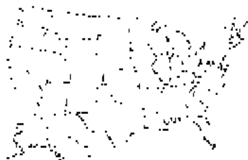

# UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

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No. of Pages 17 (including cover)

130

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Plaintiff,

v.

STATE OF OKLAHOMA, ex rel., TIM KUYKENDALL, District Attorney, District 21, Special Prosecutor; the UNITED STATES OF AMERICA, ex rel., GALE A. NORTON, Secretary of the Interior; and PHILIP N. HOGEN, Chairman of the National Indian Gaming Commission,

Defendants.

Case No. CIV-04-340-WH

JAN 2_ 2006

## JUDGMENT

In accordance with the Order entered contemporaneously herewith, this action is hereby remanded to the National Indian Gaming Commission for further proceedings.

IT IS SO ORDERED this 26th day of January, 2006.

RONALD A. WHITE
UNITED STATES DISTRICT JUDGE

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# IN THE UNITED STATES DISTRICT COURT
# FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Plaintiff,

v.

STATE OF OKLAHOMA, ex rel., TIM KUYKENDALL, District Attorney, District 21, Special Prosecutor; the UNITED STATES OF AMERICA, ex rel., GALE A. NORTON, Secretary of the Interior; and PHILIP N. HOGEN, Chairman of the National Indian Gaming Commission,

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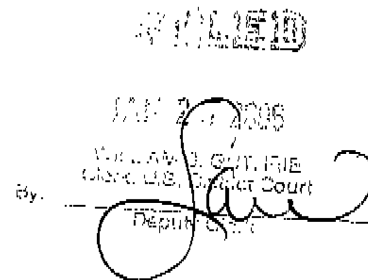

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## ORDER

This matter comes before the Court on Plaintiff's motion for partial summary judgment (Docket # 96), Defendant, State of Oklahoma's (the "State's") motion for summary judgment upon its counterclaim (Docket # 102), and Defendant, USA's (the "USA's") motion for summary judgment (Docket # 110). Also before the Court are the State's motion to supplement the records offered in support of its motion for summary judgment upon its counterclaim and in opposition to Plaintiff's motion for summary judgment (Docket # 112) and the motion by the Cherokee Nation for leave to file a brief *amicus curiae* (Docket # 100). All these motions have been fully briefed. In addition, the Court requested and the parties provided briefs on the issues of whether the September 29, 2000 letter from the General Counsel of the National Indian

Gaming Commission (the "NIGC" or "Commission") is a "final decision" under the Administrative Procedures Act ("APA") and whether that decision is arbitrary and capricious based on the administrative record in this case.

For the reasons delineated below, the Court sets aside the decision of the NIGC that Plaintiff's land that is the subject of this lawsuit, 2450 South Muskogee, Tahlequah, Oklahoma 74464 (the "Land"), is not "Indian land" and remands the matter to the NIGC for further consideration consistent with this Order. Consequently, all of the motions listed above are DENIED as moot.

**BACKGROUND**

The parties to this litigation agree on very few facts, even disputing whether Plaintiff paid taxes to the State over the past several years. Nevertheless, the Court lists here certain undisputed facts that are sufficient for the purposes of this analysis.

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq* (the "IGRA") was enacted in 1988, and established the NIGC. The NIGC and the Department of the Interior (the "DOI") have entered a Memorandum of Understanding (the "NIGC-DOI MOU") that outlines the process by which the DOI will advise and assist the NIGC in making determinations of "Indian land."

Plaintiff purchased the Land in 1990. Plaintiff is (and has been for some time, at least as early as 1991) operating a gaming facility on the Land. As early as 1993, the NIGC began conducting inspections, requiring reports, and collecting fees from Plaintiff regarding those gaming operations. On November 24, 1994, Plaintiff submitted a request to the NIGC to review

and approve a tribal gaming ordinance, but did not specify a gaming site. On May 22, 1995, the NIGC sent a letter to Plaintiff approving the gaming ordinance once Plaintiff acquired "Indian lands."

On September 29, 2000, the NIGC's General Counsel, Kevin Washburn, sent a letter to Plaintiff ("the September 2000 Letter"). This is the action that instigated the current litigation. The September 2000 Letter informed Plaintiff that the NIGC had reached the "conclusion" that the Land is not "Indian land" as that term is defined by the IGRA, and that accordingly, the IGRA does not apply to Plaintiff's gaming. That conclusion never went to the Chairman or the full Commission for formal written approval. Subsequently, the NIGC refused submission of reports from Plaintiff, attempted to return to Plaintiff all fees it previously submitted to the NIGC, and ceased all regulation of Plaintiff's gaming operation. The State has informed Plaintiff that it intends to pursue criminal sanctions against Plaintiff's members for its gaming operations that violate state law.

On April 26, 2005, the USA informed the Court that no administrative record existed in this matter.[1] At the Court's request, the NIGC made its "best effort" to compile an

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[1]The USA asserted that no administrative record existed because there was no final agency decision. The NIGC-DOI MOU states: "the NIGC makes such Indian lands decisions on a regular basis, has increased its resources and expertise on such matters, and has determined that the more complicated Indian lands questions require the development of a complete factual record on which the Chairman may rely." This clause seems to indicate that the NIGC's standard practice during the process of making Indian land determinations on a "regular basis" would be to develop a complete factual record throughout the decision-making process so that when the decision went to the Chairman for decision, s/he would have a record upon which to rely. Surely, given the time it took for the NIGC to make this determination in the present case, it would be considered one of the complicated questions.

The USA's proposition that the NIGC did not have an administrative record because there was no final decision begs the question. If there was no record, upon what was the Chairman and

administrative record and filed it with this Court in May of 2005. This "record" apparently consisted of some of the documents that the General Counsel considered in drafting the September 2000 Letter. The record assembled by the NIGC *post hoc* does include some evidence of the past dealings between the NIGC and Plaintiff; however, the September 2000 Letter does not include any reference indicating a consideration of the past regulation of the Land by the NIGC in making its determination. The September 2000 Letter itself listed five documents, all letters, upon which the conclusion was based.

After the September 2000 Letter, Plaintiff brought this action and argues that it should be granted summary judgment based on estoppel, acquiescence and/or lack of jurisdiction of the NIGC to change its earlier (purported) opinion that the Land was Indian land. The USA argues that it should be granted summary judgment because the Land is not "Indian country" or "Indian land" and Plaintiff's equitable claims fail as a matter of law. The State asserts that it should be awarded summary judgment on its counterclaim because the status of the Land was already decided in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993) and Plaintiff exercises no governmental authority on the Land and thus possesses no sovereign immunity from the regulation and control of the State.

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the full Commission to rely in making the "final" determination? It appears as though the NIGC did not intend to send the determination to its Chairman or the full Commission for a "final" determination, as more than five years have passed since that determination, and the NIGC has acted consistently with it. As discussed more *ante*, this seems a clever yet unpraiseworthy tactic for making a consequential decision yet avoiding judicial review.

## JUDICIAL REVIEW OF AGENCY DECISION

The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. A court shall hold unlawful and set aside agency action if the court finds such action is:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706. The reviewing court is tasked with applying the appropriate standard under section 706. *Florida Power & Light Co. v. United States Nuclear Regulatory Comm'n. v. Lorion*, 470 U.S. 729, 105 S.Ct. 1598, 1607 (1985).

The court is generally limited to the administrative record; however, the court may look beyond the record for limited purposes only, such as to determine whether the agency considered all the relevant factors. *Florida Power*, 105 S.Ct. at 1607; *Thompson v. United States Department of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). If the court finds the agency did not consider all relevant factors,[2] the court should set aside the action and remand to the agency for additional investigation and/or explanation. *Florida Power*, 105 S.Ct. at 1607. "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Id.*

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[2] Of course, it is important to note that "a formal hearing before the agency is in no way necessary to the compilation of an agency record." *Florida Power*, 105 S.Ct. at 1607. That being said, one might think a formal administrative hearing might be wise under the present circumstances.

## ANALYSIS

### I. September 29, 2000 Letter

Before the Court may reach the motions before it, the Court must find the answers to two questions. First is the question of whether the September 2000 Letter constitutes a "final agency action" as that term is used in either the IGRA or the APA. Second, the Court considers whether it must set aside that action as arbitrary and capricious based on the administrative record.

### A. Final Agency Action

The IGRA provides for judicial review of certain agency actions, specifically, as the USA points out, review of agency actions under sections 2710, 2711, 2712, and 2713. 25 U.S.C. § 2714. Nowhere in the IGRA, however, is there any indication that this list is exhaustive or that these are the *only* final NIGC actions subject to judicial review.[3] Indeed, Congress has provided, by way of the APA, for review of final agency actions that were not specifically provided for otherwise. 5 U.S.C. § 704. The Court, then, looks to whether the September 2000 Letter is a "final agency action" as that term is used in the APA.[4]

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[3]The Tenth Circuit has stated: "Notably, nothing in IGRA limits judicial review of the NIGC's decision under the APA; rather § 2714 of IGRA expressly provides for such review." *Kansas v. United States*, 249 F.3d 1213, 1224 (10th Cir. 2001)(discussing an "Indian land" decision.) Furthermore, the Tenth Circuit pointed out that S.Rep. No. 100-446, at 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3078 includes the quote: "*All* decisions of the [NIGC] are final agency decisions for purposes of appeal to Federal district court." *Id.* at 1222 (emphasis added in *Kansas*).

[4]The USA argues that the Tenth Circuit has held that General Counsel letters are not final agency decisions and cites *First American Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3 1166, 1175 (10th Cir. 2005), as referring to "an NIGC Deputy General Counsel's opinion letter and an NIGC Bulletin as 'informal pronouncements.'" In fact, this decision concerned a situation in which the Kickapoo Tribe requested an opinion from the NIGC on the issue of whether a particular contract with First American was an operating lease or a management contract. The NIGC's General Counsel responded with an "informal" opinion on the matter, after which the NIGC

The USA asserts that the September 2000 Letter concluding that the Land is not "Indian land" is not a final agency action, but merely an advisory opinion, a "precursor to a decision by the Chairman, 25 U.S.C. § 2705, prior to consideration by the full Commission." The USA sets forth a "hypothetical" analysis in which it proffers that final agency action would exist, subject to judicial review under the APA, if: (1) Plaintiff had submitted a gaming ordinance for review specifying the exact lands where the gaming were to occur; (2) the General Counsel issued an advisory opinion; (3) the Chairman reviewed all the facts and disapproved the ordinance after determining that the site was not "Indian land"; and (4) the entire Commission upheld the Chairman's disapproval.[5]

In this case, the Plaintiff submitted a gaming ordinance for review without specifying the exact lands where the gaming would occur. On March 22, 1995, the NIGC sent a letter to Plaintiff approving the ordinance with the caveat that the NIGC understood that Plaintiff did not

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acted no further. The Tribe then unanimously decided to terminate its relationship with First American, and First American brought suit. The facts in the instant case are considerably different. Here, the NIGC undertook *sua sponte* to investigate and come to a "conclusion" as to whether the Land is "Indian land," after which the NIGC took definite action in accordance with that conclusion.

[5]The NIGC does not appear to have any defined procedure for making Indian land determinations. Although it makes such determinations "on a regular basis," the NIGC apparently makes those determinations on an *ad hoc* basis. The only process set in place for making these determinations seems to be that set out in the NIGC-DOI MOU, whereby "the NIGC, acting through its General Counsel," requests advice and assistance from the DOI. In reviewing that MOU, as in the hypothetical set out by the USA, it appears the Chairman would generally make the determination; however, no definite NIGC procedure for making "Indian land" determinations has been shown to the Court. Here, the General Counsel made the determination on behalf of the NIGC (using language such as "[w]e conclude" and "[i]n reaching our conclusion"), the NIGC then took action based on that determination, and the determination never went to the Chairman or the full Commission for review. It would be contrary to the APA to presume that an agency could avoid judicial review simply by stating that only the full Commission can affect a "final action," while the Commission itself treats an action by its General Counsel as final.

currently hold any "Indian lands" and could not conduct class II or III gaming until such time that Plaintiff did hold "Indian lands." Despite this "understanding" of the NIGC, however, the NIGC continued to collect fees and arguably "regulate" the gaming being conducted on the Land. Not until September 29, 2000, did the NIGC made its determination through its General Counsel that the Land is not "Indian land," effectively disapproving the gaming ordinance for this site. According to the USA's hypothetical, this disapproval of the gaming ordinance on the Land was simply an "advisory" opinion; yet more than five years have passed since the disapproval, the NIGC has acted in accordance with the disapproval, and the gaming ordinance has never been sent to the Chairman or the entire Commission for consideration or "final" determination. The September 2000 Letter does not read, nor has the NIGC treated it, as an "informal" or "advisory" opinion. Indeed, the USA has never explained why the NIGC stopped regulating the gaming operations on the Land if the opinion was only "informal." To the extent the USA suggests that Plaintiff is required to resubmit the gaming ordinance, making it site specific, in order to receive a "final" reviewable decision by the NIGC, this Court does not agree. The gaming ordinance already has been effectively disapproved for the Land.

Furthermore, the Tenth Circuit has already denied the argument that an "Indian land" determination is not ripe for review. The State of Kansas, in *Kansas v. United States*, 249 F.3d 1213 (10th Cir.), invoked the district court's jurisdiction under the APA to review a determination by the NIGC that a particular tract of land in Kansas leased by the Miami Tribe of Oklahoma (the "Miami Tribe") was "Indian land." The Tenth Circuit rejected the defendants' argument that the "Indian land" determination was not yet ripe for review because the State and the Miami Tribe

had not yet entered negotiations for a Class III gaming compact. "Because the NIGC's decision that the tract constitutes 'Indian lands' within the meaning of IGRA has '*an actual or immediate threatened effect*' upon the State of Kansas and its interests, that decision is ripe for review in all respects." *Kansas*, 249 F.3d at 1224 (citation omitted)(emphasis added). The Tenth Circuit opined that not only did the NIGC's decision deprive the State of Kansas of its "sovereign rights and regulatory powers over the tract," it affected the state's "public policy concerns and 'significant governmental interests' in Class III gaming by imposing a legal duty on the State under IGRA to negotiate a Class III gaming compact at the Tribe's request." *Id.* Similarly here, the "Indian land" determination by the NIGC has effectively deprived Plaintiff of any "sovereign rights and regulatory powers" it may have exercised over the Land.[6] Plaintiff must also adhere to the State's gambling laws or face criminal prosecution. This determination has had "*an actual or immediate threatened effect*" upon Plaintiff.

Moreover, "[i]t is well established that the finality of an administrative action depends on whether the action imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process." *Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1197 (10th Cir. 1999). The Tenth Circuit goes on:

> More recently, the Supreme Court has articulated this test for final agency action as having two conditions. "First, the action must mark the 'consummation' of the agency's decisionmaking process.... And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' "

*Id.* (quoting *Bennett v. Spear*, 520 U.S. 157, 177-78 (1997)).

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[6]The *Kansas* court stated in its analysis: "The NIGC's action [the "Indian land" determination] plainly has a direct and immediate impact on the sovereign rights which the Miami Tribe, the Federal Government, and the State of Kansas exercise over the tract. *Id.* at 1223.

Though the September 2000 Letter is from the NIGC's General Counsel rather than the full Commission, the NIGC certainly appears to have treated it as the consummation of the agency's decision-making process, and Plaintiff has suffered legal consequences. The consummation of the decision is apparent by the fact that the Commission is acting in accordance with the decision and has not sent it to the Chairman or full Commission for further review. The facts that Plaintiff's rights have been determined and Plaintiff has suffered legal consequences are evidenced by the NIGC ceasing regulation of Plaintiff's operation and attempting to return fees previously paid. Also, the State, based on the NIGC's determination, has informed Plaintiff that it intends to pursue criminal sanctions against Plaintiff under State law.

Accordingly, the Court finds that the September 2000 Letter was a "final agency action" reviewable under the APA. Because the IGRA does not specifically provide for judicial review of final NIGC determinations of "Indian lands," the Court must look to and apply the default standards under the Administrative Procedures Act ("APA"). 5 U.S.C. § 701, *et seq.*

**B. Arbitrary and Capricious Standard of Review**

The Court applies the arbitrary and capricious standard here. The Tenth Circuit stated in *Kansas*:

> Because the merits of this case involve review of the NIGC's decision that the tract constitutes "Indian lands" of the Tribe within the meaning of IGRA, the APA review principles enunciated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) apply. A federal court may not set aside an agency decision unless that decision fails to meet statutory, procedural or constitutional requirements, or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

*Kansas*, 249 F.3d at 1228 (citations omitted). The Court must hold unlawful and set aside

agency action that the Court finds to be arbitrary and capricious. 5 U.S.C. § 706. An agency action is arbitrary and capricious if the agency "has entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Qwest Communications Int'l Inc. v. Federal Communications Comm'n*, 398 F.3d 1222, 1229 (10th Cir. 2005). Ordinarily, a simple determination of "Indian land" likely need not go much farther than an application of the definition of "Indian lands" found in IGRA, 25 U.S.C. § 2703(4), to the basic facts surrounding the land, i.e. whether the land is within the limits of an Indian reservation, whether it is held in trust by the United States or held subject to restriction by the United States, and whether the Indian tribe exercises governmental power over it. Here, the NIGC does not seem to have sufficiently addressed even these issues.[7] What is the status of Plaintiff's trust application? Is the Land within the boundaries of the "original Cherokee territory" in Oklahoma?[8] If so, has the Cherokee Nation been "consulted" regarding Plaintiff's trust application? If so, what were the results of that consultation? Has Plaintiff exercised governmental power over the Land? The answers to these questions are not apparent from the

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[7]The USA notes the General Counsel's meticulous manner in setting out the statutory factors for consideration and thorough analysis of the applicable law and states that "[h]is land opinion was well-researched and meticulously reasoned, as to both the facts and the law." While the General Counsel seems to have sufficiently stated the law on the "Indian land" determination, the Court disagrees in regard to the facts and finds that many, if not most, of the facts were completely ignored.

[8]Plaintiff argues that the law has changed since the *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993) decision to allow an Indian tribe to acquire land in trust status within the boundaries of the "original Cherokee territory" in Oklahoma without the written consent of the Cherokee Nation, but instead on consultation with the Cherokee Nation. This change alone would probably not change the outcome of the "Indian land" determination; one of the trust questions, if the Land is within the "original Cherokee territory" in Oklahoma, would simply change from whether the Cherokee Nation had given written consent to whether there had been any consultation with the Cherokee Nation and the outcome of any such consultation.

administrative record.

In a situation such as this, when the NIGC has exercised some sort of regulation over the gaming site for some time, the "Indian land" determination must go beyond the basic analysis. Clearly, the facts surrounding the past regulation are an "important aspect of the problem." While the administrative record compiled by the NIGC in May of 2005 includes some evidence of the past NIGC regulation of Plaintiff's gaming, it is clear from the references to the history of the gaming occurring on the Land in the pleadings that the record is incomplete. For example, when the NIGC first began regulating Plaintiff's gaming on the Land, reports were generated, yet they are not a part of the administrative record. Furthermore, the September 2000 Letter did not give any explanation as to the past regulation of Plaintiff's gaming activities, including whether the NIGC had, in fact, prior to 2000, ever made any determination that the Land was "Indian land" and if it had not, why the NIGC made the decision to regulate Plaintiff's gaming on the Land. A complete record would also include documentation of Plaintiff's tax payments to the State if they were made, and if not, would include documentation showing why they were not paid, including collection notices, if those existed.

From the pleadings of the parties and the September 2000 Letter, there also appears to be some question as to whether the Land at issue here is the same as the land at issue in the Tenth Circuit case *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993). A complete administrative record would include documents showing whether the Land is, in fact, the same as that at issue in *Buzzard*.[9]

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[9]A three line memo to the file regarding a conversation with William Rice in which he confirmed the Land is the same as that at issue in *Buzzard* does not settle the issue.

The Tenth Circuit, in *Buzzard*, held that a restriction against alienation *by itself* is insufficient to make land purchased by an Indian tribe "Indian country." Clearly something more exists here, specifically several years of some type of federal regulation.[10] The administrative record should include evidence showing the exact nature and extent of that regulation throughout the entire period of such regulation. While the Court understands that the definitions of "Indian country" under 18 U.S.C. § 1151 and "Indian land" under IGRA are not identical, the "Indian country" analysis and whether the Land is actually the same as that at issue in *Buzzard* is relevant to the "Indian land" determination here.

The USA seems to suggest that the "Indian land" determination made by the NIGC cannot be arbitrary and capricious because the NIGC's determination was correct in concluding that Plaintiff exercises no governmental power over the Land. At this time, the Court may not and should not entertain whether the NIGC's decision was ultimately correct or incorrect. The arbitrary and capricious standard is very narrow, allowing the Court here only to look beyond the record to find whether the Commission "has entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Considering the past regulation of Plaintiff's gaming operations on the Land, the exceptionally sparse administrative record and the September

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[10]While both the Cherokee Nation's brief *amicus curiae* filed on June 28, 2005, and the proposed brief *amicus curiae* attached to the motion for leave to file such (Docket # 100), cite the *Buzzard* ruling correctly, including the "of itself" or "by itself" language, the analyses in both briefs completely ignore the fact that in this case, there is more than just a restriction against alienation. While the Court generally welcomes helpful analyses from "friends of the court," any analysis that completely disregards pertinent facts is not helpful. Indeed, the Cherokee Nation's first brief came dangerously close to affirmatively misrepresenting the law.

2000 Letter do not provide sufficient evidence even to show whether Plaintiff has ever exercised governmental power over the Land.

Given that the administrative record and the September 2000 Letter have ignored important aspects of the problem, the Court reverses the "Indian land" determination as unlawful and remands the matter to the NIGC for further investigation and explanation. The NIGC shall investigate, compile a complete record[11] and consider all relevant factors before making its final determination of whether the Land is "Indian land" as that term is defined by "IGRA." The NIGC shall then explain that determination fully, including all relevant facts and application of applicable law.[12]

## II. Motions Before the Court

Because the Court is remanding this matter to the NIGC for further investigation and explanation, motions for summary judgment and for leave to file a brief *amicus curiae* in this action are moot. Furthermore, in order to examine the specific arguments put forth by parties in support of their motions, the Court would certainly have to go beyond the administrative record. As noted previously, the Court is not presently convinced that it has the authority to look beyond

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[11]Upon remand, the Court's delineation of the gaps and deficiencies in the administrative record should not be seen as complete or exclusive by the NIGC.

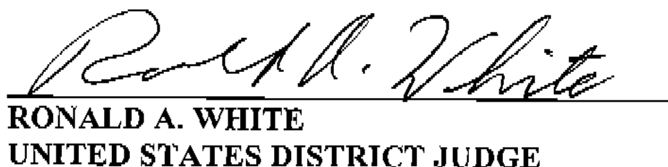
[12]Plaintiff suggests that any remand to the NIGC would be a futile effort, resulting in an unfavorable decision by the NIGC and a subsequent appeal before this Court again. While the remand very well may result in an unfavorable decision for Plaintiff that Plaintiff may appeal to this Court, the Court disagrees that remand is futile. The Court believes that the NIGC will follow the Court's Order to investigate, compile a complete administrative record and consider all relevant factors before making it final determination. Furthermore, Congress intended that the NIGC would make "Indian land" determinations, and without a full administrative record, this Court is not equipped, nor authorized, to substitute its judgment for that of the NIGC.

the administrative record for any reason other than to consider whether the NIGC considered all relevant factors in making its decision.[13]

## CONCLUSION

For the foregoing reasons, the Court hereby rules unlawful and sets aside the decision of the NIGC that the Land is not "Indian land." The matter is REMANDED to the NIGC for further consideration of all relevant factors.[14] Furthermore, in light of the ruling above and because the Court may only look beyond the administrative record for the limited purpose of deciding whether the agency considered all relevant factors, the motions of the parties (Docket #s 96, 100, 102, 110 and 112) are DENIED as moot. In order to maintain the status quo, the preliminary injunction remains in effect.

IT IS SO ORDERED this 26th day of January, 2006.



**RONALD A. WHITE**
**UNITED STATES DISTRICT JUDGE**

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[13]If the court finds the agency did not consider all relevant factors, the court should set aside the action and remand to the agency for additional investigation and/or explanation. *Florida Power*, 105 S.Ct. at 1607. "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Id.*

[14]The Court notes that without a defined process in place for making "Indian land" determinations, such determinations will inevitably be reviewed with some skepticism.