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December 15, 2006

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, Gaming on Trust Land Acquired After October 17, 1988, Bureau of Indian Affairs, 25 CFR 292; 71 Fed. Reg. 58769 (Oct. 5, 2006) #10-76-8E-81**

Dear Mr. Skibine:

The following comments reflect the views of the undersigned State Attorneys General concerning the proposed rule of the Bureau of Indian Affairs governing tribal gaming on trust land acquired after October 17, 1988, set forth at 71 Fed. Reg. 58769 (Oct. 5, 2006), relating to Section 20 of the Indian Gaming Regulatory Act of 1988 ("IGRA"). The States wish to express their thanks for the opportunity to comment on this important matter affecting the sovereign interests and welfare of the States.

According to the October 20, 2006, Government Accountability Office (“GAO”) report entitled "Indian Issues: BLM's Program for Issuing Individual Indian Allotments on Public Lands Is No

Longer Viable," Congress, the BIA, or the courts have recognized 47 new tribes and restored 37 tribes for a total of "84 newly recognized and restored tribes." GAO at 13. These recognitions and restorations have added more than 600,000 acres of individual and tribal trust land in at least 18 different states. *Id.* at 13-17. Twenty-eight of these tribes have been recognized or restored since the passage of IGRA on October 17, 1988. *Id.* at 18. Twenty-one of these tribes are "landless." *Id.*

Generally speaking, the proposed regulation is highly welcome, well designed, and meets most of the major concerns the States have addressed on this subject in the past. These comments offer some additional observations, concerns, and suggestions.

Specific concerns

1. Definition of "reservation": The provision in the proposed rule that has generated significant concern among the States is the definition of "reservation" found in § 292.2. The definition is quite broad, encompassing 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.

The States strongly recommend the definition be modified as suggested below. As presently proposed, it cannot be squared with the definition of "Indian lands" in Section 4(4) of IGRA, 25 U.S.C. § 2703(a)(2), or the discrete use of the term "reservation" in Section 20 of IGRA, 25 U.S.C. § 2719, and 18 U.S.C. § 1151.

While Congress defined "Indian lands" in IGRA to include not only "Indian reservations," "trust lands" and other lands held by an Indian tribe or individual subject to restraints against alienation, it did not use the same language in Section 20. There, Congress conditioned the ability of tribes to game on lands acquired after October 17, 1988, on the appropriate relationship between a newly acquired parcel and an existing "reservation." Congress even provided for the situation where a

tribe has no reservation, allowing gaming only if the newly acquired parcel is within a tribe's former reservation (in Oklahoma) or last recognized reservation (in a state other than Oklahoma). 25 U.S.C. § 2719(a)(2). When the United States acquires or places into trust a new parcel contiguous to or within land which is not a reservation, such as mere trust land, the statute may operate to bar gaming on the newly acquired parcel. Use of the term "reservation" throughout Section 20 plainly relates back to the term "Indian reservation" in Section 4(4)(A) and thereby reflects Congress' intent to limit Section 20's applicability to a specific sub-category of "Indian lands"—*i.e.*, the term "reservation" in Section 20 does not include trust lands or other parcels subject to restraints against alienation. The proposed regulation's definition of "reservation," however, can be interpreted to include *any* lands set aside—or "acknowledged" as having been set aside—by the Federal Government for use by a tribe. The definition is thus problematic for several reasons.

First, the proposed definition would encompass not only trust lands but also "dependent Indian communities" as such term is used in the general definition of "Indian country" (18 U.S.C. § 1151(b)). Neither category of land should be considered a "reservation"—a term which, presumably, must be construed coterminously with "Indian reservation" in 18 U.S.C. § 1151(a). *See State v. Romero*, 142 P.3d 887, 891 (N.M. 2006) (deeming § 1151(a) and (b), in light of *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), to refer to distinct categories of Indian country).[1] Any definition of "reservation" therefore should make explicit that it does not include lands encompassed within 18 U.S.C. § 1151(b) or (c) and/or 25 U.S.C. § 2503(4)(B). It also should make explicit that the lands are subject to federal superintendence—another key requirement of "reservation" status. *E.g.*, *Native Village of Venetie*, 522 U.S. at 529-30.

[1] Whether *Romero* correctly held that the non-tribal land within the exterior boundaries of the Indian pueblos at issue there should be characterized as part of the dependent Indian community associated with the tribal lands and, therefore, as Indian country need not be considered for present purposes—particularly because the issue was mooted by recent legislation. Pub. L. No. 109-133, 119 Stat. 2573 (2005). It also warrants note that, by virtue of Indian Pueblo Lands Act, ch. 331, Act of June 7, 1924, § 17, 43 Stat. 636, 641-42, all lands within New Mexico's pueblos as to which title was not quieted in private parties pursuant to its terms became inalienable except through congressional action and thus subject to the non-reservation prong of the "Indian lands" definition in Section 4(4)(B).

Second, the clause "or which has been acknowledged as having been set aside" in the proposed definition adds only confusion. The set aside has either occurred or not occurred. So, for example, even if were doubt or dispute over whether certain land had been set aside resolved through an authoritative "acknowledgment" of some type, the acknowledgment necessarily would relate back to a positive act effecting the set aside itself. Under these circumstances, the States see no benefit in encumbering the definition with surplusage.

Third, many States contain reservations 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). Much as the Attorneys General recommended a revised definition of "reservation" for the Department's proposed rule on land acquisitions for Indian tribes issued last year, so too a revision would be necessary here reflecting that ceded areas are no longer part of the reservation. The States recommend a slightly revised draft of that definition as a substitute for the proposed § 292.2 definition which, in their view, captures the substance of these comments and Congress' use of the term "Indian reservation" in Section 4(4)(A) and "reservation" in Section 20 of IGRA:

> *Reservation* means that area of land which has been set aside under federal superintendence, as such lands are described in the treaty, federal statute, judicial determination, or administrative proclamation pursuant to 25 U.S.C. § 467 setting aside such lands, for use by an Indian tribe and which otherwise constitutes Indian country under 18 U.S.C. 1151(a).

2. <u>The twenty-five mile distance standard in the definitions of "Appropriate State and Local Officials" and "Nearby Indian tribe"</u>: The States believe that the distance standards incorporated into the definitions of "Appropriate State and Local Officials," "Nearby Indian tribe," and "Surrounding community" are arbitrary and too restrictive. For example, in defining "Appropriate State and Local Officials," the limit of 25 miles for the affected community is too small. Tribal gaming proposals can be expected to have impacts on the surrounding

community far in excess of 25 miles. Local governments and surrounding communities outside of 25 miles may have significant concerns about the environmental, health, and safety impacts on their land and their citizens as the result of a proposed gaming establishment. In fact, any set distance may be inappropriate as a "one-size-fits-all" solution. There are too many differences between communities and settings to make one number serve as an effective measure or rule.

Economists would surely reject a rule based on a 25 mile limit as arbitrary. In fact, the area affected by a particular casino can vary greatly dependent on conditions. Economists can estimate the likely performance and impact of a new casino, and its drain on surrounding areas, based on analysis of a series of factors which are encapsulated in a "gravity model". See, e.g., Cummings Associates, *Analysis of the Current Markets for Gaming in South Dakota with projection for the Likely Impacts of New or Enlarged Facilities*, at 5 (2004). The distance from the facility is one factor: "the overall elasticity of spending with respect to distance is roughly -0.7, that is, consumers' total spending declines in somewhat less direct proportion to the distance to be traveled." Id. at 6. A second factor is the "'mass' that attracts customers…typically represented in the gravity models by the 'size of the casino', described either in terms of its square footage or number of slot machines and table game/positions." Id. at 7. Such models also use income analysis to "fine-tune their estimates for customer's spending." Id.

A 25-mile limit may also be considered too small for what is a "nearby" Indian tribe. Many tribes consider their markets to be more than one hundred miles away. The States recommend using 75 miles under both 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. The language could be adjusted to read, ". . . officials of local government within at least 75 miles of the proposed gaming establishment," and tribes "within a radius of at least 75 miles." A proviso could be added: "Any local government, surrounding community, or Tribe likely to be affected by the proposed gaming establishment beyond the 75-mile distance shall be included within this definition." Additionally, the definition of "Appropriate State and Local Officials" should explicitly refer to state and local officials located in a neighboring state, if the 75 miles or more extends into another State. This concern is particularly acute in

smaller Eastern States and elsewhere where tribes are located on or near state borders.

3. Time limits for comments are too short: The States believe that the time limits are too short for the consultation comment period in § 292.19. In § 292.19, the Regional Director must solicit comments within a 60-day period from the appropriate state and local officials and officials of nearby tribes. (The section does not state how soon after receipt of the application for a secretarial determination that the Regional Director must send the consultation letter required by § 292.19. There is nothing in the proposed rule's process that establishes when the Regional Director is to send the consultation letter.) What is clear to the States, however, is that 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. The consultation period should be 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 nearly tribe.

A more generous time period is necessitated for another reason as well. Section 292.19 provides that the consultation letter solicit comments on a multitude of potential impacts, which is commendable. However, the information provided to the state, local, and nearby tribal officials as required by § 292.20 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 in order to make an informed evaluation of the impacts that are the subject of § 292.19. While § 292.22(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. It may be difficult for those officials to evaluate the impacts of the proposed gaming establishment when the information that is provided them is the location and size of the facility and the scope of gaming. Additional time is needed to allow the consultation process to succeed.

4. Subpart B – Exceptions to prohibition on gaming on after-acquired trust lands: The most significant change between the regulations proposed in 2000 and the proposed regulations at issue today is the addition of Subpart B addressing exceptions to the prohibition on gaming on after-acquired trust lands contained in Section 20 of IGRA. 25 U.S.C. § 2719. Section 20 of the IGRA currently contains four exceptions to the prohibition of off reservation gaming. These exceptions are (1) the secretarial determination-gubernatorial concurrence exception; (2) the land claim exception; (3) the restored land exception; and (4) the initial reservation exception. 25 U.S.C. § 2719(b)(1). According to the March 15, 2006, testimony of James Cason, Associate Deputy Secretary at the Department of Interior, before the Committee on Resources for the United States House of Representatives, the Department of Interior has identified 23 pending applications to take off reservation land into trust for gaming purposes under the exceptions contained in Section 20 of IGRA. Further, the Department is aware that numerous other proposals are in the development stage.

Gaming on after-acquired trust lands and "reservation shopping" are matters of deep concern to the States. They are also issues of deep concern to Congress as can be demonstrated by the legislation introduced by Representative Pombo, H.R. 4893, and Senator McCain, S. 2078. As reported, H.R. 4893 would have significantly revised the exceptions in Section 20(b)(1) of IGRA by eliminating the two-part determination and the land claims exceptions. Further, the bill would have allowed newly recognized, restored or landless tribes to conduct gaming on after-acquired trust lands only if five prerequisites were met: (1) the Secretary of the Interior determined that the lands are located in the State in which the tribe primarily resides and exercises jurisdiction; (2) the lands possess a primary geographic, social, historical, and temporal nexus to the tribe; (3) the Secretary determines the proposed gaming activity would not be detrimental to the surrounding community and nearby Indian tribe; (4) the Governor of the State where the proposed gaming is to be conducted concurs in accordance with the state laws; and (5) the tribe signs a memorandum of understanding with the county in which the tribe and its facilities are located in order to mitigate direct impacts from the proposed gaming facility.

The States strongly supported H.R. 4893. They found especially important the requirements that the lands bear a primary geographic, social, historical, and temporal connection to the

tribe and that the Governor and/or the state legislature of the State in which the gaming activities will be conducted agree to the acquisition by the tribe.

The States recommend the addition of a requirement that the Governor or state legislature of the affected State concur in the acquisition if the purpose of the acquisition is to conduct gaming activities. Further, while the proposed regulations retain the temporal nexus and "significant historical connection" for the retained lands exception, the proposed regulation does not include a geographical nexus requirement. *See* § 292.11. The regulation should be modified to include that requirement.

The States suggest that the Department redraft §292.5 which defines “Settlement of a Land Claim.” This definition does not work as drafted and relies on information that the States do not have readily accessible. See paragraph 7 below for a more detailed discussion. The Department needs to clarify this entire section.

Finally, the States note the relative ease for a tribe to qualify as having been federally recognized in the past under § 292.8. Under the proposed regulations, in order for a tribe to qualify as having been at one time federally recognized a tribe must show only one of five possible criteria existed at some time in the past. The States urge a reexamination of the criteria in § 292.8 to limit it to only those tribes in which an actual government-to-government relationship existed in the past.

The proposed regulations in Subpart B are a good first step in addressing the issues of defining the terms and establishing the criteria for making a determination under Section 20 of IGRA. By including some of the concepts suggested by Congress, the regulations take an important step to adding additional certainty to the Section 20 exception and avoiding controversy and litigation for the federal government, the States, and the tribes.

5. Definition of "contiguous": Reflecting a similar concern, many States believe the definition of "contiguous" in § 292.2 is one-sided and unnecessary. Congress did not provide a definition of "contiguous" and thus, courts will look instead to the common dictionary meaning of the word. The common dictionary meaning of the word is "Sharing an edge or boundary;

touching; 2. Neighboring, adjacent; 3. Connecting without a break; the 48 contiguous states." The American Heritage Dictionary of the English Language (3d ed. 1992); see also In re Lancaster City Ordinance v. Manheim TP, 374 Pa. 546, 98 A.2d 34 (1953) ("the universally recognized authority on the English language, the Oxford Dictionary, defines contiguous as 'touching, in actual contact, next in space, meeting at a common boundary, bordering, adjoining, contiguous, with its parts in uninterrupted contact'"). While there may be room for dispute over whether a "corner-to-corner" touching is "contiguous," generally the matter can be resolved without a regulatory definition. There is simply no compelling reason to include a definition in the proposed rule. The definition in the September 14, 2000, proposed regulation, 65 Fed. Reg. 55473, was actually closer to the dictionary definition than the current proposal.

If the definition is retained, however, States believe the proposed rule should drop the second sentence. This, of course, runs counter to the proposed definition that "nothing intervening" separate the parcel from the reservation. Additionally, the language fails to recognize the title or ownership status of various roads, railroads, rights-of-way or streams, effectively giving them no status under the property laws of the states, a failure designed apparently for the sole purpose of allowing parcels to be "contiguous" for tribal gaming purposes.

Additionally, the proposed language in the rule fails to respect the sovereignty of the States and their borders. Notwithstanding the laws and the sovereign affairs of the states are different from state to state, the current proposed definition ignores these differences and countenances an inappropriate incentive to search for cross-border opportunities to take advantage of different state gambling laws. If the first sentence of this definition is to remain, the States suggest an additional phrase such as: "Parcels are not contiguous if a state boundary separates them."

Additional Comments Section-by-Section

6. § 292.2 - "Appropriate State officials" should include the Governor, the Attorney General, and the appropriate state agency regulating gaming activities within the State. For local government, the appropriate officials should include the chairperson of a county board of supervisors or commissioners, the chief county planning official, and the chief law enforcement officer of the local government.

7. § 292.5 – “Settlement of a Land Claim” needs significant work and clarification. First, § 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.” What happens if a claim is dismissed on procedural grounds? It appears that such land would still be eligible for gaming under this definition. We believe this needs to be clarified and tightened up. Second, §292.5(a)(2) requires that the tribe be “included on the Department’s list of potential pre-1966 claims published under the Indian Claims Limitation Act of 1982.” However, this list is very voluminous and was last published in the Federal Register in 1983. As a result, the only way to absolutely verify if a tribe appears on this list is to submit the tribe’s name to the Department. At a minimum a method needs to be found to make the list more user friendly.

8. § 292.13 - This section, which applies to those newly acquired lands not covered by § 292.4, is an excellent outline of the secretarial consultation and determination requirements and the gubernatorial concurrence condition in § 20 of IGRA. A long-time concern of state officials has been their view that these requirements in § 20 of IGRA should apply whenever a parcel taken into trust after 1988 for a non-gaming purpose is subsequently converted to a gaming purpose. While the States would prefer an explicit statement to this effect, this section of the proposed rule appears to settle the question by stating a tribe may conduct Class II or Class III gaming on the parcel only after the secretarial consultation, determination, and gubernatorial concurrence conditions have been met.

9. § 292.16 - The States concur that the applicant for a secretarial determination should disclose the distance of the parcel being placed into trust from the tribe's existing reservation and (other) trust lands. They also believe a reasonable addition to the proposed rule would be a provision that lands far from the tribe's existing reservation will be

disfavored for taking into trust for the purposes of gaming. As a matter of rulemaking, such a provision would provide guidance to the Regional Director and the Appropriate Departmental Official, while still permitting a measure of flexibility.

10. § 292.17. The title should use the word "impact" rather than "benefits." In fact, the substance of the section does address "adverse impacts" at 292.17(f).

11. § 292.17(f) should be expanded to require the applicant to more specifically identify adverse impacts. For example, the availability of a gambling venue will likely increase the number of problem and compulsive gamblers among the tribal members. See, California Research Bureau, *Gambling in the Golden State 1998 Forward* (May 2006), at 129. Statistical methods are now available to make sophisticated estimates of the number of new problem and compulsive gamblers generated by a new casino, and they should be utilized to estimate the number of tribal members who may be so affected. Id. at 84. Likewise, both property and violent crimes are likely to rise in the area, directly impacting tribal members. Id. at 141. Estimates should be made regarding this matter. The likelihood of disputes over membership should be addressed as should the social and political effect on those who oppose the casinos as inimical to what they believe is proper for the tribe. See generally, id. at 70.

12. § 292.18 should be made more specific. For example, tribes should be required to present a reliable economic analysis of the effect of the proposed casino on the existing tax base of the surrounding communities. It is well known that gambling does not increase the "total pool of money in the economy but rather redistributes it." Id. at 54. Consumers finance gambling by reducing their savings and other spending, causing a "displacement" effect which can and does reduce the sales tax base of the surrounding community. Id. at 54-55. Tribes should also be required to present a reliable economic analysis of the effect of the new gambling on any existing non-tribal gaming enterprises. In addition, tribes should be required to make reliable estimates of the number of new non-tribal compulsive and problem gamblers likely to be generated by the new facility, Id. at 84, and to describe how, if at all treatment will be provided.

13. §§ 292.19(a)(1) and 292.13(b) - These sections provide that the Regional Director must consult with the appropriate state and local officials as part of the secretarial determination process, but they fail to identify who might be the appropriate officials. The States recommend the rule list some key officials by way of example who should be among those notified for the consultation. For example, the appropriate state officials should include the Governor and the Attorney General at a minimum, and should include the appropriate state agency regulating gaming activities within the State. For local government, the appropriate officials would include the chairperson of a county board of supervisors or commissioners and the chief county planning official, the chief law enforcement officer of the county, such as a sheriff, and equivalent officials in any city within the affected area. For states that have multiple overlaying townships, villages, and cities, in addition to counties, the Regional Director should be required to consult with those officials who have the critical land use, public safety, transportation, and social services responsibilities in the area. One of these two sections should list the appropriate officials using the following construction or similar language: ". . . including, but not limited to, the following officials: . . ."

14. § 292.20 - The consultation letter requests comments on numerous areas for which the appropriate state, local, and nearby tribal officials will have little information - essentially nothing more than the location and size of the proposed gaming establishment. The full record provided by the applicant under §§ 292.16, 292.17, and 292.18 will be in the possession of the Regional Director. The States recognize that much of the information compiled for the Regional Director under § 292.17 may be protected proprietary information. However, they suggest this rule be modified to allow a process for the consulted officials to request additional information from the full record. Presumably, it is in the best interests of the applicant to ensure that the consultation process is well-informed and successful, in order to obtain not only the positive secretarial determination, but also the gubernatorial concurrence.

15. § 292.20(a)(2) - In this section, the Regional Director is required to include in the consultation letter to the appropriate officials information on the proposed *scope of gaming*. Curiously, however, the applicant for the secretarial determination is nowhere required to provide the Regional

Director with that very information. While §§ 292.16, 292.17, and 292.18 require the applicant to provide considerable detail about the proposed gaming establishment, there is no reference to scope of gaming.

16. § 292.20(b)(6) - Appearing last on the list of areas on which comments are solicited from the appropriate officials is the following: "Any other information that may provide a basis for a Secretarial determination that the gaming is not detrimental to the surrounding community." While the language correctly recites what the secretarial determination must be in order for gaming to be lawful. *i.e.*, "*is not* detrimental to the surrounding community" (emphasis added), it is not the logical construction for the solicitation of information that is pertinent to the consultation. The solicitation should not be limited to information that supports a foregone conclusion. (The construction provided here is perfectly reasonable in § 292.17(f), because that section sets forth the information to be submitted by an applicant, who must successfully obtain the secretarial determination in order to conduct the gaming.) The provision here should read "Any other information that may assist the Secretary in determining whether gaming *is or is not* detrimental to the surrounding community."

17. § 292.21(b) - If the Regional Director decides the application does not support a positive recommendation, the proposed rule provides that the Regional Director notify the tribe, but no one else. 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 Interior does not provide with notice. The Regional Director and the Department should be required to consider all comments it timely receives.

18. § 292.19(c)(2) - Under this section, an applicant tribe may be permitted to address or resolve any issues raised in the responses. The Regional Director should at a minimum 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 the state, local, and nearby tribal jurisdictions. In such cases, the appropriate state, local, and nearby tribal 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 which may inform and guide them in their decisions concerning the secretarial determination.

19. § 292.22 – The provisions relating to the gubernatorial concurrence requirement are well written and logical. They follow the spirit and letter of Section 20 of IGRA and further the intent of Congress.

Again, the State Attorneys General appreciate the opportunity to comment on the proposed regulation. In our view, it will serve an especially useful purpose by clarifying exiting law, providing guidance to the appropriate decision-makers and working to avoid contentious and protracted litigation over Indian gaming on parcels of land removed from existing reservations.

Please do not hesitate to contact us if you need additional information. You may direct inquiries to Charlie McGuigan, Legal Director, Conference of Western Attorneys General (CWAG), at (605) 773-3717, or Lynne Ross, Executive Director of the National Association of Attorneys General (NAAG) at (202) 326-6053.

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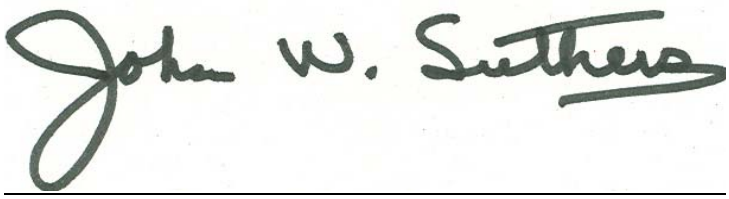
Attorney General of Alabama



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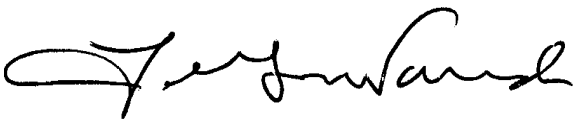

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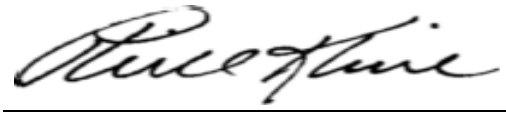

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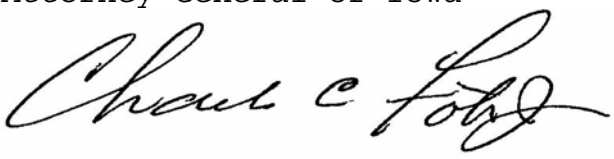

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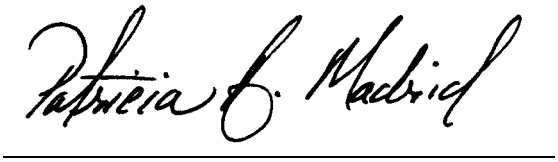

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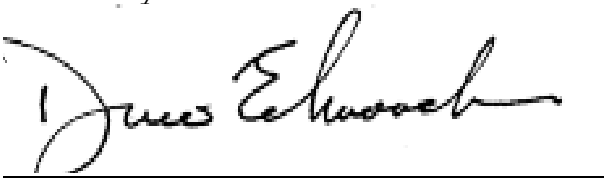

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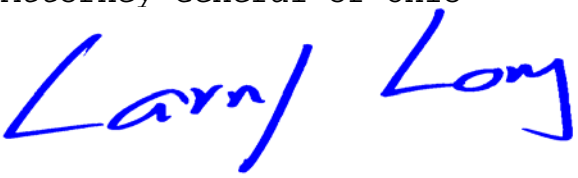

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