OFFICE OF THE GOVERNOR

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Via Facsimile (202) 273-3153 & U.S. Mail

Mr. George Skibine, Director
Office of Indian Gaming Management
Office of Deputy Assistant Secretary
Policy & Economic Development
1849 C St., NW, Mail Stop 3657-MIB
Washington, DC 20240

RE: Comments on Proposed Rule Re Gaming on Trust Land Acquired After October 17, 1988
25 C.F.R. § 292; RIN 1076-AE-81

Dear Mr. Skibine:

The California Governor's Office appreciates the opportunity to comment on the proposed rules of the Bureau of Indian Affairs (BIA) for Gaming on Trust Land Acquired After October 17, 1988, published at 71 Fed. Reg. 58,769-58,776 (Oct. 5, 2006). We welcome the BIA's efforts to bring clarity to the exceptions in Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719. In our view, the regulations should provide principles by which it can be determined that the subject land meets one of IGRA's exceptions to the general prohibition of gaming on newly acquired land. As drafted, however, we believe that some of the regulations could be revised and improved upon. We hope you will consider the following comments regarding the proposed regulations in 25 C.F.R. § 292.

I. Regulatory Definitions

We are suggesting revisions to four particular areas in the definitions proposed by the regulations; they are the definitions of "Reservation," "Contiguous," and "Appropriate State and Local Officials," and the proximity standard for providing notice to "Appropriate State and Local Officials," "Nearby Indian tribes" and the "Surrounding community." We address each of the matters below.

Reservation. Proposed § 292.2 defines "reservation" quite broadly, to encompass any area of land which has been set aside or which has been acknowledged as having been set aside by the United States for the use of the tribe, the exterior boundaries of which are more particularly defined in a final treaty, agreement, Executive Order, Federal statute, Secretarial Order or Proclamation, judicial determination, or court-approved stipulation to which the United States is a party. We propose three revisions to the definition.

First, the clause "or which has been acknowledged as having been set aside" in the proposed definition adds only confusion and we suggest that it be deleted. The set aside has either occurred or not occurred. If a dispute over whether certain land had been set aside is resolved through an authoritative "acknowledgment" of some type, the acknowledgment necessarily would relate back to the original act effecting the set aside. Second, for purposes of clarification, we believe that the phrase "final treaty" in the draft definition should be changed to "ratified treaty." Finally, we would suggest that the definition clarify that ceded areas are not part of a reservation. Many states contain reservations (or rancherias) within their borders which may have been more expansive at one time, but which have been diminished through various cessions by Congress and the tribes. Lands within these "ceded" areas are not, and have not been since their cession, part of the reservations or subject to tribal jurisdiction. *Hagen v. Utah*, 510 U.S. 399 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

Contiguous. Congress did not provide a definition for this term and thus, courts will look instead to the common dictionary meaning of the word. While a reasonable dispute remains over whether a "corner-to-corner" touching is "contiguous," generally the matter can be resolved without regulatory definition. If a definition is included, we believe the second sentence should be omitted. It contradicts the requirement in the first sentence that parcels have a "common boundary." It also ignores the title or ownership status of various roads, railroads, rights-of-way, or streams, effectively giving them no status under the states' property laws.

Appropriate State and Local Officials. The proposed definition also should include the Attorney General and other appropriate state agencies regulating gaming activities within the state.

The 25-mile distance standard in the definitions of "Appropriate State and Local Officials," "Nearby Indian tribe," and "Surrounding community." The 25-mile distance standards incorporated into the proposed definitions of "Appropriate State and Local Officials," "Nearby Indian tribe," and "Surrounding community" appear too restrictive. Tribal gaming proposals can be expected to have impacts on the surrounding community that far exceed 25 miles. Local governments and surrounding communities located outside a 25-mile radius may have significant concerns about the environmental, health, and safety impacts on their land and citizens as a result of a proposed gaming facility. Indeed, any set distance that serves as an inflexible measure may be inappropriate. There are simply too many differences between

communities and circumstances to make one number fit every situation. If it is decided that a distance standard should be included in these rules, then we recommend using 75 miles in all definitions as a "minimum" distance standard, allowing the BIA to exceed that distance in assessing which officials and tribes to notify, depending upon the local circumstances. Additionally, the definition of "Appropriate State and Local Officials" should refer to state and local officials located in a neighboring state, if the designated radius extends into another state.

II. Subpart B—Exceptions to Prohibition on Gaming on After-Acquired Trust Lands

Section 20 of IGRA currently contains limited exceptions to the prohibition of off-reservation gaming on after-acquired trust lands. *See* 25 U.S.C. § 2719. Proposed Subpart B addresses the exceptions for lands taken into trust as part of (1) the settlement of a land claim exception; (2) an initial reservation; and (3) the restoration of lands for an Indian tribe that is restored to federal recognition. 25 U.S.C. § 2719(b)(1)(B). As you recently testified before Congress, Congress did not intend the exceptions to swallow the rule:

> In our view, Section 20 of IGRA reflects Congressional intent to impose a prohibition on gaming on lands acquired in trust after enactment of the statute. Section 20 does contain a series of exceptions discussed above, but we do not believe that it was the intent of Congress that the exceptions swallow the rule.

Oversight Hearing on Taking Lands Into Trust, Before the S. Comm. on Indian Affairs, 109th Cong. 4 (May 18, 2005) (statement of George T. Skibine, Acting Deputy Assistant Secretary–Indian Affairs). We therefore urge the BIA to exercise caution in interpreting IGRA and drafting the Section 20 implementing regulations so the general prohibition of gaming on after-acquired lands remains the norm.

In 2005, the Governor addressed the issue of Section 20 concurrences. In a Proclamation, dated May 18, 2005, he announced that he shall consider requests for a gubernatorial concurrence under section 20(b)(1)(A) of IGRA, that would allow a tribe to conduct class III gaming on newly acquired land, only in cases where each of the following criteria is satisfied:

a) The land that is sought for class III gaming is not within any urbanized area.

b) The local jurisdiction in which the tribe's proposed gaming project is located supports the project.

c) The tribe and the local jurisdiction demonstrate that the affected local community supports the project, such as by a local advisory vote.

d) The project substantially serves a clear, independent public policy, separate and apart from any increased economic benefit or financial contribution to the State, community, or the Indian tribe that may arise from gaming.

Satisfaction of the four criteria is a difficult burden to meet. Section 20 concurrences will be granted in only rare instances by the Governor. We believe the criteria provides flexibility and allows the Governor to maintain his discretionary authority, while also preserving the general prohibition of gaming on after-acquired lands.

In our view, the implementing regulations should require that, except where the governor grants a Section 20 concurrence, the lands bear a primary geographic, cultural, historical, and temporal connection to the tribe to a point at least predating IGRA's enactment. Most, but not all, of these concerns are addressed in the proposed regulations. Our suggested revisions are discussed in detail below.

We request that the proposed regulations be modified to include mandatory notice and meaningful consultation procedures with appropriate state and local officials and nearby Indian tribes for *all* exceptions enumerated in Subpart B of the proposed rule. As drafted, the proposed rule requires notice and consultation with impacted state and local governments and tribes in Subpart C, governing the Secretarial determination-gubernatorial concurrence, but not for the remaining Section 20 exceptions discussed in Subpart B. Without notice and an opportunity to comment on, for example, applications for restored lands determinations, the draft regulations would effectively deny states, local governments and affected tribes meaningful participation in a process that significantly affects their sovereignty.

Moreover, state and local consultation not only makes practical sense but is compelled by Executive Order No. 13352, in which the BIA is ordered to promote cooperative actions by including local participation in federal decisionmaking and to promote collaboration among federal, state, local and tribal governments. It is also required by case law, which has held, for example, that before land can be taken into trust for gaming under the restored lands exception, the Secretary of the Interior (Secretary) should determine that doing so provides equitable relief to the tribe. *See City of Roseville v. Norton*, 348 F.3d 1020, 1029 (D.C. Cir. 2003) (*City of Roseville*); *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for W. Dist. of Mich.*, 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002) (*Grand Traverse*). In fashioning an equitable remedy, the Secretary must consider all equities surrounding the application, and the remedy should balance the interests of all the affected parties. *See British Motor Car Distrib. v. San Francisco Auto.*, 882 F.2d 371, 374 (9th Cir. 1989); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

We also believe Subpart B should specify an evidentiary standard for tribes seeking an exception under Section 20. For instance, the National Indian Gaming Commission (NIGC) has characterized the restored lands exception as a "difficult hurdle" for tribes, NIGC Mem. re Grand

Traverse Band of Ottawa and Chippewa Indians 15 (Aug. 31, 2001), and at least one court has required tribes to demonstrate the evidence "clearly established" the restored land was of "historic, economic and cultural significance" to the tribe, *Grand Traverse*, 198 F. Supp. 2d at 935. We therefore request the BIA revise the proposed regulations to include an unambiguous requirement that the burden rests with the applicant tribe to demonstrate a Section 20 exception applies by clearly established evidence.

"Settlement of a Land Claim" Exception

We believe that Section 292.5 of the draft requires clarification. Specifically, § 292.5(a)(1) qualifies lands for gaming if trust land was acquired as part of a "settlement filed in Federal court and has not been dismissed on substantive grounds." This proposal begs the question: what happens if a claim is dismissed on procedural grounds? It appears that such land would still be eligible for gaming under this definition. Therefore, we recommend that the BIA revisit this exception to eliminate the ambiguity.

"Initial Reservation" Exception

Proposed § 292.6 is problematic in some respects. First, we believe the criterion in subdivision (b) requiring a majority of tribal members to live within 50 miles, or tribal government headquarters be located within 25 miles, of the proposed initial reservation could encourage tribes with very few enrolled members to relocate to more desirable gaming locations to the detriment of local tribes with established ancestral ties to the area. Also, because it is drafted in the disjunctive and without any temporal limitations, the proposed language permits a tribe to satisfy this particular criterion by relocating its government headquarters at any time to any place in the state, which undermines the rule's purpose. We suggest the provision be revised to replace the disjunctive "or" with the conjunctive "and." We also believe the rule should include a temporal requirement that the majority of tribal members have resided, and tribal government headquarters have been located, within the specified distance from the proposed initial reservation since at least before October 17, 1988. Such a reading is more consistent with Section 20's general prohibition of gaming on land acquired after IGRA's enactment.

Section 292.6(c) specifies that eligible land must be located "within an area where the tribe has significant historical and cultural connections[.]" In our view, "area" is too broad and should be limited to the proposed acquisition to ensure gaming occurs only on the tribe's ancestral homeland. At minimum, language should be inserted that mirrors, or specifically incorporates by reference, language in 25 C.F.R. § 151.11(b) governing off-reservation trust acquisitions. Such language would indicate that as the distance between the tribe's proposed initial reservation and its recognized historical lands increases, the decisionmaker will give greater scrutiny to the application and greater weight to concerns raised by state and local officials, and nearby Indian tribes.

While the requirement of "significant historical and cultural connections" to the land is commended, the proposed regulations do not articulate what constitutes a "significant" connection, or, conversely, what failure of proof might warrant denial of the application. In addition to an historical and cultural connection, we believe a tribe should establish an uninterrupted nexus with the proposed site and demonstrate that not only has the land remained important to the tribe throughout its history, but also that it still does today.

"Restored Lands" Exception

As you demonstrated for the Senate Committee on Indian Affairs last year, restored lands applications, regulated by the proposed rule, are now the most frequently utilized vehicle for obtaining post-1988 gaming lands. Oversight Hearing on IGRA Exceptions and Off-reservation Gaming, Before the S. Comm. on Indian Affairs, 109th Cong. 2-3, 8-9 (Jul. 27, 2005) (statement of George T. Skibine, Acting Deputy Assistant Secretary–Indian Affairs). It is our understanding that currently, 14 of the 26 Section 20 applications pending for tribes in California are for restored lands determinations. OIGM, Pending Gaming Applications, *supra*. The following comments focus on the draft regulations' treatment of Section 20's restored lands exception.

§ 292.8: As drafted, the standards by which tribes may establish previous federal recognition are too low and should instead be limited to only those tribes with which the federal government maintained an actual government-to-government relationship.

Under draft § 292.8(b), a tribe could qualify as having been federally recognized if the decisionmaker determines the tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act. An Indian group's ability to organize under either of those Acts is quite distinct from *actual* organization, and a government-to-government relationship necessarily cannot exist with an unorganized group.

Proposed § 292.8(d), which suggests a tribe could qualify if the United States acquired land in trust for the tribe's benefit, is also problematic because it is too presumptive. As the BIA is aware from its historic processing and management of tribal trust acquisitions, mistakes happen. Thus, while a trust acquisition might assist a determination that a government-to-government relationship existed with the tribe, it cannot constitute *de facto* recognition by itself.

In our view, the more appropriate standard for a tribe to establish former federal recognition is the test prescribed by Professor Cohen, and adopted by at least the First and Sixth Circuits—that is, proof of recognition requires (1) a legal basis for recognition (i.e. Congressional or Executive action) *and* (2) the empirical indicia of recognition, namely, a "continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs." Felix S. Cohen, Handbook of Federal Indian Law 6 (1982 ed.) (discussing tribal recognition); *see Mashpee Tribe v. Sec'y of the Interior*, 820 F.2d 480, 484 (1st Cir. 1987); *Grand Traverse Band of Ottawa and Chippewa Indians v.*

U.S. Att'y for the W. Dist. of Mich., 369 F.3d 960, 968 (6th Cir. 2004). We also believe that any application for a restored lands exception should be referred to the BIA's Bureau of Acknowledgement and Research (BAR) for review and approval, and that its finding should receive great weight in the determination process.

§ 292.9: The BIA's attempt to propose criteria for a tribe to establish it lost its government-to-government relationship with the United States are commended. We believe, however, § 292.9(b) should be revised to include the phrase "clearly and affirmatively acted to" after Executive Branch, to preclude tribes from asserting that simple administrative errors, omissions or oversights by Department of the Interior (Department) officials constitute an unequivocal and deliberate act of termination.

§ 292.10: Draft § 292.10(a), which states a tribe can establish it has been restored to federal recognition by "enactment of legislation recognizing, acknowledging, or restoring the government-to-government relationship between the United States" and the tribe, appears overly broad. Instead, IGRA unambiguously restricts application of the restored lands exception to "an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Clearly, legislation that initially "recognizes" or "acknowledges" a tribe does not qualify for the restored lands exception. We recommend that the proposed rule be modified to reflect the statutory limitation.

Proposed § 292.10(c) is, in part, contrary to the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(3) (Nov. 2, 1994), 108 Stat. 4791, 25 U.S.C. § 479a, which specifies recognition may only be established by Congressional act, Secretarial acknowledgment under the Federal acknowledgment process, or "decision of a United States court." A "court-approved stipulated entry of judgment" is not a judicial "decision" on the merits and we recommend that his phrase be eliminated from the draft rules. In any event, after November 2, 1994, a "court-approved stipulated entry of judgment," as proposed by § 292.10(c), is an insufficient basis for a tribe to qualify as having been restored to federal recognition. *See Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1087 (10th Cir. 2004) (holding the Department must follow its own rules and regulations for tribal recognition, and comply with the Federally Recognized Indian Tribe List Act). Moreover, we believe that because the BIA initially promulgated rules defining the administrative acknowledgment process on October 2, 1978, *see* 25 C.F.R. § 83 et seq., 59 Fed. Reg. 9,280-01 (Feb. 25, 1994), the only means by which a tribe could establish restoration is by the three methods described in the Federally Recognized Indian Tribe List Act in any period after October 1978.

We also believe that, like the rule for establishing federal recognition before termination, *see* § 292.8, it is logical for the rule establishing restoration of recognition to likewise follow Professor Cohen's test for recognition—that is, not only must there be some legal basis that recognition has been restored but there must also be empirical indicia of restoration. *See* Cohen, *supra*, at 6. It is our view that the BAR should make this determination, and its decision should receive great weight. Our Indian gaming experience in California has taught us that tribal membership and heritage disputes can complicate a restored lands determination, making it difficult to evaluate the validity of a particular

group's claim. To help resolve any anticipated disputes, we request the BIA consider inserting language requiring the applicant group to clearly establish by documented evidence that its current members are directly descended from members of the terminated tribe.

§ 292.11: After a tribe demonstrates it qualifies as a restored tribe, it must next demonstrate the proposed gaming site qualifies as restored lands. We agree with a previous pronouncement by the Associate Solicitor, Division of Indian Affairs, that the restored lands exception is inherently limited by IGRA's prohibition of gaming on lands acquired after October 17, 1988. In 2001, the Associate Solicitor concluded that interpreting

> the restored lands provision without temporal or geographic limitations would give restored tribes an unintended advantage over tribes who are bound to the limitations in IGRA that prohibit gaming on lands acquired after October 17, 1988. Moreover, we believe that, in examining the overall statutory scheme of IGRA, Congress intended some limitations on gaming and restored lands.

Associate Solicitor, Division of Indian Affairs Mem. to Assistant Secretary, Indian Affairs, re Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians 4 (Dec. 5, 2001). The Associate Solicitor specifically referenced IGRA's effective date, October 17, 1988, as an inherent temporal limitation for establishing reservation boundaries within which gaming could be conducted. *Id.* ("IGRA provides certain temporal (i.e., the October 17, 1988 limitation for reservation boundaries) . . . limitations").

Thus, in our view, the BIA should revise § 292.11(b), and all related provisions in § 292.12, to establish continuity and compliance with IGRA's temporal limitation by adding the requirement that the tribe's modern and historical connection to the land must have been continuous since at least before October 17, 1988.

§ 292.12: Proposed § 292.12 sets forth the necessary elements for a tribe to demonstrate its nexus to the land under consideration. Similar to proposed § 292.6, which establishes criteria for the initial reservation exception, and for reasons discussed above, we believe § 292.12(a) should be revised to replace "or" with "and," and to include a temporal requirement that the majority of tribal members have resided, and tribal government headquarters have been located, within the specified distance from the subject land since at least some substantial period before October 17, 1988. Also, the tribe should demonstrate a culturally significant modern connection to the land beyond residency and location of government headquarters near the proposed gaming site.

Probably the most important component of the test for whether land can properly be restored to a tribe relates to the location of the proposed gaming site in relation to the tribe's historical territory. To further IGRA's purpose, preserve the integrity of Indian gaming, and protect the sovereignty of tribes with established aboriginal ties to a specific area, there must be some longstanding and

significant geographical, historical, and cultural connection that specifically ties the tribe to the particular land under consideration. *See* NIGC Final Decision, In re Wyandotte Nation Amended Gaming Ordinance 11 (Sept. 10, 2004). The proposed regulations take significant steps toward establishing reasonable criteria for satisfying this component but can be developed further. In particular, it is our view that § 292.12(b)(1) should delete any reference to "unratified" treaties. In addition, § 292.12(b)(2) should be revised to reflect case law holding that the phrase "restored lands" can, and should, be limited to avoid a result that would mean "any and all property acquired by restored tribes would be eligible for gaming," *Confederated Tribe of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 165 (D.D.C. 2000), and NIGC's interpretation that the mere proximity to the land once held by the tribe and some historical connection are insufficient for land to properly be "restored" to the tribe within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii), NIGC Mem. Re Grand Traverse Band of Ottawa and Chippewa Indians, *supra*, at 15. Further, restored land does not mean "any aboriginal land that the restored tribe ever occupied." NIGC Mem. Re Bear River Band of Rohnerville Rancheria 11 (Aug. 5, 2002); *see also* NIGC Mem. re Grand Traverse Band of Ottawa and Chippewa Indians, *supra*, at 15 ("'restoration of lands' is a difficult hurdle and may not necessarily be extended . . . to any lands that the tribe conceivably once occupied throughout history."). Including these advisories would provide greater direction for tribes applying for a restored lands determination and help reduce any ambiguity created by the use of the broad term "area" in draft § 292.12(b)(2).

Moreover, we recognize at least one circuit court of appeals has held that restoration of lands encompasses more than simply "the return of a tribe's former reservation." *See City of Roseville*, 348 F.3d at 1028. In *City of Roseville*, the court held that "[g]iven the passage of years between termination and restoration of federal recognition of tribes, it is likely that earlier reservation land could not easily be reestablished as a reservation for a restored tribe." *Id.* at 1030. That holding, however, turned on a specific congressional finding that the tribe's pre-termination reservation was in fact unavailable to the tribe. *Id.* (citing Senate Committee Report that only 22 of 40 acres in the tribe's old reservation were "in Indian hands" when Congress enacted the tribe's restoration legislation). The court did not address the situation where a tribe owns its former reservation land in fee, or it is otherwise available to the tribe through purchase or other means. Therefore, we believe it reasonable to require a tribe seeking a restored lands exception to first attempt to reacquire its former reservation. If successful, then gaming should be restricted to the tribe's pre-termination reservation. If the former reservation is genuinely unavailable, then the tribe should document the steps it took to try to acquire its former reservation land, and affirmatively demonstrate why the former reservation is otherwise unavailable before any other land can be considered for gaming under the restored lands exception. In addition, for reasons previously discussed in our comments about proposed § 292.6, it is our view that language should be inserted that mirrors, or specifically incorporates by reference, language in 25 C.F.R. § 151.11(b) governing off-reservation trust acquisitions. Such language would indicate that as the distance between the tribe's pre-termination reservation and the proposed gaming site increases, the decisionmaker will give greater scrutiny to the application and greater weight to concerns raised by state and local officials, and nearby Indian tribes. We are also

concerned that § 292.12(b) fails to articulate what would constitute a "significant" connection, or, conversely, what failure of proof might warrant denial of the application. We request the BIA revisit § 292.12(b) to address these concerns.

Last, under draft § 292.12(c), the proposed acquisition bears a sufficient temporal relationship to tribal restoration if it is the first land acquired after restoration, or the tribe applies to take the land into trust within 25 years after restoration. We do not believe this is a reasonable standard. The NIGC has recognized acquisitions that occurred up to 14 years after restoration as being "temporally related" to a tribe's restoration when it is the tribe's first land acquisition. *See Wyandotte Nation v. National Indian Gaming Com'n*, 447 F. Supp. 2d 1193, 1218 (D. Kan. 2006); *see also* NIGC Mem. Re Mechoopda Indian Tribe of the Chico Rancheria 10 (Mar. 14, 2003) (finding a 9-year gap between tribal restoration and land acquisition was not too long for the land to be considered a restoration when it was the first parcel acquired by the tribe). On the other hand, an 18-year gap is too long. *Wyandotte Nation v. National Indian Gaming Com'n*, 447 F. Supp. 2d at 1218 (noting the NIGC was unwilling "to 'push the outer limits of what has previously been considered an acceptable delay'"); NIGC, In re Wyandotte Nation Amended Gaming Ordinance, *supra*, at 14. Further, when a tribe acquires multiple parcels soon after it is recognized, land taken into trust 22 years later cannot be considered restored. *See* NIGC Letter to B. Downes re Karuk Tribe of California, *supra*, at 9.

In reality, courts and the NIGC have interpreted the statute broadly, refusing to restrict "restoration" to the first property acquired by a tribe. The acquisition, however, must be part of the restoration process. The NIGC has reasoned that "the mere passage of time should not be determinative" because of the practical difficulties of acquiring appropriate land. NIGC Mem. Re Mechoopda Indian Tribe of the Chico Rancheria, *supra*, at 10 (citation omitted). Instead, the standard is that the tribe "acquired the land as soon as it was available and within a reasonable amount of time after being restored." *Id.* We agree, and we urge the BIA to revise draft § 292.12(c) to reflect that when an acquisition is part of the tribe's first systematic effort to obtain land, and that effort occurs before or within a reasonable time after restoration, there is an adequate temporal relationship between tribal restoration and the land acquisition to support a determination that there was a restoration of lands. *See Grand Traverse*, 198 F. Supp. 2d at 936.

If after considering these comments the BIA still believes a specific timeframe is appropriate, it is our view that 25 years is too long and instead a more flexible standard should be utilized. In July 2006, the Government Accountability Office (GAO) reported that of the 87 trust application decisions made by the BIA in 2005 (gaming and nongaming), the median time frame from filing the application until BIA officials issued a final notice of decision was 1.2 years—ranging from 58 days to almost 19 years. GAO, BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications 6 (Jul. 2006). Twenty-eight complete off-reservation applications had been pending review an average of 1.4 years, and 34 decisions had been appealed and pending a decision an average of 2.8 years from the time of the decision. *Id.* Based on this empirical

evidence, and on existing case law and NIGC opinions, we recommend a maximum 5-year period, allowing the decisionmaker discretion to permit the tribe to exceed that period by up to two years, depending upon the tribe's circumstances and a showing of need.

III. Subpart C—Secretarial Determination and Governor's Concurrence

The two-part determination is critically important to this State and its citizens. Nine of the 26 Section 20 applications pending for tribes in California seek this exception. OIGM, Pending Gaming Applications, *supra*. The proposed regulations provide an excellent outline of the Secretarial consultation and determination requirements and the gubernatorial concurrence condition in Section 20 of IGRA. In our view, however, the following revisions are appropriate.

§ 292.17: The title should use the word "impact" in addition to "benefits." In fact, the substance of the section addresses "adverse impacts" at § 292.17(f). Moreover, § 292.17(f) should be expanded to require the applicant to more specifically identify adverse impacts. We also believe the regulations should require consideration and analysis of land use and development alternatives to gaming, and whether the scope of the proposed project is consistent with the tribes economic needs, if any. In addition, the rules should provide direction of how fulfillment and definition of a tribe's economic needs should be balanced against the detrimental off-reservation environmental impacts of a facility described in § 292.18. *See* U.S. Dep't of the Interior, Office of Inspector General (OIG), Process Used to Assess Applications to Take Land Into Trust for Gaming Purposes 3 (Sept. 2005) ("The Department does not have regulations implementing Section 20; however, the best interest determination typically involves *similar but closer* examination of many of the same factors which are evaluated under [25 C.F.R.] Part 151." (Emphasis added.)).

§ 292.18: We believe the words "if any" should be deleted from § 292.18(d).

§ 292.19: In our view, the time limits are too short for the consultation comment period in proposed § 292.19. As drafted, the Regional Director must solicit comments within a 60-day period from the appropriate state and local officials and officials of nearby tribes. There is nothing in the proposed rule's process that establishes when the Regional Director is to send the consultation letter required by § 292.19. What is clear, however, is the 60-day period is too short a period in which to evaluate the numerous potential environmental and infrastructure impacts outlined in § 292.20. The opportunity for a 30-day extension is similarly restrictive. We propose that the consultation period be extended to 90 days with an opportunity for 30-day extensions, to be granted in the Regional Director's discretion upon a showing of need for time by the state or local official or official of a nearby tribe.

A more forgiving time period is necessitated for other reasons as well. Section 292.19 provides that the consultation letter solicit comments on a multitude of potential impacts, which is laudable. The information provided to the state, local and nearby tribal officials as required by § 292.20,

however, is rather minimal and does not include the more complete information provided by the applicant to the Regional Director under §§ 292.16, 292.17 and 292.18, necessary for the Secretarial determination. Consequently, the state, local and nearby tribal officials may have to request additional information about the proposed project to make an informed evaluation of the impacts that are the subject of § 292.19. While § 292.22(a)(2) provides that the full record of the application may be reviewed by the Governor if and when the matter proceeds to the Governor, the consultation process does not include an evaluation of the full record by the state, local and nearby tribal officials, which the Governor may consider in determining whether concurrence is warranted. It may be difficult for those officials to evaluate the impacts of the proposed gaming facility when the only information that is provided them is the location and size of the facility and the scope of gaming. Therefore, additional time is needed to allow the consultation process to succeed.

Also, under proposed § 292.19(c)(2), an applicant tribe may be permitted to address or resolve any issues raised in the responses. At minimum, the Regional Director should notify appropriate state, local and nearby tribal officials if there are changes in the application for Secretarial determination which may have new or different impacts on their respective jurisdictions. In such cases, the consulted officials should have the opportunity to comment within a reasonable time period. With such an opportunity, the Regional Director may benefit from obtaining additional important information that may inform and guide his decision concerning the Secretarial determination.

§ 292.20: Further to our comments regarding § 292.19, we recognize that much of the information provided to the Regional Director under § 292.17 may be protected proprietary information. In our view, however, § 292.20 should be modified to allow a process for the consulted officials to request additional information from the full record. Presumably, it is in the applicant's best interests to ensure the consultation process is well-informed and successful, to obtain not only the positive Secretarial determination, but also the gubernatorial concurrence.

Also, in draft § 292.20(a)(2), the Regional Director is required to include in the consultation letter to the appropriate officials information on the proposed scope of gaming, but the applicant is not required to provide the Regional Director with that very information. *See* §§ 292.16-292.18. The rules should be revised accordingly.

§ 292.21: If the Regional Director decides the application does not support a positive recommendation, proposed § 292.21(b) requires the Regional Director to notify the tribe, but no one else. We believe that all appropriate state, local and nearby tribal officials should be notified of such a decision.

Additionally, although § 292.21(b) requires the Regional Director to consider comments submitted by the "appropriate" local officials, it does not appear to require him to consider comments submitted by any other persons, organizations, or entities that he does not provide with notice. The Regional Director should be required to consider all comments that are timely received.

IV. Additional Comments

Conversion of Trust Land From Nongaming to Gaming Purposes

As you are aware, a recent survey by the Department's Office of Inspector General found at least 10 instances where tribes had converted trust land from nongaming to gaming purposes without approval of the BIA or the NIGC, or notification to state or local governments. OIG, Process Used to Assess Applications to Take Land Into Trust for Gaming Purposes, *supra*, at 7-8. This tactic is not new and has been utilized by some tribes since at least the 1990s. *See* GAO, Indian Gaming Regulatory Act: Land Acquired for Gaming After the Act's Passage 1 (Oct. 11, 1999) ("some tribes have acquired land for nongaming purposes and have later decided to use that land for gaming. If the land converted to gaming uses is 'off-reservation,' the conversion has to be approved by the Secretary of the Interior.").

We understand your position is that this practice is permissible because the United States cannot impose deed restrictions on Indian trust lands, and that before trust land can be used for gaming, even if acquired for another purpose, it must meet IGRA's requirements. Oversight Hearing on Taking Lands Into Trust, Before the S. Comm. on Indian Affairs, 109th Cong. 4 (May 18, 2005) (statement of George T. Skibine, Acting Deputy Assistant Secretary–Indian Affairs). The regulations implementing Section 20, however, should attempt to avoid a construction that prejudices tribes that have complied with the law and clearly articulated their intentions when applying to take land into trust. To do otherwise would run afoul of 25 U.S.C. § 476(f)-(g) (forbidding federal agencies from making determinations that confer upon recognized tribes enhanced privileges and immunities relative to other tribes) and 40 C.F.R. § 1508.8 ("Effects includes such ecological . . . , aesthetic, historic, cultural, economic, social, or health effects, whether direct, indirect, or cumulative.").

Therefore, we request the BIA follow the Inspector General's suggestion and amend the regulations to require all tribes that have had land taken into trust after IGRA's passage certify in writing, subject to criminal penalties, that (1) no gaming is taking place on those lands; or (2) the lands have been converted and the use has been approved through an official land determination made by the DOI. OIG, *supra*, at 8.

Clarity and Consistency in Designating a Decisionmaker, Final Agency Action, and an Appeal Mechanism

With one exception, IGRA does not specify who must decide whether a tribe qualifies for the exceptions in Section 20. While IGRA clearly mandates the Secretary makes the determination under 25 U.S.C. § 2719(b)(1)(A), with gubernatorial concurrence, it is unclear who makes determinations on tribal applications for the remaining Section 20 exceptions, particularly those set forth in 25 U.S.C. § 2719(b)(1)(B). The authority to determine whether land is a "reservation" was delegated to the Secretary as of the effective date of IGRA, *City of Roseville*, 348 F.3d at 1029 (citing Pub. L. No. 107-63, § 134 (2001)), and the Secretary has the same primary authority to provide meaning to the terms

"restore" and "restoration of land" in the restored lands exception, *State of Oregon v. Norton*, 271 F. Supp. 2d 1270, 1277-78 (D. Or. 2003). Therefore, it seems logically to be within the Secretary's exclusive authority to make the requisite determination under 25 U.S.C. § 2719(b)(1)(B).

In May 2006, the Department entered into a Memorandum of Agreement with the NIGC to assist the Secretary in the legal determination of whether tribes meet one of the exceptions in Section 20. Mem. of Agreement Between NIGC and Dep't (May 2006). While the NIGC may assist the Secretary, the NIGC cannot make the determination itself as that authority is reserved exclusively to the Secretary and, as we understand it, has not been delegated to any specific agency within the Department. We believe the BIA should revisit proposed Subpart B to provide clarity and consistency by specifying which agency or official will make the determinations covered by § 292.4.

Further, the regulations should indicate what constitutes final agency action on an application for an exception under Section 20, and what is the appropriate mechanism, if any, to administratively appeal the decision. We suggest final agency action occur by publishing the decision in the Federal Register, or by requiring the designated decisionmaker to indicate the resulting Section 20 determination is a final agency action. To create an adequate record for review, the decisionmaker should also specify all material considered in the determination. Whether the Department vests review authority in the Interior Board of Indian Appeals, or some other agency or official within the Department, it should not insulate from review any and all decisions made under Section 20. The regulations should be revised to include clearly established procedures and standards to appeal a Section 20 decision within the Department.

V. Conclusion

We thank the BIA for its efforts in drafting regulations that attempt to provide clarity to an area that has become increasingly complex. Promulgating regulations that strengthen IGRA by clearly defining its exceptions and allowing a greater role for meaningful participation by state, local and other tribal governments will further IGRA's original goals. Thank you for the opportunity to comment on the draft proposed regulations.

Sincerely,

Stephanie Johnson

for ANDREA LYNN HOCH
Legal Affairs Secretary

cc: See Attached List