TESTIMONY
OF
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ACTING DEPUTY ASSISTANT SECRETARY – INDIAN AFFAIRS
FOR POLICY AND ECONOMIC DEVELOPMENT
DEPARTMENT OF THE INTERIOR
AT THE OVERSIGHT HEARING
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING
TAKING LAND INTO TRUST

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Good morning, Mr. Chairman and Members of the Committee. My name is George Skibine, and I am the Acting Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs at the Department of the Interior. I am pleased to be here today to discuss the role of the Department in taking land into trust and the procedures used when the land is for gaming purposes.

The Department manages approximately 46 million acres of land held in trust for Indian tribes. The basis for the administrative decision to place land into trust for the benefit of an Indian tribe is established either by a specific statute applying to a tribe, or by Section 5 of the Indian Reorganization Act of 1934 (IRA), which authorizes the Secretary to acquire land in trust for Indians "within or without existing reservations." Under these authorities, the Secretary applies her discretion after consideration of the criteria for trust acquisitions in our "151" regulations (25 CFR Part 151), unless the acquisition is legislatively mandated.

The regulations, first published in 1980, provide that upon receipt of an application to acquire land in trust the Bureau of Indian Affairs (BIA) will notify state and local governments having regulatory jurisdiction over the land of the application and request their comments concerning potential impacts on regulatory jurisdiction, real property taxes, and special assessments. In reviewing a tribe's application to acquire land in trust, the Secretary considers the: need; purposes; statutory authority; jurisdictional and land use concerns; the impact of removing the land from the tax rolls; the BIA's ability to manage the land; and compliance with all necessary environmental laws.

The regulations impose additional requirements for approval of tribal off-reservation acquisitions. The Secretary is required to consider the: location of the land relative to state boundaries; distance of the land from the tribe's reservation; business plan; and state and local government impact comments. In doing so, the Secretary "shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition . . . [and] greater weight to the concerns raised" by the local community the farther the proposed acquisition is from the tribe's reservation.

When the acquisition is intended for gaming, consideration of the requirements of the Indian Gaming Regulatory Act of 1988 (IGRA) are simultaneously applied to the decision whether to take the land into trust. Section 20 of IGRA does not provide authority to take land into trust for Indian tribes. Rather, it is a separate and independent requirement to be considered before gaming activities can be conducted on land taken into trust after October 17, 1988, the date IGRA was enacted into law. Specifically, Section 20 provides that if lands are acquired in trust after October 17, 1988, the lands may not be used for gaming, unless one of the following statutory exceptions applies:

(1) The lands are located within or contiguous to the boundaries of the tribe's reservation as it existed on October 17, 1988;

(2) The Indian tribe has no reservation on October 17, 1988 and the trust lands are located in Oklahoma and (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or (ii) are contiguous to other land held in trust ort restricted fee status for the Indian tribe in Oklahoma;

(3) The tribe has no reservation on October 17, 1988, and "the lands are located…within the Indian tribe's last recognized reservation within the state or states where the tribe is presently located;"

(4) The "lands are taken into trust as part of: (i) the settlement of a land claim; (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition."

During this Administration, the Secretary has approved eight applications to take land into trust that have qualified under these various exceptions to the gaming prohibition contained in section 20 of IGRA. Of these eight, three were on-reservation acquisitions (Suquamish, Picayune, and Skokomish), three were acquisition of restored lands for restored tribes (Little Traverse Bay Band, Ponca Tribe of Nebraska, and United Auburn of California), one was for a newly Federally-acknowledged tribe under the acknowledgment process (Nottawaseppi Huron Potawatomi), and one was for lands acquired in trust as part of the settlement of a land claim (Seneca Nation of New York).

Finally, an Indian tribe may also conduct gaming activities on after-acquired trust land if it meets the requirements of section 20(b)(1)(A) of IGRA, the so-called "two-part determination" exception. Under section 20(b)(1)(A),

(1) gaming can occur on the land if the Secretary, after consultation with appropriate state and local officials, and officials of nearby tribes, determines that a gaming establishment on newly-acquired land will be in the best interest of the tribe and its members, and would not be detrimental to the surrounding community, but

(2) only if the Governor of the state in which the gaming activities are to occur concurs in the Secretary's determination.

Since 1988, state governors have concurred in only three positive two-part determinations for off-reservation gaming on trust lands: the Forest County Potawatomi gaming establishment in Milwaukee, Wisconsin; the Kalispel Tribe gaming establishment in Airway Heights, Washington; and the Keweenaw Bay Indian Community gaming establishment near Marquette, Michigan. During this Administration, the Secretary has made two such affirmative determinations: One for three Wisconsin tribes seeking a gaming establishment in Hudson, Wisconsin, and the other for the Jena Band of Choctaw seeking a gaming establishment in Logansport, Louisiana. In both cases, the governors of the affected states have refused to concur in the Secretary's determinations.

Currently, there are eleven applications for two-part determinations under section 20(b)(1)(A) pending with the Bureau of Indian Affairs for sites in New York, Wisconsin, Michigan, California, and Oregon. Of these, only one concerns the proposed acquisition of land in a state other than where the tribe is currently located. However, more applications are rumored to be in development for cross-state acquisitions, including potential applications in Ohio, Colorado, Illinois, and New York. It is within the context of this emerging trend that Secretary Norton has raised the question of whether Section 20(b)(1)(A) provides her with sufficient discretion to approve or disapprove gaming on off-reservation trust lands that are great distances from their reservations, so-called "far-flung lands."

We have spent substantial effort examining the overall statutory scheme that Congress has formulated in the area of Indian self-determination and economic development. This includes a careful examination of what Congress intended when it enacted Section 20 (b)(1)(A). Our review suggests that Congress sought to establish a unique balance of interests. The statute plainly delineates the discretion of the Secretary, limiting her focus to two statutory prongs. Also, by requiring that the Governor of the affected state concur in the Secretary's determination, the statute acknowledges that in a difference of opinion between a sovereign tribe and an affected state, the state prevails. Further, at least on its face, Section 20(b)(1)(A) does not contain any express limitation on the distance between the proposed gaming establishment and the tribe's reservation, nor is the presence of state boundaries between the proposed gaming establishment and the tribe's reservation a factor.

Our review indicates that the role of the Secretary under section 20(b)(1)(A) is limited to making objective findings of fact regarding the best interests of the tribe and its members, and any detriment to the surrounding community. Therefore, while the trust acquisition regulations provide broader discretion, Section 20(b)(1)(A) does not authorize the Secretary to consider other criteria in making her two-part determination, thus limiting her decision-making discretion to that degree. It should be noted that neither this Administration, nor previous ones, have ever approved a two-part determination under Section 20(b)(1)(A) of IGRA that would authorize a tribe to engage in gaming activities on land located in a state other than where the tribe is

presently located. Although off-reservation acquisitions for gaming under Section 20(b)(1)(A) are subjected to a very lengthy approval process, potential ventures between tribes and their financial partners keep emerging because neither IGRA nor the main land acquisition authority in the Indian Reorganization Act, or regulations promulgated thereunder, close the door on these projects. 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.

In addition, there have been instances where an Indian tribe submitted an application to take land into trust for a non-gaming purpose, and subsequently attempted to change the use of the property to gaming. While this practice is discouraged, it is possible because the United States does not permit deed restrictions to be attached to land owned by the Government, and trust lands are lands owned in fee by the United States for the benefit of an Indian tribe. It should be stressed that Section 20 prohibits all Indian gaming on land acquired after October 1988, and this prohibition applies regardless of the original purpose for which the land was acquired. Absent an exception under Section 20(b), a tribe would still be required to secure a favorable two-part determination including concurrence by the State Governor in order to legally engage in Indian gaming on that land. It is also important to emphasize that before trust land can be used for gaming, even if acquired for another purpose, it must meet other requirements of IGRA, which include a determination that the land in question is "Indian land" over which the tribe exercises jurisdiction and over which it exercises governmental power; receive approval of a gaming ordinance by the Chairman of the National Indian Gaming Commission; and receive approval of a tribal/state gaming compact by the Secretary if the tribe is seeking to engage in class III gaming activities on the land.

Taking land into trust is an important decision not only for the tribe seeking the determination but for the local community the land is located in. The regulations seek to ensure that the local community is kept informed and allowed to participate in the process. Any community comments received are considered before a determination is made whether to take the land into trust. The tribe and the public are also given an opportunity to appeal to federal court.

In addition, the Department recognizes the growing concerns about land venue shopping by tribes, especially for gaming purposes, and the concerns some have expressed about efforts to take developed (or land with development potential) land into trust. We are evaluating closely the expansion of tribal interests in filing fee-into-trust applications for sites ever more distant from current geographic locations or for sites with significant implications for state and local jurisdictions.

Under 25 C.F.R. parts 151.10 and 151.11 the Department is required to consider, when determining whether to take land into trust, whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status. The Department is also evaluating the implications of taking land into trust on other issues such as land fractionation. For example, the Department and Congress have been actively engaged in efforts

designed to reverse the negative effects of fractionation on individual Indian allotments. As such, it may be prudent to consider whether steps should be taken to limit, or eliminate, efforts to take land into trust for individual Indians as one additional means of preventing future fractionation.

While the Department has not made any decisions to alter the status quo, we recognize serious concerns exist. The Department will, of course, communicate and work with Congress and other affected parties if significant changes are proposed for the fee-into-trust program.

This concludes my remarks. I will be happy to answer any questions the Committee may have. Thank you.