DICKINSON WRIGHT PLLC

1901 L STREET, N.W., SUITE 800
WASHINGTON, DC 20036-3506
TELEPHONE: (202) 457-0160
FACSIMILE: (202) 659-1559
http://www.dickinsonwright.com

DENNIS J. WHITTLESEY
DWhittlesey@dickinsonwright.com
(202) 659-6928

October 1, 2007

Via E-Mail and U.S. Mail

Jeffrey Nelson, Esquire
Senior Attorney
National Indian Gaming Commission
1441 L St. NW
Suite 9100
Washington, DC 20005
USA

Re: *Proposed Gaming by Prairie Band Potawatomi Nation in DeKalb County, Illinois*

Dear Mr. Nelson:

Thank you for the opportunity to respond to your letter of June 12, 2007, wherein you invited DeKalb County, Illinois ("County") to "submit comments, legal analysis, historical records, and any other relevant material" to the National Indian Gaming Commission in the development of a legal opinion as to whether the Prairie Band Potawatomi Nation ("Nation") may conduct gaming on 128 acres of fee land within the County that the Nation recently acquired near the Village of Shabbona ("Tribal Parcel"). This Firm serves as special counsel for Indian gaming to the County Board, and this letter is submitted in that capacity.

Because the legal status of the Tribal Parcel has never been determined formally by the U.S. Department of the Interior ("Interior"), Congress, or any federal court, this non-trust land cannot be deemed "Indian Lands" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"), until and unless one of those entities renders such a determination. I should note that we have conducted extensive reviews and analysis of the land at issue over some 10 years, and have concluded that title to the Tribal Parcel can be categorized as "unextinguished Indian title." However, we find no precedent for the proposition that unextinguished Indian title is the legal equivalent of "Indian Lands" under IGRA Section 4(4), 25 U.S.C. § 2703(4). With that as predicate, we submit the following discussion and analysis to assist in the NIGC's determination of the legal status of the Tribal Parcel.

I. The Tribal Parcel

The Nation recently purchased the 128-acre Tribal Parcel in fee simple. This site is entirely within the exterior boundaries of 1,280 acres of land that were withdrawn from public domain in 1829 by the United States for Chief Shab-eh-nay and his Band and is commonly identified as the "Shab-eh-nay Reserve". *See* Article III, Treaty of July 29,

1829 with the Chippewa, Ottawa and Potawatamie Indians, 7 Stat. 320 (hereinafter referred to as the "Treaty of Prairie du Chien." and attached hereto as Exhibit A).

We believe that the Nation is the proper tribe to assert a claim to the unextinguished Indian title to the Reserve based on our extensive research and analysis documenting that it is the successor in interest to Chief Shab-eh-nay's Band. However the land's precise legal status remains unclear despite the fact that it has been the subject of two separate analyses by the Department of the Interior – neither of which confirms Section 4 land status for the Shab-eh-nay Reserve.

Because IGRA permits gaming only on "Indian lands" as defined in IGRA Section 4, the Nation must obtain a positive land determination from the United States that Indian gaming can be conducted thereon.

II. The United States Has Never Formally Determined the Legal Land Status for the Shab-eh-nay Reserve.

Two recent letters from Department of the Interior officials confirm that as a matter of federal law, the United States has never made a formal legal determination as to the Shab-eh-nay Reserve's qualification for gaming.

A. The Leshy Letter.

By letter dated January 18, 2001 (hereinafter referred to as the "Leshy Letter" and attached hereto as Exhibit B), then Interior Solicitor John D. Leshy summarized the position of the Interior Department regarding the Shab-eh-nay Reserve. First, he confirmed our conclusion that the Nation is the lawful successor in interest to Chief Shab-eh-nay's Band. Second, he also confirmed our conclusion that the Nation "has a credible claim for unextinguished Indian title" to lands within the Shab-eh-nay Reserve.

At the outset, the Leshy Letter summarized the Interior Department's understanding of the origins of the Nation's claim to Indian title by reciting the relevant language of Article III of the Treaty of Prairie du Chien and concluded that such a land withdrawal for Chief Shab-eh-nay constituted a recognition of Indian title to those lands as of 1829.

In 1833, the United States proposed to grant the Shab-eh-nay Reserve "in fee simple to [Chief Shab-eh-nay], his heirs and assigns forever." Leshy Letter at 2 (quoting Article 5 of the Treaty of September 7, 1833, 7 Stat. 433). However, Leshy also notes the U.S. Senate struck that provision when ratifying the treaty. *Id.* (citing 7 Stat. 447). In light of the Senate's action in striking that provision, Leshy opines that the land status was unchanged from the 1829 withdrawal for Chief Shab-eh-nay and thus,

remained "under the protection of the United States." *Id.* However, there was no further clarification beyond those words.

The U.S. General Land Office in 1849 sold the Shab-eh-nay Reserve at a public auction to non-Indian settlers. *Id.* In response to this fact Leshy concluded "[b]ecause this sale was not approved or authorized by Congress, there is a credible argument that it violated the [Indian] Non-Intercourse Act." *Id.* (citing 25 U.S.C. § 177). In short, the Leshy Letter does not opine as to whether the Shab-eh-nay Reserve is a "Reservation" or "Indian lands," but rather only that the Nation has a "credible claim for unextinguished title to this land." *Id.*

As noted above, the County agrees that the Nation is the lawful successor in interest to Chief Shab-eh-nay's Band. The County also agrees that the Nation may have a credible claim that the Tribal Parcel is unextinguished Indian title. But the County does not concede the Nation's argument that these factors alone confer reservation status for the purposes of gaming under IGRA.

B. The Olsen Letter.

By letter dated September 22, 2006 (hereinafter referred to as the "Olsen Letter" and attached hereto as Exhibit C), then Principal Deputy Assistant Secretary for Indian Affairs Michael D. Olsen again summarized the position of the Interior Department and reiterated the legal reasoning contained in the Leshy Letter. However, consistent with the Leshy Letter, Olsen concluded that "the status of the land must be determined prior to gaming occurring on this land." Olsen Letter at 1 (citing IGRA).

The Olsen Letter further notes that IGRA requires land be determined "Indian lands" as defined at Section 4 before a Tribe may lawfully engage in Indian gaming thereon. *Id.* Because the Interior Department "had not yet reviewed [the Tribal Parcel] to determine if it would be considered Indian land within the definition of IGRA," the Olsen Letter states that "the status of the land must be determined prior to gaming occurring on this land." Olsen Letter at 1.

III. The Shab-eh-nay Reserve Treaty Set-Aside Does Not Clearly Establish Reservation Status for the Land.

An examination of the language contained in the Treaty of Prairie du Chien demonstrates that Treaty gave Chief Shab-eh-nay and his Band recognized rights to treaty title, or Indian title, but did not expressly confer permanent reservation status on the lands.

A. IGRA's Definition of "Indian Lands."

As noted in the Olsen Letter, IGRA authorizes gaming to occur only on "Indian lands," which are defined as:

> **(A)** all lands within the limits of any Indian reservation; and
>
> **(B)** any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.
>
> 25 U.S.C. § 2703(4).

Thus, for the Tribal Parcel to qualify for gaming, it must be (a) within the boundaries of a reservation or (b) land that is held in trust or restricted fee title and over which the Tribe exercises governmental power. The Nation asserts that it is reservation land.

Two cases referenced in the Olsen Letter are worthy of further consideration. In *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), the Supreme Court held that once Congress authorized the alienability of that tribe's land within the boundaries of its clearly established reservation, that tribe's repurchase of the land did not reinstate its reservation status or the land's non-taxability.

In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Court held that the Oneida Nation could not unilaterally revive Indian sovereign control over lands it had reacquired within the exterior boundaries of its reservation. The Court relied on several factors including (1) the justifiable expectations of the non-Indian community based on long, uncontested occupancy in good faith belief that their titles were good and (2) the doctrines of laches, impossibility and acquiescence.

B. Language in the Treaty of Prairie du Chien.

The County understands that the Nation takes the position that the Treaty of Prairie du Chien created a reservation for Chief Shab-eh-nay and his Band. The County further understands that the Nation has circulated a memorandum that compares the language contained in other treaties, which indisputably created permanent reservations for those tribes, for the proposition that the Treaty of Prairie du Chien created a permanent reservation for Chief Shab-eh-nay and his Band.

The County disagrees with the Nation's interpretation and comparison with language contained in other treaties because the Treaty of Prairie du Chien states only that tracts of lands were reserved for certain Indians, without any further language defining the nature of the land being reserved, or providing amenities or supervision that would otherwise be deemed necessary for permanent tribal occupancy such as a reservation. Moreover, the language used in other treaties made clear that Indian reservations were being set aside for the tribes, and customarily included provisions for such things as federal trust supervision over the tribes and their lands, the presence and supervision of Indian Superintendents and/or Agents, funds for buildings, food, supplies for planting crops, and other elements to assist tribes in establishing new permanent homelands for their members. Article III of the Treaty of Prairie du Chien contains no such language that would suggest the United States intended to create a permanent reservation for Chief Shab-eh-nay and his Band.

The following discussion illustrates the Nation's cited treaty language that did establish permanent Indian reservations.

C. Treaties Creating Permanent Indian Reservations.

1. Treaty with the Makah, 12 Stat. 939 (1855).

The Treaty with the Makah provides at Article 2 for a "reservation" to be set aside and marked out for the exclusive use of that tribe, and excludes residency of white men without permission of the Makah Tribe and the superintendent or agent. Article 3 states a timetable for the tribe to relocate to the reservation. Article 5 provides for financial payments over a period of time for the use and benefit of the Indians. Article 6 concerns agricultural activity and provides funds for this purpose. Article 10 prohibits alcohol on the reservation. Finally, Article 11 establishes a general Indian agency near the reservation, an agricultural and industrial school for the children, a smithy and carpenter's shop with tools and a blacksmith, a carpenter and farmer to work with the Indians, as well as providing for a physician to provide medical care to the Indians.

2. Treaty with the Sauk and Foxes, 12 Stat. 1171 (1861).

The Treaty with the Sauk and Foxes provides at Article 2 for the survey and set aside of a reservation for that tribe. Article 5 funds the erection of a schoolhouse and dwelling house for the teacher, and an annual payment for school purposes. Article 6 provides for the set aside of 640 acres for the agency dwelling, agency office, council house, school house, teacher's dwelling, blacksmith's dwelling and shops, and such farming land as may be necessary for the use of the school, agency, and employees.

3. Treaty with the Nez Perces, 14 Stat. 647 (1863).

The Treaty with the Nez Perces provides at Article 2 for the set aside and survey of a reservation and establishment of a superintendent and agent. Article 3 calls for the survey into lots for Indian residency within the reservation, and the assignment of permanent allotments to those Indians. Article 4 provides for annuities to fund the fencing and cultivation of land, purchase of equipment and livestock, erection of a saw and flouring mill, clothing for children attending school, establishment of schools with furnishings, and the construction of two churches. Section 5 further provides for the erection of the schools, boarding houses and out-buildings, erection of a hospital, erection of a blacksmith's shop and purchase of tools, and many items necessary for the permanent reservation residency of the Nez Perce Tribe.

4. Treaty with the Crows, 15 Stat. 649 (1868).

The Treaty with the Crows provides at Article 2 the specific boundaries of a reservation for the Crow Tribe, with further provision for federal agents to assist that tribe in its affairs. Article 3 provides for construction of a warehouse to store goods belonging to the Indians, an agency building for the residence of the agent, a residence for a physician, five other buildings for a carpenter, farmer, blacksmith, miller and engineer, a school house and a steam circular saw mill with a grist mill and shingle machine attached. Article 6 deals with agricultural development and allotting of lands to individual Indians for that purpose. Article 7 provides for schools, teachers, and housing for them. Article 9 provides clothing for the Indians. Article 10 provides for a physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths.

As noted above, these four treaties furnish good illustrations of how treaties clearly and unequivocally established permanent reservations for tribes. None of the reservation elements found in these four treaties accompany the set aside for Shab-eh-nay's Band under Article III of the Treaty of Prairie du Chien.

IV. Conclusion

As noted throughout, the County does not dispute that the Prairie Band Potawatomi Nation is the lawful successor in interest to the lands that were withdrawn by the United States for Chief Shab-eh-nay and his Band in 1829 under the Treaty of Prairie du Chien. However, the only conclusion we can make as to the legal status of the land is that the current status of the land is unextinguished Indian title, but not necessarily a permanent reservation qualifying for gaming under IGRA. In any event, both the Leshy Letter and the Olsen Letter make clear that the Department of the Interior has never made a formal determination on the land status of the Shab-eh-nay Reserve and the Tribal Parcel that the Nation recently acquired. It is beyond question that a positive land determination is a prerequisite to the Nation's lawfully conducting gaming under IGRA at the site.

In closing, the County respectfully requests that NIGC work expeditiously with the Department of the Interior to render a final land determination for the Nation's desire to conduct gaming on the Tribal Parcel, since it is in the best interests of all affected entities to have this clarification. Please let us know if you need additional information or have any questions about the County's position on this very important issue.

Very truly yours,

Dennis J. Whittlesey

DJW/hsa

Enclosures: (1) Treaty of Prairie du Chien
(2) Leshy Letter
(3) Olson Letter

cc: Alice E. Keane, Esquire
Assistant Attorney General
State of Illinois
100 W. Randolph Street - 13th Floor
Chicago, IL 60601

M. Frances Ayer, Esquire
Counsel for Prairie Band Potawatomi Nation
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, NW - Suite 700
Washington, DC 20037

Ronald Matekaitis, Esquire
DeKalb County State's Attorney
Office of the State's Attorney
200 N. Main Street
Sycamore, IL 60178

Mr. James A. Johnson
Supervisor
Shabbona Township
P.O. Box 312
Shabbona, IL 60550

DC 114458v1

EXHIBIT A

APPENDIX II.

Schedule of claims referred to in the fourth article of the treaty of the 20th September, 1828, with the Pottawatamie Indians.

Sept. 20, 1828.
7 Stat., 603.

Thomas Robb $200, for goods heretofore sold to the Indians.
McGeorge $300, for provisions sold to the Indians.
Jno. B. Godfroy $200, for goods heretofore sold to the Indians.
Jno. P. Hedges $200, for goods heretofore delivered to the Indians.
Joseph Allen $145, for horses stolen from him by the Indians while he was surveying.
Jean B. Bourre $700, for goods furnished the Indians, a part of them in relation to this treaty.
Thomas Forsyth $200, for goods heretofore sold to the Indians.
S. Hanna & Co. $100, for goods heretofore sold to the Indians.
Gabriel Godfroy, jr., $500, for goods heretofore sold to the Indians.
Timothy S. Smith $100, for goods heretofore sold to the Indians.
W. G. and G. W. Ewings $200, for goods heretofore sold to the Indians.
Joseph Bertrand $2,000, for goods heretofore sold to the Indians.
To Eleanor Kinzie and her four children, by the late John Kinzie, $3,500, in consideration of the attachment of the Indians to her deceased husband, who was long an Indian trader, and who lost a large sum in the trade by the credits given to them, and also by the destruction of his property. The money is in lieu of a tract of land which the Indians gave the late John Kinzie long since, and upon which he lived.
Robert A. Forsyth $1,250, in consideration of the debts due from the Indians to his late father, Robert A. Forsyth, who was long a trader among them, and who was assisted by his son, the present R. A. Forsyth. The money is in lieu of a tract of land which the Indians gave to the late R. A. Forsyth, since renewed to the present R. A. Forsyth, upon which both of them heretofore lived.
Jean B. Comparet $500, for goods heretofore sold to the Indians.
C. and D. Dousseau $100, for goods heretofore sold to the Indians.
P. F. Navarre $100, for goods heretofore sold to the Indians.
Francis Paget $100, for goods heretofore sold to the Indians.
G. O. Hubbard $200, for goods heretofore sold to the Indians.
Alexis Coquillard $200, for goods heretofore sold to the Indians.
Amounting, in the whole, to the sum of ten thousand eight hundred and ninety-five dollars.

LEW. CASS,
PIERRE MENARD.

TREATY WITH THE CHIPPEWA, ETC., 1829.

Articles of a treaty made and concluded at Prairie du Chien, in the Territory of Michigan, between the United States of America, by their Commissioners, General John McNeil, Colonel Pierre Menard, and Caleb Atwater, Esq. and the United Nations of Chippewa, Ottawa, and Potawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers.

July 29, 1829.
7 Stat., 320.
Proclamation, Jan. 2, 1830.

ARTICLE I.

Certain lands ceded to United States.

THE aforesaid nations of Chippewa, Ottawa, and Potawatamie Indians, do hereby cede to the United States aforesaid, all the lands comprehended within the following limits, to wit: Beginning at the Winnebago Village, on Rock river, forty miles from its mouth, and running thence down the Rock river, to a line which runs due west from the most southern bend of Lake Michigan to the Mississippi river, and with that line to the Mississippi river opposite to Rock Island; thence, up that river, to the United States' reservation at the mouth of the Ouisconsin; thence, with the south and east lines of said reservation, to the Ouisconsin river; thence, southerly, passing the heads of the small streams emptying into the Mississippi, to the Rock River aforesaid, at the Winnebago Village, the place of beginning. And, also, one other tract of land, described as follows, to wit: Beginning on the Western Shore of Lake Michigan, at the northeast corner of the field of Antoine Ouitmette, who lives near Gross Pointe, about twelve miles north of Chicago; thence, running due west, to the Rock River, aforesaid;

thence, down the said river, to where a line drawn due west from the most southern bend of Lake Michigan crosses said river; thence, east, along said line, to the Fox River of the Illinois; thence, along the northwestern boundary line of the cession of 1816, to Lake Michigan; thence, northwardly, along the Western Shore of said Lake, to the place of beginning.

ARTICLE II.

Consideration therefor.

In consideration of the aforesaid cessions of land, the United States aforesaid agree to pay to the aforesaid nations of Indians the sum of sixteen thousand dollars, annually, forever, in specie: said sum to be paid at Chicago. And the said United States further agree to cause to be delivered to said nations of Indians, in the month of October next, twelve thousand dollars worth of goods as a present. And it is further agreed, to deliver to said Indians, at Chicago, fifty barrels of salt, annually, forever; and further, the United States agree to make permanent, for the use of the said Indians, the blacksmith's establishment at Chicago.

ARTICLE III.

Certain lands reserved.

From the cessions aforesaid, there shall be reserved, for the use of the undernamed Chiefs and their bands, the following tracts of land, viz:

For *Wau pon-eh-see*, five sections of land at the Grand Bois, on Fox River of the Illinois, where *Shaytee's* Village now stands.

For *Shab-eh-nay*, two sections at his village near the Paw-paw Grove. For *Awn-kote*, four sections at the village of *Saw-meh-naug*, on the Fox River of the Illinois.

ARTICLE IV.

Certain tracts to be granted to certain descendants from the Indians.

There shall be granted by the United States, to each of the following persons, (being descendants from Indians,) the following tracts of land, viz: To Claude Laframboise, one section of land on the Riviere aux Pleins, adjoining the line of the purchase of 1816.

To François Bourbonné, Jr. one section at the Missionary establishment, on the Fox River of the Illinois. To Alexander Robinson, for himself and children, two sections on the Riviere aux Pleins, above and adjoining the tract herein granted to Claude Laframboise. To Pierre Leclerc, one section at the village of the As-sim-in-eh-Kon, or Paw-paw Grove. To Waish-kee-Shaw, a Potawatamie woman, wife of David Laughton, and to her child, one and a half sections at the old village of Nay-ou-Say, at or near the source of the Riviere aux Sables of the Illinois. To Billy Caldwell, two and a half sections on the Chicago River, above and adjoining the line of the purchase of 1816. To Victoire Pothier, one half section on the Chicago River, above and adjoining the tract of land herein granted to Billy Caldwell. To Jane Miranda, one quarter section on the Chicago River, above and adjoining the tract herein granted to Victoire Pothier. To Madeline, a Potawatamie woman, wife of Joseph Ogee, one section west of and adjoining the tract herein granted to Pierre Leclerc, at the Paw-paw Grove. To Archange Ouilmette, a Potawatamie woman, wife of Antoine Ouilmette, two sections, for herself and her children, on Lake Michigan, south of and adjoining the northern boundary of the cession herein made by the Indians aforesaid to the United States. To Antoine and François Leclerc, one section each, lying on the Mississippi River, north of and adjoining the line drawn due west from the most southern bend of Lake Michigan, where said line strikes the Mississippi River. To Mo-ah-way, one quarter section on the north side of and adjoining the tract herein granted to Waish-Kee-Shaw.

The tracts of land herein stipulated to be granted, shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States.

ARTICLE V.

United States to pay claims against Indians.

The United States, at the request of the Indians aforesaid, further agree to pay to the persons named in the schedule annexed to this treaty, the sum of eleven thousand six hundred and one dollars; which sum is in full satisfaction of the claims brought by said persons against said Indians, and by them acknowledged to be justly due.

ARTICLE VI.

United States to survey boundary line of cession.

And it is further agreed, that the United [States] shall, at their own expense, cause to be surveyed, the northern boundary line of the cession herein made, from Lake Michigan to the Rock River, as soon as practicable after the ratification of this treaty, and shall also cause good and sufficient marks and mounds to be established on said line.

ARTICLE VII.

Right to hunt reserved.

The right to hunt on the lands herein ceded, so long as the same shall remain the property of the United States, is hereby secured to the nations who are parties to this treaty.

ARTICLE VIII.

Treaty binding when ratified.

This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

In testimony whereof, the said John NcNiel, Pierre Menard, and Caleb Atwater, commissioners as aforesaid, and the chiefs and warriors of the said Chippewa, Ottawa, and Potawatamie nations, have hereunto set their hands and seals, at Prairie du Chein, as aforesaid, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and twenty-nine.

John McNiel, [L. S.]
Pierre Menard, [L. S.]
Caleb Atwater, [L. S.]
Commissioners.
Sin-eh-pay-nim, his x mark, [L. S.]
Kawb-suk-we, his x mark, [L. S.]
Wau-pon-eh-see, his x mark, [L. S.]
Naw-geh-say, his x mark, [L. S.]
Shaw-a-nay-see, his x mark, [L. S.]
Naw-geh-to-nuk, his x mark, [L. S.]
Meek-say-mauk, his x mark, [L. S.]
Kaw-gaw-gay-shee, his x mark, [L. S.]
Maw-geh-set, his x mark, [L. S.]
Meck-eh-so, his x mark, [L. S.]
Awn-kote, his x mark, [L. S.]
Shuk-eh-nay-buk, his x mark, [L. S.]
Sho-men, his x mark, [L. S.]
Nay-a-mush, his x mark, [L. S.]
Pat-eh-ko-zuk, his x mark, [L. S.]
Mash-kak-suk, his x mark, [L. S.]

Pooh-kin-eh-naw, his x mark, [L. S.]
Waw-kay-zo, his x mark, [L. S.]
Sou-ka-mock, his x mark, [L. S.]
Chee-chee-pin-quay, his x mark, [L. S.]
Man-eh-bo-zo, his x mark, [L. S.]
Shah-way-ne-be-nay, his x mark, [L. S.]
Kaw-kee, his x mark, [L. S.]
To-rum, his x mark, [L. S.]
Nah-yah-to-shuk, his x mark, [L. S.]
Mee-chee-kee-wis, his x mark, [L. S.]
Es-kaw-bey-wis, his x mark, [L. S.]
Wau-pay-kay, his x mark, [L. S.]
Michel, his x mark, [L. S.]
Nee-kon-gum, his x mark, [L. S.]
Mes-quaw-be-no-quay, her x mark, [L. S.]
Pe-i-tum, her x mark, [L. S.]
Kay-wau, her x mark, [L. S.]
Wau-kaw-ou-say, her x mark, [L. S.]
Shem-naw, her x mark. [L. S.]

In presence of—

Charles Hempstead, secretary to the commission,
Alex. Wolcott, Indian agent,
Jos. M. Street, Indian agent,
Thomas Forsyth, Indian agent,
Z. Taylor, Lieutenant-Colonel U. S. Army,
John H. Kinzie, subagent Indian affairs,
R. B. Mason, captain, First Infantry,
John Garland, major, U. S. Army,
H. Dodge,

A. Hill,
Henry Gratiot,
Richard Gentry,
John Messersmith,
Wm. P. Smith,
C. Chouteau,
James Turney,

Jesse Benton, Jr.,
J. L. Bogardus,
Antoine Le Claire, Indian interpreter,
Jon. W. B. Mette, Indian interpreter,
Sogee,
John W. Johnson.

July 29, 1829.
7 Stat., 604.

Schedule of claims and debts to be paid by the United States for the Chippewa, Ottawa, and Pottawatamie Indians, under the fifth article of the treaty of the 29th July, 1829, with said tribe.

To Francis Laframboise, for a canoe-load of merchandise taken by the Chippewa and Ottowata Indians of Chab-way-way-gun and the neighboring villages, while frozen up in the lake in the winter of the year 1799, two thousand dollars	$2,000 00
To Antoine Ouilmett, for depredations committed on him by the Indians at the time of the massacre of Chicago and during the war, eight hundred dollars	800 00
To the heirs of the late John Kinzie, of Chicago, for depredations committed on him at the time of the massacre of Chicago and at St. Joseph's, during the winter of 1812, three thousand five hundred dollars	3,500 00
To Margaret Helm, for losses sustained at the time of the capture of Fort Dearborn, in 1812, by the Indians, eight hundred dollars	800 00
To the American Fur Company, for debts owed to them by the United Tribes of Chippewas, Ottowas, and Pottawatamies, three thousand dollars	3,000 00
To Bernardus Laughton, for debts owed to him by same tribes, ten hundred and sixteen dollars	1,016 00
To James Kinzie, for debts owed to him by same, four hundred and eighty-five dollars	485 00
	$11,601 00

TREATY WITH THE WINNEBAGO, 1829.

Aug. 1, 1829.
7 Stat., 323.
Proclamation, Jan. 2, 1830.

Articles of a treaty made and concluded at the Village of Prairie du Chien, Michigan Territory, on this first day of August, in the year one thousand eight hundred and twenty-nine, between the United States of America, by their Commissioners, General John M'Neil, Colonel Pierre Menard, and Caleb Atwater, Esq., for and on behalf of said States, of the one part, and the Nation of Winnebaygo Indians of the other part.

ARTICLE I.

Certain lands ceded to United States.

THE said Winnebaygo nation hereby, forever, cede and relinquish to the said United States, all their right, title, and claim, to the lands and country contained within the following limits and boundaries, to wit: beginning on Rock River, at the mouth of the *Pee-kee-tau-no* or *Pee-kee-tol-a-ka*, a branch thereof; thence, up the *Pee-kee-tol-a-ka*, to the mouth of Sugar Creek; thence, up the said creek, to the source of the Eastern branch thereof; thence, by a line running due North, to the road leading from the Eastern blue mound, by the most Northern of the four lakes, to the portage of the Wisconsin and Fox rivers; thence, along the said road, to the crossing of Duck Creek; thence, by a line running in a direct course to the most Southeasterly bend of Lake Puck-a-way, on Fox River; thence, up said Lake and Fox River, to the Portage of the Wisconsin; thence, across said portage, to the Wisconsin river; thence, down said river, to the Eastern line of the United States' reservation at the mouth of said river, on the south side thereof, as described in the second article of the treaty made at St. Louis, on the twenty-fourth day of August, in the year eighteen hundred and sixteen, with the Chippewas, Ottawas, and Potawata-

EXHIBIT B

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 18 2001

Honorable J. Dennis Hastert
Speaker, U.S. House of Representatives
Washington, D.C. 20515

Honorable George H. Ryan
Governor, State of Illinois
State House, Room 207
Springfield, IL 62706-1150

Re: Land Claim of the successors to Chief Shab-eh-nay and his Band

Dear Speaker Hastert and Governor Ryan:

In 1998 the Prairie Band of Potawatomi Indians of Kansas requested the Department of the Interior to review the Band's claim, as the successor in interest to Chief Shab-eh-nay and his Band, asserting Indian title to 1,280 acres of land in DeKalb County, Illinois. Title to this land was recognized in a reservation set aside for Shab-eh-nay and his Band by the 1829 Treaty of Prairie du Chien. I am writing to advise you that, after considerable review of the relevant facts, we have determined that the Prairie Band has a creditable claim for unextinguished Indian title to this land. I understand that the leaders of the Prairie Band are not asking that this claim be referred to the Department of Justice for litigation (and indeed, the Department of Justice has not reviewed this claim). Rather, the Band's leaders believe that such a claim should be resolved through legislation enacted by Congress.

I also understand that, since requesting the Department to review the claims, representatives of the Tribe have met and discussed this claim with members of Speaker Hastert's staff. Representatives of Governor Ryan's office have met with Interior Department officials and have asked of our position.

The origin of this title claim lies in the reservation set aside in Article III of the Treaty of Prairie du Chien signed July 29, 1829 by representatives of the United States and the United Nations of Chippewa, Ottawa and Potawatomi Indians, and subsequently ratified by the U.S. Senate. 7 Stat. 320. Such reservations of Indian land constitute recognition of Indian title. The Indian Nonintercourse Act, 25 U.S.C. § 177 (enacted by Congress in 1790), makes void any conveyance of Indian title without the consent of Congress. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). Our research has not

revealed any subsequent treaty or Act of Congress which authorized the conveyance of these lands.

Article 5 of the Treaty of September 26, 1833 with the United Nations of Chippewa, Ottawa, and Potawatomi Indians provided that the lands reserved to Shab-eh-nay and his Band "be a grant in fee simple to him his heirs and assigns forever." 7 Stat. 433. This "fee simple" grant would have removed federal trust restrictions against alienation of those lands, but the Senate struck Article 5 from the 1833 treaty when it ratified it. See 7 Stat. 447. The legal effect was to maintain the 1,280 acres for Shab-eh-nay and his Band under the protection of the United States. These lands were, however, sold in 1849 at a public auction by the U.S. General Land Office to non-Indian settlers. Because this sale was not approved or authorized by Congress, there is a credible argument that it violated the Non-Intercourse Act.

Our research has also led us to the conclusion that the Prairie Band is the lawful successor in interest to Chief Shab-eh-nay and his Band. The Prairie Band did bring a claim against the United States under the Indian Claims Commission Act of 1946 and was paid for the loss of certain lands in northern Illinois. However, the reservation of land for Chief Shab-eh-nay and his Band was specifically excluded from the lands for which the Commission awarded payment. 11 Ind. Cl. Comm. 693, 710 (1962). As a result, we believe the U.S. continues to bear a trust responsibility to the Prairie Band for these lands.

There is evidence that Chief Shab-eh-nay tried to regain possession of these lands before his death in 1859, and that his family and friends continued these efforts after his death. In 1857 sympathetic non-Indian friends of the Chief purchased nearby land for a home for him. Almost a century after his death, a local Boy Scout troop erected a granite memorial to Chief Shab-eh-nay on this site. Representatives of the Prairie Band advised us that they have discussed this claim with local officials, and that the Prairie Band has an option to acquire some land in the claimed area.

The merits of this claim have been discussed among attorneys for this Department, attorneys representing the State of Illinois, and tribal attorneys. The success of any litigation to vindicate this claim is necessarily uncertain, and there is much to be said for pursuit of a settlement for ratification by Congress that would avoid the time, expense, and acrimony of litigation. We have long encouraged such settlements of credible claims, and there would appear to be a genuine possibility here of amicable resolution. We offer the Department's full cooperation in such an endeavor.

Sincerely,

John D. Leshy
Solicitor

cc: Chairman Joseph Wahwassuck, Prairie Band of Potawatomi Indians
Chief Charles Dawes, Ottawa Tribe of Indians, Miami, Oklahoma
M. Frances Ayer, Morisen Schlosser, Ayer & Jozwiak, Washington, D.C.
(representing the Prairie Band of Potawatomi Indians of Kansas)
Gillian C. D'Emilio, Mayer, Brown & Platt, Chicago, Illinois
(representing Governor Ryan of Illinois)
Mark Wamsley, Counsel to the Governor of Illinois, Springfield, Illinois
Lynn J. Slade, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, NM
(representing the Governor of Illinois)

EXHIBIT C

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

TAKE PRIDE IN AMERICA

SEP 22 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Thank you for your letter of August 22, 2006, to Secretary Kempthorne forwarding correspondence you had received from two members of the state legislature. The legislators were concerned about recent actions by the Prairie Band of Potawatomi Nation. The Secretary referred your letter to my office for response.

Most of the questions raised in the correspondence from the legislators concern issues addressed by former Solicitor John Leshy, in his January 21, 2001, letter to you concerning the Prairie Band's claim to land located near Shabbona, Illinois. In his letter, Mr. Leshy indicated that, after considerable review of the relevant facts, the Department of the Interior determined the Prairie Band, a federally recognized Indian tribe, had a credible claim for the unextinguished title to the land at issue. Mr. Leshy noted also: "[t]he success of any litigation to vindicate this claim is necessarily uncertain."

The issues in any litigation would center on the fundamental issue of the extent to which this recently purchased land is subject to state and local jurisdiction. State jurisdiction over Indian owned lands is a complex area of the law dominated by the unique history of each parcel of land but recent case law provides guidance. For example, in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), the Supreme Court held that once Congress authorized the alienability of that tribe's land within the boundaries of its clearly established reservation, the tribe's repurchase of the land did not reinstate its non-taxability. More recently in the *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Court held that the Oneida Indian Nation could not unilaterally revive Indian sovereign control over lands it had purchased within the exterior boundaries of its reservation. The Court relied on several factors, including for example, the justifiable expectations of the non-Indian community based on long, uncontested occupancy in good faith belief that their titles were good and laches, impossibility and acquiescence. The *Sherrill* decision is of fundamental importance and any assertion of rights over land would require an analysis under these and other relevant cases.

In addition, the status of the land must be determined prior to gaming occurring on this land. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 et seq., states that for class II gaming to occur on the land it must be "Indian Lands", which are

"all lands within the limits of any 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 or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703 (4)(A)-(B). The Department has not yet reviewed this land to determine if it would be considered Indian land within the definition of IGRA, and we do not know if the National Indian Gaming Commission has approved "any tribal ordinance or resolution concerning the conduct of or regulation of class II gaming on the Indian lands." 25 U.S.C. 2710 (B)(2).

Any claim to jurisdiction over Indian owned land within a tribe's former territory, and conversely any claim to immunity from such jurisdiction, will have to deal with the complex application of all the factors referenced by the treaties, courts, and statutes in the context of the specific claim.

Sincerely,

Michael D. Olsen
Principal Deputy Assistant Secretary –
Indian Affairs