting this special legislation Congress did not restore the Tribe's jurisdiction. And this legislation was enacted eight years prior to the holding of the Court of Appeals for the Tenth Circuit that Congress had "done nothing" to reverse its abrogation of tribal jurisdiction.

As discussed above, the **Miami I** district court and the Court of Appeals for the Tenth Circuit concluded that Congress specifically abrogated the Tribe's jurisdiction over the Reserve. Having so acted, Congress would have to take a subsequent action to reinstate Tribal jurisdiction. The Tribe cannot, through its unilateral actions, override congressional intent and disturb that which Congress has made clear.

#### VI. CONCLUSION

The Court of Appeals for the Tenth Circuit in **Miami III** affirmed the **Miami I** district court's opinion that Congress abrogated the Tribe's jurisdiction over the Reserve and noted that Congress has not acted since **Miami I** to overturn that decision. I conclude that the Reserve does not constitute "Indian lands" within the jurisdiction of the Tribe for purposes of the IGRA.

Sincerely,



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