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Re: Mississippi Band of Choctaw Indians – Advisory Opinion Request No. 2005-01

Dear Ms. Smith:

On behalf of the Mississippi Band of Choctaw Indians ("Tribe"), I submit these comments on the drafts issued by your Office regarding the Tribe's request for an advisory opinion. We understand that those draft advisory opinions (2005-01 Drafts A and B) are expected to be on the agenda for the Commission's March 10 meeting. We would appreciate it if these comments would be included in the record for consideration by your Office and the Commission in connection with that meeting.

The two draft opinions prepared by the General Counsel's Office – which reach opposite conclusions – suggest that there is a significant measure of uncertainty within that Office regarding this matter. This letter seeks to diminish that uncertainty by clarifying certain facts, underscoring the important policy concerns involved, placing indemnification in context, and providing a well-established legal principle for addressing ambiguities in federal law in connection with its application to Indian tribes. Based on these factors and our original submission, we urge the Commission to adopt Draft B as its advisory opinion.

First, to the extent that Draft A relies in its analysis on the issue of sovereign immunity, it appears to be based on mistaken, or at least incomplete, facts. Draft A states, for example, that "IKBI enjoys the sovereign immunity that vests with the Tribe as a sovereign entity, which indicates that IKBI cannot be wholly separate from the Tribe." Draft A, p. 6. But, Draft A overlooks the provision of IKBI's Articles of Incorporation that states that "IKBI, Inc. may sue and be sued in courts of competent jurisdiction, including United States Federal Courts, for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans and contract performance." Articles of Incorporation, sec. 7(J), Exhibit C (to our January 6 submission to the Commission). Such a provision is required by the SBA as a condition of a tribally chartered corporation gaining eligibility to participate in that program. See 13 CFR 124.109(c)(1). IKBI, having established that it can sue and be sued (and that it meets all other requirements) has been granted eligibility for the SBA program. Exhibit D.

In addition, the separate provision of IKBI's charter cited in Draft A concerning sovereign immunity reflects the independent authority of IKBI to sue and be sued in connection with all of its other projects. That language provides:

The Board of Directors [of IKBI] shall have authority to approve unconditional, conditional, full or limited waivers of its sovereign immunity in regard to particular contracts and transactions and otherwise as set forth in section 7.J of this Charter. The Board shall have no authority to waive the sovereign immunity of the Mississippi Band of Choctaw Indians or any other tribal entity or enterprise except of IKBI, Inc.

Articles of Incorporation, section C(9), Exhibit C. Under this language IKBI, acting through its Board, can subject itself to suit without action of the Tribe. Likewise, it provides that IKBI can not affect the sovereign immunity of the Tribe itself. This provision suggests not an identity between IKBI and the Tribe, but rather independence – as IKBI acts on its own with respect to this issue (as it does more generally in all of its activities). Decisionmaking and operational control remain with IKBI.

Moreover, as a practical matter, as a commercial enterprise undertaking construction projects, IKBI will necessarily be required to be subject to suit with respect to all of its projects. Just as SBA requires a "sue and be sued" clause under its 8(a) program, so suppliers, vendors and subcontractors doing business with a tribally-chartered construction company will routinely insist on such provisions in their contracts. For this reason, IKBI, like any non-tribal contractor, will be subject to suit regarding its construction projects. So, to the extent Draft A as a practical matter reflects the notion that IKBI would be shielded from suits by sovereign immunity in connection with its federal projects, that view is based on a mistake of fact.¹

Second, Indian tribes possess sovereign immunity as an attribute of their inherent sovereignty. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 118 S.Ct. 1709 (1998).

¹ Draft A (p.6, n.4) also cites to a footnote in a law review article, 37 Tulsa L. Rev. 661, 702 n.199 (2002). The referenced footnote cites cases about whether certain *unincorporated* tribal entities have sovereign immunity – a question not relevant here, because IKBI, Inc. is *incorporated*. The more basic point in the footnote in Draft A, that sovereign immunity normally applies to tribal commercial activities, unless waived, is not in question here.

All tribal entities likewise possess that attribute, except as it has been waived. Making the question whether such an entity does or does not possess sovereign immunity a litmus test for whether the entity has sufficient separateness from the tribal government which created it to satisfy the standards enunciated in Ad. Op. 1999-32 would essentially render all tribal entities unable to meet that test, even if sovereign immunity has been waived as to federal contracts. This would be so even as to the Tribal Utility Authority which was the subject of Ad. Op. 1999-32. As an unincorporated public entity of the Tribe there involved, that Utility Authority would certainly possess the same kind of sovereign immunity as possessed by IKBI – though IKBI's immunity has been expressly acknowledged, while the "plan of operations" considered by the Commission in Ad. Op. 1999-32 is silent on the issue. In any event, IKBI's immunity has been expressly waived as regards its proposed federal contracts as shown above.

Third, there are strong policy reasons that counsel against adopting Draft A. Congress has for years strongly supported measures that would enable tribes to progress through their own economic development efforts. See our January 6, 2005 letter, p. 9 n. 15. This same policy has had strong support from every President since Nixon. See *id.*, p. 9, n.16. The underlying principle behind this well-established Indian policy is that the problems faced in Indian country can best be addressed by authorizing and facilitating tribal business efforts that promote long term self-sufficiency. The Tribe has created IKBI, Inc. to engage in construction contracting (including contracting with federal agencies) consistent with the broad federal policy that encourages such activity.

In its prior decisions, the Commission has recognized the "specialized and unique treatment" afforded under federal law to tribal enterprises. Ad. Op. 1999-32. But, Draft A ignores this important feature of federal Indian policy. Instead of proposing a determination that would promote Indian economic development, consistent with this "specialized and unique" policy toward tribes, Draft A takes the opposite approach. In essence, Draft A provides tribes with a choice. Either give up a significant component of your right to participate in the political process (that is, your right to make contributions to federal candidates, political parties and committees), or give up your right to charter and support separate corporations to facilitate economic progress through federal programs. Further, Draft A would present Tribes with this Hobson's choice based on an indemnification agreement that leaves intact all the basic elements of separateness between the Tribe and IKBI, Inc. that the Commission previously held to be sufficient – such as that the entity has its own bank account and books, its own employees, its own personnel and benefits policies, its own property, its own attorneys, its own board, and its own separate and segregated funds (from those of the tribe). Nothing in Draft A (or any other source) suggests that Congress intended Federal Election law to be construed in a manner that, as a practical matter, conflicts with the fundamental federal goal of advancing Indian economic self-sufficiency or SBA policies as established by the Congress to advance those goals. .

Fourth, although Draft A asserts that "[t]he Tribe owns and controls IKBI through CDE," nowhere does it explain how or why that is so in any way germane to the standards established in Ad. Op. 1999-32. CDE – like the shareholders of any corporation – has the power to appoint and remove the IKBI Board of Directors; but that does not give CDE any decisionmaking authority over IKBI's management or business operations. IKBI clearly has more independence from the

Tribe (and CDE) under the standards established in Ad. Op. 1999-32 than the Tribal Utility Authority there at issue .

Fifth, Draft A's assertion that "the tribe . . . provided the initial capital to fund IKBI's operation," and the inference this somehow supports the conclusion that "the Tribe and IKBI are inextricably linked," is also unsupportable. The Tribe's decision through CDE to initially capitalize IKBI – something it was otherwise required to do to avoid "piercing the corporate veil" arguments² – confers no more right or authority to manage or control IKBI's business operations than would any other initial investment by CDE in the stock of any other company. The Tribe through CDE certainly hopes its investment in IKBI will prove profitable in the future; but, that initial investment did not bring with it any right of the Tribe or CDE to exercise any management control over IKBI. Indeed, as alluded to above, the failure to have initially capitalized IKBI could have opened up the Tribe to future liability for IKBI's contracts under a "piercing the corporate veil" argument. Providing that initial capital therefore underscores IKBI's separateness from the Tribe, not any ongoing connection violative of the standards established in Ad. Op. 1999-32.

Likewise, execution of the proposed indemnification would not undermine IKBI's separate decisionmaking and independent control of its own operations. The factors relied upon by the Commission in Ad. Op. 1999-32 provide evidence of the extent to which the decisionmaking and management of a tribal entity are separate and distinct from those of the Tribe itself. So, for example, if a tribal entity and the tribe itself share a common bank account, or common personnel policies, that might suggest that the tribe and the tribal entity would be operating, in some pragmatic sense, as a unified entity rather than as separate entities.

The proposed indemnification agreement involved here, however, provides at most a much more attenuated link than any of the factors in Ad. Op. 1999-32. Nothing in the indemnification agreement would provide the Tribe with any right to change or affect the manner in which IKBI runs its business, maintains its operating funds, interacts with vendors, decides which contracts to undertake or how it will perform under those contracts, hires or fires personnel, or initiates or maintains its relationship with federal agencies. In all those respects – the respects that matter under Ad. Op. 1999-32 – IKBI, Inc. and the Tribe remain separate, and IKBI decisionmaking and management would remain independent. The indemnification agreement would have no effect on the day-to-day operations of IKBI at all – as it would come into play, if at all, only after several contingencies come to pass. That is, if IKBI defaults on its obligations under its contract, fails to cure its default, the bonding company steps in to fulfill the breached contract, and the bonding company can not collect its expenses in doing so from IKBI, Inc., only then would the Tribe have any role. Even then, under the indemnification agreement, there would be no role for the Tribe in any decisionmaking by IKBI, and no connection whatever

² Undercapitalization is recognized as a significant consideration in determining whether corporate stockholders are protected from liability. See e.g., *Anderson v. Abbott*, 321 U.S. 349, 362 (1943) ("An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability."); *Trustees of the National Elevator Industry Pension*, 140 F. Supp.2d 447, 458 (E.D. Pa. 2001) ("Whether a corporation is grossly undercapitalized for the purposes of the corporate undertaking is of particular importance in a veil-piercing analysis, especially in the case of a closely held corporation.").

between the Tribe and the federal agency, which is not a party to that agreement. Indeed, the very fact of the indemnification agreement shows a separation between the Tribe and IKBI, Inc. – since if they were in fact a single entity, no arm's length contract would be needed between them to provide an assurance to the bonding company. See *Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285, 1288 n.2 (10th Cir. 1982) (indemnification agreement as evidence of separate existence of tribal entity).

Finally, the preparation of the General Counsel's Office of two diametrically opposed draft opinions demonstrates that, in the General Counsel's view, this is a close question which ultimately involves ambiguity in the federal law underlying this matter. The Supreme Court has repeatedly articulated a principle for resolving issues in such circumstances: statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). This Indian canon of construction applies with equal force in cases involving treaties, and those involving general federal statutes. See, e.g. *National Labor Relations Board v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000); *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1082 (9th Cir. 2001); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989); *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490, 494 (7th Cir. 1993). This principle clearly supports a determination that would preserve, not restrict or eliminate, opportunities for tribal economic development.

In sum, we respectfully submit that the General Counsel's Draft B, as supported by the points set out herein provides the proper resolution of this matter.

We again appreciate the Commission's consideration of this submission.

Sincerely,

Bryant Rogers
C. BRYANT ROGERS *by R. Ortiz*