TESTIMONY OF
CARL J. ARTMAN
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

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Good morning Mr. Chairman and members of the Committee. It is a pleasure to be here today to address the issue of backlogs at the Bureau of Indian Affairs on land related matters, and the impact that this has on the ability of tribes to govern and engage in economic development.

When I served as Assistant Secretary – Indian Affairs, we identified the backlogs in fee-to-trust applications, probates, and leases as a foundational issue in problems that impacted tribes on numerous levels. This backlog prohibited tribes from fully exercising their sovereignty and jurisdiction over these lands, inhibited tribal economic development, and forestalled the vesting of rights for individual tribal members.

The need to address this issue became immediately apparent at the first hearing this Committee held on this issue during my tenure, on October 4, 2007. In preparing for the hearing, we were not able to gather consistent data to quantify the problem for ourselves, for you, or our tribal stakeholders. The Department could not identify, with certainty, the number of pending fee-to-trust applications in the regions; it could not determine when off-reservation trust applications first came to the Central Office; and it could not determine the status of pending leases. I pledged to you, at the end of the hearing, that we would resolve these issues and make substantial forward progress.

On May 22, 2008, this Committee revisited the issue. At that point we were able to report significant progress. In the eight months between hearings, the employees of the Department involved in leasing and trust acquisition focused their efforts to resolve these identified issues. In that time:

1) We were in the final phase or completed the process to take into trust nearly 65,000 acres of land.
2) We completed the transition to the Trust Asset and Accounting Management System, thereby improving the Department's access to current data regarding the status of land holdings and applications.
3) We identified the number and locations of pending commercial leases in the Department's system.
4) We assigned additional personnel to help reduce the lease backlog associated with recent oil and gas lease bids.

We began the process to reduce the backlog of applications by looking at potential policy changes, through either new or amended regulations. Compilation and analysis of the data quickly revealed that the backlog was not a policy problem, but a management choice. The regulations at 25 CFR 151 *et seq.* adequately outlined the necessary processes to acquire the land into trust. The Department did not manage those processes to incentivize and finalize the trust acquisition.

Therefore, we changed our approach the fee-to trust process. First, we quantified and qualified the extent of the backlog. We were able to determine that the Department had 1,489 fee-to-trust applications.

Second, we made completion of the fee-to-trust applications a priority that manifested itself in annual performance goals that impacted every person involved in the fee-to-trust process, ranging from the intake specialist at the agency level all the way to the director of the Bureau of Indian Affairs. The Department has excellent employees that want to perform at their best. However, they have too many demands on their time and, often times, little direction on what to do first. The BIA does not have employees dedicated to only fee-to-trust acquisitions. This is a responsibility that falls onto the shoulders of persons that review leases, process lease payments, answer data calls, and contend with various other issues that fall on their desk everyday. If these tasks are not prioritized through a meaningful method, all of the tasks will suffer. The other option is appropriation of funds to hire and train additional personnel to efficiently manage all the issues currently managed by one person.

Our third initiative was the development of a Fee-to-Trust Handbook. At that time, each of the BIA's eleven regions receiving fee-to-trust applications managed the process differently. Applicants in one region were required to submit an environmental impact statement, while an applicant in another region with a similarly situated piece of land would qualify for a categorical exclusion. In some regions, applicants would submit reams of information regarding the status of the land, and merely a summary in others. This national inconsistency bred frustration, imposed geographical discrimination, and baited litigation. Regional domination of the process made meaningful data collection and analysis impossible.

Deputy Director Vicki Forrest managed with aplomb the Handbook development. It was approved and disseminated to the regions in May 2008. It is now used by all of the regions, and, hopefully, it has brought some consistency to the fee-to-trust process.

Finally, we addressed unique problems with unique solutions. Applicants seeking to take off-reservation land into trust for non-gaming purposes had a unique problem. To resolve this matter, we replaced the three people that allowed these applications to linger, sometimes over a decade, with one very motivated person. Kevin Bearquiver, now the Deputy Director for Indian Services, reviewed each of the 44 applications over a four

month period, made final determinations on some of them or requested specific information from the applicant Tribes to allow for final determinations.

By May 2008, we were able to return here and tell you that of the 1,489 applications, 89 were completed, 266 were moving into the final stages of acquisition, 90 were withdrawn, and 613 pending requests lacked sufficient information required by the regulations. Of the remaining 363 land-into-trust applications:

- 178 pending applications were waiting on local government comments or tribal responses to questions;
- 45 were undergoing NEPA analyses;
- 35 were being surveyed for hazardous materials impacts; and
- 105 were being reviewed to determine if there are title-related issues that must be resolved before a land-into-trust determination can be made.

I wish I could tell you we had similar success with leasing and appraisals. The best we were able to accomplish in the eight months between hearings was an accurate quantification of the outstanding appraisals and leases. We began discussion of a solution for appraisals that involved the use of blanket appraisals of lands that could be similarly situated. With regards to leases, we moved people, funds, and equipment to concentrate on unique issues in specific areas, such as the processing of oil and gas leases on the Fort Berthold Reservation and commercial leases for the Agua Caliente tribe in the Palm Springs Office.

The Department of the Interior and its Bureau of Indian Affairs improved the timeline for taking land-into-trust. The real impact will occur if these improvements are made a part of the fabric of the organization. The Department and the BIA are sometimes a necessary and sometimes a helpful partner with the tribes in developing the latter's future. Tribes must carefully gauge their reliance on the federal government. And tribes should render the strategic determination if they want or need land taken into trust for economic development.

The purpose of taking land into trust, set out in the Indian Reorganization era, was to re-establish the land base that had been allotted in the previous decades. This land base would create a foundation for tribal governments to exercise their sovereignty to the exclusion of others. It would provide tribes the protection of the federal government in the ownership of the land, a protection that harkened back to pre-colonial times through the initial years of our government, and in the exercise of their jurisdiction. This IRA based process is still a very necessary process as tribes struggle to regain control over a portion of their lands.

In this era of Self-Determination, tribes have developed the internal expertise and experience to effectively manage their own lands. Tribal governments run their own land, title, and records offices. They regulate land use through their own laws that oversee development and conservation on the reservation. Tribal governments are once

again managing their lands in accordance with their culture and needs, be it a need for development or a mandate for environmental stewardship.

The decision to take land into trust by the tribal government has ramifications that may not have been considered. Tribes may wish to approach the issue from the perspective of "should we take this land into trust," instead of "we must take this land into trust."

The federal government states it wants to promote economic development in Indian country. It supports this claim with programs like loan guarantees, the 477 program, training grants, and bonding authority. It also claims that taking land into trust will further economic development. This is a concept I promoted when speaking about this issue. And yes, taking land into trust may help a tribe with an aspect of its economic development plan. Some of the aforementioned federal programs may be limited to use for developments on trust land. The exercise of sovereignty may benefit tribal economic development in determining the use of the land, the timing of development, and the extent of sovereign immunity for those entities that operate on those lands.

Real economic development flourishes in markets that exhibit both flexibility and predictability. Economic development in Indian country requires, among other things, government transparency, an accessible and stable legal and political infrastructure, and a tribal government that acts quickly in a market rife with competition. It is the latter point that argues against taking all land into trust.

Perhaps, the first question a tribal government should ask is whether taking this land into trust will promote economic development. The tribal government may determine that the process takes too long, especially when compared to how fast the market moves. In addition, budget constraints on the Department may make it a longer process or perhaps it will eliminate tools like the fee to trust consortium. The tribal government may wish to consider that once it is in trust, the land cannot be collateralized to finance other projects. Once it is under federal control, the Tribe can no longer lease it or market it as it sees fit, instead the federal government must now approve those acts. The government may weigh the benefits against the fact that the mere process of taking it into trust is time consuming, expensive, fraught with litigation threats, wastes local political capital, and may compel the tribe to negotiate prematurely intergovernmental agreements with their neighbors.

If the land is taken into trust, the tribe will be able to clearly exercise its authority over the land. But in many cases that authority has been limited over the decades by the Supreme Court. Once the land is in trust, the tribe knows, with some degree of certainty, what laws apply on that land. The tribe knows that state and local tax, zoning, and environmental laws are not applicable on those lands. And if given the choice between having the land in trust and not in trust, most tribes will go with the former.

However, this could become less of a Hobson's Choice if the Department made a clear determination on the applicability of 25 U.S.C. 177 to on-reservation lands. Especially since the Department is not sure how 25 USC 177's restraint on alienation applies to fee

lands in reservations, thereby essentially foreclosing the benefits of on-reservation fee land.

In the last administration, a Solicitor's Opinion from the Department may be read to imply that Indian tribes' authority to engage in real estate transactions relating to lands they own in fee simple absolute title extends only to off-reservation land and that tribe must seek federal approval for sales, leases, and mortgages of reservation fees lands. Federal courts that have addressed this issue have rejected this implied limitation on tribal authority. Tribes routinely engage in transactions relating to reservation fee lands without federal approval. BIA has not claimed any approval authority over them nor is it likely that BIA, already overburdened, wants to assume these new duties.

This opinion has the potential to limit choices in Indian country and sow doubt among title companies regarding the authority of tribes to engage in real estate transactions relating to their lands owned in fee simple title. This could inhibit economic development, create further unacceptable delays in closing business transactions and tribal home loans, and force tribes, alone among owners of fee land, to incur costs of obtaining acts of Congress in order to engage in routine real estate transactions.

Tribal sovereignty would suffer as tribal governments' decisions become subject to second-guessing by federal bureaucrats. In view of the circumstances that the federal government most likely does not want to assume additional trust burdens, the potential oversight impinges on a forty-year old federal policy of encouraging tribal self-determination, and that this may limit tribal options, the Interior Department should issue an additional opinion that Section 177 does not apply to lands owned by tribes in fee simple absolute and that tribes require the approval of neither the Interior Department nor the Congress to use these lands as the tribes see fit.

I offer my best wishes Assistant Secretary Echo Hawk, his staff, and employees of the BIA as they continue to struggle with these complex and emotional issues.

This concludes my statement.