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DEPARTMENT OF INTERIOR'S RECENTLY RELEASED GUIDANCE ON TAKING LAND INTO TRUST FOR INDIAN TRIBES AND ITS RAMIFICATIONS

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

Wednesday, February 27, 2008

Serial No. 110-60

Printed for the use of the Committee on Natural Resources



Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

40-943 PDF WASHINGTON : 2008

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OVERSIGHT HEARING ON "DEPARTMENT OF INTERIOR'S RECENTLY RELEASED GUIDANCE ON TAKING LAND INTO TRUST FOR INDIAN TRIBES AND ITS RAMIFICATIONS."

Wednesday, February 27, 2008
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to call, at 11:10 a.m. in Room 1324, Longworth House Office Building, Hon. Nick J. Rahall [Chairman] presiding.

Present: Representatives Rahall, Kildee, Christensen, Napolitano, Sarbanes, Hinchey, Kind, Inslee, Baca, Herseth Sandlin, and Fallin.

STATEMENT OF HON. NICK J. RAHALL, II, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

The CHAIRMAN. The Committee is meeting today for the purpose of a hearing which will focus on a guidance memo issued by the Department of the Interior in early January affecting fee-to-trust applications. Under this guidance, the Department now employs a never-before-used commutable distance test that requires a series of questions being answered to determine whether the anticipated benefits outweigh potential negative consequences to the tribe.

Because of this new guidance, the Department denied fee-to-trust applications for 11 tribes and returned fee-to-trust applications for another 12 tribes. Action is expected on the other pending applications.

The hearing today is not intended to examine the merits of the applications that were denied or returned. Instead, today's hearing will focus on how the new guidance was developed, whether it was lawfully enacted, the ramifications of the new requirements on all off-reservation fee-to-trust applications, and whether this signifies an attempt by the administration to change Federal policy toward Indian tribes.

The potential change to the Federal policy toward Indian tribes is disturbing. In the area of healthcare, this administration has taken a position that once an Indian leaves a reservation, that person is no longer an Indian. To support this strange concept, the President has zeroed out funding for urban Indian healthcare.

Now we see this occurring at the Bureau of Indian Affairs, and we have to question if this administration is advocating a policy to keep Indians on the reservation.

Finally, I am particularly interested in the lack of consultation on this matter between the Department and the tribes. Unfortunately, the lack of consultation appears to be a reoccurring trend with this administration. As a result, I intend to introduce legislation that will mandate that the administration adequately consults with the Indian tribes. I hope my colleagues will join me in sponsoring that legislation when it is introduced.

For today, however, we will focus on the new guidance, and I want to thank all of the witnesses who have traveled to be with us this morning and give other Members present a chance for opening statements, if they so desire.

The gentleman from Michigan, Mr. Kildee, who is Co-Chair of our Indian Caucus.

[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall, II,
Chairman, Committee on Natural Resources

The Committee will come to order. Today's hearing will focus on a recent Guidance memo issued by the Department of the Interior in early January affecting fee to trust applications.

Under this Guidance, the Department now employs a never before used "commutable distance" test that requires a series of questions be answered to determine whether the anticipated benefits outweigh potential negative consequences to the tribe.

Because of this new Guidance, the Department denied fee to trust applications for 11 tribes and returned fee to trust applications for another 12 tribes. Action is expected on other pending applications.

The hearing today is not intended to examine the merits of the applications that were denied or returned. Instead, today's hearing will focus on how the new Guidance was developed, whether it was lawfully enacted, the ramifications of the new requirements on all off-reservation fee to trust applications, and whether this signifies an attempt by the Administration to change Federal policy towards Indian tribes.

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Finally, I am particularly interested in the lack of consultation on this matter between the Department and the Tribes. Unfortunately, the lack of consultation appears to be a reoccurring trend with this Administration. As a result, I intend to introduce legislation that will mandate that the Administration adequately consults with Indian tribes. I hope my colleagues will join me in sponsoring that legislation when it is introduced.

For today, however, we will focus on the new Guidance and I thank all the witnesses who have traveled to be with us this morning.

STATEMENT OF HON. DALE E. KILDEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. KILDEE. Thank you very much, Mr. Chairman. I appreciate very much these hearings, and I think we have some major issues to discuss, the whole idea of consultation.

I met with the under secretary yesterday, and it was a very good meeting. I pointed out that this sovereign-to-sovereign relationship that has trust responsibility is not a patronizing one. It is one really where it is sovereign to sovereign. I pointed out the three

sovereignties you recognized in Article 1, Section 8, and I think if there is even any doubt, we should assume that this is with consultation with the tribes and that the Administrative Procedures Act be used in that. But I did appreciate the fact that the under secretary did drop by my office yesterday for a discussion on this.

The CHAIRMAN. I thank the gentleman. Do other Members wish opening statements? If not, we will proceed with the agenda.

The first witness is The Honorable Carl Artman, assistant secretary, Indian Affairs, United States Department of the Interior.

Carl, we welcome you once again to our Committee. I appreciate your consultation with us on this issue, and we do have your prepared testimony and, as is the case with all witnesses, the prepared testimony will be considered as read and printed in the record, and you may proceed as you desire.

STATEMENT OF THE HON. CARL ARTMAN, ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

Mr. ARTMAN. Thank you, Mr. Chairman, Ranking Member Young, and Committee Members. My name is Carl Artman. I am the assistant secretary for Indian Affairs, and I would like to spend a few minutes this morning discussing the January 3rd memorandum regarding off-reservation, land-into-trust applications as related to gaming.

The January 3rd memorandum dealt with tribal requests for the Department to take off-reservation land into trust for gaming. There were approximately 30 applications for land into trust under the two-part determination exception to the Indian Gaming Regulatory Act general prohibition against gaming on land acquired after October 17, 1988.

In the 20 years since the Indian Gaming Regulatory Act was passed, only four times has a Governor concurred in a positive, two-part, secretarial determination pursuant to that exception. In the last four years, the number of applications has more than doubled, and the Bureau of Indian Affairs' regional directors lacked clarification on how to make consistent recommendations on the applications.

The Indian Gaming Regulatory Act authorizes tribes to conduct gaming and does not contain any authority to take land into trust. Additionally, Section 2719[c] of the Indian Gaming Regulatory Act provides "[n]othing in this section shall affect or diminish the authority and responsibility of the secretary to take land into trust."

This guidance instructs the Bureau of Indian Affairs' regional directors and Office of Indian Gaming to begin their analysis of applications using the 151 factors: existence of statutory authority and limitations; need; purpose; impact on the state and its political subdivisions; Bureau of Indian Affairs' responsibility to discharge additional responsibilities; compliance with NEPA, et cetera.

For off-reservation applications, 151.11[b] directs the secretary to give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition, the further the acquisition is from the applicant's reservation, and greater weight to concerns raised by state and local governments as to impacts on jurisdiction, real property taxes, and special assessments.

Of the 30 applications, some were two or 20 miles away. Over half were over 100 miles away, while others were over 1,000 miles away.

The Indian Reorganization Act aims to counter the effects of the allotment era by growing the tribal land base and strengthening tribal governments to promote flourishing Indian communities.

The BIA is used to dealing with requests for land off reservation 20, 30, or 50 miles away from the tribe's reservation. The BIA, however, is not accustomed to assessing applications for land 100, 200, or 1,500 miles away from the reservation.

Clarification of the analysis used under Section 151.11[b] was needed because the 151 regulations do not elaborate on how or why the Department is to give greater weight or greater scrutiny as the distance from the reservation increases.

The January 3, 2008, guidance memo provided that clarification, and it advises the BIA regional directors to give a hard look at the 151.11[b] requirements and assess the potential for negative consequences on reservation life before making a recommendation. The Department has now issued several letters consistent with this guidance memo.

In conclusion, the Department does favor tribal economic development and has, and continues to, support off-reservation enterprises. I look forward to answering any questions you may have.

[The prepared statement of Mr. Artman follows:]

Statement of Carl J. Artman, Assistant Secretary—Indian Affairs, U.S. Department of the Interior

Good morning, my name is Carl Artman, and I am the Assistant Secretary—Indian Affairs at the Department of the Interior (Department). I am here today to discuss guidance issued on January 3, 2008, to Bureau of Indian Affairs (BIA) Regional Directors and to the Office of Indian Gaming (OIG). The January 3rd memorandum dealt with tribal requests for the Department to take off-reservation land into trust for gaming.

We had approximately 30 applications for land to be taken into trust under the "two-part determination" exception to the Indian Gaming Regulatory Act's (IGRA) general prohibition against gaming on land acquired into trust after October 17, 1988. That exception, 25 U.S.C. §2719(b)(1)(A), allows gaming if "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination."

In the 20 years since the passage of IGRA, only 4 times has a governor concurred in a positive two-part Secretarial determination made pursuant to section 20(b)(1)(A) of IGRA. The number of applications for this exception has increased in recent years, and BIA regional directors lacked clarification on how to make consistent recommendations on the applications.

There has also been confusion about the interplay between IGRA and the Indian Reorganization Act (IRA). The IGRA authorizes tribes to conduct gaming and does not contain any authority to take land into trust. Specifically, section 2719(c) of IGRA provides: "[n]othing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." In contrast, the Department's authority to take land into trust for Indians stems from section 465 of IRA and its implementing regulations, 25 C.F.R. Part 151. It has been unclear whether the BIA should first decide whether a trust acquisition would be in the best interest of an Indian tribe and not detrimental to the surrounding community under section 2719 of IGRA or whether the land should be acquired in trust under Part 151.

The guidance instructs the BIA Regional Directors to begin their analysis of applications using the Part 151 factors. The factors considered when analyzing a tribal

application under these regulations for land to be taken into trust include under 25 C.F.R. 151.10:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
(b) The need of the individual Indian or the tribe for additional land;
(c) The purposes for which the land will be used;
(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
(f) Jurisdictional problems and potential conflicts of land use which may arise; and
(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW, Room 4525 MIB, Washington, DC 20240.)

For off-reservation applications, as the distance between the tribe's reservation and the land to be acquired increases, 25 C.F.R. Part 151.11(b) directs the Secretary to give:

(1) greater scrutiny to the tribe's justification of anticipated benefits from the acquisition; and
(2) greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

Some of the 30 applications under consideration were for distances only 2 or 20 miles away from a tribe's reservation while others were for land over 1000 miles away. Traditionally, the off-reservation applications the Department has seen for non-gaming purposes have been close to the reservation with the intention of serving reservation residents. The BIA is used to dealing with requests for land 20, 30, or 50 miles away from a tribe's reservation. The BIA is not accustomed to assessing applications for land 100, 200, or 1500 miles away from a tribe's reservation. The Part 151 regulations do not elaborate on how or why the Department is to give "greater weight" and "greater scrutiny" as the distance from the reservation increases. Clarification of the analysis used under section 151.11(b) was needed.

The Department's guidance memorandum of January 3, 2008, provided that clarification. The Department looked to the purpose of the IRA and the factors that influenced its enactment. The IRA was enacted in 1934 in the aftermath of the disastrous allotment era when millions of acres of reservation land was broken up and tribal communities were floundering. The IRA aims to counter the effects of the allotment era by growing the tribal land base and strengthening tribal governments to promote flourishing Indian communities.

One of the clarifications within the guidance relates to 151.11(b). We are concerned that taking land into trust for economic development far from the reservation may increase the potential for negative consequences on reservation life. The typical tribal gaming facility provides job training and employment for tribal members as well as a revenue stream. We are concerned that an economic enterprise too far away from the reservation to allow for reasonable commuting may end up harming the tribe by encouraging tribal members to leave the reservation for an extended period to take advantage of the job opportunities. Another factor that we examine involves state and local concerns, including jurisdictional problems. Thus, the guidance advises the BIA Regional Directors to give a hard look at these concerns before making a recommendation.

The Department has now issued several letters to tribes that are consistent with the new guidance. These provide clarification to the tribes and BIA Regional Directors on what must be submitted for an application to be approved. Knowledge of the process and consistency in review of the applications will promote speedier decision-making.

The Department favors tribal economic development and has many initiatives to promote and support tribes as they address the high unemployment and poverty rates found on many reservations. We have and do support off-reservation enterprises. The farther from the reservation the land acquisition is, the more difficult it will be for the tribal government to efficiently and effectively project and exercise its governmental and regulatory powers, especially if the distance is in the hundreds of miles.

This concludes my testimony. I welcome any questions that the Committee may have.

The CHAIRMAN. Thank you, Carl. I appreciate very much your testimony.

Let me first recognize a new Republican Member of our Committee that is with us today, the gentleman from Nebraska, Mr. Adrian Smith. We welcome you. I am sure the Ranking Member, should he happen to show up today, would be glad to welcome you as well. And also a former colleague of ours on this side of the aisle and a former Member, a valued Member, I might add—let us not forget that—of our Committee on Natural Resources, the gentleman from California, Mr. Rick Lehman. Rick, good to see you again.

Carl, let me start by asking you about a draft in December '05 that the Department issued of proposed Part 151 regulatory changes. While these were never published in the Federal Register, they do include a similar commutability test, and a determination of whether there would be negative consequences to reservation life.

Would you please explain why the Department changed course and decided to issue these mandates and guidance as part of the rulemaking process?

Mr. ARTMAN. Thank you, Mr. Chairman. The 151 regulations and any amendments subsequent to the original ones have had a long and storied history throughout the last two administrations. As you may remember, at the end of the Clinton administration, some proposed regulations were put forward. In 2001, the current administration decided to hold off on issuing and going forward with those regulations until it had a chance to assess the impact that those might have. Since then, subsequent drafts have been made and developed but never put forward as proposed regulations.

To that end, we are, right now, working well within the confines of the current regulations, probably maybe not as best as we possibly could in a perfect world under perfect regulations, but we also look at the backlogs, backlogs on reservation, off reservation, nongaming and off-reservation gaming. We have managed to deal with all of those issues.

With regard to on reservation, whereas six months ago we did not know how many we had in our pipeline, we now know that we have approximately 1,300 applications that we know of, but only 215 of those were we actually able to move forward on, and we know exactly where those are, and we are moving forward, and we are dealing with those.

In terms of off-reservation, nongaming, for the past decade, we have had a fluctuating backlog within the central office on review of these, and when I first came on board, we had a backlog of approximately 40 of those applications. As of this week, the backlog on off-reservation nongaming will be zero. We have moved some back to the regional directors, saying that we have done our review and have no issues with it. Those will likely be approved. We have asked for further information on others, and we have recommended a negative finding on yet a few others, but we are moving forward.

I will just segue on that. We are taking land into trust that is off reservation, and most of those are 40 miles or below in those particular situations.

So with that kind of progress made on the 151 process, and taking land into trust and looking at what we had to deal with, whether or not we needed to issue additional regulations or go back and amend the regulations, we decided that we needed to focus more on the management issues. This guidance memo on 151.11[b] and how it impacts both gaming, and will have a residual impact on nongaming as well, addresses those management concerns.

Therefore, we do not feel we need to look to new regulations at this point, especially this late in the administration.

The CHAIRMAN. Part of that same draft was an indication that you would consult with the Indian tribes in January and February of '06. Could you report to us the results of that consultation process and the extent and what was put into the process by the tribes?

Mr. ARTMAN. Mr. Chairman, I am not sure. As I was not part of that process, I am not sure what was put into the development of that consultation process, but I would be happy to put together an answer for you and submit that to the Committee.

The CHAIRMAN. I would appreciate it. Before I ask my final question, as part of that same question about consultation, please explain why this guidance does not fall within the scope of Executive Order 13175, which is entitled "Consultation and Coordination with Tribal Governments."

Mr. ARTMAN. The January 3, 2008, memo clarifies existing regulations. We were not coming up with new policy. We were not coming up with new regulations. It does not create anything new. It simply clarifies for our regional directors, for our Office of Indian Gaming, to whom the memo was addressed, how they should be looking at these applications when they come in.

The applications of the tribes seeking off-reservation land into trust for purposes of gaming had lingered for quite some time, and there is an obvious lack of understanding perhaps of how to interpret the 151 regulations, be it 151.10 and 151.11, which are necessary for the off reservation.

When you looked at the applications, when you looked at where the process may have gotten hung up, this seemed to be one of the areas. Every tribe that submitted applications understood that 151.11[b] had to be answered. Looking at the applications, all of them attempted to answer that section. Sometimes it was multiple pages, sometimes it was multiple paragraphs, but the same issues that we raised in our memorandum were oftentimes dealt with by the tribes.

This was not presenting anything new to Indian Country. It was not a new policy, and as I said before, it certainly was not a new regulation. But for our folks, our internal folks, to whom this memo was addressed, that is where we were having the problem. It was just the management of that process.

The CHAIRMAN. I will have another question on the next round, but let me yield to my colleagues. Mr. Smith? Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman. Mr. Secretary, again, I appreciate the meeting we had in my office yesterday.

If you had anticipated the reaction from the tribes and the reaction from the Congress in this procedure, 151, would you have done things differently?

Mr. ARTMAN. That is an interesting hypothetical, Congressman. We expected that this would be an area that would receive a lot of attention. Indian gaming is an incredibly important part of the country's economy, an incredibly important part of many states' economies, and definitely a critical part of Indian Country's economy overall. It is a $27 billion industry.

Many of the tribes that submitted applications understand this very well, as they, themselves, already have Indian gaming on their reservations.

So we were not naive to the fact that this would be of great concern to many people: the tribes, the local neighbors that may be impacted, other tribes that may be nearby, and certainly to Congress. We expected that, and we looked at the consultation question, we looked at the APA questions very carefully and tried to make sure that what path we took was the correct one.

Now, you can certainly say that we erred in favor of not having consultation, and I think consultation and communication are an incredibly important part of our office and certainly my job.

Consultation, under both our own policy and under the executive order, are reserved for a very special place. There is a point in time when consultation has to be had, and certainly the Department of the Interior lays out a minute process to have that consultation, and it is usually reserved for the new policies and the new regulations. There are times when something may not rise to the level of consultation, but certainly communication is important.

We spoke with a number of tribes and associations as we were developing this. A number of the lawsuits that were out before this was published anticipated the final end point, I think, where we came. Again, the tribes, in their responses to their applications, their—trust applications on 151.11[b], also showed a good understanding of what that should be used for.

So I think, if we had to do it over again, perhaps expanded communications, but I want to be careful on the use of the word "consultation" and keep that reserved for the very special instances but not diminish the fact that we need to have dialogue and communication leading up to them.

Mr. KILDEE. I think it is a question, not only of practice or law, but of attitude, too. There is a fundamental to all of this consultation and Administrative Procedures Act. The underlying structure of that is really the idea of a sovereign-to-sovereign relationship. When we deal with Indian tribes, we are not dealing with the Knights of Columbus. I can say that because I am a member of the Knights of Columbus. We are not dealing with a social club.

We are dealing with a sovereign tribe, and I think, whenever there is a sovereign-to-sovereign relationship, then it is better to take the safer role, or, at least, there is the process of appeal, because there is no real formal process of appeal under the method which you use. Is that not correct? Complaint but maybe not appeal.

Mr. ARTMAN. There is certainly a process of appeal for the final decision, for the final agency action, and through the courts. In

terms of the memorandum itself, I would say, no, there is not, and, again, because we looked at that as a management memorandum.

Mr. KILDEE. I have been dealing with Indian matters for 32 years here in the Congress and 44 years of my elective life, and a strong underpinning of protection for everybody is the idea that sovereign-to-sovereign is a very, very important concept. As I mentioned in my office yesterday, it is not a patronizing type of sovereignty; it is a real sovereignty. And I would hope that that attitude permeates your Department.

I hope that, in the future, one would look, because we are having these hearings, which is taking time, and it is a value to us, but, I think, had you used the other method, we would be satisfied—more people, at least, the proper procedure that would give them a chance, at least, to formally appeal would have been in place. I yield back, Mr. Chairman.

Mr. ARTMAN. Thank you, Congressman Kildee, and I agree 100 percent with what you said, even in this administration. This administration is taking steps to make sure that all government employees understand the importance of consultation and communication with Indian tribes through the numerous training programs it has, including one that was unveiled just about two or three weeks ago. Thank you.

Mr. KILDEE. Thank you very much, Mr. Assistant Secretary.

The CHAIRMAN. The gentlelady from the Virgin Islands, Dr. Christensen.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman, and thank you for holding this hearing that follows up on the one that we had earlier.

I guess I would have two questions. The first one: Nothing diminishes the secretary's authority to acquire land into trust. What difference does it make how far away the land is, because there are those other considerations, the impact on other businesses, the four or five things that are listed that are also considered? So why does distance have to be considered if all of the other issues are responded to adequately?

Mr. ARTMAN. I think you raise a very important distinction, that distance from the reservation is just one of many factors that are considered in this process.

The 151 regulations, 25 C.F.R. 151 come from 25 U.S.C. 465, the Indian Reorganization Act. The purpose of the Indian Reorganization Act was to bring back the reservation to a status, perhaps if not at parity with where it was before the allotment era, as close as we could possibly get in our attempt to come back from the allotment era.

The Indian Reorganization Act, passed in 1934, allows tribes and the United States government to bring together those lands that they may have lost so that the tribes can bring back the people and also exercise sovereignty and jurisdiction over the reservations, and, hopefully, in the end, exercise self-governance, self-determination, and have a community that flourishes on that reservation within the sovereignty of the tribe.

151.11, which specifically speaks to the off-reservation portion of it, asks questions of how does that off-reservation acquisition benefit that community that was essentially being reestablished under the IRA? Specifically, 151.11[b] speaks to the distance issue.

151.11[b], to paraphrase, says that greater scrutiny shall be applied to applications, the greater the distance the land is from the applicant's reservation.

So there is a sliding scale. The greater the distance, the greater the scrutiny. You do not see the same kind of sliding scale applied in the second part of that test, which is the greater weight. That is just a general greater weight that has to be applied.

So the drafters of 151, time tested as it is, time, and the drafters concluded that when you are looking at off reservation, distance does become an important factor.

As is mentioned in the statement, we have experience dealing with two miles or five miles or 30 miles off reservation, and it is easy to see how they reflect back how that brings an individual back to the reservation or perhaps allows for job training and future applications on the reservation or around the reservation. You can see how that may bring a family back.

When you start getting into longer distances, in the hundreds or thousands, that question becomes more difficult to answer and, hence, the clarification.

Mrs. CHRISTENSEN. But if the tribe decides that it is workable, I agree with my colleague on the sovereignty issues there.

My second and last question is, am I correct that the distance is not an absolute prohibition; it just says greater weight, greater scrutiny?

Mr. ARTMAN. That is correct.

Mrs. CHRISTENSEN. So even given the greater weight and the greater scrutiny, the secretary can still decide to take that land into trust.

Mr. ARTMAN. The secretary has the discretion to take the land into trust or not take the land into trust.

Mrs. CHRISTENSEN. It is just greater weight, greater scrutiny, but no prohibition.

Mr. ARTMAN. There is no prohibition.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman.

The CHAIRMAN. The gentlelady from California, Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chair. It is interesting because I was intrigued by several other things that come to mind because other Federal agencies, Mr. Artman, follow your direction or your decision, your policy. Did the Department conduct an analysis of the guidance to determine how it would affect other Federal agencies, such as the SBA, that would deal with off-reservation and tribal activities and the impact on their future?

Mr. ARTMAN. Congresswoman Napolitano, no, we did not look at that, but to the degree that they follow what we do, in terms of working with tribes and granting money, perhaps, or status, in the case of the SBA, oftentimes they will look to see what the status is of that land. Is it in trust, or is it held in fee?

Mrs. NAPOLITANO. But would it affect their decision negatively, possibly, because of your direction and policy?

Mr. ARTMAN. It is hard to come to that conclusion without looking at the specific policy. If, for example, we are looking at IHS, the Indian Health Service, they have a very independent mind, and oftentimes our policies may be parallel, or they may even be at cross-purposes or perpendicular purposes, but HUD, IHS are great

examples of agencies out there that have a very independent mind in working with Indian tribes, and oftentimes we have different policies altogether.

Mrs. NAPOLITANO. But is it possible that someone may have a negative effect on them?

Mr. ARTMAN. I would suppose, in a hypothetical, yes, it is possible.

Mrs. NAPOLITANO. And as the result of guidance, the Department denied fee-to-trust applications for 11 other tribes, as was previously stated, and returned another 12. Explain the due process procedures afforded to each tribe whose application was denied.

Mr. ARTMAN. Each tribe, prior to that, and oftentimes, I think, up to a decade, had submitted applications complete with answering the questions under the 151 test.

In terms of what happens after they are returned, a number of things could happen.

One, our determination, since it is a final agency action, can be challenged in Federal court, or, if the tribe wishes, it could also resubmit an application. Nothing prohibits a tribe from resubmitting the application even multiple times.

Mrs. NAPOLITANO. But are you placing an undue hardship on that tribe by denying that application without grandfathering it?

Mr. ARTMAN. Grandfathering it for what, Congresswoman?

Mrs. NAPOLITANO. Why were these applications not grandfathered? You know, many of these fee-to-trust applications that were denied were pending for several years, according to staff.

Mr. ARTMAN. They were, and many of them were pending because our regional directors in the Office of Indian Gaming did not have an absolute answer or a consistent answer on how to apply 151.11[b].

Mrs. NAPOLITANO. Why were they not grandfathered under the existing fee-to-trust regulations?

Mr. ARTMAN. The regulations are the same regulations. Nothing has changed.

Mrs. NAPOLITANO. But you are saying they have to go to court to be able to appeal.

Mr. ARTMAN. Or they can resubmit the application, in accordance with the 151.

Mrs. NAPOLITANO. But you have already denied it once.

Mr. ARTMAN. But they have the ability to resubmit it.

Mrs. NAPOLITANO. Do they know that?

Mr. ARTMAN. Yes, they do.

Mrs. NAPOLITANO. Would that take an additional how many other years?

Mr. ARTMAN. Hopefully, with the changes that we are putting in place, this process will be far more efficient, on average.

Mrs. NAPOLITANO. When is this process being implemented?

Mr. ARTMAN. Ongoing. As I mentioned before, we are dealing with the off-reservation nongaming, we are creating a more efficient process in the on-reservation application process simply by understanding what we have in the pipeline, where it is at, and what we have to do to review it, and also changing the culture within the Department, that we have to move forward with these, even if we are to be sued.

With these specifically, these 11, nothing prohibits them from resubmitting the applications.

Mrs. NAPOLITANO. But in being able to resubmit or in resubmission, would that not put them at the back of the line again and another long waiting period?

Mr. ARTMAN. No, it would not. On January 4th, as you mentioned before, 11 tribes received letters that denied their application. I think it is another 11, actually, received letters that stated that we did not have sufficient information to review their application, and, largely, those came about in the last two years in the 109th Congress, and they had lingered with no additional information.

We also moved forward on, I believe, five applications, moved forward to the next step. We approved their FONMSI, their FONSI, their ROD, whatever needed to be done to move to the next stage. Those were moved to the next level. So we cleared out a lot of the clutter, if not all of the clutter.

Mrs. NAPOLITANO. I know. I am referring to the ones you denied. I know you say you have been moving some forward, but the ones that were denied, that were told that their application was not sufficient, or for whatever reason, whether it was incomplete, they have the ability to come back and refile. In being able to refile, what is going to be their status on the line of being able to be reviewed if you have backlog and insufficient personnel?

Mr. ARTMAN. Well, we do not have a backlog. A couple of things. First of all, we do not have a first-in/first-out process for fee-to-trust applications. We look at them in terms of completeness, and one of the biggest issues that we have is that we receive a lot of incomplete applications, either on the tribal side, or perhaps something we did that did not allow that——

Mrs. NAPOLITANO. I am sorry, Mr. Chairman, if I can pursue this.

But do you, in your application process, identify everything that has to be done? Some of my entities have filed for grants to Federal agencies, and because they did not cross a t or dot an i, they were rejected. Is it specific enough for them to understand what they need to provide and the timeframe they need to provide it in, whether it is the number of pages by the end of the month? You understand.

Mr. ARTMAN. Yes, ma'am. With our fee-to-trust handbook and with our Indian gaming checklist, there is sufficient information out there to submit a complete application, and those are some of the changes that we are making, the fee-to-trust handbook being one of them.

Mrs. NAPOLITANO. You are not changing in midstream.

Mr. ARTMAN. I am sorry? No, ma'am.

Mrs. NAPOLITANO. You are not changing rules midstream.

Mr. ARTMAN. Not at all. Not at all. Not at all.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

The CHAIRMAN. [Off mike.] The gentlelady from Oklahoma?

Ms. FALLIN. Yes. Thank you, Mr. Chairman. I am sorry I arrived late, so I did not get to hear some of the testimony.

In our State of Oklahoma, we have many Indian gaming facilities. I think, the last time I counted, it was 97, somewhere around

97, for a population of 3.5 million people, so I was just curious, in reading some of the background about when a tribe can take land into trust and when exemptions are given for gaming, and looking at some of the information that I had, it says that, in the last 20 years since the passage of the IGRA, only four times has a Governor concurred for the determination to be able to process those applications for gaming, if I am reading this right.

So I guess my question is that, in looking at when you take land into trust versus when you take land into gaming, and you say that you look at what is in the best interest of the tribe, what is in the best interest of the community—will it create jobs, and will it create investment?—how is that determination made, and I just do not know, when it comes to the gaming side of it, that it is in the best interest of the tribe, when, like in my state, we have around 95 different casinos and 3.5 million people? Mine is more informational because I just do not know how it works.

Mr. ARTMAN. Let me break that up into two different pieces: the 151 process, the fee-to-trust process; and then the Indian Gaming Regulatory Act process.

The 151 process; in order to game, you have to have land into trust, land that is held in trust, and if it is after October 17, 1998, you have to do some additional things. I will not get too much into that, a little bit in the second part.

Now, if it is off reservation, as we are discussing here today, there is a benefits test, if you will, on the 151, and that is the greater scrutiny on the benefits to the tribe, the further away the land is from the reservation. That, the IRA test, in many respects, because we are going back to the 1934 act, is really a test on governance, jurisdiction, sovereignty, bringing the land back, bringing the people back, and allowing a community to flourish. How does that acquisition, off reservation, benefit that community, which was the original target community of the 1934 act?

Switching over to the Indian Gaming Regulatory Act, a wholly separate act and one which does not inform the IRA process or the fee-to-trust process, according to its own words, under the two-part determination, if it is land acquired after October 17, 1988, and it is off reservation, you go through the two-part determination process, and part of that is looking to the benefits afforded to the tribe from that off-reservation gaming.

That is an economic test. Does the business plan read well? Is the tribe going to make money? Any other information that may fuel an economic test, and there is also a political test, too, of how does this impact the surrounding communities? Oftentimes, that is a very different answer than the greater-weight test of the 151, which is given greater weight when it is off reservation to the impact on the local and state communities.

So each one has parallel tests, but they have different weights, if you will, one being a governmental, jurisdictional one, and the other one being an economic and political one.

Ms. FALLIN. Thank you, Mr. Chairman. I am a new Member of this Committee, so I am just trying to figure out how this works. As I mentioned, the abundance of the casinos that we have in Oklahoma, and they are not like the Las Vegas casinos because we have a limited Class 3 and Class 2, but I wonder what kind of tests

we have for, like, my state, which is relatively small, when it comes to the economics of having numerous casinos that are located close to each other?

Maybe that is just between your agency and the tribes to work out, but it seems like, at times, that it might become a diluted market where tribes might not be able to be successful with their gaming operations just because of the immense competition between so many different operations.

Mr. ARTMAN. That is certainly something that the tribes consider, but that is really where the first consideration begins. Indian gaming is an inherently sovereign act. It is an act of the government, and the tribe controls that and has a lot of input into it, and it has become a very important and well-honed industry in and of itself, outside of just Indian gaming. The amount of economic development that it has brought to tribes and the excellent leadership that is exhibited by tribes is certainly something to be lauded and is very commendable.

Certainly, there are big markets out there. I have been to Oklahoma a few times and know what the market is like down there, and, in many respects, that is the first question that the tribe asks itself and then engages in a conversation with the state. For the most part, until the very end, if it is Class 3, we stay out of it. Again, we certainly want to do our best to promote tribal self-determination and self-governance.

Ms. FALLIN. OK.

Mr. ARTMAN. Thank you, ma'am.

Ms. FALLIN. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from California, Mr. Baca.

Mr. BACA. Well, thank you very much, Mr. Chairman. Let me ask this question. Why did the Department of the Interior issue a guidance without any consultation or prior notice?

Mr. ARTMAN. Thank you, Congressman Baca. We view this guidance as a management tool, a clarification for internal individuals, in this case, addressed to the Office of Indian Gaming in Washington, D.C., and our regional directors in the field that deal with this issue.

The regulations have not changed. The policy has not changed. There has always been that greater-scrutiny test that has been part of the regulations in 151.11[b]. How it was applied, how it was interpreted seem to be a point of confusion, and, if not, a point of stasis within the arteries of Indian Affairs.

We wanted to be able to break that free to create consistency in our policies, and, again, we viewed this as an internal memorandum on management. This was not creating new policy and was not creating new regulations, and, as I mentioned before, this consultation is very important to us, as well as communications. But I think that those are, in many ways, two separate things, and I have heard consultations quite a bit, not just here, but also as it relates to what we did on January 3rd, and consultation, I think, should be reserved precisely for what the executive order promoted: new policy, new regulations.

We remain committed to that, but, again, nothing new came out of this, and we feel, looking at the applications that the tribes submitted, there was certainly an understanding, within the applica-

tion process, that this needs to be answered, and it has been answered in various ways.

I think, if nothing else, the fact that this internal management tool, which was made public when we released it, will also help tribes in the future understand what needs to be put into that particular section.

Mr. BACA. Thank you. I want to follow up on a question that Mr. Kildee was asking, and that was on sovereignty. We are all very much concerned with the protection of sovereignty. When you look at off reservation, what protection, then, will the tribes still have for sovereignty on off-reservation gaming if, in fact, the trust land was granted to those particular tribes? And then what tribes, then, would have the jurisdiction, also as a follow-up? Because when you talk about distance, you know, like, I know, in my particular area, we have some tribes that want to have gaming in Linwood, California, but yet they are not even from that area. One is from Arizona; one is from another portion of the area but not the actual tribe in that area.

Mr. ARTMAN. Well, the tribe that seeks the application for the land into trust is the tribe that will have jurisdiction over that particular property, but these are some of the things that we also look at in the application. We expect the tribe to contribute, too, but also our own knowledge of the area contributes to that determination.

What is the history and culture of that area? In the upcoming Section 20 regulations, there is, for restored tribes, initial reservations and even the two-part determination. You will see phrases that look to historical connections and modern connections.

This is one of the reasons why I think we need to go through this exercise and give some clarifications for our regional directors to have a better understanding of how distance may impact that.

Now, you are looking at, especially when you go a great distance, you are looking at transporting, essentially, jurisdiction from somewhere on the reservation, and jurisdiction is certainly exercised very well when it is on reservation, over trust land, over land that is in trust already. But when you take that same jurisdiction, and you move it elsewhere, it is easily applicable, but you are creating, if you will, an impact to the system.

Now, many of the tribes have negotiated agreements with the city, so the wave may be mitigated, but it is still going to be a wave, nonetheless, that is impacting the——

Mr. BACA. But there is no way that one tribe, like, for example, from San Diego is going to Barstow, if that is the definition that you have out here that is close within that jurisdiction—that is a long ways—versus having tribes that are even a lot closer.

Mr. ARTMAN. That is true, and, in fact, I think three of the tribes of the 11 were seeking to game in Barstow, and they were 150, 550, varying distances away from that area.

Mr. BACA. They had a private jet to get back and forth in——

Mr. ARTMAN. I am not sure.

Mr. BACA.—versus the other ones that are in there, based on the definition. That is why, when we look at these guidelines, we have to be very careful as we address these issues as well, as you interpret them, and the impact it has. I know that we can look from

the economic area and the development of the area, which may be good in one area, but, at the same time, it is cherry picking and going over some of the other tribes that may have better jurisdiction that are closer than someone else.

Mr. ARTMAN. There are a lot of factors that spill into this decision. That is for sure.

Mr. BACA. OK. Thank you. I yield back the balance of my time, Mr. Chair.

The CHAIRMAN. The gentlelady from South Dakota, Mrs. Herseth Sandlin?

Mrs. HERSETH SANDLIN. Thank you, Mr. Chairman. I appreciate the opportunity to pose a few questions about this guidance memo, and I understand that the Chairman and Mr. Kildee and now Mr. Baca posed questions related to the consultation process.

Can you tell me specifically? I heard your explanation, in terms of consultation as it relates to new policy, new regulations, versus communications, that you contend have been going on as it relates to the need for clarification and elaboration of how to interpret the two criteria in the applications for taking land into trust. Can you tell us which other officials within the Department participated in formulating the clarifications?

Mr. ARTMAN. Sure. There were officials from our Office of Indian Gaming. The Office of the Solicitor participated in this as well.

Mrs. HERSETH SANDLIN. Remind me again, how many pending applications were there at the time that the guidance was issued?

Mr. ARTMAN. Thirty.

Mrs. HERSETH SANDLIN. And how many of those have been denied since the guidance was issued?

Mr. ARTMAN. Eleven tribes received negative determinations on taking the land into trust, and without taking the land into trust, the gaming portion will automatically fail as well.

Mrs. HERSETH SANDLIN. Were all of them gaming?

Mr. ARTMAN. Yes, they were. These were all specifically gaming. We had another 40 previous to that. We had the off-reservation nongaming. We had approximately 40 applications for off-reservation nongaming.

Mrs. HERSETH SANDLIN. So when you say that there were 30 pending applications, those were 30 that dealt with gaming.

Mr. ARTMAN. Specifically, yes.

Mrs. HERSETH SANDLIN. And there were 40 additional ones.

Mr. ARTMAN. That have dealt with nongaming.

Mrs. HERSETH SANDLIN. And the guidance was issued and made public on January 3rd.

Mr. ARTMAN. That is correct.

Mrs. HERSETH SANDLIN. And how many of the applications that were pending were rejected within days after the guidance was issued?

Mr. ARTMAN. Eleven.

Mrs. HERSETH SANDLIN. All 11 were denied the day after?

Mr. ARTMAN. Yes, ma'am. That is correct.

Mrs. HERSETH SANDLIN. So did it just take one day to do the initial review?

Mr. ARTMAN. No, ma'am. This was not developed in a vacuum.

Mrs. HERSETH SANDLIN. But you made it public on January 3rd.

Mr. ARTMAN. You have a finite set of applications, and we knew what issues we were dealing with in that. In fact, when we looked at how do we create a better process, be it for on-reservation or off-reservation nongaming or gaming, we looked at the universe of applications that we had. If we were to make this decision in a vacuum, I do not think that we would have been able to make it as specific to finding the clot in the arteries, if you will, of our system and dealing with that.

Mrs. HERSETH SANDLIN. Well, then how did the 19 other applications differ, again, from the 11 that were denied the day after the guidance was made public?

Mr. ARTMAN. There were another 11 tribes that received letters saying that we did not have sufficient information to act on their application and that we would not be acting on it because of that. Certainly, those tribes have every right, as do the others, to submit further applications. Most of those were only letters of intent, or perhaps a tribal resolution to take land into trust.

Our fee-to-trust applications, especially when dealing with off reservation, are usually quite thick. Those folders are quite thick, and, again, those 11 tribes where we say we did not have sufficient information usually only submitted one or two pages under either a letter or a resolution.

Another five tribes—they were FONSIs, or they were RODs, depending upon if it is an EA or an EIS or approved, the notice of intent to publish draft decisions, draft RODs or draft FONSIs, were published as well. So we moved forward on a number of these as well.

Mrs. HERSETH SANDLIN. So it sounds like the 11 that were denied were very far along in the process.

Mr. ARTMAN. Some were further than others. Some were at the beginning.

Mrs. HERSETH SANDLIN. Well, let me just state—I am going to submit some other questions in writing for the record as it relates to the application of this commutable-distance test, but I do think that when you have the questions posed by Members of the Committee that are concerned about the consultation process and perhaps have a different view than you as it relates to whether or not this is a new regulation splitting that apart from need for further elaboration on how the criteria would be applied, that when you have those concerns and not just in this instance but in others with regard to true respect for the consultation process, and then you have, and I hear what you are saying about nothing is decided in a vacuum, but the concerns that would be raised in such a short period of time after the guidance was made public, was published, that, all of a sudden, within a day, people are receiving notification that applications that have been pending for years were now denied and have to go through the process again, that that raises some concerns.

I appreciate your responses to my questions but will look forward to working with the Chairman and other Members of the Committee as we explore this further. Thank you.

Mr. ARTMAN. Thank you, Congresswoman.

The CHAIRMAN. The gentleman from Wisconsin, Mr. Kind?

Mr. KIND. Thank you, Mr. Chairman. I want to thank you for holding this important hearing. Mr. Artman, thank you for your testimony today. I apologize. I was a little late coming in, so I did not hear your opening statement, but I appreciated the chance to get together with you yesterday so we could discuss this a little bit.

Now, in my review of both the 2004 document that has been referenced here and then the recent guidance memo that came out in January of 2008, just looking at the clear language of it, there seems to be that major distinction with regard to the distance between the two. The '04 memo said that distance should not be a factor. It should not be a consideration, and now the January 2008 guidance memo says that greater weight, greater scrutiny should be given with commutable distances.

In speaking to some of the tribes that were affected, their initial reaction is, what changed? Were there any studies? Was there any analysis done that would lead to a different guidance along the distance factor giving rise to the recent guidance of January of this year?

Mr. ARTMAN. Thank you, Congressman Kind. The 2004 memo, the February 2004 memo, that was issued to the secretary, and it was part of a recent lawsuit as an exhibit, in many respects, ended up in the same place that we did. I would characterize that as being two sides of the same coin.

What that stated was that neither the IRA, neither the Indian Reorganization Act, or the Indian Gaming Regulatory Act, referenced distance. Therefore, we cannot develop a distance at which this is the line at which the diameter of the perimeter from the center of a reservation that you can have Indian gaming. I wholly agree with that.

But distance is referenced in the land-acquisition test, in the trust test under 151 as part of the Indian Reorganization Act, under Section 151.11[b], and the February 2004 memorandum speaks to that as well.

This memorandum, the January 3, 2008, memorandum, for clarification, offers guidelines, offers clarification, on how that should be looked at, how that greater scrutiny, the further you get away, the further the distance is between the reservation and that——

Mr. KIND. Let me just stop you there. Was there a feeling, then, in the office that the 2004 guidance memo was in error in not addressing the distance issue, not offering further guidance on the distance issue, and that is what you were trying to clarify in the January memo?

Mr. ARTMAN. I do not think it was an error, especially since I still work with many of the people there. I would not call it an error at all. I just do not think it answered the question that we attempted to answer. It was not seeking to answer that question.

Mr. KIND. And what was that based on, just the fact that it was left out there unaddressed, or were there any studies done? Were there any reports, any surveys, anything that could point to some underlying justification of why this should be a consideration?

Mr. ARTMAN. Well, when looking at the applications, looking at what our Office of Indian Gaming and regional directors were looking at, what seemed to be the problem? Where was the hump that

they were having a difficult time getting over? It did come back to how do you give that scrutiny?

The February 2004 memorandum even talked about that. I believe it even referenced commutability, if I am not mistaken, maybe on that. But I think it did reference commutability as an issue in there, and it spoke to 151.11[b] as well, but it was more of an informational: Here is what is out there. Here is the universe.

We focused specifically on 151.11[b] because of the obstacle in the process that it presented for our folks.

Mr. KIND. Right. You mentioned to Ms. Herseth some of those who were involved in the recent guidance memo that came out. Was Secretary Kempthorne himself personally involved in this latest guidance memo or anyone on his staff?

Mr. ARTMAN. Secretary Kempthorne was aware that we were developing this, and certainly he knew what it said prior to its being issued.

Mr. KIND. Was he providing any opinion or guidance?

Mr. ARTMAN. No. This is something that we were presenting to him along the way.

Mr. KIND. Right. Getting back to the distance issue, because that really does seem to be the crux of why some of the tribes feel that this is an unfair change in the guidance procedures, if I am a rural tribe with some reservation off at a great distance from any population center, if they are trying to develop some type of economic enterprise that is dependent on being where the people are, obviously, distance is going to be an important consideration of where they want to get land in trust and where they want to develop that enterprise.

So can it work both ways? Can distance be a factor that would lead the Bureau to weigh more heavily the need to put land in trust so that they can be closer to a population base and develop a business enterprise that will thrive, or is it always going to be used in the negative, that the longer the distance, regardless of population base, it is going to be harder for them to get land in trust?

Mr. ARTMAN. No. This memorandum was not meant to get at that. It was not meant to achieve that. It is, again, a factor among many other factors that have to be looked at. Perhaps a well-written application could actually use that to the positive in its determination.

Mr. KIND. And you already testified that this is not a determinative issue, that it is just one of many factors and considerations in what you grant——

Mr. ARTMAN. That is correct.

Mr. KIND.—although it is peculiar, as Ms. Herseth just pointed out in her questioning, that so many of these determinations came the day after the recent guidance memo, in January. Was there any consideration given to those that are already down the road with the application process, many basing what they were doing in the application process on the 2004 guidance memo to grandfathering them, or any particular consideration for those who were already in the process for some time?

Mr. ARTMAN. I am not sure how widely distributed the 2004 guidance memo was, so I am not sure how it applied to that.

Mr. KIND. OK.

Mr. ARTMAN. In terms of grandfathering them in, there was never a dispositive conclusion that there would be a positive finding. Anything may have led to a negative finding, be it the environmental impact statement conclusions on our ability to oversee it or even discretion alone, could lead to a negative finding. So I do not think there was any one factor that led to a negative, nor do I think that a grandfather would have benefited the tribes as well.

Mr. KIND. Thank you. Mr. Chairman, I see my time has expired.

The CHAIRMAN. Are there any questions? Mr. Kildee?

Mr. KILDEE. Eleven of the 30 were immediately informed that their application had deficiencies. Did the Department provide an opportunity for those 11 tribes to meet the deficiencies it identified in those applications?

Mr. ARTMAN. No, they were not, but we also made clear, in the correspondence with the tribes, that they are welcome to resubmit an application that would satisfy all of the mandates of 151.10 and 151.11.

Mr. KILDEE. To start all over again.

Mr. ARTMAN. Yes.

Mr. KILDEE. I do not mean to be cute, but were those 11 letters written before or after the new criteria were adopted? In other words, were the letters ready to go immediately?

Mr. ARTMAN. It is a centralized process. While many fee-to-trust decisions are made at the regional level, the fee-to-trust decisions with regard to off-reservation gaming are made at the central office, at the Office of Indian Gaming, and working in conjunction with the Office of Indian Gaming, as I said before, we were looking at this clarification and why it needed to address what was blocking those 30 applications and others from getting through the process, from moving forward.

So, in many respects, we knew what the conclusion would be for some of them. We knew that some would move forward. We knew that there might be a negative determination for others. So, yes, we knew where these would end up. As I said before, it was not done in a vacuum. This is our universe, and this is what we had to deal with. That was the backlog, and it was not customized for any one conclusion for any one particular tribe, but it was developed as a way to have a better-managed process and then applied that to what we had.

Mr. KILDEE. But you knew these 11 were dead.

Mr. ARTMAN. I knew that there would be a negative finding on those 11. I would not say that they were necessarily dead. Again, in resubmission, there may be a different answer.

Mr. KILDEE. Mr. Artman, I have not been unconcerned with distance myself in the 32 years I have been here on the Committee. I have not been unconcerned, but I hope always that you will always, in perpetuity, take into consideration that this is, if it is accepted as a criterion, only one criterion, if it is included as a criterion.

I am kind of going into another area of our national life, but I am sure—this is another area. Hawaii might have had a hard time becoming a state—right?—because Hawaii is 3,600 miles from the

continental United States? So distance itself, if anything, should only be one factor in anything. Thank you, Mr. Chairman.

Mr. ARTMAN. Thank you, Congressman.

The CHAIRMAN. Any further questions? Yes. The gentlelady from California.

Mrs. NAPOLITANO. Just looking at and listening to the questions and the answers, was this new guidance developed lawfully? Was there a possible, I would say, an attempt to bypass congressional authority to be able to do those changes? Was it a change to Federal policy without coming to Congress?

Mr. ARTMAN. No, ma'am. I do not believe there was.

Mrs. NAPOLITANO. Then why the change?

Mr. ARTMAN. You had Section 151.11[b] that discussed greater scrutiny and greater weight. As I said before, we certainly have an understanding of how to apply 1.11[b] when you are talking about two miles, five miles, or 30 miles off the reservation. There is an easy connection to see where that governmental community benefit lay. However, when you start getting into the hundreds of miles or thousands of miles, it becomes a more difficult determination.

Mrs. NAPOLITANO. Is it a new phenomenon?

Mr. ARTMAN. Yes, it is. Since 1934, this is something that has really only popped up in the last two decades.

Mrs. NAPOLITANO. Two decades. That's almost 20 years. No attempt has been made to ask Congress for direction?

Mr. ARTMAN. Not to my knowledge, there has not been, but, certainly, Congress has expressed its feelings through bills it has introduced, and especially in the 109th Congress, through legislation introduced on the Senate side and the House side with regard to the concerns about distance. Now, that was not driving this, but this is not an issue that is unknown to either your body or to our Department.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

Mrs. HERSETH SANDLIN. Just one quick follow-up, Mr. Chairman, based on the line of questioning that Mr. Kind was pursuing.

Is it your intention that the commutable-distance test will apply only to off-reservation gaming applications or to all off-reservation applications, regardless of whether or not gaming is involved?

Mr. ARTMAN. I think that any time you have an off-reservation application, 151.11[b] will be triggered, and anything that we have done on that, in this case the January 3rd memorandum, would apply to that situation. But I think if you look at the universe of applications that we have for off-reservation nongaming, many times—for example, it may be for a cultural or historical acquisition for preservation—the concept of a commutable distance would not be applicable in that case.

Also, there is a shorter distance—maybe it is five miles away—for housing. Again, commutable distance may not be applicable in that case. It may not be applicable in every situation.

Mrs. HERSETH SANDLIN. I understand what you are saying. I just think Mr. Kind was trying to get at the issue of more geographically remote reservations, some of which I represent, tribes that are located in more geographically remote areas, and if there were ever an application for a nongaming business enterprise for economic-development purposes, then it seems to me that, since other

offices are involved, to talk about the centralized process in terms of the Indian Gaming Office.

I am uncomfortable with how this has been developed, in part because I do not know that we have thought through how the new factor that some people have identified, which seems to be the biggest change from 2004, is going to apply differently with different applications, and given that it was applied so quickly with the gaming applications that had been pending for several years, it seems to me that this is a factor that was developed specifically to address gaming enterprises.

So I would hope that, as Mr. Kildee has encouraged you to do and those in your office, that not only with consultation but how these are applied and the fairness with how the new criteria is applied, particularly in light of the concerns raised today, is simply something that I, too, want to encourage you to do because I think that, as we look at new markets and new opportunities and economic-development ventures, that I hope that we are not going in a direction here that may have been devised to address some people's philosophical concerns or differences with Indian gaming that will ultimately not only hamper those enterprises that have been very good for the economic well-being of many tribes across the country but also hamper the development of other business enterprises that will be developed in the future, whether that is a wind energy project for land that may be taken into trust that is off reservation or for some other purpose in new markets that are emerging.

So, Mr. Chairman, thank you for giving me an opportunity to follow up and express my concerns more broadly with how the new criteria may be applied. Thank you.

Mr. ARTMAN. Thank you.

The CHAIRMAN. Do any other Members have questions? The gentleman from Washington, Mr. Inslee?

Mr. Artman, thank you.

Mr. ARTMAN. Thank you, Chairman.

The CHAIRMAN. Thank you for your patience in answering the questions this morning, and while you may be leaving the hot seat from this Committee, I am sure you will continue to be in the hot seat for some time to come.

Mr. ARTMAN. I look forward to being back in it, sir. Thank you.

The CHAIRMAN. Thank you, Carl.

[Discussion held off the record.]

The CHAIRMAN. OK. I am going to suggest that the Committee take a recess until between quarter-to-one and one because we do have a series of votes on the Floor at this time, and this seems to be an appropriate place to take a break before calling the rest of the panels. Is that OK with Members? The Committee stands in recess.

[Whereupon, at 12:15 p.m., a recess was taken.]

The CHAIRMAN. The Committee will resume its sitting.

Our second panel is composed of The Honorable Lorraine White, Chief, St. Regis Mohawk Tribal Council, Akwesasne, New York; The Honorable Vincent Armenta, the Tribal Chairman, the Santa Ynez Band of Chumash Indians, Santa Ynez, California; The Honorable Hazel Hindsley, Chairwoman, St. Croix Chippewa Indians of

Wisconsin, Webster, Wisconsin; and Mr. Jeff Warnke, the Director of Government and Public Relations, Confederated Tribes of the Chehalis Reservation, Oakville, Washington.

We welcome all of you to the Committee, and, as previously stated, we have your prepared testimonies. They will be made part of the record as actually read, and you are encouraged to summarize.

Chief White, do you want to proceed first?

STATEMENT OF HON. LORRAINE WHITE, CHIEF, ST. REGIS MOHAWK TRIBAL COUNCIL, AKWESASNE, NEW YORK

Ms. WHITE. Good afternoon, Chairman Rahall and Members of the Committee. I do not actually believe that we have any other Members of the Committee at present.

I am Lorraine White. I serve as one of the three elected chiefs of the St. Regis Mohawk Tribe. Thank you for the invitation to be here today to present our views on the Department's new guidance and how it was wrongly, unfairly, and illegally used to deny our tribe's long-pending, fee-to-trust application. Additionally, we have prepared an extended written statement for the record.

The tribe's efforts to develop a casino project in the Catskills region has a long, complex history spanning nearly 12 years. In particular, the tribe has worked closely with state, Federal, and local officials to evaluate and document the project's significant social and financial benefits and to fully mitigate any environmental impacts on the affected local community.

Based on this documentation and analysis, on April 6, 2000, then Assistant Secretary for Indian Affairs Kevin Gover issued an affirmative IGRA, Section 20, determination that the tribe's application would be in the best interest of the tribe and tribal members, and would not be detrimental to the surrounding community. This decision included 16 pages of detailed findings of fact supporting the two-part determination.

On February 18, 2007, New York Governor Eliot Spitzer wrote to Secretary Kempthorne concurring with the April 2000 secretarial two-part determination, which fully and affirmatively concluded the IGRA, Section 20, process. This historic event was only the fourth time such a concurrence was issued in the 19-year history of IGRA.

Interior explained, in the determination, that once the Governor concurred, the Department would, in fact, take the land into trust, pursuant to the IRA. Indeed, our application has been the subject of three departmental EAs and FONSIs, the most recent issued by Secretary Kempthorne on December 21, 2006.

These studies specifically evaluated and affirmatively demonstrated that our application fully satisfied all existing requirements.

In summary, it is hard to find any project that has been the subject of more extensive state, local, and Federal reviews, and, more importantly, approvals.

Given these circumstances, it was a complete miscarriage of justice for the Department to have created a brand-new rule one day and apply it the next as the sole basis to deny our application, even though, by the Department's own evaluation, their conclusions and

their approvals, we had satisfied every single requirement and fully complied with every Federal process.

Instead, the guidance establishes a new "commutable distance rule." Without any analysis or factual support, the Department announced a blanket statement that if a gaming facility is not within a commutable distance of the reservation, tribal members who reside on the reservation either will not be able to take advantage of job opportunities at the facility or else will be forced to move away from the reservation to do so.

If tribal members do leave the reservation, the Department concluded that the gaming facility would not "directly improve" the employment rate on the reservation, but if leaving the reservation, the Department also concluded that the departure of a significant number of reservation residents and their families could be detrimental to the remaining tribal community.

Clearly, the guidance is inconsistent with and contrary to the Department's own policies and legal interpretation of limitations on the secretary's discretion to establish a distance requirement.

The Department's 2004 Indian Gaming Paper thoroughly analyzed this issue. Its conclusions are strikingly at odds with the secretary's purported rationale for the guidance.

For instance, the guidance concludes that IGRA was not intended to encourage the establishment of Indian gaming facilities far from existing reservations, yet the Indian Gaming Paper itself explains that if Congress had intended to limit the Indian gaming on lands within established reservation boundaries, or even within a specific distance from a reservation, it would have done so, expressly within IGRA. It clearly did not; nor has Congress amended IGRA to add a distance limitation or any other geographic limitation since its passage in 1988.

Similarly, the Indian Gaming Paper notes that a distance requirement is simply not necessary and should not be applied. Specifically, it states that "[w]hile some now argue that, in 1988, Congress may not have envisioned that states and tribes would enter into compacts that would locate gaming sites on lands located far from the reservation, there is no evidence that Congress intended a limitation on that activity within the law. Moreover, the suggestion that reservation shopping has run amok is without a basis. To the contrary, states have exercised their statutory prerogative to deny tribes access to lands for gaming under the two-part determination in all but three instances, providing that the framework of IGRA has been working."

By stark contrast, the guidance is being used to deny all applications that are not a commutable distance from a tribe's reservation based upon the unsupported premise that the negative impacts on reservation life could be considerable. However, the Indian Gaming Paper documents the potentially significant benefits of such facilities. The Indian Gaming Paper also concludes that Congress made a deliberate and intentional choice not to impose obvious distance or other restrictions on off-reservation gaming projects.

The Indian Gaming Paper also notes that IGRA imposed checks and balances by requiring approval by the secretary, as well as the high hurdle of a Governor's approval, and that IGRA purposely left the tribes with the opportunity to pursue gaming markets that

were otherwise denied to them because 19th Century policies favored locating Indian reservations in remote areas.

In IGRA's 20-year history, Congress has not seen fit to incorporate any distance limitations to gaming-related trust applications. Similarly, the IRA is over 70 years old and has not been amended to place a geographic limit on a secretary's authority to take land into trust.

The guidance was created with unmistakable disregard for procedural requirements. Even assuming the new commutable-distance rule had been authorized by the IRA and that it had been duly promulgated under the formal APA procedures, our application would have met and exceeded the new rules, and, therefore, it should have been approved.

After the December 2006 FONSI, only two conditions needed to occur.

First, the secretary needed to finalize the determination to take the land into trust by formally issuing a record of decision.

Second, New York Governor Eliot Spitzer needed to issue his concurrence to the secretarial determination. As noted above, the Governor did so, over a year ago, in February of 2007.

Given the obvious injustice this case demonstrates, the rules of the House of Representatives authorize, empower, and obligate this Committee to investigate, review, and study, on a continuing basis, laws, programs, and government activities relating to Native Americans.

Accordingly, this Committee should exercise its jurisdiction to investigate the following issues.

No. 1: Why did the secretary postpone a decision on our application for nearly one year?

Item No. 2: Were any Interior Department officials or employees directed or encouraged to either postpone a final decision on the tribe's application or to concoct a basis for denying the tribe's application? If so, who provided such directives?

Item No. 3: Did Assistant Secretary Carl Artman participate in the review of the tribe's application, notwithstanding his putative recusal from all New York-related gaming land issues? In light of his recusal, did he unduly interfere with the tribe's application? Did he participate in any discussions about whether the new rule could or should be retroactively applied to the tribe's application?

Item No. 4: Did any third party encourage the Department to delay a decision or deny the tribe's application? Who were these third parties, and who, if anyone, did they contact at the Department? Did they contact anyone in the White House? In denying the tribe's application, the secretary has arrogated to himself the legislative authority of Congress and this Committee. He has also violated a commitment he made to Congress during his confirmation hearing that he would abide by the law, including Section 20, notwithstanding any personal views he may harbor about gaming or Indian gaming.

Allowing the secretary to evade responsibility for his actions will only serve to encourage a culture of disregard for established law and this Committee's jurisdiction. Thank you, and I would be pleased to answer any questions.

[The prepared statement of Ms. White follows:]

Statement of The Honorable Lorraine M. White,
Chief, St. Regis Mohawk Tribe

I. INTRODUCTION

The Saint Regis Mohawk Tribe ("Tribe") is pleased to provide testimony for the House Committee on Natural Resources ("Committee") hearing regarding the Department of Interior's ("Department") January 3, 2008 Guidance on off-reservation land into trust for gaming purposes ("Guidance"), issued through an internal memorandum signed by Assistant Secretary for Indian Affairs Carl Artman. As the Committee is aware, the Department prepared and issued the Guidance as the basis to deny a number of fee-to-trust applications, including our long-standing application for the development of a major casino project in the Catskills region, approximately 90 miles from New York City. Specifically, the Department illegally created a new binding and enforceable "commutability" rule in the Guidance. In basing its denial of our application on this new rule, the Department violated existing law and ignored more than twelve years of work costing more than $25 million, unprecedented local and state support, numerous environmental review and studies, and numerous favorable determinations and conclusions issued by the Department itself.

II. SUMMARY

This statement addresses general concerns about the Guidance, how it violates federal law, and how it was promulgated in clear violation of the Administrative Procedures Act, in blatant disregard of its own policy pronouncements on this matter, and in contravention to Executive Order 13175 on Consultation and Coordination With Indian Tribal Governments.

This statement also specifically addresses the Department's unfounded and unsupported denial of our fee-to-trust application. Not only did the Department fail to rely on or point to any factual basis to support its denial of our application, the Department also failed to provide our Tribe with an opportunity to address the new "commutable distance" rule created in the Guidance. As discussed below, generations of our professional Mohawk ironworkers have a long and distinguished history of commuting farther distances to build the skyline across major cities along the northeastern seaboard and in Canada. Clearly, their dedicated service and generations of employment have greatly contributed to America's development while enriching our tribal community.

Moreover, the Department unreasonably delayed action on our application for nearly a year, which set the stage for the immediate development of a competitive project several miles from the Tribe's proposed project site.

III. THE TRIBE'S FEE-TO-TRUST APPLICATION FULLY AND AFFIRMATIVELY SATISFIED ALL APPLICABLE FEDERAL STATUTORY AND REGULATORY REQUIREMENTS FOR APPROVAL.

Before addressing the Department's illegitimate Guidance and its unlawful application to the Tribe's fee-to-trust application, this section summarizes the background of our application, including the statutory, regulatory and policy requirements that were completed and fully satisfied under existing law, all of which demonstrate that our application was wrongly denied.

A. Statutory Authority

The Tribe's fee-to-trust application was prepared and submitted for federal approval to build a casino on the Monticello Raceway site pursuant to and in accordance with:

- Section 20 of the Indian Gaming Regulatory Act ("IGRA") (hereinafter "Section 20"), which authorizes Indian gaming on lands that are acquired into federal trust status for an Indian tribe after October 17, 1988, the date of IGRA's enactment (such lands are referred to as "newly acquired," "after acquired," or "off reservation" lands). The Section 20 process is commonly referred to as a "two part determination" by the Secretary of the Interior ("Secretary") and the governor of the State where the land is located; and
- The Indian Reorganization Act of 1934 (hereinafter "IRA") and its implementing regulations codified at 25 CFR Part 151 (hereinafter "Part 151 Regulations") which delegates authority to the Secretary of the Interior to acquire land and hold title in federal trust status on behalf of an Indian tribe, including land that is not within the boundaries of an Indian reservation.

- New York State Law—In 2001 the New York legislature adopted legislation specifically authorizing the Governor to enter into compacts authorizing up to three Indian casinos in Sullivan and Ulster counties. [1]

B. Factual Background Regarding Compliance With Applicable Regulatory Requirements

The Tribe's efforts to develop a casino project in the Catskills region has a long, complex history spanning nearly twelve years. The extensive record of the Tribe's application demonstrates the years of effort and analysis by the Tribe, Federal officials, New York State and local officials and elected representatives evaluating, among others, the benefits the project would provide to the Tribe, and all relevant social, financial, and environmental impacts to the affected local community, as required by Section 20 of the IGRA and the Part 151 regulations of the IRA. The following is a listing of major actions taken on the application:

- On August 1, 1996, the Tribe submitted the fee-to-trust application for the Monticello site to the BIA Eastern Region for processing under BIA regulations and policies.
- From August 1996 to April 2000, the Tribe's fee-to-trust application and its proposed Monticello project was the subject of two Environmental Assessments under the National Environmental Protection Act ("NEPA") which resulted in two Findings of No Significant Impact ("FONSI") for the proposed federal action: to approve the Tribe's fee-to-trust application for the Monticello casino project. The project was also fully studied and evaluated under the more rigorous and demanding New York State Environmental Quality Review Act ("SEQRA") process. These independent and extensive evaluations concluded there would be no adverse environmental impacts from the Tribe's project.
- On April 6, 2000, then-Assistant Secretary for Indian Affairs ("ASIA") Kevin Gover issued an affirmative Section 20 determination that the Tribe's application would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. ASIA Gover wrote to then-New York Governor George Pataki requesting his concurrence in this determination, and asserted that the Department would acquire the land into trust upon the Governor's concurrence.
- For several reasons, the Tribe switched gaming development partners, and from May 2000 through July 2005, explored the viability of pursuing an alternative Section 20 project at a nearby location ("Kutcher's site"). During part of this timeframe, the Cayuga Indian Nation filed its own an application for the Monticello Raceway site and spent considerable time updating and revising the environmental reviews.
- In July 2005, the Cayugas dropped their application and the St. Regis Mohawk Tribe reactivated its own fee-to-trust application for the 29.31 acre site at the Monticello Raceway site. The Tribe took immediate steps to confirm the validity of the April 2000 Section 20 secretarial determination and then proceeded with updating the environmental work.
- In September 2005, George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development/Director of Indian Gaming Management Staff confirmed that the April 6, 2000 two part determination issued by then ASIA Gover was still valid, and upon the Governor's concurrence the Department would resume consideration of the St. Regis Mohawk Tribe's application to take land into trust at Monticello Raceway. Skibine also informed the Tribes that environmental work would likely need to be "refreshed" and revised.
- A year later, on September 8, 2006, after extensive consultations and tedious revisions to the EA and discussions between the Tribe and Departmental officials, the BIA Eastern Region issued a Notice of Availability ("NOA") commencing a 30 day comment period on the draft EA, and on September 12, 2006, published the NOA inviting public comments on the most recent draft EA.
- On October 31, 2006, the BIA Eastern Region submitted the FONSI and final EA to the BIA Central Office with the recommendation to take the land into trust and issue the FONSI.
- On December 21, 2006, Associate Deputy Secretary Cason signed the FONSI and sent transmittal letters to the Tribe and to Governor Pataki requesting his concurrence with the Department's Section 20 secretarial determination. The December 2006 FONSI was the third one issued by the Department for the construction of the Tribe's casino project at the Monticello Raceway site.
- On February 18, 2007, Governor Spitzer signed a letter concurring with the Department's affirmative Section 20 secretarial determination to take the land

[1] N.Y. Exec. L. § 12 (McKinney 2001).

into trust, and, on behalf of New York State, entered into a gaming compact with the Tribe. Gov. Spitzer requested Secretary Kempthorne to "expeditiously take the land into trust and approve the gaming compact...so that the Tribe can begin construction of the proposed casino."

- On February 27, 2007, the St. Regis Mohawk Tribal Council sent a letter to Secretary Kempthorne formally requesting that he approve the Tribe's fee-to-trust application and acquire the land into trust for its intended purpose.
- From February 2007 through November 2007, the St. Regis Mohawk Tribal Council submitted numerous and repeated requests to meet with Secretary Kempthorne to discuss the Secretary's inextricable delay in rendering a final decision on the Tribe's application. Secretary Kempthorne did not respond to any of the Tribe's requests. Other Departmental officials could not provide any specific answers or reasons for the delay, though some of the same senior officials remarked both publicly and privately that the real source of delay was directed by Secretary Kempthorne for what many attributed to be his personal views and objections to "off reservation" gaming. During this timeframe and leading up to the January 4, 2008 denial, neither Secretary Kempthorne nor any official within the Department indicated to the Tribe that the application was deficient or that it lacked any key information.
- Faced with an intractable impasse, the Tribe filed a complaint against the Department and Secretary Kempthorne in the U.S. District Court for the District of Columbia for judicial review of the continued failure to act on the Tribe's application, and to compel a decision on the application. The government sought and received an extension to answer the Tribe's complaint—the response was due on January 4, 2008.
- On January 4, 2008, the Department issued a denial letter to the Tribe based solely on the failure of the Tribe's application to meet a new "commutability" standard, which was simultaneously issued through an internal memorandum dated January 3, 2008 from Assistant Secretary Carl Artman to the BIA Regional Directors.

C. IGRA—Section 20 Procedure & Requirements

As noted above, the Indian Gaming Regulatory Act's ("IGRA"), 25 U.S.C. §§2701 et seq, Section 20 two-part determination process authorizes Indian gaming to be conducted on newly acquired lands such as the 29.31 acres of the Monticello Raceway. Under this authority, the Secretary is required to undertake the following:

- Consult with the applicant Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, and
- Issue an affirmative or negative decision under the two-part determination process on whether the gaming establishment on newly acquired lands (1) will be in the best interest of the Indian tribe and its members, and, (2) will not be detrimental to the surrounding community, and
- If an affirmative secretarial two-part determination was issued, obtain the concurrence of the Governor of the State in which the gaming activity is to be conducted in such determination.

The Department's analysis and evaluation of the Tribe's application under Section 20 was undertaken in accordance with the Department's "Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 Determinations." All of these requirements and processes under the Department's checklist were satisfied for the Tribe's Monticello project.

By letter dated April 6, 2000, then-ASIA Kevin Gover issued an affirmative Section 20 determination that the Tribe's application would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. ASIA Gover's determination included 16 pages of detailed Findings of Fact supporting the two-part determination, which included the following key findings:

- The Tribe's casino project was projected to generate approximately $583 million net revenues to the Tribe over its initial seven years of operation.
- Approximately 260 tribal members were projected to be employed directly by the casino, earning an estimated total of $6.6 million annually, and approximately $23 million in contracts would be awarded to tribally-owned construction enterprises engaged in the construction of the casino.
- The Tribe had some 8,630 enrolled members, with 4,193 living on or near the reservation; approximately 600 members were unemployed and seeking work; no estimate had been made of the number of reservation residents who would relocate to the casino, but tribal members leaving for jobs at the casino "could reduce reservation unemployment by a substantial percentage."
- Significant training opportunities would be provided to tribal members as a result of the casino.

- Revenues from the casino would enable the Tribe to expand its reservation senior citizen center, to construct a day care facility and ambulatory/nursing home, to expand the sewage system, extend a water line to serve the entire reservation, and connect a natural gas pipeline to the reservation, as well as provide funds for scholarships and post-secondary education tuition assistance.
- There would be "no foreseeable adverse impacts on the Tribe associated with the acquisition of the Monticello property in trust for a gaming and entertainment center."
- State and local officials had been consulted, that the Town of Thompson supported the application, and that a Cooperation Agreement met the concerns of the Village of Monticello and of Sullivan County and addressed various project impacts.
- The casino would boost the economy of the region, generate employment and income for local residents, and generate revenues from hotel taxes to local governments.
- An assurance that **"If the Governor of the State of New York concurs with this two-part Secretarial determination, the Monticello Property will be taken into trust pursuant to the requirements of 25 CFR Part 151."**

By letter dated February 18, 2007, New York Governor Eliot Spitzer wrote to Secretary Kempthorne concurring with the April 2000 secretarial two-part determination that acquiring the Monticello site in trust status is in the Tribe's best interest and would not be detrimental to the surrounding community. Governor Spitzer's action in concurring with the April 2000 secretarial determination fully and affirmatively concluded the IGRA Section 20 process.

D. IRA—25 CFR Part 151 Procedure & Requirements

Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. §465, enacted in 1934, authorizes the Secretary of the Interior to acquire lands for Indian tribes in the name of the United States to hold in trust for the Indian tribe, and to take action on a tribe's request to acquire such lands. The federal regulations implementing the Secretary's authority under Section 5 of the IRA are codified at 25 C.F.R. Part 151. With respect to land that is not located on or contiguous to an existing Indian reservation, the Part 151 Regulations require the Secretary to make the following determinations:

- The acquisition is authorized by an act of Congress; and
- The acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing."

The satisfaction of these requirements is evidenced by the Department's consistent findings and conclusions in issuing three FONSIs, the most recent on December 21, 2006, for the Tribe's Monticello Raceway fee-to-trust application. All of the federally approved EAs and FONSIs for the Tribe's project specifically evaluated the Tribe's fee-to-trust application, and their conclusions address and demonstrate the Tribe's application's compliance with and satisfaction of all existing Part 151 considerations and requirements. Specifically, the below findings and favorable conclusions substantiate full compliance and satisfaction of the applicable provisions in the 151 Regulations:

- Section 151.10(a): Statutory authority for the acquisition and any limitation contained in such authority—The IRA constitutes an affirmative policy of advancing tribal economic interests. Congress conferred the authority to the Secretary to acquire new trust lands as the primary means to fulfill the government's trust obligation to "rehabilitate the Indian's economic life[.]"[2] The authority extends to acquiring trust lands "within or without existing reservations" Section 151.10(b): The need of the Tribe for additional land—The EAs and FONSIs issued by the Department specifically found and concluded that "The Tribe needs a stable economic base to address problems stemming from high unemployment, insufficient housing and inadequate health care." In evaluating the Tribe's fee-to-trust application for the Monticello casino project, the Department concluded that "this project clearly presented the best opportunity for a financially successful venture. The best long term employment opportunities [are from] the development of this proposed casino complex[.]"
- Section 151.10(c): The purpose for which the land will be used—The December 2006 FONSI concluded that the purpose for acquiring the land into trust is to operate a Class III Native American Gaming facility and associated restaurants, and retail facilities" in order to improve the Tribe's "long term economic condi-

[2] Id. at 1016, quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).

tion through the development of the stable, sustainable source of revenue and employment through Indian gaming."

- Section 151.10(e): The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls—This factor was addressed in detail throughout the EA and NEPA review process. The FONSI details all mitigation, including local agreements wherein the Tribe agreed to pay annually $5 million to the Village of Monticello, and $15 million to Sullivan County, to offset an increase in government services and loss of tax revenue for the 29 acre site.
- Section 151.10(f): Jurisdictional problems and potential conflicts of land use which may arise—The Tribe's application was fully supported by both the Village of Monticello and Sullivan County in which the project was to be located. The EAs and FONSIs fully addressed how medical, fire services, public safety, zoning and land use would be handled between the Tribe and local entities, and concluded there would be no jurisdictional problems and there were adequate measures in place to address any potential conflicts of land use.
- Section 151.10(g): Whether the BIA will be equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status—Approval of the Tribe's fee-to-trust application would not have created any adverse impacts or resulted in any additional responsibilities for the BIA. The Tribe agreed to maintain all responsibilities relating to the development and maintenance of the trust parcel, including exercising jurisdiction and control of the property. In addition, the Tribe had entered into agreements to contract with local governmental entities for all additional services.
- Section 151.10(h): The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, NEPA Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations—On May 24, 2006, the BIA conducted a contaminant Level I survey and site assessment of the proposed parcel. No hazardous materials were detected. A May, 2006, Phase I Environmental Site Assessment Report also concluded that there were no hazardous substances or contaminants within the project site. See EA, page 5-4.
- Section 151.11(b): The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation—the greater the distance from the tribe's reservation, this factor instructs that the "Secretary give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition," and provides that the "Secretary shall give greater weight to the concerns raised" by state and local governments. Akwesasne is approximately 6 hours from the Monticello site, in a remote northern corner of the State. With respect to an analysis of anticipated benefits, the EAs and FONSIs discussed the Tribe's past failed attempts at developing a stable, sustainable, revenue source through development of projects on the reservation, and further considered and rejected the "No Action" alternative to the proposed federal action in approving the Tribe's application. The Department concluded that the proposed project "clearly presented the best opportunity for a financially successful venture. The best long term employment opportunities [are from] the development of this proposed casino complex[.]" With respect to giving greater weight to concerns raised by the state and local governments, the Tribe application clearly documents the full support of the state and the affected local governments. Moreover, the 2001 New York state law authorizing the Governor to enter into compacts authorizing up to three Indian casinos in Sullivan and Ulster counties [3] demonstrates broad state policy supporting the application. Section 151.11(c): The Tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use—The Tribe fully complied with this requirement by providing the Department with extensive documentation on how this land would be used and how the Tribe would benefit from the planned use and development of this parcel.
- Section 151.11(d): Sets forth procedures for notifying affected local governments and soliciting comments on the impacts of the project—As demonstrated by the administrative record, the BIA employed in depth notification and consultation procedures with the state, and local communities, which were engaged and fully participated in these agency's consultation on the proposed project.

In applying the IRA and its existing implementing regulations to the Tribe's Monticello Raceway parcel fee-to-trust application, Tribe's application fully satisfied and fulfilled all of the Part 151 requirements. Moreover the Department had previously notified the Tribe and the State that it would take the land into trust status fol-

[3] N.Y. Exec. L. § 12 (McKinney 2001).

lowing the Governor's concurrence, which demonstrated the agency's acknowledgement that these requirements were fully satisfied. It was a complete miscarriage of justice for the Department to have created a brand new rule one day and apply it the next as the sole basis to deny our application after we satisfied every single requirement and fully complied with every federal process.

In summary, it is hard to find a project that has been the subject of more extensive state, local, and Federal reviews and approvals.

All of these reviews and approvals culminated on December 21, 2006, when the Department issued a "Finding of No Significant Impact" ("FONSI") indicating the Tribe satisfied all of the federal regulations for environmental review necessary to have the land taken into trust status.

IV. JANUARY 3, 2008 "GUIDANCE" CONSTITUTES A BINDING LEGISLATIVE RULE AND ITS ISSUANCE WITHOUT FORMAL NOTICE AND COMMENT VIOLATES FORMAL FEDERAL RULEMAKING REQUIREMENTS

This section summarizes the provisions of the Guidance and demonstrates that the Guidance constitutes an unlawful rule issued in violation of the advance notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

A. Scope of the Guidance

As noted above, 25 CFR § 151.11 sets forth the factors the Department is to consider in deciding tribal fee-to-trust applications, when the land is located outside of and noncontiguous to a tribe's reservation. It provides, in part, that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give:

1) greater scrutiny to the tribe's justification of anticipated benefits from the acquisition; and
2) greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments.

25 CFR § 151.11(b). The Guidance purports to "clarify" how the requirements for "greater scrutiny" and "greater weight" are to be interpreted and applied, particularly when considering the taking of off-reservation land into trust status for gaming purposes. The Guidance noted that there were 30 pending applications from Indian tribes to take off-reservation land into trust for gaming purposes, and the memo instructed the BIA Regional Directors to review all pending and future applications in accordance with the Guideline and its requirements. Thus, on its face, the Guidance was drafted to apply to the 30 pending (and future) fee-to-trust applications for Class III gaming on lands acquired after the enactment of IGRA and located outside or noncontiguous to a tribe's reservation.

B. Key Provisions—including the "commutable distance" rule

The Guidance articulates a new standard for assessing off-reservation land applications—"commutable distance"—which it defines as "the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation." The Guidance states that it applies to all applications that involve requests to take land into trust that is off-reservation, but also asserts that it "only provides guidance for those applications that exceed a daily commutable distance from the reservation."

Without any analysis or factual support, the Guidance asserts as a "general principle" that the farther a gaming facility is from the reservation, the greater the potential for significant negative consequences on reservation life. The Guidance announces a blanket statement that if a gaming facility is not within a commutable distance of the reservation, tribal members who reside on the reservation either will not be able to take advantage of job opportunities at the facility or else will be forced to move away from the reservation to do so. In the former event, the gaming facility would not "directly improve" the employment rate on the reservation. In the latter event, the departure of a significant number of reservation residents and their families could be detrimental to the remaining tribal community. [4]

Insofar as the potential concerns of state and local governments are concerned, the Guidance provides that the application should include copies of any intergovernmental agreements negotiated between the tribe and the state and local govern-

[4] Ironically, the Guidance notes that "tribes are free to pursue a wide variety of off-reservation business enterprises and initiatives without the approval or supervision of the Department" although such enterprises and initiatives might raise the very same issues as off-reservation gaming insofar as the on-reservation employment rate and luring tribal members away from the reservation are concerned.

ments, or an explanation as to why no such agreements exist. The Guidance directs that "[f]ailure to achieve such agreements should weigh heavily against the approval of the application."

The Guidance instructs that the application should include a comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local government, and with the uses being made of adjacent or contiguous land, and whether such uses would be negatively impacted by the traffic, noise, and development associated with or generated by the proposed gaming facility. If the application does not contain such an analysis, the Guidance directs that it is to be denied.

If an application fails to address, or does not adequately address, the other issues identified in the Guidance, the Guidance directs that the application should be denied.

C. Guidance is an illegally promulgated rule

The Administrative Procedure Act ("APA") requires that when federal agencies promulgate "legislative rules" that have the force of law, they must do so by providing advance notice of the proposed rules and giving the public an opportunity to comment on them before they become effective. 5 U.S.C. § 553. These requirements improve the quality of agency rulemaking. See Sprint Corp. v. F.C.C., 315 F.3d 369, 373 (D.C. Cir. 2003). Failure to comply with these requirements can result in judicial invalidation of the agency's rule. Id. at 376-77.

A "legislative rule" is an agency pronouncement that establishes a "binding norm." See American Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980). Likewise, agency pronouncements that make "substantive changes" or "major substantive legal additions" to prior regulations are "legislative rules." U.S. Telecom Ass'n v. F.C.C., 400 F.3d 29, 34-35 (D.C. Cir. 2005). The Code of Federal Regulations, including 25 CFR Part 151, consists of legislative rules which were duly promulgated pursuant to the notice-and-comment procedures of the APA.

The APA notice-and-comment requirements do not apply to general statements of policy or to "interpretative rules" issued by an agency. An interpretative rule merely supplies crisper and more detailed lines than the authority being interpreted, or simply provides a clarification of an existing rule. U.S. Telecom Ass'n v. F.C.C., 400 F.3d at 38. An "agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise." Croplife America v. EPA, 329 F.3d 876, 883 (D.C. Cir. 2003). Congress was concerned that the few specified exceptions to the notice-and-comment requirements should not be broadly defined and indiscriminately used. See American Bus Ass'n v. United States, 627 F.2d at 528.

Thus, the issue here is whether the Guidance constitutes a "legislative rule." Plainly, the Guidance establishes a presently binding norm and is not a mere policy statement. For example, the Guidance directs all BIA Regional Directors, without exception, (1) to apply it to all pending and future applications to take off-reservation land into trust status, and (2) if an application fails to address, or does not adequately address, the issues identified in the Guidance, the application should be denied. See Community Nutrition Institute v. Young, 818 F.2d 943, 946-47 (D.C. Cir. 1987) (agency's use of mandatory, definitive language indicates binding norm is being established, as does agency's treatment of that norm as binding absent some exception).

Nor can the Guidance be deemed an "interpretative rule" that simply provides a clarification of the existing regulation at 25 CFR § 151.11. Instead, the Guidance makes a series of substantive changes and additions to 25 CFR § 151.11. To start with, it introduces the novel concept of "commutable distance" in terms of assessing a tribal request to take land into trust. A commutable distance factor is not part of the statutory requirements under Section 5 of the IRA nor can it be found in or fairly be interpreted to derive from Part 151 regulations. Instead, based on this new rule, created from whole cloth, the Guidance imposes the following new requirements:

(1) a specific assessment of the impact of the proposed gaming facility on the unemployment rate on the reservation;
(2) an assessment of how many tribal members (and dependents) are likely to leave the reservation to seek employment at the gaming facility;
(3) an assessment of how will their departure affect the quality of reservation life;
(4) an assessment of how their relocation will affect their long-term tribal identification and the eligibility of their children and descendants for tribal membership;
(5) inclusion of copies of any intergovernmental agreements negotiated between the tribe and the state and local governments and a presumption that failure

to achieve such agreements will weigh heavily against the approval of the application; and

(6) a comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local government, and with the uses being made of adjacent or contiguous land, and whether such uses would be negatively impacted by the traffic, noise, and development associated with or generated by the proposed gaming facility.

An agency pronouncement that substantively changes a preexisting legislative rule is itself a legislative rule and can be valid only if it satisfies the notice-and-comment requirements of the APA. U.S. Telecom Ass'n v. F.C.C., 400 F.3d at 38. For instance, in Pickus v. U.S. Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974), the Parole Board had issued, without advance notice and comment, guidelines specifying many of the factors it would use in deciding whether to parole prisoners. The court concluded that the guidelines were an invalid legislative rule finding that:

> [The guidelines] were of a kind calculated to have a substantial effect on ultimate parole decisions.—Although they provide no formula for parole determination, they cannot help but focus the decisionmaker's attention on the Board-approved criteria. They thus narrow his field of vision, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significant might have been differently articulated had [the notice-and-comment requirement] been followed.

Id. at 1112-13.

This analysis is equally applicable to the Guidance. The Guidance clearly supplants the open-ended provisions of 25 CFR 151.11—which speak generally about the weighing of the "anticipated benefits" of an acquisition against the "concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments"—with a set of detailed new requirements that "narrow the field" of decision-making and instructions for decisive reliance on the factors in the Guidance.

Therefore, because it effects substantive changes in the regulatory requirements for taking land into trust, the Guidance is an invalid legislative rule that was issued in defiance of the notice-and-comment requirements of the APA.

D. Process for developing the Guidance violates Executive Order

In addition to violating the APA, the Secretary failed to abide by longstanding guidance on directing federal agencies to consult with tribal governments on a government-to-government basis. In particular, Executive Order 13175 directs agencies to establish meaningful policies to obtain input from Indian tribes before new policies are announced or applied.

> Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

Executive Order 13175, Sec. 5.

The Guidance unquestionably constitutes a regulatory policy that has "tribal implication," not to mention devastating implications with respect to the Tribe. It is our understanding that legislation may soon be introduced to ensconce this policy as a requirement of federal law. This case also proves that such legislation is necessary and should be enacted immediately.

V. THE GUIDANCE IS INCONSISTENT WITH AND CONTRARY TO THE DEPARTMENT'S POLICIES AND LEGAL INTERPRETATION OF LIMITATIONS ON THE SECRETARY'S DISCRETION TO ESTABLISH A "DISTANCE" REQUIREMENT

The principal legal and policy advisors to then-Secretary of the Interior Gail Norton produced, a document entitled "Indian Gaming Paper" dated February 20, 2004. This "white paper" provided an in-depth legal analysis of Secretarial discretion to approve off-reservation fee-to-trust applications for gaming-related development. The document evidently was the outcome of a two-day work session that included participation by the Secretary's Counselor, the Principal Deputy Assistant Secretary, the Associate Solicitor for Indian Affairs, and the Deputy Associate Solicitor for Indian Affairs. The Chairman of the National Indian Gaming Commission also participated in the Indian Gaming Paper's development and concurred in the document's content.

The Indian Gaming Paper comprehensively explores the legislative history and structure of IGRA, and employs this background to produce a cogent deliberative analysis of the framework for the Secretary's authority under IGRA and the IRA. The Paper's conclusions are strikingly at odds with the Secretary's purported

rationale for the Guidance. For instance, the Guidance concludes that IGRA "was not intended to encourage the establishment of Indian gaming facilities far from existing reservations." Yet, the Indian Gaming Paper explains:

> In any event, it is certain that if Congress had intended to limit Indian gaming on lands within established reservation boundaries or even within a specific distance from a reservation, it would have done so expressly within IGRA. It clearly did not. Nor has Congress amended IGRA to add a distance limitation or any other geographic limitation since its passage in 1988.[5]

Similarly, in light of the remarkably small number of Secretarial two-part determinations and even smaller number of gubernatorial concurrences, the Indian Gaming Paper notes:

> While some now argue that, in 1988 Congress may not have envisioned that states and tribes would enter into compacts that would locate gaming sites on lands located far from the reservation, there is no evidence that Congress intended a limitation on that activity within the law. Moreover, the suggestion that "reservation shopping" has run amok is without a basis. To the contrary, states have exercised their statutory prerogative to deny tribes access to lands for gaming under the two-part determination in all but three instances, proving that the framework of IGRA has been working.[6]

By stark contrast, the Guidance denigrates all off-reservation gaming acquisitions that are not a "commutable distance" from a Tribe's reservation by stating that "the negative impacts on reservation life could be considerable." Yet, the Indian Gaming Paper explains the potentially significant benefits of such facilities:

> Another factor considered in the best interest determination is the impact on tribal employment, job training and career development, including impact to the tribe if members leave the reservation for employment at the gaming facility. For a facility that is located a distance from the reservation, the Department may review whether housing is provided for members working at a proposed facility. However, if the tribe is using gaming proceeds at a distant facility to create job opportunities on-reservation, then while tribal members may have to travel a distance to casino employment, overall tribal employment may be boosted by the economic gains of the distant facility. In addition, even without substantial job creation, a tribe may demonstrate best interest by projecting the benefits to tribe and tribal members from increased tribal income alone. Increased tribal services, improved education and health care are also benefits from increased tribal income that the Department may consider.[7]

The Indian Gaming Paper also explains that Congress made a deliberate choice not to impose obvious distance or other restrictions on off-reservation gaming projects. (Concomitantly, Section 20(c) of IGRA expressly re-affirms the Secretary's "authority and responsibility" to acquire trust land.) The Indian Gaming Paper also notes that IGRA imposed "checks and balance" by requiring approval by the Secretary as well as the "high hurdle" of a governor's approval. Nevertheless, IGRA otherwise left tribes with the opportunity to pursue gaming markets that were otherwise denied to them because 19th Century policies favored located Indian reservations in remote areas.

> Further, a plain reading of IGRA and its very purpose supports the conclusion that off-reservation gaming is clearly contemplated by the law. Otherwise the balance of State, Federal, and Tribal power of the two-part determination would be unnecessary. This conclusion also acknowledges (at least implicitly) the history of locating reservations in remote areas so as not to conflict with non-Indian settlers. IGRA marks a departure from this history of blanket isolation of tribes where prosperous non-agrarian economic development is unlikely, in part by employing a structure that envisions state and local participation in a decision to allow off-reservation gaming. IGRA implicitly recognizes the limitations of economic opportunities on the reservation by specifically providing for a mechanism to allow off-reservation gaming and permits a tribe to exercise jurisdiction on new Indian lands for that purpose.[8]

As noted above, in IGRA's twenty-year history, Congress has not seen fit to incorporate any distance limitations to gaming related trust applications. Similarly, the

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[5] Indian Gaming Paper page 13.
[6] Id. page 12-13.
[7] Id. page 11.
[8] Id. page 13.

IRA is over seventy years old and it has not been amended to place a geographic limit on the Secretary's authority to take land into trust. The Guidance was created with unmistakable disregard for procedural requirements. Furthermore, it purposefully disregards the obvious conclusions reached in the Indian Gaming Paper concerning IGRA's purpose, structure, and legislative history. Unlike the Guidance, the Indian Gaming Paper is entirely consistent with the Department's previous interpretations of Section 20, including testimony from previous administrations.

VI. THE TRIBE'S APPLICATION MEETS AND EXCEEDS THE NEW COMMUTABILITY STANDARD IN THE GUIDANCE

Even assuming the new commutable distance rule had been authorized by the IRA and that it had been duly promulgated under the formal APA procedures, the Tribe's application meets and exceeds the new rules and therefore, it should have been approved. Specifically, the Guidance dictates that "no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distant gaming facility." In fact, the Tribe's application fully addresses the issues listed in the Guidance that the BIA Regional Directors are now required to address:

- What is the unemployment rate on the reservation? According to the Department's own findings, the unemployment rate on the reservation is estimated to be between 35 and 40%. Two-Part at 2. (Ironically, the unemployment rate although already unconscionable, would be even higher except for the willingness of Tribal Members to commute substantial distances for employment.)
- How will it be affected by the operation of the gaming facility? According to the Department's studies and conclusions, the proposed Monticello project is the only alternative evaluated that addresses the Tribe's demonstrable need for "a stable economic base to address problems stemming from high unemployment, insufficient housing, and inadequate health care." FONSI page 2.
- How many tribal members (with their dependents) are likely to leave the reservation to seek employment at the gaming facility? According to the EA and FONSI, approximately 260 tribal members would be projected to be employed in the facility. (Because the employees have not been identified, there was no empirical way to calculate the number of dependents affected. Moreover, there was no "guidance" in place to flag this issue and make it a part of the analysis at the time the Eastern Regional Director processed the application.) In any case, the Guidelines intentionally seek to create a Catch-22; if too many tribal members seek employment the detrimental impacts are too great and the application must be denied; if too few, the benefits on tribal member employment are inadequate and the Secretary may not approve the application. "Head's" the Secretary must deny, "tails" he may not approve. Either way the Secretary may not approve a "non-commutable" application.
- How will their departure affect the quality of reservation life? The EA calculated projected earnings of the employees and concluded that the employment and associated training would greatly benefit the tribal members. With a population exceeding 12,000 people, the employment of 260 people off the reservation would not be a detriment to the quality of "reservation life" at Akwesasne. On the contrary, the employment earnings would enhance the quality of reservation life because tribal members would continue to maintain close ties to the reservation community and would be able to financially assist other family members on the reservation. The Two-Part determination reports that the estimated annual payroll to tribal members is $6.6 million and approximately $23 million will be realized by tribally-owned construction contractors. Two-Part page 6.
- How will the relocation of reservation residents affect their long-term identification with the tribe and the eligibility of their children and descendants for tribal membership? Based on the Mohawks long history of commuting far distances from the reservation for employment, there is a strong factual basis to support the conclusion that tribal members commuting to the project site for employment would not adversely affect their long-term identification with the Tribe nor would it affect the eligibility of their children in the Tribe. As far as their descendants, there is no guarantee or way to require them to marry and/or have children in the Tribe. Frankly, such a factor goes far beyond the legitimate scope of fee-to-trust transactions and involves nothing more than conjecture and speculation. Indeed, as noted above, the Guidelines recognize that "tribes are free to pursue a wide variety of off-reservation business enterprises and initiatives without the approval or supervision of the Department" and such enterprises and initiatives could result in comparable off-reservation employment op-

portunities that lure tribal members away from the reservations. Nevertheless, the Two-Part Determination explains that "[c]asino, business, and general skills training will improve tribal members' job skills for increased opportunities on and off-reservation." Two-Part Determination page 7.

- What are the specifically identified on-reservation benefits from the proposed gaming facility? Will any of the revenue be used to create on-reservation job opportunities? These questions were conclusively and thoroughly considered by the EAs and FONSIs. "The Tribe is considered an environmental justice community for this proposed action that would receive a significant benefit as a result of project approval." FONSI page 5 (emphasis supplied). There is no question that $23 million in construction contracts will primarily benefit tribal members, who will either commute to Monticello for the duration of these construction projects or, potentially, commute further, perhaps even to Canada, for comparable construction projects.

VII. THE DEPARTMENT WRONGLY CONFLATED THE IGRA SECTION 20 PROCESS WITH THE IRA PART 151 PROCESS

There is substantial overlap with the factors, processes and considerations the Department considers and evaluates under the IGRA Section 20 two-part determination process and the IRA Part 151 process. For example, under the Section 20 process, the Tribe's application has undergone numerous and comprehensive environmental reviews under both SEQRA and NEPA; the application has successfully secured the issuances of several extensive and comprehensive Environmental Assessments (issued in April 1998, revised in February 1999 and again in February 2004, and updated in September 2006) and several FONSIs (issued in September 1998, revised in October 1999 and signed in April 2000, and revised and reissued in December 2006). These processes and related determinations are directly relevant to the Part 151 Regulations the Secretary is required to consider in exercising his discretion to acquire land into trust pursuant to his authority under the IRA.

Although the Section 20 and Part 151 requirements and factors overlap, technically, the Section 20 two-part determination process under IGRA is separate from the Part 151 process under the IRA.

Furthermore, the law does not allow the Department to deny the application solely on the basis that the land to be taken into trust will be used for gaming purposes. Specifically, 20(c) provides that "nothing in Section 20 shall affect or diminish the authority and responsibility of the Secretary to take land into trust." Denying this application because the land will be used for gaming purposes would impermissibly allow the Section 20 two-part determination to overtake and thereby diminish the Assistant Secretary's authority to take land into trust. In other words, pursuant to Section 20(c) and the FONSI, the Assistant Secretary (or the Associate Deputy Secretary overseeing the Tribe's Application here) should approve the Tribe's application because the land will be available for gaming purposes. However, he may not deny the trust application because the land is subject to a complete two part determination and can be used for gaming purposes.

VIII. THE TRIBE HAS VALID LEGAL EXPECTATION THAT ITS APPLICATION WOULD BE APPROVED

After the FONSI, only two conditions needed to be satisfied before the project site met all of the requirements necessary for gaming to occur. First, the Secretary of Interior needed to finalize the determination to take the land into trust by formally issuing a Record of Decision. Second, New York Governor Eliot Spitzer needed to issue a "concurrence" to the April 2000 favorable Section 20 Secretarial determination, thereby closing the Section 20 process. Governor Spitzer satisfied this condition on February 18, 2007.

Of course the Tribe was elated once it received the Governor's concurrence; and for good reason. In the nearly twenty year history of the Indian Gaming Regulatory Act, the St. Regis application is only the sixth positive Secretarial two-part determination. Two of these previous applications were rejected when the respective Governor refused to grant a concurrence. In the other three cases, after the governor's concurrence, the trust status for the land was, understandably, a non-issue. In two cases the land was already in trust.[9] In the third instance, the land was taken into

[9] Source: Office of Inspector General, Evaluation Report, Process Used to Assess Applications To Take Land Into Trust For Gaming Purposes, September 2005 (Report Number: E-EV-BIA-0063-2003), Appendix 6 (Existing trust lands of Kalispel Tribe and Keweenaw Bay Indian Community converted to gaming uses followed by two-part determination).

trust as a matter of course about two weeks after the Secretary's two-part determination. [10]

- The prior history of land-to-trust applications involving two-part determinations, the Department's uniformly positive assessment of the project and its impact on the Tribe, its members, and
- After the Governor's concurrence, the Tribe had every reason to be confident of a positive outcome. A number of factors bolstered our expectations including:
- the unprecedented State and local support for the Project,

Nevertheless, with the stakes so high for the Tribe and in light of the Tribe's good faith commitment to its development partner, Empire Resorts, the Tribe left nothing to chance. Even before the Governor's concurrence the Tribe began contacting the relevant officials in the Secretary's office and the Office of Indian Gaming. One or more of the Three Chiefs met personally or spoke with either Associate Deputy Secretary James Cason or George Skibine on a regular basis throughout 2007. Sometimes the Chiefs spoke with both Messrs. Cason and Skibine several times in the same week. On each and every one of these conversations, the Chiefs sought or demanded information on the status of the Tribe's application and whether there was anything more the Tribe could submit that might conceivably assist the Department in finalizing the process. Neither the Chiefs nor any other Tribal Official was ever advised that the Tribe's application was deficient in any way. The Tribe was repeatedly assured that its application would be evaluated on an objective and transparent basis. These representations belie the Department's undisclosed contemporaneous effort to develop new standards in order to provide a basis for denying the Tribe's application.

IX. SECRETARY KEMPTHORNE'S UNWARRANTED AND UNPRECEDENTED DELAY

The Rules of the House of Representatives authorize, empower, and obligate this Committee to investigate "review and study on a continuing basis laws, programs, and Government activities relating to Native Americans." House Rules 2(h). This case cries out for this Committee to exercise its jurisdiction to investigate the following:

- Why did the Secretary postpone a decision on our application for nearly one year?
- Were any Interior Department officials or employees directed or encouraged to either postpone a final decision on the Tribe's application or to concoct a basis for denying the Tribe's application? If so, who provided such directives?
- Did Assistant Secretary Carl Artman participate in the review of the Tribe's application notwithstanding his putative recusal from all New York-related gaming land issues? In light of his recusal, did he unduly interfere with the Tribe's application? Did he participate in any discussions about whether the new rule could or should be retroactively applied to the Tribe's application?
- Did any third-party encourage the Department to delay a decision or deny the Tribe's application? Who were these third-parties and who, if anyone, did they contact at the Department. Did they contact anyone in the White House?

X. CONCLUSION

The Secretary's sole basis for denying the Tribe's application is the following statement:

> "[T]he Tribe's application fails to carefully address and comprehensively analyze the potential negative impacts on reservation life[.]"

In contrast to this single unsubstantiated assertion, the Tribe has amassed an unassailable and exhaustive assemblage of favorable determinations and approvals, including the following:

- Local Approvals—
  - Sullivan County—May 23, 1996
  - Town of Thompson—September 6, 1996
  - Village of Monticello—September 20, 1996
- Final Environmental Impact Statement (FEIS) Completed & Accepted "February 18, 1998
- NY State Environmental Quality Review Act (SEQRA) Approval—March 10, 1998
- 1st—Federal Finding of No Significant Impact on Environmental Assessment (FONSI)—April 22, 1998
- 2nd—Federal FONSI—April 4, 2000
- Secretarial Two-Part Determination—April 6, 2000—

[10] Forest County Potawatomi Community v. Doyle, 1993 WL 765438 (W.D.Wis.).

- "Establishment of [the gaming project] in Monticello, New York would be in the best interest of the Tribe and its members."
- "There are no foreseeable adverse impacts on the Tribe associated with the acquisition of the Monticello property [.]"

- NY SEQRA Updated & Confirmed—July 22, 2005
- 3rd—Federal FONSI—December 21, 2006—
  - "The Tribe needs a stable economic base to address problems stemming from high unemployment, insufficient housing and inadequate health care."
  - "[T]his project clearly presented the best opportunity for a financially successful venture. The best long term employment opportunities [are from] the development of this proposed casino complex[.]"
  - "[T]proposed project will improve the socioeconomic conditions for both the Tribe and Sullivan County."
- Governor's Concurrence with Secretarial Two-Part Determination—February 19, 2007

In denying the Tribe's application the Secretary has arrogated to himself the legislative authority of Congress and this Committee. He has also violated a commitment he made to Congress during his confirmation hearing that he would abide by law, including Section 20, notwithstanding any personal views he may harbor about gaming or Indian gaming.[11] Allowing the Secretary to evade responsibility for his actions will only serve to encourage a culture of disregard for established law.

The record reflects that the Tribe's application was denied based on a rule that was illegally fabricated behind closed doors solely to justify the Secretary's decision. The Secretary (or his minions) also contrived to make it procedurally impracticable for the Tribe to challenge this action. Apparently the Secretary imposed these additional procedural obstacles out of recognition that the Tribe could have easily satisfied even this fabricated and contrived "commutability" standard if the Tribe had been given an opportunity.

The CHAIRMAN. Thank you. Mr. Armenta?

STATEMENT OF HON. VINCENT ARMENTA, TRIBAL CHAIRMAN, THE SANTA YNEZ BAND OF CHUMASH INDIANS, SANTA YNEZ, CALIFORNIA

Mr. ARMENTA. Thank you. First of all, I would like to thank you, Chairman Rahall, and the Committee Members here for holding this important meeting and allowing us the opportunity to submit testimony, both written and orally.

My name is Vincent Armenta, and I am the Tribal Chairman of the Santa Ynez Band of Chumash Indians, and I am here to testify against the so-called "commutable distance rule" established by Secretary Kempthorne by his guidance memorandum, dated January 3, 2008.

What exactly is the reservation life that Secretary Kempthorne is trying to protect? Is he trying to protect that part of reservation life that is always striving to restore the lost aboriginal homelands and territory of the tribe? Is he trying to protect those areas of land, both on and off the current tribe's reservation, over which a tribe exercises governmental control, or is the secretary of the interior taking the most restrictive possible definition of reservation life and limiting it solely to the extremely diminished boundaries of an existing reservation?

Under the guise of supposedly trying to protect reservation life, the secretary has established a new rule, without any tribal input or consultation, that is designed to keep Indians on their existing reservations.

When the Spanish explorer, de Portela, arrived in what has become the State of California, there was a thriving community of

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[11] Kempthorne Nomination, S. Hrng. 109-507 (May 4, 2006) page 60-61.

coastal Native American Indians. This group surrounded Santa Barbara and called themselves the Chumash, and was considered by the Spanish to be one of the most advanced California Indian tribes, as they lived in interconnected villages stretching from Malibu in the south to Paso Robles in the north, and encompassing almost 7,000 square miles.

The Spanish, at that time, had built a series of Catholic missions in such Chumash areas, and, within just 74 years, the population of the Chumash Indians decreased from 25,000 to merely 1,200. By the time California was made a state in 1848, the Chumash had been reduced to living in a riverbed of the Zanja de Cota, which is just east of the Santa Ynez Mission. That is what we refer to today as the Santa Ynez Indian Reservation, home of the Santa Ynez Band of Chumash Indians.

Since the Zanja de Cota riverbed was limited in size and opportunity, I, myself, soon began to travel off the reservation for work. To the north, I could pick grapes as a farmer. I could visit, to the west, Vandenberg Air Force Base; to the northeast, the Kyama Valley where they grow alfalfa; or to the west, in Ventura, two other military bases: Point Hueneme and Point Mugu.

So within a 70-mile radius of our reservation, I could either become a farm laborer or join the military. Ultimately, I took a construction-management job in Los Angeles, almost 200 miles away from our reservation. I commuted there because there were no jobs on the reservation.

Regrettably, Secretary Kempthorne would not support my choice to travel from the Zanja de Cota riverbed to the big city, Los Angeles, because it is beyond a reasonable commute of 70 miles. Ironically, Secretary Kempthorne, himself, continues to commute from Idaho to Washington, D.C., for his job, but apparently that is not an unreasonable commute for him.

The historical lands of the Chumash extended to the south and eastward, almost to the eastern suburbs of Los Angeles and Malibu. The so-called "prehistory" of this area is covered with Chumash artifacts and burials. The Chumash people still consider this aboriginal territory to be their home, even though they have been forced to relocate in the Zanja de Cota riverbed.

Perhaps Secretary Kempthorne should recast his 70-mile reasonable commute in relationship to the aboriginal territories of each tribe. Historically, tribes in their aboriginal territory state have crossed back and forth throughout the aboriginal territories in search of food and resources. Modern-day tribal members and descendants still travel great distances for gainful employment.

Today, in my position as Tribal Chairman, I have commuted to Washington, D.C., just like Secretary Kempthorne.

Limiting fee-to-trust acquisitions to only 70 miles from each current reservation perpetuates a cycle of poverty and despair on each reservation. Today's reservations are a mere shadow of their historic aboriginal territories.

The Indian Reorganization Act was enacted to prevent the destruction of current reservations and to permit the secretary to assist tribes in restoring as much of such lost aboriginal territories.

While we appreciate Secretary Kempthorne's concern with the negative effects of off-reservation fee-to-trust, gaming acquisitions

on existing reservation life, we invite him to see what the Chumash have done with our riverbed. We had hoped that the secretary would work with us to reestablish our former aboriginal territories of our tribe, but, instead, the secretary is more concerned about how far our members can drive to work.

We asked the House Resources Committee to work with the tribes and at least permit us to go through the indignity of having to buy back our own aboriginal territories. Instead, we are being labeled as desiring to reservation shop. The Chumash desire to regain the lands of their ancestors, one piece at a time. This aboriginal territory analysis is completely absent from the so-called "commutable distance test," which is a mere pretext to keep the tribes on their existing reservations. Thank you very much.

[The prepared statement of Mr. Armenta follows:]

Statement of The Honorable Vincent Armenta, Tribal Chairman, Santa Ynez Band of Chumash Indians

Is Section 5 of the Indian Reorganization Act a catalyst for self determination or a ball and chain keeping "those Indians" on the Reservation?:

Opposition to that new Guidance by Secretary Kempthorne dated Jan. 3, 2008, Regarding off-reservation fee-to-trust acquisitions for gaming purposes, and Interior's new "Commutable Distance Rule."

Good afternoon, my name is Vincent Armenta and I am the Tribal Chairman of the Santa Ynez Band of Chumash Indians. I am here to testify against the so-called "Commutable Distance Rule" established by Secretary Kempthorne by his Guidance memo dated January 3, 2008.

At the outset, I would like to thank Chairman Rahall, Ranking Committee member Young and the entire Committee for holding this important hearing and providing us with the opportunity to submit testimony and a written response to a directive memorandum that was received by our Tribe without any prior notice or government-to-government consultation prior to our reading about the new rule in the media on January 4th of this year.

Under the guise of supposedly trying to protect "reservation life" the Secretary has established a new rule without any tribal input or consultation that is designed to keep "the Indians" on their existing reservations.

What exactly is the "reservation life" that Secretary Kempthorne is trying to protect? Is the Secretary trying to protect that part of Reservation Life that is always striving to restore the lost aboriginal homelands and territory of the Tribe? Is the Secretary trying to protect those areas of land both on and off the Tribe's current reservation over which the Tribe exercises governmental control as provided in the IGRA? Or is the Secretary of the Interior taking the most restrictive possible definition of Reservation Life and limiting it solely to the extremely diminished boundaries of existing reservations? [1]

Aboriginal Chumash Bands

I would first like to provide a brief historical overview of the Santa Ynez Band of Chumash Indians here in the State of California.

The Chumash historically occupied an area from Morro Bay to the north, Malibu to the south, Tejon Pass to the east (what is now called the "Grapevine") and the four Northern Channel Islands. In prehistoric times the Chumash territory encompassed some 7000 square miles. Today, this same region in Southern Central California takes in five counties including Santa Barbara, Ventura, San Luis Obispo, Los Angeles, and Kern. An elaborate Chumash trail network linked several hundred early Chumash villages and towns, seasonal encampments, rock art sites, shrines, gathering places and water sources. These trails were vital to sustaining cultural

[1] "California tribes that were parties to the 18 treaties negotiated in 1851-52 would have retained 8.5 million acres of their aboriginal homelands had the treaties been honored by the Senate. Then the Senate refused to ratify the treaties and Congress extinguished the California tribes' land claims in the California Land Claims Act of August 3, 1851, the tribes lost claims to their entire aboriginal homeland totaling more than 70,000,000 acres. Today the tribal land base in California is just over 400,000 acres (about 0.6% of the aboriginal land base), with an additional 63 acres of land held in individual land allotments." Final Report, Advisory Council on California Indian Policy, Pursuant to P.L. 102-416, Executive Summary, p. 25 (September 1977).

longevity for over 8,000 years in this region as they formed the foundation for economic and social exchange among the Chumash.

The Chumash numbered over 25, 000 people on the eve of the first Spanish land expedition in 1769. This scouting trip by Portolá led to the founding of five Catholic missions in the Chumash territory beginning in 1772; with Mission Santa Inés the last to be built in 1804. [2]

In a period of seven decades, the once thriving population of 25,000 Chumash drastically declined to 1,200 people. After secularization of the missions in 1833, the Chumash population in the Santa Ynez River area alone, including today's Lake Cachuma, Mission Santa Inés, Mission La Purisima Concepción and the Lompoc Coast, severely declined to only 455 Indians. A map of Chumash Towns at the Time of European Settlement is attached. [3]

The Treaty of Guadalupe Hidalgo

In the aftermath of the Mexican-American War in 1848, the United States acquired the California territory as part of the Treaty of Guadalupe Hidalgo. An interesting aspect of the Treaty was that the United States agreed to respect the land claims and rights of the Native Americans already living in California on the land they physically occupied.

The 18 Unratified California Treaties

Indian Commissioners were sent to California to remove the California Native Americans from the lands they "physically occupied" and create the first reservations. In reliance on the Treaties, the California Indians abandoned much of their aboriginal lands and began withdrawing to their new treaty lands. However, unbeknownst to the California Tribes, the California delegation in Congress was busy lobbying against ratifying the Treaties.

Instead of just not ratifying the Treaties, Congress went one step further. By secret joint resolution, Congress agreed not to ratify the California Treaties and to formally "hide" them for 50 years. The net effect of this deception was to open up California for settlement, as the Native Americans were no longer physically occupying the land and yet give the Tribes no reciprocal rights to any reservations whatsoever.

Between April 29, 1851 and August 22, 1852, a series of eighteen treaties "of friendship and peace" were negotiated with a large number of what were said to be "tribes" of California Indians by three treaty Commissioners (George W. Barbour, Redick McKee and O. M. Wozencraft) whose appointments by President Millard Fillmore were authorized by the U.S. Senate on July 8, 1850. Eighteen treaties were made but the Senate on July 8, 1852 refused to ratify them in executive session and ordered them filed under an injunction of secrecy. The texts of these 18 unratified treaties were made public on January 19, 1905 at the order of the U.S. Senate which met in executive session on that day in the Thirty-second Congress, First Session. [4]

The Santa Ynez Indian Reservation

Chumash Reservation life began with the Spanish Missions who claimed to be "teaching" tribal members religion while allowing tribal members to perform manual labor to build their character. So much character was built that a once vibrant population of Chumash in the Santa Ynez River area was reduced from 3,000 to a few hundred in a space of 74 years.

With the secularization of the Missions and California Statehood, even these few Chumash found they had lost their homelands and were living in the shadows of the former glory of the Missions. The Chumash of the Village of Kalawashaq, from where I descend, found refuge in the Zanja de Cota riverbed near the town of Santa Ynez—mostly because no one else wanted to live in that flood plain.

From the beginnings of California Statehood, the Catholic Church had maintained that many Church lands were jointly owned by the Church and its neophytes, which

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[2] John R. Johnson, Chumash Social Organization: An Ethnohistoric Perspective. Ph.D. dissertation, University of California, Santa Barbara (1988); John R. Johnson, The Chumash after Secularization (1995), California Mission Studies Association, no pagination; John R. Johnson, personal communication with Kathleen Conti (Feb. 8, 2008).

[3] Reproduced with permission from Professor John R. Johnson, personal communication, http://www.sbnature.org/research/anthro/chumash/local.htm. Map prepared by John R. Johnson in collaboration with Chester King, Kathryn Klar, Sally McLendon and Kenneth Whistler. From Sally McLendon and John R. Johnson (editors), Cultural Affiliation and Lineal Descent of Chumash Peoples. Report submitted to the Archaeology and Ethnography Program, National Park Service, Washington, D.C., 1999.

[4] Robert F. Heizer, THE EIGHTEEN UNRATIFIED TREATIES OF 1851-1852 BETWEEN THE CALIFORNIA INDIANS AND THE UNITED STATES GOVERNMENT (1972), reprinted at http://www.maidu.com/maidu/maiduculture/bibliography/historyofthe18.html.

is how the Church referred to its Chumash workers in residence. In a quiet title action beginning in 1897, the Catholic Bishop of Monterey began the process to eliminate any neophyte claims to about 11,500 acres of the Canada de los Pinos or College Rancho owned by the Church and to transfer title to the Zanja de Cota Riverbed to the Indian Agent of the Mission Tule (Consolidated) Agency in California. In a settlement of such quiet title action, and by the implementation of the Mission Indian Act of 1891 and an Executive Order from President Benjamin Harrison, the Zanja de Cota riverbed was turned into the Santa Ynez Indian Reservation of the Santa Ynez Band of Chumash Indians. A sketch of Legal Description of two parcels in Notice of Pendency of Action, The Roman Catholic Bishop of Monterey, Plaintiff, against Salomon Cota, et al., filed 2/23/1897; Superior Court of the County of Santa Barbara, CA is attached.

Such Santa Ynez Reservation consisted of about 99 acres—a far cry from the 7,000 square miles of aboriginal Chumash lands prior to the Missions or even the 11,500 acres of Church lands over which the Chumash shared with the Catholic Church by land claim.

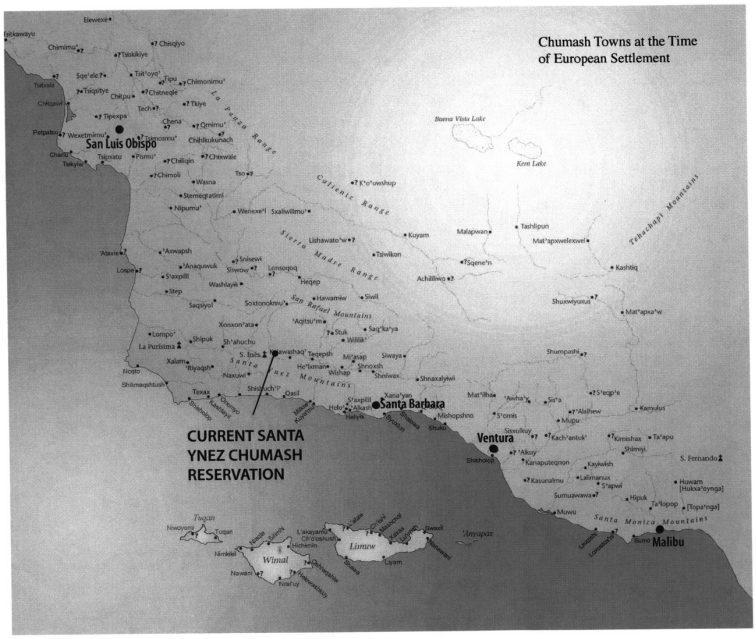
The Commutable Distance Rule and Lost Tribal Lands

The Indian Reorganization Act of 1934, the so-called Wheeler-Howard act, was designed with two objectives. The first was to reverse the effects of the Dawes Act of 1887 and end the era of allotment and forced assimilation by creating strong tribal governments on established federal reservations.

The second objective was to reverse the loss of tribal lands and, if possible, reestablish the aboriginal territories of many tribes.

We appreciate Secretary Kempthorne's concern with the negative effects of off Reservation fee to trust gaming acquisitions on existing reservation life and we invite him to see what the Chumash have done with our riverbed. We would hope that the Secretary would work with us to re-establish the former aboriginal territories of our tribe. Instead the Secretary is more concerned with how far our tribal members can drive to work.

We ask the House Resources Committee to work with Tribes and at least permit us to go through the indignity of having to buy back our aboriginal territories. Instead we are being labeled as desiring to Reservation Shop. The Chumash desire to regain the lands of their ancestors even if it means buying them a piece at a time. This aboriginal territory analysis is completely absent from the so-called commutable distance test—which is mere pretext to keep tribes on their existing diminished reservations.





The CHAIRMAN. Thank you. Ms. Hindsley?

STATEMENT OF HON. HAZEL HINDSLEY, CHAIRWOMAN, ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, WEBSTER, WISCONSIN

Ms. HINDSLEY. Thank you. Good afternoon, Chairman Rahall, Ranking Member Young, and Members of the Committee. My name is Hazel Hindsley, and I am currently the Chairwoman of the San Croix Chippewa Indians of Wisconsin, and I have been a member of the Tribal Council for eight years.

I would like to introduce St. Croix Tribal Council Member Elmer J. Emory, Bad River Tribal Council Member Edith Leoso, Beloit

City Council President Terry Monahan, and Beloit City Manager Larry Arft.

The City of Beloit invited the Bad River Band of Lake Superior Chippewa Indians and the St. Croix Tribe to pursue the development of a casino resort project. We submitted our fee-to-trust application in 2001. There was a favorable recommendation by the regional office in January 2007. It is currently under review at the central office here in Washington, D.C.

During the summer of 2007, in an effort to find a way to deny off-reservation casino projects like ours, the Interior Department reversed its longstanding procedures by making the Part 151 fee-to-trust decision before the two-part IGRA decision. This was compounded by the January 3rd guidance memo, which contained fabricated assumptions that a casino beyond a commutable distance would negatively impact reservation life.

The St. Croix Tribe filed a lawsuit in the U.S. District Court here in Washington, D.C., that challenges the legality of the guidance memo, as well as a decision to make the Part 151 decision first. Our lawsuit is still pending before the Court.

We have filed, in our lawsuit, a copy of the Interior Department's own analysis of the issues presented by the guidance memorandum. It is called "The Indian Gaming Paper," and it is dated February 20, 2004. It presents an extensive and detailed analysis prepared by senior officials of the Interior Department, together with its lawyers.

It concludes that Congress, in enacting the Indian Reorganization Act in 1934 and IGRA in 1988, was very aware that Indian tribes, due to their remote locations, would need to establish economic enterprises, including casinos, at great distances from their locations in order to promote their self-government and economic development.

The guidance memorandum totally ignores the Interior Department's own conclusions set out in detail in the 2004 Indian Gaming Paper.

The memorandum talks about commutability as a new standard. In my tribe's history, it has always been common for our ancestors to travel, for subsistence purposes, whether that was our maple sugar camps or our wild rice camps. It was also common for our ancestors to travel great distances to trade and barter with other tribal groups and various Europeans who came to the Great Lakes region.

This is still true today. My people have traveled to various urban areas for employment, yet still maintain strong ties to the tribe's reservation and community. My own daughter is one of them.

The St. Croix people survived the Federal relocation era, where our families were sent anywhere from California to Indiana. Most of them returned home as soon as they saved enough money. So commutability is one of the ways that we have survived in the past.

There are some tribal members living currently in the Beloit area who may look for jobs there, and a few tribal members who may move from our reservation. In either case, this will not negatively impact my tribe's reservation life. The whole concept behind this project was to find a way to provide better services and em-

ployment for our tribal membership on the reservation through the revenue generated by the casino project.

The Tribal Council at St. Croix has studied this issue. We regularly deal with the issues of jobs, education, healthcare, housing, elder care, infrastructure, and land. We have stayed the course on the Beloit application because it is so vital to our future. This is our responsibility, and it was our decision to pursue this opportunity.

Since 1934 and the passage of the IRA, the policy of the United States has been that of encouraging Indian self-determination and economic development. The Interior Department's guidance memo has changed this policy. The Interior Department is essentially telling my tribe that we do not know what is best for us, our children, our elders, and our generations to come. This is paternalistic and oppressive. It is an economical effort to imprison my people to my reservation.

The guidance memo is directly contrary to the purpose of the Indian Reorganization Act. The Supreme Court has stated that the purpose of that statute is, and I quote: "To rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."

The Supreme Court has also stated that "the Indian Reorganization Act was to establish the machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."

As the Chairperson of my tribe, I was elected to make decisions that take into consideration the best interests of my people. I cannot allow that right to be taken away.

There are many reasons that I feel the guidance memorandum is inappropriate. I believe that the new guideline is an improper shift in BIA policy, and it was made without consulting tribal leaders. It is exactly the opposite of what is stated in the Indian Gaming Paper. I feel that it is not only inappropriate; it is unfair.

I believe that the Interior Department has constructed an elaborate framework whose sole purpose was to deny pending off-reservation casino applications. The agency understood that our application and a number of others would succeed under the two-part IGRA determination process. This led the Interior Department to change the rules so that it could deny the applications by using Part 151 of the regulations, rather than IGRA. In doing so, it avoided the will of Congress. How else can you explain 22 denial letters within one day?

There is an argument from pages 3 and 4 of the guidance memorandum that states, I quote: "The operation of the gaming facility would not directly improve the employment rate of tribal members on the reservation."

The question that I have is, how could the revenue stream from the gaming facility not improve our employment rate at home?

I believe that the guidance memorandum makes substantive changes to Federal law and that the Interior Department has violated its trust responsibilities. There was no consultation with the tribes. It creates new standards that are designed to limit a tribe's opportunities, and it ignores the decisions that are made by the tribal governments. I believe that the guidance memorandum

should be withdrawn and that before any changes are made to these important laws, the proper consultations with the tribes should occur. Thank you.

[The prepared statement of Ms. Hindsley follows:]

Statement of The Honorable Hazel Hindsley,
Chairwoman, St. Croix Chippewa Indians of Wisconsin

Chairman Rahall, Ranking Member Young, and other Members of the House Resources Committee. I am the elected Chairwoman of the St. Croix Chippewa Indians of Wisconsin. I have been an elected member of the Tribal Council for eight years. The St. Croix Tribe is located in a remote area of northwestern Wisconsin. Our reservation lands are spread in three separate counties. We hold very little land in trust. Only a small portion of our land is suitable for farming or commercial use. Other than work for the tribal government itself, business and employment opportunities are very limited for tribal members. There are currently 1,089 enrolled members of the St. Croix Tribe. The unemployment rate is 19.4%. Twenty percent of those employed earn wages below the poverty level.

The tribal government has substantial unmet needs in a number of areas, including reservation housing, healthcare and education. Funding by the federal and state governments continues to decline while the Tribe's population has substantially increased and continues to grow. The Tribe has a casino in Turtle Lake, a rural area of Wisconsin, and two other small casinos. Even with those revenues, the Tribe's financial resources have simply proven to be inadequate and are incapable of providing adequate services and keeping pace with the needs of its growing population.

The St. Croix Tribe, together with the Bad River Band of Lake Superior Chippewa Indians, have been partners in an effort to gain approval for a casino resort project in Beloit, Wisconsin. Beloit is about 330 miles from our two reservations. This project was originally the idea of the City of Beloit. The area had experienced numerous factory closings and the permanent loss of thousands of jobs. The city conceived of a destination resort casino, with a large hotel, restaurants and a convention center, as a principle mechanism to restore its economy not only by the revenues involved in the construction of the project (which would be the largest in the area's history) but by some 3,000 fulltime jobs which the casino project would create. Some 61% of Beloit residents voted favorably for the project in a referendum held several years ago. For many years, the project has enjoyed the unanimous support of the Beloit City Council. It has received the continuing support of an overwhelming majority of the elected members of the Rock County government (where Beloit is located) and nearby municipalities. Each of our two tribes has historical and aboriginal ties to the Beloit area.

The St. Croix Tribe and Bad River Band filed their application to take the land into trust for a Beloit casino in July of 2001. Since that time, the Tribes have taken every effort to comply with all of the requirements in order to gain approval by the Interior Department. Studies and more studies have been prepared. An environmental impact statement has been prepared. Consultations with untold numbers of local, state and federal officials have taken place as well as consultations with other Indian tribes. Tribal leaders and local elected officials have met with BIA officials time and time again to present the project and answer any of their questions. Unlike many such projects, there is no outside developer. All of the costs have been borne by the two Tribes and the Tribes will receive all of the profits. The two Tribes have undertaken these expenses because they have come to learn that viable economic development on or nearby their reservations is simply not realistic. It has proven to be very difficult for the St. Croix tribe to diversify its economy despite significant efforts to do so. The Bad River Band's wild rice crop, a major revenue source for the tribe, totally failed this past fall due to the low water levels in Lake Superior.

In January of 2007, the BIA's regional office forwarded the casino application with a favorable recommendation to the Central office of the BIA here in Washington, D.C. Several months later, tribal leaders were informed that approval by the Interior Department was in real doubt due to Secretary Kempthorne's strong negative attitude towards off-reservation casinos. At that time, we naively thought that the application would still be approvable because it met the "best interest" test under the two-part determination and there was no detriment to the surrounding community. Assuming approval by Governor Doyle, we thought that the remaining issues posed by Part 151 of the regulations were easily satisfied because we had previously negotiated a comprehensive inter-governmental agreement with the City of Beloit.

We sadly underestimated the ingenuity of the Secretary's office in finding a way to turn these applications down. As I am sure you know, historically the two-part determination under IGRA has been made first. However, during the summer of 2007, we began to hear that the Interior Department had decided to make the Part 151 determination prior to the two-part IGRA determination because it viewed the broader language in Part 151 would provide more discretion to deny these applications. (This was confirmed in a letter received by our counsel.) This decision was made without consultations or any type of public notice or explanation as to the reasons for this change.

Over time, it has become evident that the Interior Department has decided to use the Part 151 so that it can deny meritorious off-reservation casino applications. In so doing, the Interior Department has bypassed IGRA which Congress clearly envisioned was to provide the appropriate standards. From public statements made by Assistant Secretary Artman, we were aware that internal fee-to-trust guidelines were being drafted and would shortly be issued. Our lawyers, in their meeting with Mr. Artman on November 29, 2007, asked for a copy of those guidelines prior to the time that any decision was made on our application. He declined. After being told by Assistant Secretary Artman at the November meeting that decision letters would be issued within several weeks, my tribe filed suit in the District of Columbia. We asked the court to declare the practice unlawful of making the Part 151 decision first.

On January 3 of this year, those guidelines were issued by Assistant Secretary Artman in the form of a Guidance memorandum. It was required to be followed by regional offices as well as the office of Indian Gaming in the BIA's central office directed by George Skibine. Its assumptions were false and ill informed. As an overall matter, the Guidance memorandum flies in the face of Tribes' right of self-determination. I, and other Tribal leaders, have the right to determine what is in the best interest of our people. The Interior Department's Guidance memorandum attempts to take this decision making power away from the Tribes. For some reason, the Interior Department believes that it, and not Tribal leaders, knows how best to preserve and improve the quality of life on our reservations. In this way, it is patently paternalistic. There is no doubt in my mind that the Guidance memorandum was issued just to provide a colorable basis to achieve Secretary Kempthorne's directive to deny off-reservation casino applications, regardless of their merits, where there was a distance of over a "commutable distance" from the proposed casino to the established reservation.

The guidelines proclaimed a totally new policy—which essentially said that "reservation life" should be protected by denying applications because significant numbers of tribal members might leave the reservations to work in the distant casinos. This new policy was adopted without any consultations with either Indian Tribe. It has no factual basis. It is evident that the Interior Department did not conduct any type of analysis or studies before adopting it. The St. Croix tribe has amended its lawsuit and asserted a legal challenge to the Guidance memorandum.

The Guidance memorandum theorizes that there will be a mass exodus from existing reservations to a new casino. That will not happen in my tribe. There will predictably only be a very small number of tribal members who will leave the reservation and move to Beloit. Most tribal members will not leave due to their strong ties to reservation life, tribal culture and their families. The St. Croix Tribe already has a number of members who live far away from the reservation who might well relocate to Beloit. There are several hundred Bad River Band members who live nearby Beloit who might also seek jobs at the casino. At. St. Croix, to the extent a few tribal members do leave the reservation for Beloit, their jobs will be filled by other tribal members anxiously seeking employment. Their departure will not harm reservation life. Any negative impact caused by departures will be more than offset by increased revenues flowing to the reservation which will fund additional tribal services, provide for more jobs, and allow the tribe to purchase more land and construct badly needed housing so that more Tribal members can move back to the reservation. Currently, there is a waiting list of 132 tribal members seeking housing.

The Guidance memorandum claims that the policy of the Indian Reorganization Act (IRA) was to provide for taking lands into trust within or in close proximity to existing reservations so that they could "flourish." Similarly, the memorandum asserts that IGRA was not intended to encourage the establishment of Indian gaming facilities "far from existing reservations." Notably, there are no citations to legislative history or to case law to support these assertions. In fact, the legislative history and the case law reach conclusions totally at odds with the Guidance memorandum.

The Guidance memorandum advised BIA offices that applications for off-reservation casinos beyond a "commutable distance" should be denied. And on the very next day, January 4, the Interior Department issued eleven denial letters. (My tribe did

not receive one because of the pending litigation.) Inexplicably, the eleven tribes who did were never provided an opportunity to make a submission which responded to the issues raised in the Guidance memorandum. I am aware that at least two of these tribes, the Jemez Tribe in New Mexico and the Lac du Flambeau Tribe in Wisconsin, were still developing their administrative records at the Regional Offices. They could have presumably made submissions which were responsive to the issues raised. While these denial letters can be challenged in Court, lawsuits impose a real additional cost on these tribes who, for the most part, cannot afford litigation expenses. The denial letters, by themselves, can also have devastating effects on a tribe's efforts to develop a casino. For example, after the St. Regis Mohawk Tribe received a denial letter, the developer withdrew from the project. The entire project has fallen apart.

Soon after our litigation started, our attorney received (from a confidential source) an internal analysis prepared by the Interior Department dealing with the position raised by the Guidance memorandum that distance is a determining factor in approving or denying an application. It had never before been made public. It was prepared by numerous senior officials of the Interior Department together with the Solicitor's Office. The Chairman of the National Indian Gaming Commission agreed with its conclusions. Its introduction stated that it was prepared in response to Secretary's Norton's query as to "what discretion, if any, the law provides her in regard to the approval of off-reservation Indian gaming acquisitions that are great distances from an established Indian reservation, so-called "far-flung lands." This document, the "Indian Gaming Paper," is dated February 20, 2004. With minor redactions agreed to by the Government, it has now been filed in the public record in our lawsuit. A copy is appended.

This Paper is obviously the product of an extensive and in-depth analysis. It contains numerous references to the legislative history of the IRA and IGRA. It placed substantial reliance on a number of Supreme Court decisions interpreting the IRA. It concluded, contrary to the Guidance memorandum's edicts, that the legislative history nowhere suggests that the purpose of either statute was only to encourage economic enterprises on or nearby reservations. Instead, starting with the IRA, the Paper stated (page 8) that it had a much broader purpose—to rehabilitate the Indian's economic life by establishing "the machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Morton v. Mancari, 417 U.S. 535, 542 (1973). Given this background, the Interior Department's own conclusion was that (page 8): "Nowhere in the IRA or its legislative history was there ever a discussion of mileage limits to lands that the tribes could acquire to engage in economic enterprises."

Its analysis of the Congressional intent behind IGRA was similar—Congress did not intend for the distance of a proposed casino from an established reservation to be a limiting factor. The Interior Department stated in its Paper (page 6): "...it is certain that if Congress had intended to limit Indian gaming on lands within established reservation boundaries or even within a specific distance from a reservation, it would have done so expressly within IGRA. It clearly did not." The Paper further stated (pages 12-13): "While some now argue that, in 1988 Congress may not have envisioned that states and tribes would enter into compacts that would locate gaming sites on lands located far from the reservation, there is no evidence that Congress intended to include a limitation on that activity within the law. Moreover, the suggestion that 'reservation shopping' has run amok is without a basis."

The Indian Gaming Paper reveals that the Guidance memorandum's "commutable distance" and the asserted negative impact on reservation life are pure inventions—created to provide a cover for denying off-reservation casino applications. The Guidance memorandum was written as if the Indian Gaming Paper did not exist—or there was a mistaken assumption that it would never fall into hands of tribes. Now that it has, the "commutable distance" and the perceived harm to reservation life concepts should not be allowed to stand. The Interior Department, like any Federal agency, cannot publish a Guidance memorandum which is at odds with Congressional intent. And it has. I urge this Committee to make a searching inquiry as to how the Interior Department can attempt to justify the Guidance memorandum when its own analysis appearing in the Indian Gaming Paper stated (page 13): "If IGRA was intended to bring substantial economic development opportunities to Indian tribes where none could be achieved solely because of the remoteness of reservation lands, Congress provided tribes the potential to prosper on Indian lands a distance from remote reservations. Conversely, if IGRA was intended to spur on-reservation economic development only—or lands that are so close that for all intents and purposes they are on-reservation—the purpose of the law would fail because existing isolated reservation lands would not provide the potential of the law. Accepting the inherent market limitations within some rural states, distance limitations

should not be grafted onto IGRA. To do so could deny the very opportunity for prosperity from Indian gaming that Congress intended IGRA to foster."

Even if the Guidance memorandum was fully consistent with Congressional intent, it is still legally flawed. In 2001, the Interior Department withdrew final Part 151 regulations. When it did, the published notice in the Federal Register stated that revised standards for taking land into trust would be promulgated by rule making and there would be prior consultations with Indian tribes. There were no prior consultations. 66 Fed. Reg. 56608-10 (November 9, 2001).

Moreover, the new requirements in the Guidance memorandum should have gone through the "Notice and Comment" rule making process under the Administrative Procedure Act. The memorandum set out requirements which were to be followed in making decisions on off-reservation casino applications. They were not just a set of parameters which the BIA decision maker could, as a matter of discretion, follow or not follow. Given this, as numerous Courts have held, the rule making process should have been followed. And indeed, Assistant Secretary Artman once told our attorneys that rule making under Part 151 was being considered—and at a later meeting told them that there was not enough time remaining during the current Administration to go through rule making. The Interior Department was undeterred and proceeded anyway by issuing the Guidance memorandum.

The new policy outlined in the Guidance memorandum goes much further than gaming issues. For in it, the Interior Department has announced a new policy discouraging Indians moving from their reservations—even if Tribal members, faced with impoverished conditions on their reservations, decide to move several hundred miles away to a new job. The Interior Department's stated goal is that by discouraging departures from the reservations, Indian reservations will "flourish." Where are the consultations that led to this sweeping policy change? Where are the studies or analyses which show that by denying off-reservation casino applications, life on the reservations will "flourish"? Where is the analysis which demonstrates that the Indian Gaming Paper was wrong when it stated (page 11): "...if the tribe is using gaming proceeds at a distant facility to create job opportunities on-reservation, then while tribal members may have to travel a distance to casino employment, overall tribal employment may be boosted by the economic gains of the distant facility."

And, how can this be anything but pure hypocrisy when the Interior Department is fully aware that economic opportunities on most reservations are very scarce—and when the Administration—as recently as several weeks ago—has proposed a new budget which substantially reduces funding for Indian tribes?

In conclusion, Mr. Chairman, we believe that in its zeal to carry out Secretary Kempthorne's directive to deny off-reservation casino applications, the Interior Department has not only ignored the will of Congress but has fundamentally violated its trust responsibilities owed to Indians and Indian tribes by adopting a new policy which it knew had no legal authority.

[NOTE: The "Indian Gaming Paper," dated February 20, 2004, has been retained in the Committee's official files.]

The CHAIRMAN. Thank you. Mr. Warnke?

STATEMENT OF JEFF WARNKE, DIRECTOR OF GOVERNMENT AND PUBLIC RELATIONS, CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, OAKVILLE, WASHINGTON

Mr. WARNKE. Good afternoon, Chairman Rahall and Ranking Member Young and Members of the Committee. My name is Jeff Warnke, and I am the director of government and public relations for the Chehalis Indian Tribe in southwest Washington.

You have some written testimony that was submitted by Chairman Burnett earlier in the week, and I will do my best to summarize it. He certainly wanted to make it out to D.C. to give this testimony himself, but he fell ill, and we cannot be entirely sure if it was the influenza virus or whether the proposed regulations are what made him sick. Sorry. I could not help it.

At any rate, the Chehalis Indian Tribe, just to give you a little geographic background, is located in southwest Washington. You may be familiar with southwest Washington. It was recently in the news late last year due to flooding in the area. I think we probably

hold the record for the most water over I-5 at one time. I-5 was 10 feet under water, and it caught a little national attention. We are about 20 miles southwest of Olympia, the state capital, and it is a beautiful reservation. Much of it is in the flood plain, and it floods almost every year.

With that kind of a reservation topography, there was also a 60-percent unemployment rate on the reservation among tribal members before the casino was built. The casino has been very successful, even though it is a small casino in a rural community, and it has brought a great number of jobs and opportunities for tribal members of the Chehalis Indian Tribe.

Our testimony today is not specifically about a gaming fee-to-trust application. We were, by all accounts, one of the last reservations to receive a fee-to-trust application that was approved for general economic-development purposes, and we feel that the guidelines that have been distributed in January equally affect the nongaming applications, as well as the gaming applications, and even though the memo is titled to specifically address gaming applications, it is obvious, throughout the memo, that it actually affects all fee-to-trust applications.

Just to go back a little bit to the application that we successfully maneuvered through the Bureau of Indian Affairs, I would like to give you a little history on that.

In 1999, Thurston County, which is the county government that is located adjacent to the Chehalis Tribe, approached the tribe and asked them to move their casino closer to Interstate 5 because they had begun to build up an infrastructure for local development, and that local development was not happening. Their operating costs for that infrastructure were driving their budget into the red annually. They were looking for the tribe to be an anchor tenant for many of their services to fill their budget gap.

The tribe was happy to do this because they thought a more advantageous location for their facility would attract more gaming customers. However, as we went through the process, it became evident that the off-reservation gaming application was not going to be well received by the Bureau of Indian Affairs, and we changed the application to a general economic-development application.

This also was met with resistance due to the fact that the actual application did not have a specific business plan attached to it. The tribe was lucky enough to partner with a publicly traded, very reputable company, which many of you are familiar with, the Great Wolf Lodge Corporation. The Great Wolf Lodge Corporation provided both the Bureau of Indian Affairs a specific business plan that they needed to approve our application, as well as a business opportunity that was viable for the Chehalis Indian Tribe. I think we were lucky in that.

I think the speed of business moves a lot faster than the Bureau of Indian Affairs, and most Indian tribes who are attempting to diversify from gaming need to move faster than the Bureau of Indian Affairs, or those business partners who are publicly traded companies and reputable companies in America will back out of deals when things get hung up in Washington, D.C.

So what are our recommendations to this panel on the guidelines that have been set forth in January? Well, we have got a few that would have helped us. First of all, commutability seems to be a nonissue. We have heard a lot, earlier this morning, in testimony about how the projects are a thousand or 1,500 miles away from the reservation. Our project was seven miles away from the reservation, and yet we constantly heard about how far away from the reservation it was, not specifically to commutability but, in geography, it seemed far away to the Bureau.

We also were at a loss as to where our application ever was at any one time in the process. We feel that if you want to improve the process for tribes, make sure that there is a process with guidelines that can be followed and understood in terms of a timeline with milestones in it so that a tribe can track where their application is in the process and when they can reasonably communicate with business partners as to what the can expect for a conclusion of the process.

There should also be an assumption that the land, if all things are created equal, shall be taken into trust unless there is a specific reason why it should not be, and it seems that, right now, the assumption is that it will not be taken into trust unless the tribe proves that it should be, and we think that that is backwards.

That concludes my testimony, and I would be more than happy to answer any questions.

[NOTE: Chairman Burnett's statement can be found on page 75.]

The CHAIRMAN. Thank you all for your testimony. Let me ask Chief White my first question in regard to the proposed regulations and the commutable distance.

You heard me ask Mr. Artman this question this morning, I believe. Was your tribe sent a copy of the draft proposed regulations, and did you have comments at that time?

Ms. WHITE. Not at any point in time.

The CHAIRMAN. So you were not consulted or given an opportunity to comment in any way.

Ms. WHITE. We were never consulted, not at all. In fact, the first time that we were made aware that there was even a discussion regarding a new policy, an internal policy in particular, was at a gaming conference where Assistant Secretary Artman was sitting on a panel, and when he was questioned about the policy, he declared that it was an internal policy but that it would not be available for public review.

So, at that point in time, we had several of our supporters and representatives reach out to the assistant secretary to inquire as to what exactly this policy was going to represent and look like, and whether or not it was going to apply to us.

The CHAIRMAN. What about after your application was denied? Were you given any chance to comment?

Ms. WHITE. Not at all. None whatsoever. In fact, Assistant Secretary Artman was also in attendance at a recent NIGA conference here in Washington, D.C., and when we pressed him, with respect to the new guidance policy and its application to us, the response was that the Department welcomes judicial review.

So, in fact, we have been instructed that there is no appeal process for the St. Regis Mohawk Tribe as it relates to the specific denial, and, in fact, our only recourse, at this point in time, would be to file a lawsuit, once again incurring additional expense and costing us considerable resources and time and energy and resources.

The CHAIRMAN. The guidance appears to be based on the assumption that tribal employment opportunities from off-reservation fee-to-trust acquisitions outweighs the revenue stream that might stem from the economic-development opportunity.

To your knowledge, did the tribe consider both potential employment opportunities and increased revenue stream when making the decision to go forward with the proposed off-reservation, economic-development opportunity?

Ms. WHITE. Absolutely and completely. Furthermore, we actually had the support of the Department, in that respect, in the form of conclusions that were included in the FONSI that was most recently issued by Secretary Kempthorne.

The CHAIRMAN. One final question. The guidance requires an agreement with state and local governments to address their concerns before the fee-to-trust application will be considered. Did the state and local governments support your proposed acquisition, and, if so, was the Department aware of this support?

Ms. WHITE. Absolutely. We had unprecedented local and state and Federal support for this particular project, and, in fact, there are hundreds of letters of support that the Department has received over the years and in that respect.

The CHAIRMAN. OK. Thank you, Chief White.

Ms. WHITE. Thank you.

The CHAIRMAN. Let me ask Chairman Armenta, to your knowledge, do tribes use revenue from economic activities, whether on or off the reservation, to further the purposes of the Indian Reorganization Act, such as acquiring land and ensuring a flourishing reservation community?

Mr. ARMENTA. Yes, we do.

The CHAIRMAN. And does the tribe have the ability to make decisions that are in the best interests of your members?

Mr. ARMENTA. Yes, we do.

The CHAIRMAN. OK. For Chairwoman Hindsley, let me ask you, were you consulted in the development of the guidance in any way?

Ms. HINDSLEY. No, we were not.

The CHAIRMAN. No input whatsoever?

Ms. HINDSLEY. None.

The CHAIRMAN. The Department examines off-reservation gaming in terms of whether increased on-reservation employment will occur and whether tribal members will be forced to move away from the reservation. Does your tribe view off-reservation economic development solely as an employment opportunity, or does it consider the increased revenue stream as a means to provide the governmental services?

Ms. HINDSLEY. I think, for the Beloit casino project, we knew that some of our tribal members would probably move to the area and want to move down there, but a lot of it was when we were looking for that revenue stream to come home so that we could de-

velop our programs and our projects at home and provide jobs there also.

The CHAIRMAN. Do you think that more job opportunities will occur on reservation as a result of increased revenues being used for healthcare, law enforcement, and the provision of other governmental services?

Ms. HINDSLEY. Yes, I believe so.

The CHAIRMAN. The guidance memo requires an agreement between the tribes and state and local governments or an explanation as to why one does not exist. To the best of your knowledge, did the state and local governments support your proposed fee-to-trust off-reservation acquisition?

Ms. HINDSLEY. Yes. We have the local governments in agreement with us. We have agreements with the local government.

The CHAIRMAN. OK. Mr. Warnke, in December 2005, the proposed draft that we have been talking about, again, as you heard me ask the secretary and ask Chief White, there was a copy of the proposed draft that provided for comments. Were you, in any way, consulted, or did you have any input?

Mr. WARNKE. Not to my knowledge. I do not believe we had any input on that. I do not have any knowledge of whether we were notified or not.

The CHAIRMAN. So, to your knowledge, you did not have any input, but you may have been notified and not know about it.

Mr. WARNKE. Correct. I do not have any knowledge of whether we were notified, and I am sure we had no input. I am sure that would have been in our brief.

The CHAIRMAN. In your testimony, you indicated that it became clear in 2003 that an off-reservation gaming facility associated with a fee-to-trust application would not be approved by the Department, even if the state and local governments supported the project. What information led you to believe that no fee-to-trust applications associated with off-reservation gaming would be approved by the Department?

Mr. WARNKE. Well, our application was, in fact, supported by state and local governments. We had letters of support and agreements in place to make sure that that support was taken care of. I believe it was feedback from the Portland area office that recommended to us that that was not going to be an application that would be met favorably in Washington, D.C.

The CHAIRMAN. OK. Thank you. I am sorry. I did not see the gentleman from New York, Mr. Hinchey. Do you wish to be recognized for any questions or comments?

Mr. HINCHEY. Well, thank you very much, Mr. Chairman. I say thank you particularly for holding this hearing because I think it is a very important subject, and now the opportunity to have this testimony and the responses to the questions that have been asked by the Chairman on the record in an official way is very significant. So this hearing, I think, is very important.

I wanted very much to get here in time to hear the testimony of Chief Lorraine White of the Mohawk Tribe because the Mohawk Tribe is in the state that I represent, not the district that I represent, but the State of New York, and, prior to my coming here to the Congress some years ago, I was involved in the state govern-

ment and had a very close affiliation with the Mohawk Tribe in Akwesasne.

So I very much appreciate the circumstances that you have talked about today and the way in which the Federal government continues to deal with the circumstances involving Native American tribes here, and the way in which it is done sort of out of consultation, without interaction, not enabling the tribes to make comments about potential conclusions that may be reached so that those conclusion could be reached in the context of more complete information than they have been reached. So I appreciate your response to the question, which made that very, very clear.

What Tribal Chairwoman Hindsley said about the economic imprisonment, isolation, imprisonment, of the Native American tribes, I think, is also very significant, and I think it rings a very accurate bell.

Our representative from the tribe in Washington made the opinion that the situation really needs to be addressed in a different way and dealt with more generally, more comfortably, more entirely, as did others in the course of their testimony, and I think that all of that is very important.

So I am glad to have been here. I was not able to get here earlier because I had hearings at the Appropriations Committee, and I broke away from them as soon as I could, and I am sorry that I missed your testimony. But you and I know each other very well, and I feel very confident that I had a fairly good idea of what you were saying in the context of your testimony.

So I just want to thank you very much, and I, again, want to express my appreciation to the Chairman of this Committee for giving an opportunity to put this information on the record and to have the question raised as to whether actions ought to be taken by the Congress to enable the correction of actions that have been taken by the administration in the context of the Department of the Interior. This is something that we have to look at very closely.

One of the things that was said was that the proposal that had been made had been approved by the state and local government, but, nevertheless, in spite of that, it was not approved.

The same thing was true of the situation with regard to the Mohawk Tribe in the County of Sullivan, which is, in fact, the county that I represent as part of a congressional district that I currently represent, where the proposal put forth by the Mohawk Tribe was approved by the town, the county, and the state. Nevertheless, all of that was not given adequate consideration and, therefore, was not instrumental in, or even a part of, the decisions that were made.

So I thank you very much for being here, and I realize that this is all the result of the sense of responsibility that our Chairman from West Virginia has and the good work that he does chairing this very important committee.

The CHAIRMAN. Thank you. That is all of the questions that I have for this panel. Other Members may have questions they may wish to submit at a later time in writing. We hope you would be responsive to those questions, should they occur. Thank you again, all of you, for being with us today.

Our next panel is composed of Ms. Jacqueline L. Johnson, executive director, National Congress of the American Indians, Washington, D.C.; Mr. Alex Tallchief Skibine, professor, University of Utah, S.J. Quinney College of Law, Salt Lake City, Utah; and, I might note, former counsel of the Office of Indian Affairs on this Committee under our late Chairman Mo Udall, so I want to welcome Alex back to the Committee. It has certainly been a long time—and Mr. Kevin K. Washburn, the visiting Oneida Nation Professor of Law from Harvard Law School, Cambridge, Massachusetts.

We welcome you all to the Committee. We do have your prepared testimony, and you are encouraged to summarize. Ms. Johnson, I guess we will go with you first.

STATEMENT OF JACQUELINE L. JOHNSON, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, D.C.

Ms. JOHNSON. Thank you very much, Mr. Chairman. I am really pleased to be able to be here today and, of course, speak to you about an issue that NCAI is more concerned about, but I really wanted to thank you again for your long-term commitment to treaty rights and the Federal trust responsibility, and the ability of tribal governments to meet the urgent needs of their people.

As you know, NCAI is an organization that represents over 250 tribes, and I want to make it really clear up front: We do not have a position for or against any tribe's land-into-trust application for gaming purposes. But we do think it is very important that tribes have a fair consideration of their applications, based upon the merits of the laws that have been passed by Congress, and we are troubled about the process the Department used to establish this new guidance on commutable distance.

But, mostly, we are very concerned about the nongaming implications that we do not believe were considered when they put forward this guidance, and for those nongaming acquisitions of land-into-trust that are allowed under Section 5 of the Indian Reorganization Act. In my testimony, I go into greater detail about the Indian Reorganization Act and Section 5.

Clearly, you know the history of this country, as far as tribes being placed on land that was not necessarily economically producible for them, as well as the challenges that they have, and the reason why the Indian Reorganization Act tried to address those issues of putting land into trust for economic natural resources protection and for cultural and religious purposes.

Sometimes it is not uncommon that these lands are greater than what we would call "commutable distance," particularly as we are dealing with issues around sacred sites and for transitional use issues or for natural resources, giving fishing and hunting rights in various parts of the country.

You heard earlier today the assistant secretary speak to the fact that the 151—he felt that that was the appropriate place rather than Section 20. You know, NCAI does have a resolution that I have attached to my testimony. I am speaking to the fact that the tribes have asked for regulations around Section 20.

As you know, it has been a couple of years since they have actually done a consultation on those, and yet we still have not seen regulations, and our concern is, by attaching this particular provision to 151, even though it is an administrative directive internally, that it will have implications broader than land into trust for gaming.

We also are concerned that many times there are these internal memos that become longer-term policy, and we have seen programs created, actual programs created, from an internal memo, such as the Indian Housing Program, which was actually created by an internal memo, and, of course, that is a program we wish to continue to have.

But internal memos become set policy, and although Assistant Secretary Carl Artman said this morning in his testimony that he did not see that there would be issues around for determinations around cultural sites, that we are not sure what the implication would be of the next administration or subsequent administrations trying to look at that same internal memo and that internal guidance.

We also want to register our concern, as far as the consultation efforts, the process itself. NCAI, as well as other organizations, traveled many distances, many tribes, as we had consultation on the Section 20 regs or proposed regs for a couple of years, but we never had any consultation on this provision regarding attached to 151.

So we are very concerned about that, and we believe, in our recommendations to you, our testimony is that we would support the legislation that you are discussing, the concept of the legislation you are discussing, around mandating consultation with tribes with issues that affect them, as well as we believe, in this particular instance, asking this administration to go back and to do consultation and to start over would not necessarily get us to the same result, given that they have already made a determination, and we would know where their mind-set is in developing that, and we would look to the next administration, 11 months from now, to address this issue.

Once again, I want to reiterate, we have no positions on any tribe's land-into-trust application for nongaming. We are clearly concerned about the impact that has not been fully discussed or researched to any provisions that could happen with other traditional uses of land-into-trust applications for other purposes than gaming. Thank you.

[The prepared statement of Ms. Johnson follows:]

Statement of Jacqueline Johnson, Executive Director, National Congress of American Indians

On behalf of the National Congress of American Indians, I would like to thank Chairman Rahall, Representative Young, and the members of the Committee on Resources for the invitation to testify today, and for their continued commitment to support treaty rights, the federal trust responsibility, and the ability of Indian tribal governments to raise governmental revenue and meet the urgent needs of their people through gaming enterprises under the Indian Gaming Regulatory Act of 1988 (IGRA).

This hearing is on an important topic. The NCAI is an organization made up of over 250 tribal governments, and we do not have a position for or against any tribe's application for land into trust for gaming purposes. However, as a matter of federal

policy it is extremely important that each tribe has an opportunity for fair consideration of their application on its own merits based on the laws passed by Congress. We are gravely troubled by the process that the Secretary of Interior used to establish new guidance that land into trust for gaming will be rejected if it is not within "commutable distance" from the tribe's reservation, and the manner in which the Secretary used this new policy to summarily reject so many pending applications. In addition, this new policy was created with little thought and no discussion about its implications for non-gaming acquisitions of land under Section 5 of the Indian Reorganization Act (IRA).

As a quick summary of the issue before the Committee, Section 20 of the IGRA is a general prohibition on gaming on off-reservation land acquired after 1988, but with several exceptions. The most relevant exception is often called a "two-part determination" where land may be taken into trust for gaming if the Secretary of Interior determines that the acquisition would be in the best interest of the Indian tribe, and would not be detrimental to the surrounding community, and the Governor of the state approves. There is no limitation on distance from the reservation in the statute. In early 2006, the Department of Interior began consulting with tribes on draft regulations regarding Section 20. The proposed regulations, like the statute, did not include a limitation on the distance from the reservation. Comments were submitted, the comment period closed, and the Section 20 regulation has been pending since February of 2007. On January 4 of this year, the Department issued a document entitled "Guidance on taking off-reservation land into trust for gaming purposes," establishing a new rule that land acquisition for gaming is not in the best interest of the tribe if the land in question is greater than a "commutable distance" from the reservation. The document justifies this decision by reference to the Secretary's discretionary authority to take land into trust under Section 5 of the IRA. On the same day, the Department used this new rule to deny eleven pending applications.

The Secretary's Authority and Responsibility to Acquire Land in Trust for Indian Tribes

NCAI is very concerned that the Department of Interior is attempting to set a new policy related to the land into trust acquisition under the IRA with no consultation with tribes and no consideration of the implications outside of the limited area of gaming. Indian tribes regularly seek to place off-reservation land into trust for purposes of economic development, natural resources protection, and cultural and religious use. Because of the history of removal and tribal land loss, it is not uncommon that these lands are greater than a "commutable distance" from existing reservations.

The principal goal of the Indian Reorganization Act was to halt and reverse the abrupt decline in the economic, cultural, governmental and social well-being of Indian tribes caused by the disastrous federal policy of "allotment" and sale of reservation lands. Between the years of 1887 and 1934, the U.S. Government took more than 90 million acres from the tribes without compensation, nearly 2/3 of all reservation lands, and sold it to settlers. The IRA is comprehensive legislation for the benefit of tribes that stops the allotment of tribal lands, continues the federal trust ownership of tribal lands in perpetuity, encourages economic development, and provides a framework for the reestablishment of tribal government institutions on their own lands.

Section 5 of the IRA, 25 U.S.C. § 465, provides for the recovery of the tribal land base and is integral to the IRA's overall goals of recovering from the loss of land and reestablishing tribal economic, governmental and cultural life:

> *The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.*

Section 5 is broad legislation designed to implement the fundamental principle that all tribes in all circumstances need a tribal homeland that is adequate to support economic activity and self-determination. As noted by one of the IRA's principal authors, Congressman Howard of Nebraska, "the land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship," and said the purpose of the IRA was "to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it." (78 Cong. Rec. 11727-11728, 1934.)

As Congressman Howard described these land reform measures:

This Congress, by adopting this bill, can make a partial restitution to the Indians for a whole century of wrongs and of broken faith, and even more important—for this bill looks not to the past but to the future—can release the creative energies of the Indians in order that they may learn to take a normal and natural place in the American community. 78 Cong. Rec. 11731 (1934).

Of the 90 million acres of tribal land lost through the allotment process, only about 8 percent has been reacquired in trust status since the IRA was passed seventy-four years ago. Still today, many tribes have no land base and many tribes have insufficient lands to support housing and self-government. In addition the legacy of the allotment policy, which has deeply fractionated heirship of trust lands, means that for most tribes, far more Indian land passes out of trust than into trust each year. Section 5 clearly imposes a continuing active duty on the Secretary of Interior, as the trustee for Indian tribes, to take land into trust for the benefit of tribes until their needs for self-support and self-determination are met.

Congress recognized that the impact of allotment meant that, as a practical matter, the restoration of a viable tribal land base and the effective rehabilitation of the tribes would often require land acquisitions off-reservation. This is clear on the face of Section 5 itself, which provides the Secretary with broad authority to take land into trust "within or without existing reservations." This language underscores that Congress intended lands to be taken into trust to advance the broad policies of promoting tribal self-determination and self-sufficiency, and that to accomplish those goals Section 5 established a policy favoring taking land into trust, both on and off reservation. The legislative history also shows that the acquisition of land outside reservation boundaries was deemed necessary to meet the goals of providing adequate land for tribes:

Furthermore, that part of the allotted lands which has been lost is the most valuable part. Of the residual lands, taking all Indian-owned lands into account, nearly one half, or nearly 20,000,000 acres, are desert or semidesert lands.... Through the allotment system, more than 80 percent of the land value belonging to all of the Indians in 1887 has been taken away from them; more than 85 percent of the land value of all the allotted Indians has been taken away. Readjustment of Indian Affairs, Hearings before the House Committee on Indian Affairs on H.R. 7902, 73rd Cong. 2nd. Session. at 17, 1934.

Most tribal lands will not readily support economic development. Many reservations are located far away from the tribe's historical, cultural and sacred areas, and from traditional hunting, fishing and gathering areas. Recognizing that much of the land remaining to tribes within reservation boundaries was economically useless, the history and circumstances of land loss, and the economic, social and cultural consequences of that land loss, Congress explicitly intended to promote land acquisition off-reservation to meet the economic development goals of the legislation. There is no statutory basis for an arbitrary limitation on a "commutable distance." The guidance document's intention to create new barriers to off-reservation land acquisitions is directly contrary to the IRA's purpose.

The Department's regulations on land to trust acquisitions include language indicating that the greater the distance from the reservation, the greater the scrutiny the Department would afford to the benefits articulated by the tribe, and the greater weight that the Department would give to concerns of state and local governments. We agree that the location of land is an important factor to consider in any proposal for trust land acquisition. However, it is not an overriding consideration that cancels out all of the other purposes of the IRA. These purposes—the need to restore tribal lands, to build economic development and promote tribal government and culture—are the paramount considerations identified by Congress and must be balanced with other interests. The National Congress of American Indians strongly urges both Congress and the Department to reject any implication that the new guidance limits the ability of the Secretary to acquire land into trust under Section 5 of the IRA.

Concerns Regarding the Process for Developing the Guidance

The Indian Gaming Regulatory Act (IGRA) was enacted in 1988 in response to the Supreme Court's 1987 decision in California v. Cabazon Band of Mission Indians. Section 20 of the IGRA was a central part of the legislative compromise over Indian gaming, as Congress found it necessary to address concerns that the Secretary could take land into trust and tribes would build gaming facilities far away from existing reservations. Section 20 is a general prohibition on gaming on off-reservation land acquired after 1988, but with several exceptions. In general,

Congress created exceptions for when land is returned or restored to a tribe, and a general exception often called the "two-part determination" where land may be taken into trust for gaming if the Secretary of Interior determines that gaming on the newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, and the Governor of the State concurs in the Secretary's determination.

Since 1988 only three tribes have successfully petitioned the Secretary for a two-part determination. However, there has sometimes been controversy and confusion over how the Secretary will make the determinations, and media reports tend to hype every new proposal with little recognition of how rigorous and difficult the process is. As a result, in 2005 the National Congress of American Indians passed a resolution urging the Department of Interior to develop regulations governing the implementation of the Section 20 two-part determination process. See attached NCAI Resolution GBW-05-009.

As mentioned above, the Department of Interior embarked on a process to develop a regulation on Section 20. A draft rule was first circulated and consultation meetings were held with tribal leaders. Later, the proposed rule was published in the Federal Register on October 5, 2006, more meetings were held, and comments were submitted and the comment period closed on February 1, 2007. Since that time we have been waiting for the Section 20 regulations. The proposed rule never contemplated any sort of new limitation on distance from the reservation, much less a "commutable distance" test.

The "guidance" document and the new rule on commutable distance issued on January 4th were completely unexpected by NCAI or by tribal leaders. There was no consultation with tribes and no notice and comment period under the Administrative Procedures Act. Instead, the process lured tribes into commenting on one set of rules, while the Department was developing another rule behind closed doors. On the same day the Department denied eleven pending applications, all that the Department considered ripe for decision, while sending back eleven others for more information. Each letter of denial is virtually a carbon copy of the others and all eleven applications are denied for exactly the same reason—that they would violate the new "commutable distance" rule. Each of the decision letters bases its denial on an unsupported assertion that it would not be in the best interest of the tribe to own a casino in a desirable market because of the effect on tribal community life. Given the high levels of poverty and joblessness on most Indian reservations, this is an extraordinarily paternalistic rationale that flies in the face of tribal self-determination and common sense.

The violation of the federal-tribal government-to-government consultation policy and the abuse of the Administrative Procedures Act are obvious and we will not belabor them. We do want to make the point that Indian tribes are particularly vulnerable to these types of abuses. The Secretary of Interior has very broad discretionary authority over a range of issues that are extremely important to tribes. Tribal leaders have worked very hard for decades to put in place federal policies that require consultation, and it appears we still have much more work to do.

This leads us to our final point of asking what Congress and the Administration can or should do to remedy the issue. NCAI does not have a position for or against any tribe's application for land into trust for gaming purposes. Instead, NCAI's long held position is that each tribe must have an opportunity for fair consideration of their application on its own merits based on the laws passed by Congress.

We do not believe that the right answer is to ask the current leadership at the Department of Interior to simply go back and do the process over again. It would not satisfy the tribes to have more process when the results are predetermined, and tribes are strongly against any effort to open up the non-gaming land into trust regulations in this gaming context. The guidelines provide that any tribe receiving a denial may resubmit the application with further information. Perhaps it is best that these issues wait for the next Administration, less than eleven months away, so that they can be given an opportunity for fair consideration. We have worked very well with the Department on many issues, but on this issue the agency seems to be inclined in one direction. In the meantime, we would urge the Department to withdraw the guidance document.

In the larger picture, NCAI is very concerned about the failures of the Department to adhere to the government-to-government consultation policy. We would encourage this Committee to consider legislation that requires the Department to consult with tribes on any matter that significantly affects tribal rights. A voluntary policy is not working, and so a mandatory consultation policy may be necessary.

Thank you for your consideration of NCAI's views on this issue, and once again we thank you for your commitment to tribal governments and the federal trust and treaty obligations to Indian tribes.

The CHAIRMAN. Thank you. Mr. Skibine.

STATEMENT OF ALEX TALLCHIEF SKIBINE, PROFESSOR, UNIVERSITY OF UTAH, S.J. QUINNEY COLLEGE OF LAW, SALT LAKE CITY, UTAH

Mr. SKIBINE. Mr. Chairman, a hard-working Member of this Committee, and staff members, of which I used to be between 1980 and 1990, it is good to be back here after 18 years, and I appreciate you inviting me to testify on this important issue.

I have been basically teaching administrative law and Federal Indian law and legislative process for the last 18 years at the University of Utah, and I think I was asked to testify to give my views as to the legality of the Department's action relative to the Administrative Procedure Act.

So with this, let me summarize my remarks. There are three issues.

First, those 11 letters were, in effect, an informal adjudication under principles of administrative law, and, therefore, the APA does not technically govern this, but due process does. So the question is, were those decisions made in violation of the due process rights of those 11 tribes? That is the first question.

The second question is a technical one, and that is whether this guidance document should have been published, according to Section 553 of the APA notice and comment requirements.

And, finally, the third issue is whether those 11 decisions were arbitrary and capricious under the judicial review section of the APA.

So let me go first with due process. The guidance document was issued on January 3rd, and the decisions were made January 4th. Right here and there, it does not smell good. I kind of smell a rat, if you know what I mean.

Due process is basically a question of fairness. You have to give the plaintiff the evidence that is going to be used against him, and that particular person has to have an opportunity to respond, and I cannot see that those rights were respected in this case, since, in effect, the tribes did not know about the evidence that was going to be used against them, and, of course, they did not have an opportunity to respond. So that is the due process issue.

The second one is this technical issue about whether they should have been published under 553 notice and comment procedure. You have to figure out whether this is a legislative rule or a nonlegislative rule. This is a very complex issue.

There is a law review article that was just published in the Chicago Law Review by a Chicago law professor, and I am just going to read a couple of sentences: "The distinction between legislative rules and nonlegislative rules is one of the most confusing in administrative law. To describe the legislative rules debate is to conjure a doctrinal phantoms, circular analytics, and fundamental disagreement even about correct vocabulary."

Then another leading law professor concludes: "If the above seems a long and confusing set of factors in determining whether an agency rule is really an interpretive rule, there is some solace in the fact that courts find it equally difficult and have characterized the distinction between interpretive rule and legislative rule

as fuzzy, tenuous, blurred, baffling, and shrouded in considerable smog."

So, with this caveat, here I go. Basically, the first issue is whether this was an interpretive rule or a statement of policy. My feeling is that if this was an interpretive rule, then it should have been published under 553, pursuant to notice and comment, because, as an interpretation, I do not think that this particular guidance document does not interpret an existing term, but it comes up with two new criteria: commuting distance to the reservation and the existence of intergovernmental agreements.

So if it is going to be an interpretive rule, it should have been published. The reason that it is important to make a distinction between interpretive rule and policy statement is that the interpretive rule will be given some deference on judicial review, while a policy statement will not. So that is one.

Number two: If it is, in effect, a policy statement, then it should really have been published under 553 only if it, in effect, comes up with some binding norms. In other words, is that policy statement just a guidance document to give general guidance to the employees of the BIA on how to decide those issues, or, really, is it determinative?

So, for instance, if the guidance document would have said, "No land transfer will be put into trust if they are not within 50 miles of the reservation," that would have been a binding norm and, therefore, should have been published.

The guidance document does not do this. It basically comes up with those two new criteria, but the criteria—commutable distance and existence of intergovernmental agreements—those two just create a rebuttable presumption.

On the other hand, the fact that the first 11 decisions all went against tribal interests may indicate that, in effect, it is much more than a rebuttable presumption.

Anyway, in the academy, there is a movement that because it is so confusing to decide whether a policy statement is really a legislative rule that some of us think that the best way to decide it is really a question of judicial review and the amount of deference that the government is going to be given. If it is a policy statement, and it has not been published under 553, then, in effect, it will be given no deference on judicial review, so, in effect, it becomes kind of irrelevant.

Let me finally conclude by looking at whether those 11 decisions were made on arbitrary and capricious ground under the APA, and here it seems that there are some good arguments why this was arbitrary and capricious.

First, the commuting distance. Ultimately, there is a presumption that anything not within a commuting distance is not to the benefit of the tribe, and the question is, what are the assumptions behind this? I can find four reasons why, in effect, that is not the case.

One, traditional tribes may very well decide that they want gaming, but they do not want the gaming on the reservation because it will interfere with Indian tradition and culture.

Number two: Commuting distance, if it is within the commuting distance, it may actually make it easy for members of the reservation to gamble, and that can be detrimental to tribes.

Number three: Obviously, as the previous testimony suggested or stated, if a tribe is isolated, hundreds of miles from any urban areas, that, in effect, having a casino within commuting distance is not going to make any difference. It is still not going to be a working economic product.

Finally, number four: I think that most Indians, as the last census revealed, live off the reservation, and I think that the Department's obsession about only looking at the impact of gaming on the reservation Indians, in effect, denies an overwhelming majority of Indians today in the United States the right to benefit from gaming as a form of economic development.

Finally, the last thing has to do with whether the guidance document conforms to the policy of the Indian Gaming Regulatory Act, and, in this regard, the IGRA has a very complex procedure where the tribes have to get the state to agree to a compact, and then there is another section where the Governor has to agree with the two-factor determination.

By imposing additional intergovernmental agreements beyond the compact, and the Governor determination, it seems that this guidance document goes beyond the requirement of IGRA and, therefore, is inconsistent with IGRA. I do not think that the secretary, in this document, has explained why he is doing this, and that is another factor where it may be arbitrary and capricious. Thank you very much.

[The prepared statement of Mr. Skibine follows:]

Statement of Alex Skibine, Professor of Law, S.J. Quinney College of Law, University of Utah, Salt Lake City, Utah

Mr. Chairman, members of the Committee, my name is Alex Skibine and I am currently a professor of law at the University of Utah. Previous to coming to Utah, I was for ten years, from 1980 to 1990, a counsel for this Committee under the chairmanship of Morris Udall. Thank you for inviting me to participate in this hearing. I want to say at the outset that I do not currently represent any clients with any interest in gaming.

The Secretary of the Interior has the power to take land in trust for the benefit of Indians under Section 5 of the Indian Reorganization Act of 1934 (IRA). The actual text of the IRA leaves the Secretary with an extraordinary amount of discretion. Facing a potential court decision that this broad delegation of authority might amount to an unconstitutional delegation of legislative power under the non-delegation doctrine, Interior developed some rules and regulations in the late 1990's, and issued them pursuant to Section 553 of the Administrative Procedure Act (APA).

These rules are applicable to any off reservation land acquisition, not just acquisition for gaming purposes. Under the rules, the greater the distance the proposed lands are to the reservation, the greater the scrutiny to be given to the tribe's justification for anticipated benefits, and the greater the weight to be given to concerns raised by state and local officials. The "guidance document "issued this January 3rd further delineated how the Department should go about giving this greater scrutiny. Essentially, the guidance document came up with two more factors. Concerning the anticipated benefit to the tribe, the document created a presumption that placing lands in trust that are located beyond commuting distance from the existing reservation will not be to the benefit of the tribe. Addressing concerns raised by state officials, the document creates a presumption that these have not been satisfied unless there are intergovernmental agreements between the tribe and the various local governments.

There are two questions with the Guidance Document relative to whether it is in conformance with the APA. First is whether these two factors creating presumptions against transferring the land in trust are truly "guidance" or really amendments to

the previous regulations. If they are amendments such that they have the force of law, the document should have been issued pursuant to the Notice and Comment requirements of Section 553 of the APA. Secondly, the question is whether the two factors, commuting distance and intergovernmental agreements, are legitimate in evaluating the best interest of the tribes and the concerns of state and local officials. In APA parlance, we ask: are the factors rational and relevant, or are they arbitrary and capricious, an abuse of discretion, or not otherwise in conformance with existing law.

Finally, although I was asked to comment specifically on whether this Guidance Document was issued in accordance with, and meet the standards contained in, the APA, there is also an issue of whether the recent decisions denying the fee to trust tribal applications for the purpose of gaming respected the tribes' procedural due process rights. At its very basic, the core concept of procedural due process means that life, liberty, or property cannot be taken by the government without notice and a hearing. I noted here that the Guidance Document was issued on January 3rd, 2008, and the letters denying the fee to trust applications were sent on January 4th. The Tribes obviously did not have proper notice of the two new factors, and thus, they did not have time to respond or rebut if you will the presumptions these two factors created. Although some may argue that no "property" was taken from the tribes since they do not have an entitlement to have these lands taken into trust, this lack of notice and opportunity to respond at least violates the spirit of procedural due process. It was exactly to avoid such appearance of unfairness that Congress enacted section 553 of the APA, allowing the affected public to be notified of proposed rules and giving the people an opportunity to comment before such proposed rules became final.

1. ARE THE FACTORS SPECIFIC AND DETERMINATIVE ENOUGH THAT THEY SHOULD HAVE BEEN PUBLISHED IN A LEGISLATIVE RULE ACCORDING TO SECTION 553 OF THE APA?

On one hand, policy statements or guidance documents are rather innocuous in that they are, by definition, not legally binding. They are intended to provide guidance as to how the agency might act in the future and therefore may not serve as the basis for enforcement actions and do not have the force of law. This means that on judicial review of an agency decision to deny a fee to trust land transfer, a court of law could overturn the decision of the Agency without giving any deference to this guidance document, unless this document qualified as an interpretive rule in which case, what is known as Skidmore deference might apply.

The test used in determining whether a policy statement or guidance document is really a legislative rule that should have been published under 553 of the APA is whether the document creates a binding legal norm on the agency and the regulated public. In making this determination, federal courts generally consider (1) whether in the absence of the Document there would be an adequate legislative basis for an enforcement action or other agency action to confer benefits or ensure performance of duties, (2) whether the agency specifically invoked its general legislative authority, and (3) whether the rule effectively amends a prior legislative rule. Another simpler way to put it is to ask whether the document will merely influence the decision of the agency, or whether it will in fact pre-determine a certain result. For example, if the document had stated that from now on, there will no longer be any off reservation land transferred into trust for the purpose of gaming unless the lands are within, say, 50 miles of the reservation, this would have been a legislative rule that should have been issued pursuant to 553.

This Guidance Document, however, does not say that. Instead, it identified two factors, the presence of which raise a presumption that the lands should not be placed into trust. Under the first factor, any land transfer not within commuting distance of the reservation is presumed "not" to be in the best interest of the tribe. Under the second factor, a failure to achieve intergovernmental agreements with local communities raise a presumption that the concerns of the local communities have not been addressed, and this absence of agreement is supposed to weigh heavily in favor of not approving the proposed land transfer into trust.

Whether these two factors are determinative enough to be considered amendments to the existing rule is a close call: Good arguments exist on both sides. On one hand, the existing rule already mentioned that the more distance the lands are from the reservation, the more scrutiny will be given the tribe's claim of anticipated benefits and the greater the weight will be given to the concerns of state and local governments. On the other hand, the existing rule never mentioned commuting distance or the importance of existing intergovernmental agreements. However, these two factors are only suppose to raise a presumption that can be rebutted. Yet, the fact that the first 11 tribal applications after the Guidance Document was issued

were all denied may indicate that in reality, these two factors raise much more than mere presumptions and may, in fact, be binding on the agency. Of one thing I am sure. Even if it was legally permissible to have included these two additional new factors in a non-legislative rule not subject to notice and comment under Section 553 of the APA, it was definitely bad policy to have done so. In addition, as mentioned earlier, it may have violated the tribes' procedural due process rights which at a minimum would seem to require notice of the proposed new factors, and an opportunity to rebut the presumptions raised by these factors.

In the next section, I discuss whether an actual decision based on the Guidance Document and denying a tribal application to take land into trust, is likely to be considered arbitrary and capricious under the APA.

2. IS COMMUTING DISTANCE TO THE RESERVATION RELEVANT TO DECIDING WHETHER GAMING ON SUCH LANDS WILL BE BENEFICIAL TO THE TRIBE?

Even if the commuting distance is flexible enough of a factor to be considered merely guidance to federal decision makers, any decision made under this guidance document is subject to review under the arbitrary and capricious standard. This means, among other things, that in making these decisions the Secretary has to look at the relevant factors. In other words, factors Congress would have wanted him to consider in determining whether the land transfer was to the benefit of the Tribe.

Concerning whether the land transfer is in the best interest of the tribe, the guidance document takes the position that the commuting distance is relevant because one of the benefits to the tribe is employment for tribal members. If this employment is not located within commuting distance, the document claims that it will create significant "negative" effects on the reservation in that tribal members would have to move out and relocate outside the reservation. The document then asks the agency to look at 4 factors. These factors are: (1). how many Indians are currently employed?, (2) how many Indians are likely to leave to work at the casinos?, (3) how will their departure impact the quality of life on reservations? (4) how will working at an off-reservation casino affect the long term identification of a tribal member with the tribe?

The question here is whether it is rational—not arbitrary or capricious—to make commuting distance to the reservation such a preeminent and important factor so that it dwarfs everything else. Perhaps this is important to some tribes. But it is definitely not that important for many other Indian tribes. Accordingly, it seems to me that there are at least four reasons why decisions based on the guidance document could be considered arbitrary and capricious or otherwise an abuse of discretion under the APA:

1. Discounting Non-reservation Indians: Why should the merits of off reservation gaming only be based on the benefits or detriments to Indians who live on a reservation? The latest census revealed that way over half of all tribal members in this country do not live on reservations. In addition, why should the benefit of gaming as a tool for economic development be primarily restricted to tribes that happen to be closer to big urban centers?
2. Paternalism and Discounting Tribal Determinations: Even if the primary concern with reservation Indians is rational, one has to wonder whether it is rational to think that it is better to have unemployed Indians on the reservations than tribal members gainfully employed say 3 hours away from the reservation. The issue here is who should really be deciding this, the BIA or the tribes, let alone each tribal member? This seems to be a throw back to the pre IRA paternalistic policy under which Indians were deemed to be too incompetent to decide for themselves and needed the great white father to make such decisions for them.

In addition, it may very well be that some traditional tribes may take the position that gaming on the reservation will have a greater negative impacts on tribal culture and traditions. Among other things, it will make it easier for tribal members to gamble.

3. Discriminating Against Gaming: The next issue that points to arbitrariness is that this guidance document is only applicable to gaming. Is there a rational basis for treating gaming differently than other tribal economic ventures? Perhaps there is, but this is left unexplained in the guidance document.
4. The Impact of IGRA: One sentence in the document stated that the BIA should make sure that, in taking land into trust, the purposes of the IRA should be respected. While this is true, sometimes a decision can be arbitrary and capricious not only if it focused on irrelevant factors, but also if it failed to discuss certain relevant factors. The guidance document seems to minimize, if not ignore the policies of the 1988 Indian Gaming regulatory Act (IGRA). As the

Guidance Document accurately stated. "The IRA had nothing to do directly to do with Indian gaming." IGRA, however, changed prior law and established the federal policy towards gaming as a tool for economic development. It is mostly the policies of the IGRA that should influence the Secretary's determination as to what is in the best interest of the tribe, not solely the IRA. It seems odd to determine what is in the best interest of the tribe when it comes to gaming by reference to whatever congressional policies may have been in 1934, instead of focusing primarily on what the congressional policies are today or at least, what they were in 1988 when Congress enacted IGRA.

The Guidance Document did summarily state that IGRA "was not intended to encourage the establishment of Indian gaming facilities far from existing reservations." There is a section in IGRA that does impose severe restrictions on gaming on land acquired off the reservations after passage of IGRA. Although this section specifically says that nothing in this section shall affect the power of the Secretary to take lands into trust under other laws, it does say that no gaming shall take place unless the Secretary finds that gaming on such lands shall be for the benefit of the tribe and shall not be detrimental to surrounding communities. However, if one reads the Congressional findings and the declaration of policy in the preamble to IGRA, one does not see a restriction to promote economic development only for reservation Indians. It only says that the policy of congress is "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." If anything, IGRA encouraged gaming generally as a mean to economic development and self-sufficiency for all Indians and all Indian tribes. To the extent that the guidance document only looks at the impact gaming has on reservation Indians, it seems inconsistent with the policy and spirit of IGRA.

3. ARE THE CONCERNS OF STATE OR LOCAL GOVERNMENTS LIKELY TO GROW THE FURTHER THE LANDS ARE FROM AN INDIAN RESERVATION AND SHOULD THE ABSENCE OF INTERGOVERNMENTAL AGREEMENTS CREATE A PRESUMPTION THAT THESE LOCAL CONCERNS HAVE NOT BEEN ADDRESSED?

Another potential problem with the document is whether giving greater weight to local concerns the farther the lands are from the reservation is arbitrary and capricious. The Secretary has taken the position that jurisdictional problems will be larger the farther the lands are located from the reservation but the Department has failed to provide any meaningful support for this finding. Instead, the Department summarily concluded that it is more likely to disturb "the established governmental patterns," presuming that distant governments have less experience in dealing with tribal governments. Besides this being somewhat dismissive of the capabilities of local governments to adapt to new situations, it also ignores the fact that a local government can be distant from one tribe but not from other tribes and therefore may be very familiar with jurisdictional issues involving Indian tribes. It also ignores the fact that it is often the local jurisdictions closest to reservations that are more concerned about off reservation tribal activities.

Finally, the requirement of intergovernmental agreements with local communities is inconsistent with IGRA. IGRA requires a compact with the State and also requires the Secretarial determination that the land will not be detrimental to the surrounding community to be agreed to by the Governor of the State. The guidance document creates a presumption against taking the land in trust in the absence of intergovernmental agreements. This seems to impose an additional requirement on top of what is required in IGRA. While I agree that the authority to take land in trust is contained in the IRA and not the IGRA, the Department should not issue policies that indirectly conflict and add to the requirements of IGRA, at least not without first acknowledging the issue and adequately explaining its decision.

CONCLUSION:

Although I have just given some reasons why a Secretary's decision under the Guidance Document might be considered arbitrary and capricious, as one of the mainstream administrative law textbook stated "The reason an agency gives for its policy judgment need not be the best reasons or even a good reason." All the Agency needs to give is an understandable and coherent reason. In other words, even if a federal court disagrees, as I do, with the policy choices made by the Agency, and thinks these are not the best policy choices, this is not the standard on judicial review. The standard is deferential to the Agency. The burden is on the party challenging the agency choice to show that the choices made were unreasonable or irrational enough to amount to something arbitrary and capricious or otherwise an abuse of discretion.

Under existing law, although the Secretary cannot make decisions that are arbitrary or capricious, he is still given broad discretion in the IRA to decide whether

lands should be placed into trust and whether gaming should take place outside of Indian reservations. The IRA, however, did not have off reservation gaming in mind. Furthermore, IGRA did not address the precise question at issue. In narrowing his discretion, the Secretary decided to make commuting distance from the reservation a crucial factor. There is no doubt that there should be some factors limiting the Secretary's discretion to put off reservation land in trust for the purpose of gaming. The real question is what those factors should be and who should make those determinations.

Should commuting distance be such a key factor? Should the value of off-reservation gaming be solely assessed by its impact on reservation Indians instead of its impact on the majority of Indians who nowadays live off the reservations? Should the benefit of gaming be solely accessible to Indians who are lucky enough to have a reservation located closer to big urban centers? I think these are not legitimate factors or grounds to refuse to put land into trust for the purpose of off-reservation gaming. I believe there is a good chance the courts will see it my way. However, should the courts decide to grant great deference to the Secretary and uphold his latest decisions, I think this Committee should be prepared to introduce legislation addressing these important issues and give some fresh directions to the Executive Branch.

Thank you.

The CHAIRMAN. Thank you. Mr. Washburn?

STATEMENT OF KEVIN K. WASHBURN, VISITING ONEIDA NATION PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. WASHBURN. Thank you, Mr. Chairman, and thank you to your staff for inviting me to appear with these fine witnesses. I want to tell you that Professor Skibine is not just one of the most long-winded professors on this subject in the country; he is also one of the best. He has been working in administrative law. He is probably the leading scholar in the country at the intersection of administrative law and Indian law.

I want to thank you for holding this hearing. You have delegated a very, very important power to the secretary. By "you," I mean Congress. It happened many years ago, but this power that Congress has delegated to the secretary is perhaps one of the most important powers in Indian affairs; that is, to take land into trust. And as evidence of that, the U.S. Supreme Court took certain a case, earlier this week, that is going to involve interpretation of this power.

I think that the 2008 guidance memo, the recent guidance memo, is really just not a very impressive document, I guess is the way to put it. It fails to recognize that off-reservation gaming is actually very good for tribes. It is good for the tribes that do it, at any rate.

Gaming is not so much about jobs, as your insightful questions suggest; it is more like state lotteries. They are about revenues for state governments and tribal governments. They are not about jobs so much, but they do create jobs. Off-reservation gaming creates many jobs in tribal government on the reservation. It also helps tribes provide all of the services that they ought to be providing to their constituents: tribal colleges, tribal healthcare, social services, law enforcement, reacquisition and protection of sacred sites, land acquisition generally, tribal land restoration.

All of these services are improved. No matter where the gaming occurs, whether it is on reservation or off reservation, if the message to tribes is, we want you to be more self-sufficient, and we want you to pursue economic development, then off-reservation

gaming helps that just as much as on-reservation gaming does, and the secretary and the assistant secretary know that. That is why I do not find the guidance memo very impressive.

Off-reservation gaming is also very controversial, obviously, and let us be honest about it. It is not good for everybody. Some local communities are going to be opposed to it. Some local tribes are going to be opposed to it. But we should not try to hide those issues behind rules that do not make much sense, and that seems to be what the guidance memo does.

It is a politically controversial area, frankly, and that counsels not doing things in closed doors, producing guidance memos with no process. It counsels toward doing things in the open and giving everybody a chance to speak about these issues.

Just because this process is not happening in Congress does not mean there ought to be public participation, and I applaud you for giving some public attention to this issue because, but for this hearing, Indian tribes would not have been able to give input about this policy.

I want to talk little bit about Professor Skibine's comments about administrative law, and he gave you a very good discourse on the administrative law principles that apply here. Let me just kind of take it a step back, I guess, and that is that administrative law, despite its kind of boring name and the fact that it is kind of technical, really is about good government. It is about ensuring that agencies follow good approaches to making policy, that they do so in an open manner so that the public can be involved.

People may think these processes are not important, but they give people a place to go to register their voice, and that is really what administrative law is all about. There is a lot about these particular actions that look really troubling, from an administrative law standpoint, but they are troubling from just a human standpoint.

I work at a law school, and I can tell you that if a bunch of people who had applied to law schools applied and paid their admission application fee and then were suddenly told there is a new rule, and all of their applications were rejected the next day, they would be upset. That is just a matter of fairness.

So this is not unique to Indian tribes in any way, obviously, and, at bottom, I think the problem that you have revealed here today is there is no really good explanation for this changing course by the assistant secretary. The assistant secretary really did not have a good answer to the question as to why the Department of the Interior changed course.

The 2004 guidance that the Department of the Interior had reached is flatly contradictory to this new guidance, this 2008 guidance, and agencies are entitled to change their policies, but they should do so generally only for good reasons because people rely on those policies. They spend money, they invest time and resources to follow those policies.

What I heard was that the assistant secretary did not really answer that question as to why did you need to change the policy? He presented no compelling reasons for departing from that policy, and, for that, I think that if there is no good reason that he can articulate for the policy, then the policy ought to be withdrawn.

Again, I appreciate this Committee for giving attention to this important issue.

[The prepared statement of Mr. Washburn follows:]

Statement of Kevin K. Washburn, 2007-08 Oneida Indian Nation Visiting Professor of Law, Harvard Law School, Cambridge, Massachusetts

Thank you for inviting me to appear before the Committee again to discuss important matters related to Indian gaming. You have asked for my views on a recent Guidance Memorandum issued by the Assistant Secretary of Indian Affairs on the acquisition of off-reservation land in trust for Indian gaming.

Introduction

The policy of the United States, as expressed by Congress, is to assist American Indian tribes in restoring some of the 90 million acres that tribes lost during the allotment era in the late Nineteenth and early Twentieth Centuries. See 25 U.S.C. § 465. It is also the policy of the United States, as expressed by Congress, to encourage Indian gaming as a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. Although Congress has delegated to the Secretary of the Interior the power to help tribes re-acquire lands, public appropriations for tribal land acquisitions have rarely kept pace with tribal hopes and dreams for land restoration. In recent years, gaming has given tribes financial resources, and access to more financing, that will allow them to acquire more tribal lands. Off-reservation acquisitions of land for Indian gaming can be justified by Congressional policies favoring tribal land restoration as well as policies favoring Indian gaming as a source of tribal economic development and self-sufficiency.

However, off-reservation acquisitions for gaming are controversial. For neighboring tribes and for state and local communities, gaming can have ill effects. First, gaming developments, like any construction projects and commercial activity, can have negative effects on neighboring communities, related to noise, traffic, disruption and environmental degradation. Second, casinos may increase social ills, such as compulsive (or pathological) gambling. Third, the economic well-being of many tribes depends on having a monopoly or a quasi-monopoly in the market they serve.

From an economic standpoint, new casinos often cannibalize the business of existing casinos. While competition is generally a positive value in business because it leads to a higher quality product (or a higher quantity of product at a lower price), competition is not necessarily advantageous in gaming. Indeed, as a matter of public policy, we should not necessarily want casinos to "sell more gaming" at a lower cost, or to offer a better product that is more widely consumed. The product itself comes with some social costs.

Thus, as a matter of public policy, we do not value casinos because of the value of the casino "product." Rather, we tolerate casinos for the governmental revenues they produce and in recognition of the inevitability of illegal gaming if we try to prohibit legal gaming activity. If we do not authorize legal gaming from which governments derive revenues, we will nevertheless have illegal gaming from which governments do not. In any event, full free market competition in gaming is not necessarily good. This is why most states now offer state-sponsored lotteries, but they do not allow private vendors to compete for lottery customers.

Because of the controversial nature of Indian gaming, decisions about off-reservation land-into-trust acquisitions often have high political costs. Because of the political costs, federal decision-makers naturally look for ways to avoid facing these difficult questions. Because of the forces of inertia and the power of the status quo, it is often much easier for the Secretary to deny a land-into-trust application than to grant one.

On January 3, 2008, the Assistant Secretary of the Interior for Indian Affairs issued a memorandum providing guidance on taking off-reservation land into trust for gaming purposes (hereinafter "Guidance Memorandum"). The Guidance Memorandum seems designed, first, to make it easier for the Secretary to deny off-reservation land-into-trust applications, and second, to discourage new applications for land-into-trust.

While I understand Interior's cautious approach toward Indian gaming and its desire for a bright-line rule that will mitigate the political controversy surrounding such decisions, the Guidance Memorandum is problematic for several reasons. First, the policy expressed therein is based on a fundamental misconception of the value and purpose of Indian gaming. Second, it is overly broad, reaching non-controversial trust applications, and thereby departing from the values that ought to drive federal decisions involving Indian affairs. Finally, it seems unfair as a matter of process

and ill-advised as a matter of policy. In the testimony below, I will explain some of the problems with the Guidance Memorandum and comment more generally on Interior's dysfunctional decision-making process in the land-into-trust context.

I. The Department of the Interior's Guidance Memorandum Misunderstands the Benefits of Indian Gaming; For Tribes, Gaming is about Revenue, Not Jobs.

While the Guidance Memorandum is useful in understanding Interior's position on land-into-trust, Interior's analysis is unsupportable and misguided. The Guidance Memorandum claims that an off-reservation gaming operation that lies beyond a "commutable distance" from the reservation has "considerable" "negative impacts" on reservation life in that such a casino "would not directly improve the employment rate of tribal members living on the reservation." Guidance Memo at p. 4. This conclusion is a non sequitur; it is also flat wrong. It showcases an apparent misconception about the benefits of Indian gaming.

It is likely impossible to find an off-reservation Indian gaming operation that has had negative economic effects on reservation life. The Guidance Memorandum seems to assume that the purpose of Indian gaming is to provide jobs to tribal members. A little perspective is in order. While it is true that an Indian gaming operation can provide some employment advantages to any community, primarily because Indian gaming tends to provide a living wage and reasonably good benefits for low- and medium-skilled workers in the service sector, the vast majority of people who work in Indian casinos nationwide are non-Indians. Indeed, while Indian gaming may have been a "full employment act" for gaming lawyers and for non-Indians in many communities, it has not had the same result for Indian citizens.

This should not, however, be particularly troubling. No serious observer would claim that casino employment for tribal members is the primary benefit of Indian gaming. Rather, gaming has provided a stream of revenue to tribes to improve reservation public safety, healthcare and education, and to pursue other economic development opportunities.

While the Guidance Memorandum misunderstands the importance of gaming jobs, it also misstates the impact of its new policy on reservation jobs. The Guidance Memorandum's central claim about jobs—that off-reservation casinos fail to provide jobs on the reservation—is patently ridiculous. Revenues from off-reservation gaming operations pay for tribal jobs on the reservation in a variety of areas, including healthcare, elderly services, social services, education, law enforcement, and numerous other areas of public service, many of which provide direct services to reservation residents. Indeed, such tribal public service jobs—involving tribal members directly helping other tribal members—may be much more personally fulfilling than casino jobs. Indian gaming pays for these jobs in a very direct way.

In presuming that increasing reservation jobs is one of the most important aspects of Indian gaming, the Guidance Memorandum departs from the Indian Gaming Regulatory Act. IGRA describes the benefits of Indian gaming as tribal governmental revenues, not jobs. Indeed, nowhere in IGRA are jobs specifically mentioned, but IGRA specifically refers to "tribal revenues" or "tribal governmental revenues" repeatedly throughout the Act. See, e.g., 25 U.S.C. §§ 2701(1) & (4), 2702, and 2710(b)(2).

The fact that IGRA was not focused primarily on jobs should not surprise anyone. The closest analogues to Indian gaming operations are state lotteries. Like tribal casinos, state lotteries are not valued so much for the jobs they create. Rather, they are valued for the revenues that they provide, which, in turn, serve other governmental functions. In many states, lottery revenues are devoted to education. Thus, lottery revenues pay teachers' salaries and increase jobs in teaching. Tribal gaming operations work in much the same way. Tribal casinos pay for teachers, social workers, doctors and nurses, services for the elderly and myriad other jobs. The Guidance Memorandum is flawed in failing to understand this very basic point.

While it is possible to find policy-makers extolling the job-generating virtues of Indian casinos, this is often used to justify Indian gaming within non-Indian communities and to explain the benefits to non-members. In sum, for Indian tribes, Indian gaming is not primarily a jobs initiative; it is a revenue initiative. II.

II. For Indian Tribes, Off-Reservation Gaming Operations Are in Some Ways Better than On-Reservation Gaming Operations and Should Be Encouraged, Especially When They Are Supported by State and Local Governments.

A casino is not an unmitigated good for any community. As any Not-In-My-Back-Yard (NIMBY) community group will tell you, a casino may provide some economic benefits in jobs and tourism, but it also has significant social costs. It can increase traffic and congestion, can create or exacerbate public safety issues, and can lead

to an increase in gaming-related social harms, such as pathological (or compulsive) gambling. Thus, one rarely sees wealthy communities clamoring for casinos. Gaming tends to be sought by communities that need economic development and are willing to put up with the inevitable negative externalities. Indeed, much of the planning as to location and siting of gaming facilities is focused on mitigating such harms.

For Indian tribes, casinos can have even more particular side effects in that they bring outsiders onto the reservation, sometimes overwhelming the reservation character of the community and interfering with tribal culture, tribal daily life, and even tribal values. Indeed, to Indian communities, the most positive aspect of casinos is the revenues that they provide. Thus, contrary to the conclusion of the Guidance Memo, in some ways, the ideal Indian gaming operation is one that is outside the reservation. Off-reservation casinos can provide all the revenue benefits of Indian gaming without the corresponding interference with tribal life.

The Guidance Memo claims that taking off-reservation land into trust for a casino can "defeat or hinder" the Indian Reorganization Act purpose to restore the tribal land base. This assertion is just as ridiculous as the claim that off-reservation Indian gaming produces no jobs on the reservation. The chief obstacle to restoration of the tribal land base over the past seven decades has been the Department of the Interior's failure to ask for—and Congress's failure to appropriate—sufficient funds for tribal land acquisition. Off-reservation gaming operations can give tribes the revenues to overcome this obstacle to land restoration. Gaming off the reservation can be used to support land acquisition on the reservation. Indeed, many tribes use their gaming revenues, in part, to fund reservation land acquisition and land consolidation programs.

III. Off-Reservation Casinos That Are Non-Controversial Should be Approved, Without Regard to Party Politics.

Congressional policy, as expressed in the Indian Gaming Regulatory Act, suggests that land acquisitions for Indian gaming should be encouraged, especially if state and local communities concur. In light of the policy values expressed in IGRA, the Secretary's recent denial of Indian land-into-trust acquisitions that were supported by local communities and the governor of a state is difficult to understand. It is unclear what federal interest justifies rejecting a project supported by local, tribal and state officials.

While the Secretary has an important role of serving as a buffer between tribes and states in the context of disagreement, the Secretary should not become an obstacle to joint efforts at economic development when tribes and states agree on the value of an off-reservation Indian gaming operation. The Secretary's denial of land into trust in such circumstances is contrary to tribal self-determination and self-sufficiency. It is also contrary to basic values in a federalist governmental system which suggest that the federal government should intervene in local affairs only when the there is a clear federal interest in doing so. While the federal government has a responsibility to protect tribes from state interference in some circumstances, no federal interest justifies the Secretary's refusal to take land into trust when tribes, local communities and the state's governor agree. To justify taking such action in the face of wide local agreement, Interior should articulate a clear federal interest. In the absence of such an interest, the action appears to represent a decision made on the basis of crass party politics. Indeed, the tortured reasoning in the Guidance Memorandum may be intended to serve as cover for cynical political considerations.

IV. In Light of the Haphazard Development of Interior Policy on Land-Into-Trust for Gaming, a Clear and Consistent Statement of Policy Is a Good Idea, But It Should Be Developed in a Public Process with Tribal and Public Input.

Partially because of the many externalities of casinos (and large economic development projects in general), taking land into trust for tribes is often controversial, especially outside a reservation. Given the political salience of this important issue, land-into-trust policies should not be developed behind closed doors without public input. Much of the weakness of the Guidance Memorandum is directly attributable to the failure to consult on these important policies with tribal governments and other interested members of the public. If Interior had consulted with affected interests, it likely would not have produced a memorandum with such weak analytical conclusions.

Current law anticipates broad public involvement in Executive Branch policy-making on land-into-trust issues. Department of the Interior regulations on land-into-trust, for example, require consultation with state and local government officials on such decisions. See 25 C.F.R. § 151.11. Likewise, although Section 2719 of IGRA generally prohibits gaming on land taken into trust after October 17, 1988,

it gives the Secretary discretion to allow such gaming when the Secretary has consulted with "the Indian tribe and appropriate State and local officials" as to whether gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community" and the state governor concurs in such a decision. In other words, the Secretary is given broad discretion, but only in circumstances in which wide public participation occurs (indeed, absent such consultation, the Secretary lacks discretion on these issues and IGRA governs).

Since the New Deal, the notion that the public should have a role in agency decision-making has been a bedrock principle of American government. Given the wide interest and significant local ramifications of decisions about gaming, however, and the very specific responsibilities for consultation with tribes and others in these contexts, decisions about Indian gaming policy should not be made behind closed doors or without significant public participation.

The Clinton administration spent nearly two years attempting to formulate a coherent policy for land-into-trust decisions. Its extensive study of this issue produced a rule that was adopted at the end of President Clinton's second term, on January 16, 2001, to become effective 30 days later. The Bush Administration may have been wise to be suspicious of a rule that was adopted by a lame duck administration so late that it would never apply until after that administration was gone. However, it was unfortunate that the Bush Administration failed to capitalize on the significant sophistication that had developed surrounding this issue. The previous administration had sought significant public involvement on this question.

In light of the current administration's rejection of the previous administration's new rule for off-reservation acquisitions, the problem has festered. In 2004, several high ranking officials produced an "Indian Gaming Paper," ostensibly to answer an inquiry by Secretary Gale Norton on the extent of her discretion to approve off-reservation acquisitions for gaming. Though the Indian Gaming Paper was apparently not developed with public participation, it reached a sensible conclusion. The Indian Gaming Paper concluded that "distance limits should not be grafted onto IGRA. To do so could deny the very opportunity for prosperity from Indian gaming that Congress intended IGRA to foster." Michael Rosetti, et al., Indian Gaming Paper, at *13 (February 20, 2004).

Though it was never formally enacted as a rule, the 2004 Indian Gaming Paper received widespread public attention. For almost four years, Indian tribes relied on this interpretation in myriad ways. They invested substantial resources into negotiating with communities, as well as state officials, private developers and investors. And they submitted land-into-trust applications believing that they could rely on the Department's guidance. During this time, tribes relied in good faith on the belief that distance from the reservation would not be a significant factor in the decision on land-into-trust applications.

Off-reservation acquisitions have continued to occupy public interest. No less than ten Senate Indian Affairs Committee hearings have been dedicated to the issue of off-reservation land-into-trust acquisitions for gaming. Now, four years after the 2004 Indian Gaming Paper established a policy stance upon which the public largely relied, Interior has abruptly changed course, imposing an arbitrary and indefensible standard on land-into-trust applications. While Executive Branch agencies are entitled to—and indeed have the duty to—change course when a policy change ought to be made or can be justified for good reason, they should not change policy for erroneous reasons. While the decision to take land into trust is a matter committed generally to the discretion of the Department of the Interior, Interior presumably must exercise that discretion in a non-arbitrary manner and should not change policy based on reasons that are patently wrong on the facts and inconsistent with broader Congressional policy.

If the Department wishes to make policy in this area, as perhaps it should in light of the importance of the issue, it would be wise to consult with interested parties in doing so. Such consultation could have prevented the embarrassingly weak analysis set forth in the Guidance Memorandum and the inevitable confusion that bad policy can produce.

V. Because the Guidance Memorandum Effectively Operates as a Rule Promulgated in Violation of the Administrative Procedure Act, Its Immediate Use to Deny Applications Is Inconsistent with Basic Principles of Administrative Due Process.

The Guidance Memorandum advises Interior decision makers that "all pending applications or those received in the future should be initially reviewed in accordance with this guidance" and that if an "application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied." Guidance Memo at p. 2-3. By requiring the decision makers in Interior to

deny an application that does not meet the newly imposed standards, the "guidance" is more than a mere clarification of the factors set forth in 25 C.F.R. Part 151. It guides Interior's decisions to take land into trust, effectively having the force of law. Since it is effectively a legislative rule, it is unlawful in the absence of the notice and comment procedures spelled out in Section 553 of the Administrative Procedure Act (APA). It runs afoul of basic administrative law principles in several respects.

First, the APA requires an agency to engage in a notice and comment rulemaking procedure when it either adopts a legislative rule or issues an "interpretative rule" or "statement of policy" that "expresses a change in substantive law or policy" which "the agency intends to make binding, or administers with binding effect." General Electric v. EPA, 290 F.3d 377, 382-383 (D.C. 2002) (finding a Guidance Memorandum listing specific requirements applicants must meet to be a legislative rule and vacating because not promulgated in accordance with APA Section 553). The Guidance Memorandum seems to expresses a change in substantive law by rewriting, rather than interpreting, Part 151.

The Guidance Memorandum seems to be a legislative rule, rather than an interpretive one, because it carries the force of law, as reflected in its binding language and immediate effects. A document has binding effect, even before applied, "if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as—denial of an application." General Electric v. EPA, 290 F.3d at 383. The Guidance Memorandum explicitly advises tribes that failure to satisfy its requirements will result in denial of their applications. The Guidance Memorandum then goes a step further by binding reviewers to deny applications that do not address the narrow and seemingly arbitrary prescribed factors such as whether the gaming will encourage reservation residents to relocate off-reservation and whether relocation will affect members' identification with the tribe. Thus, the Guidance Memorandum effectively offers more than mere "guidance."

Second, the Guidance Memorandum was put into effect immediately and without any notice, reflecting a lack of due process and an appearance of unfairness. Indeed, on January 4, only a day after the Guidance was issued, the Secretary rejected numerous applications to take land into trust for gaming on the basis of the reasoning set forth in the Guidance Memorandum, and without even giving the affected parties an opportunity to address the new standard. Indeed, Secretary Kempthorne explicitly indicated that the applications were rejected because the gaming operations would be too far from the reservations to offer jobs to tribal residents, that residents would be forced to relocate as a result, and that relocation of tribal members would "have serious and far-reaching implications for the remaining tribal community." See Anahad O'Connor, Interior Secretary Rejects Catskill Casino Plans, N.Y. Times (Jan. 5, 2008).

Third, the rule set forth in the Guidance Memorandum operates in an arbitrary and unreasonable manner. While Part 151 advises the Secretary to "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" of trust land "as the distance between the tribe's reservation and the land to be acquired increases," it recognizes that each case involves balancing various factors specific to the parties involved. Thus, it instructs the Secretary to "give greater weight to the concerns" of "state and local governments" as the distance increases. 25 C.F.R. § 151.11. However, instead of recognizing the positive as well as the negative impact that state and local governmental views should merit in the "greater scrutiny" review, the Guidance Memorandum identifies two factors that a reviewer should consider: 1) "jurisdictional problems" and "conflicts of land use"; and 2) "removal of the land from the tax rolls." Guidance Memo at p. 5. The Guidance Memorandum ignores the substantial possibility that state and local governments may have negotiated with tribes around these issues—which is almost necessarily how local support and gubernatorial consent is achieved—and does not instruct a reviewer to consider any positive input from state and local governments. This rule is unfair and makes little sense. Disapproval by the affected non-tribal parties may occasionally tip the scale against taking land into trust for gaming far from a reservation, but likewise, strong support by the affected state and local government should motivate approval.

Given that the Guidance Memorandum is supported by dubious (and even erroneous) assumptions about Indian gaming, that it was adopted without any public or tribal input, and that it was used to deny applications immediately and without notice to affected parties, it should be withdrawn. Although the Secretary has wide discretion as to whether to take land into trust for any legitimate reason, the Secretary should not decline to take land into trust for illegitimate reasons. The Secretary has broad discretion, but good government and basic principles of administrative law suggest that the Secretary's discretion be exercised wisely and fairly.

Conclusion

Interior should be applauded for focusing on this important issue and attempting to provide guidance. Indeed, good government requires clear rules. The only beneficiaries of a mysterious system with vague rules are the lawyers and lobbyists who can navigate the murky and overly political land-into-trust process, and land speculators who can capitalize on the uncertainty in the process to profit from tribal hopes. Clear rules on land into trust would serve tribes and their commercial partners by providing greater predictability.

Acquisition of land into trust is a difficult political issue for the Secretary. Indeed, while Interior has a clear mandate to work to restore the tribal land base, and to create opportunities for tribal self-sufficiency and economic development that comes from Indian gaming, the Secretary bears the brunt of controversial actions in that area. In light of the longstanding Congressional support for the restoration of tribal lands, and the more recent Congressional support for tribal economic development through Indian gaming, however, the Secretary has political cover for taking land into trust. The Secretary should exercise the discretion to accomplish the policy goals that Congress has mandated.

Interior's caution in this area is sometimes well-motivated. Interior has sometimes believed that it must carefully guard its authority to take land into trust by using this power cautiously. Liberal use of the power might cause widespread public opposition that would motivate Congress to withdraw the delegation of this power to the Secretary. Withdrawal of this power would have the effect of placing the power in an even more political body, i.e., Congress, and could well frustrate the land-into-trust process. That kind of result might harm all tribes. In general, it is good that the Secretary have the authority to take land into trust for tribes. However, Congress has given the Secretary reasonably clear direction and the Secretary should follow that direction until it is changed.

In exercising this important discretion, Interior must do a better job of acting in a fairer (and swifter) fashion. Moreover, whatever rules Interior may adopt as to land-into-trust, the Secretary should be willing to waive the rules when an acquisition is non-controversial. While Congress may have believed that the appropriation process would necessarily serve as a practical limit on restoration of tribal land, Congress likely never intended Interior to be an additional obstacle to restoration of tribal lands when tribes could afford to bypass the appropriations process. In any event, when local communities and the governor of the state support a land-into-trust application, the Secretary is not facing a controversial decision. Local and state officials, who are closer to their respective communities, should bear the political fallout of those decisions. Such applications should be approved. When the Secretary of the Interior uses his discretion to deny a land-into-trust application for gaming when there is agreement between tribal, state and local officials, the Secretary invites speculation that the result is not being driven by good government but by partisan politics.

The Secretary should withdraw the Guidance Memorandum and make a serious effort to develop clear rules. Because of the high political salience of these issues, such rules ought to be developed with tribal consultation and public participation in notice and comment. Such rules ought to reflect real concerns, and not half-baked policy considerations unrelated to the purposes of the laws that support tribal land restoration and Indian gaming.

Thank you for considering these views on this important issue.

Disclaimer: The comments expressed herein are solely those of the author as an individual professor and do not represent the views of the Harvard Law School or any other institution with which the author may be affiliated.

* * *

A bibliography of Professor Washburn's work related to Indian gaming is set forth below:

BIBLIOGRAPHY

Gaming Law Cases and Materials, Casebook and Teacher's Manual (Forthcoming Aspen/Wolters-Kluwer 2010).

Felix S. Cohen's Handbook of Federal Indian Law, 2006 Supplement, Principal Author, Gaming Law Chapter (LexisNexis).

The Legacy of Bryan v. Itasca County: How a $147 County Tax Notice Helped Bring Tribes $200 Billion in Indian Gaming Revenue, 92 Minnesota Law Review—— (forthcoming 2008). The Supreme Court's landmark 1976 decision in Bryan v. Itasca County is known within Indian law academia its dynamic and pragmatic

interpretation of a termination-era statute to limit Congressional termination's harmful legacy during a more enlightened era of tribal self-determination. What is less well-appreciated about the case is that it provided the legal bedrock on which the Indian gaming industry was built. This article explores the genesis of the litigation and traces its path, describing how it came to produce a unanimous Supreme Court opinion of surprising breadth. It also demonstrates that the right to engage in gaming, which ultimately has produced vast tribal economic development and even riches for some tribes, had its roots as much in Indian poverty as in Indian sovereignty. This article can be downloaded electronically at: http://papers.ssrn.com/abstract=1008585.

The Mechanics of the Indian Gaming Management Contract Approval Process, 9 Gaming Law Review 333 (2004). This article provides a detailed description of the formal and informal policies and procedures of the National Indian Gaming Commission when it reviews Indian gaming management contracts. It discusses various substantive and technical factors that the agency considers in its review.

Federal Law, State Policy and Indian Gaming, 4 Nevada Law Journal 285 (2004) (Essay in Symposium on Cross-Border Issues in Gaming). This essay underlines the close link between Indian gaming and state law. Under the Indian Gaming Regulatory Act, Indian gaming is lawful only if state law allows gaming for at least some purposes. Yet, Indian gaming is likely to be profitable only in those states that have restricted gaming by commercial entities thus preventing substantial competition against tribal casinos. Indian tribes will have profitable operations only as long as they can continue to maintain artificial monopolistic or oligopolistic power through restrictive state laws. In other words, the economically advantageous position that many tribes currently occupy is precarious and subject to the whims of state legislators. Despite its wild success for some tribes, Indian gaming exists largely at the sufferance of state governments. Over the long term, any successful tribal endeavor that depends on the cooperation of a competing sovereign is destined to come to an end.

Recurring Problems in Indian Gaming, 1 Wyoming Law Review 427 (2001). This article surveys several of the legal problems that have arisen repeatedly in this industry around the country, often in a state-by-state fashion. It has been cited by the Ninth Circuit in In re: Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) (majority opinion by Circuit Judge W. Fletcher).

PAST CONGRESSIONAL TESTIMONY

Prepared Statement and Oral Testimony, Oversight Hearing on the [NIGC] Minimum Internal Control Standards, United States House of Representatives, Committee on Resources (Richard Pombo, Chair), 109th Congress, 2d Session (May 11, 2006). This testimony addressed the importance of internal control standards in casino gaming operations and the effect of a recent federal court decision on sound gaming regulation. This testimony can be viewed online at http://ssrn.com/abstract=1030926.

Prepared Statement and Oral Testimony, Oversight Hearing on the Regulation of Class III Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chairman), 109th Congress, 1st Session (September 21, 2005). This testimony addressed the need for strong federal regulatory oversight of Indian gaming and the pitfalls of failing to provide such oversight. Available online at http://ssrn.com/abstract=1030924.

Prepared Statement and Oral Testimony, Oversight Hearing on the Regulation of Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chairman), 109th Congress, 1st Session (April 27, 2005). This testimony discusses some of the problems in the Indian gaming regulatory structure and suggests that the time for federal economic decision-making for Indian tribes is long past. Available online at http://ssrn.com/abstract=1030922.

The CHAIRMAN. Thank you. Ms. Johnson, let me ask you, do you believe that the requirement that tribes must now enter into agreements with local governments places Indian tribes at a disadvantage in having fee land placed into trust?

Ms. JOHNSON. Absolutely. I think that the first premise of the tribes is our relationship with the Federal government, and by having to have the local governments weigh in to the decision of the Federal government, it subjects us to a different relationship.

I applaud the tribes who spoke here earlier today who worked through those local processes, but it is not always a place where it is comfortable for the tribes and the local governments to have relationships, and, of course, they are encouraged to have good relationships. But the tribal government's relationship is a trust responsibility with the Federal government, and our relationship primarily sits here in the House of Washington.

The CHAIRMAN. Professor Skibine, you mentioned that if the courts uphold the Department's actions, that the Committee should introduce legislation to address issues and provide direction to the executive branch. I intend to do just that and introduce legislation soon that will ensure adequate consultation is conducted in situations such as this and others.

Are you willing to work with our Committee to ensure that all issues are addressed?

Mr. SKIBINE. Absolutely.

The CHAIRMAN. Thank you. I thought that might be the answer.

Let me ask Professor Washburn, do you agree with Professor Skibine that the new requirement in the guidance that requires tribes to enter into agreements with local governments before off-reservation gaming may be considered as an additional requirement to IGRA that Congress did not intend?

Mr. WASHBURN. I do believe it is an additional requirement that Congress did not intend that has been added summarily by the assistant secretary without proper consultation with tribes, yes, Mr. Chairman.

The CHAIRMAN. OK. Thank you. We are being rushed to get out of here because there is a budget hearing being scheduled by the Parks Subcommittee, and they are waiting to get in. So, again, I would ask this panel to be open to written questions that Members of the Committee may wish to submit at a future time, and we thank you for your patience and being with us today. Thank you.

The Committee stands adjourned.

[Whereupon, at 2:07 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

[A statement submitted for the record by Hon. David Burnett, Chairman, Confederated Tribes of the Chehalis Reservation, follows:]

Statement of The Honorable David Burnett, Chairman, Confederated Tribes of the Chehalis Reservation

INTRODUCTION

Good morning Chairman Rahall, Ranking Member Young and members of the Committee:

My name is David Burnett. I am the Chairman of the Confederated Tribes of the Chehalis Reservation (Tribe), a small tribe in Southwestern Washington State. I am honored to have the opportunity to provide my Tribe's views on the Department of Interior's recently released guidance on off-reservation fee-to-trust applications.

As the Committee is aware, the Department's new guidance makes significant changes to the manner in which it considers off-reservation fee-to-trust applications. My testimony today will focus on my Tribe's protracted but ultimately successful effort to persuade the Department to acquire a parcel of off-reservation land into trust for non-gaming economic development purposes. Based on our experience, I will also provide our views on the guidance.

BACKGROUND ON THE TRIBE

The Reservation location historically was inhabited by our ancestors at the confluence of the Chehalis River and the Black River. In 1864, after the Chehalis people and other tribes refused to go to a single reservation, the United States, by Executive Order, confirmed the Chehalis choice and set aside our Reservation.

The Chehalis Reservation is a beautiful Reservation, but it is in an economically depressed area of the State of Washington. Before the Tribe built a casino on trust land on the Reservation, tribal member unemployment exceeded 60%. Much of the Reservation is in a flood plain and floods most years.

The Tribe's casino has been very successful, but the Tribe has known all along that, to continue our economic progress in an age of declining federal assistance and where there is a land base insufficient to provide tax support for government programs, there must be economic diversity. Economic development is the vehicle Tribes have used to obtain the resources to meet the needs of their Tribal Members in circumstances where it is impossible to generate tax revenue.

Since becoming Chairman in 2002, I have worked to diversify the economic development of the Tribe. I do not want to be recognized as a "gaming tribe", but rather a tribe that has taken advantage of the opportunities and developed businesses to help it achieve economic independence.

THE TRIBE'S EXPERIENCE WITH THE DEPARTMENT'S FEE-TO-TRUST PROCESS

In 1999, Thurston County, Washington came to the Tribe and asked the Tribe to consider moving its casino or some other economic development project to Grand Mound near Interstate 5 at Exit 88. They needed help to jump start the economy of South Thurston County. The County had built a sewer and water plant that had virtually no hook ups and was costing the County $400,000 in losses a year. It was presumed that "an anchor" development would create growth and generate revenue to stop the losses incurred by the County.

With the County's assistance, the Tribe identified a parcel of land approximately seven miles from the Reservation and held two public meetings in February and May 2002, to discuss moving its casino. There was support from the County and the non-Indian community and the Tribe began to collect the information required under the fee-to-trust check list. However, when discussing the matter with the BIA in March and April, 2003, it became very clear that an off-reservation casino project associated with a fee-to-trust application would not be approved by the BIA even with substantial community and local governmental support.

The Tribe accepted this limitation and prepared a fee-to-trust application that would have provided for general economic development on the site. In the past, the Tribe had actually had such an application approved by the BIA. However, by June 2004, the BIA told us that applications for general economic development would no longer be accepted. The Tribe was told that it would have to have a specific project and a business plan before its application would be considered complete.

Fortunately for the Tribe, we found a project and a non-Indian partner for the creation of a Great Wolf Lodge, an indoor waterpark, hotel and conference center. Without the waterpark project, get the land into trust, the Tribe would have had to create a project to satisfy the BIA. The Tribe would not have been able to maintain the flexibility of choice, but would have had to find a specific project to satisfy the United States rather than make considered, economic decision as a sovereign.

With the project decided, the Tribe again began to prepare its fee-to-trust application and gather support. The Tribe was able to secure the support of:

- Thurston Economic Development Council
- Local Chambers of Commerce
- Thurston County, Washington
- Local Cities
- Sheriff of Thurston County
- Members of the Washington State Legislature
- The Governor's office
- The Tribe's congressional delegation

The other critical piece of support for the Tribe came from the Portland Regional Office. The Portland Regional Office worked with the Tribe on its application and then reviewed it in an expedited fashion. Because it was an off-reservation fee-to-trust application, the Portland Regional Office was then required to send the application back to the Central Office in Washington DC.

The Tribe's fee-to-trust application for the waterpark project arrived in Washington, DC where:

a) there were over 2000 non-gaming fee-to-trust applications from tribes languishing and

b) the Committee which that considers applications had not met for over two years, and
c) we could not even determine who was on such committee.

The Tribe was fortunate in getting the interest and support of James Cason, who was then the Associate Deputy Secretary of the Interior, and Arch Wells, then the Acting Director for Trust Services of the BIA. In order to move through the process, the Tribe sent a delegation to Washington, DC 11 times in 12 months to meet with the BIA, the Washington State Congressional delegation, and Mr. Cason. The Tribe also hired outside professionals to keep its interests uppermost in the attention of the BIA. These efforts cost the Tribe thousands of dollars, but represented the possibility of future jobs and economic diversification.

In July, 2006, the United States took the Tribe's land into trust for the Great Wolf Lodge project. This was after the combined efforts of the Tribe and its staff, its local government supporters, the Governor's office of the State of Washington, its Congressional delegation supporters, the support of the Portland Regional Office, and the Tribe's own efforts. At one point before approving the Tribe's application, the Department suggested the idea of a self-managed trust. The Tribe would retain regulatory jurisdiction over the land, and have primary management responsibility, and the Department would be absolved of any potential liability. This was a unique idea that the Tribe, as a sovereign liked, because we believed we could manage the land better than the BIA. This was never implemented because of concerns from the BIA Solicitor's Office.

We began the fee-to-trust process in 2001, and completed it in 2006. The process is arduous and subjective. We were reminded at each junction that this is a discretionary process, and that the Secretary was under no obligation to make any kind of decision, let alone a definite yes or no. There is no need to make the process more difficult.

RECOMMENDATIONS ON THE RECENTLY RELEASED GUIDANCE

At the outset, it is important to note that while the guidance is intended to assist evaluating off-reservation land into trust "for gaming purposes"; the memorandum is much broader and applies to all off-reservation fee-to-trust applications, including projects like ours. Our views and recommendations are shaped by our experience with this process.

The recently released guidance erodes the sovereignty of tribes. I can understand the concern that some have expressed about allowing tribes to acquire off reservation lands into trust for the sole purpose of gaming. However, reservations in remote locations without natural resources are not conducive to economic development. Economic development requires population and transportation to survive and thrive.

Take the Chehalis Tribe as an example. Our project is seven miles from the Reservation, but out of the flood plain. It is adjacent to the freeway and within one-half mile of an interchange. How far away from the Reservation would our project have to be before the BIA would not approve our fee-to-trust application under the newly released guidelines? Will the determining factor be whether the BIA likes the project? Whether it provides a certain number of jobs to non-Indians and / or Tribal members? Whether the Tribe is involved in industries or an economic sector the BIA approves of? What will be the rules so that a tribe can make a valid, sovereign decision for its economic future?

The idea of commutability is not universally applicable, and the standard should remain relative to historic ties to usual and accustomed areas of living. The idea that the BIA is trying to make sure that the reservation lifestyle and communities are protected is paternalistic and is offensive to me. What this policy means to me is that there are non-Indian people who have no problem with Indians being successful as long as they are not too successful. When they start getting off the reservation, we begin round them up and keep them on the Reservation. All of this flies in the face of self-determination.

If this type of policy were applied in the context of education, then perhaps scholarships should be denied for Indian students. After all, there are few institutions of higher learning located in Indian Country, and the students must leave the reservation to pursue an education. Then, when they have completed their education, there are few opportunities to maximize their education on the reservation, so they leave the reservation to pursue their careers. Does all this mean we should stop educating Indians?

Tribes have worked hard for generations to maintain their identity and independence, and it is they who will have the best interests of their tribal members at heart when making these decisions. The BIA should not be involved in making decisions about the impact of a business on the quality of life for a particular tribe.

To improve the process, there should be an assumption the land will be taken into trust, unless there is a valid reason not to do so. Then if there are valid reasons not to take the land into trust, that would be the decision point for decline or request for additional information.

Further, there should be some specific timelines and milestones identified in the process. It is difficult for a Tribe such as the Chehalis who are working to develop a specific project with a partner like Great Wolf Lodge, a publicly traded company, to maintain any kind of momentum and interest when it is unclear of when certain events will take place.

The regulations need to reflect the reality in Indian Country and not the prejudices of either our neighbors or BIA officials. Sovereignty requires the ability to make choices regardless whether others like that choice. The guidelines should not subject tribes to arbitrary standards of distance that are not related to valid economic decisions.

This concludes my testimony. At this time I would be happy to answer any questions that members of the Committee may have.

[A letter submitted for the record by Larry N. Arft, City Manager, City of Beloit, Wisconsin, follows:]

City of
BELOIT, Wisconsin
CITY MANAGER • CITY HALL • 100 STATE STREET • BELOIT, WI 53511
Office: 608/364-6614 • Fax: 608/364-6756
www.ci.beloit.wi.us
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February 26, 2008

SENT VIA E-MAIL

The Honorable Nick Rahall, Chairman
Committee on Natural Resources
United States House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515

RE: Department of Interior's Administrative Rule Changes Regarding the Indian Gaming Regulatory Act

Dear Chairman Rahall:

Please accept this correspondence as a strong affirmation of support for the proposed St. Croix/Bad River gaming application for a facility to be located in the City of Beloit.

City officials were shocked and dismayed to learn of the sudden and unannounced changes in policy at the Department of the Interior, which appeared to violate both Federal law and established administrative procedure for making review modifications of this sort.

We are also upset that this sudden and unannounced change in policy seemed to have as its goal depriving Native American Tribes of the economic development opportunities granted by Congress under the Indian Gaming Regulatory Act. A number of Native American Tribes have been very successful in operating both on- and off-reservation gaming facilities in different locations around the country. While not all applications may be sound in terms of meeting the review criteria, many (including the Beloit application) clearly meet the two part determination and are fully compliant, not only with the letter but the spirit of the Indian Gaming Regulatory Act. No administrative agency, or the Secretary thereof, should have the right to arbitrarily reject those qualified applications, thereby depriving the Tribes of rights granted by law.

We urge the committee to take the necessary steps to correct this egregious injustice and to require the Department of the Interior to follow the provisions of the Act as approved by Congress and the administrative procedures previously utilized by the agency.

Sincerely,

Larry N. Arft
City Manager

C: Hazel Hindsley, Tribal Chairman, St. Croix Chippewa Indians of Wisconsin
Loretta Livingston, Tribal Chair, Bad River Band of Lake Superior Chippewa Indians
Terrence T. Monahan, Beloit City Council President
Beloit City Councilors
Craig Knutson, Rock County Administrator
Randy Kirichkow, Mayor, South Beloit, Illinois
Joe Hunt, Beloit Casino Project

[A letter submitted for the record by Mike McGovern, Supervisor, Yolo County, California, and Chair, CSAC Indian Gaming Working Group, California State Association of Counties, follows:]

California State Association of Counties

1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327-7500
Facsimile
916.441.5507

February 29, 2008

The Honorable Nick Rahall
Chairman, House Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: Oversight Hearing on Department of Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and its Ramifications

Dear Chairman Rahall:

The California State Association of Counties (CSAC), the single, unified voice speaking on behalf of all 58 California Counties, would like to submit the following comments in response to the Committee on Natural Resources' informational hearing on the Department of Interior's recently released guidance on taking land unto trust for tribal governments. Our initial review of the memo shows that the guidance is inline with CSAC policy on the land into trust process, and that we concur with the concepts expressed with respect to greater weight given to the concerns of state and local governments.

As you know, California's counties are at the forefront of responding to the myriad of challenges associated with the unprecedented rise of Indian gaming in our state. In particular, county governments have been forced to expend considerable resources as a result of addressing the numerous local impacts caused by Indian gaming operations, including impacts related to traffic congestion, water/wastewater management, criminal justice/public safety matters, and health/social services issues.

While the impacts of Indian gaming fall primarily on local governments and the citizens they serve, Indian policy is largely directed and controlled at the federal level. Just as it is essential that tribes mitigate all off-reservation impacts caused by tribal gaming, it is just as equally important that local governments have a meaningful voice in the federal process.

In light of this, CSAC has adopted principles related to Federal Tribal Lands Policy (attached), which supports a voice for affected communities in the decision-making process for taking lands into trust for a tribal government. CSAC finds it critical that lands are not taken into trust and removed from the land use jurisdiction of local governments without adequate notice, meaningful consultation, and the consent of the State and the affected community. While our policy does not challenge the sovereign right for tribal governments to seek tribal gaming and strive towards self-reliance, the rapid expansion of tribal gaming has created a myriad of significant economic, social, environmental, health, safety, and other impacts.

Thank you for the opportunity to provide comments regarding this very important matter. CSAC remains committed to working with federal and state lawmakers, tribes, and other local governments to help ensure that the land into trust process is better meets the needs of both tribes and local governments.

Sincerely,

Mike McGowan

Mike McGowan
Supervisor, Yolo County, California
Chair, CSAC Indian Gaming Working Group

[NOTE: The information listed below has been retained in the Committee's official files.]

- Brown, Daniel, Vice-President, Ho-Chunk Nation of Wisconsin, Black River Falls, Wisconsin, Letter submitted for the record
- Chicks, Robert, President, Stockbridge-Munsee Band of Mohican Indians, Statement submitted for the record
- Glover, Federal D., Chair, Board of Supervisors, Contra Costa County, Martinez, California, Letter submitted for the record
- Greene, Rob, Tribal Attorney, Confederated Tribes of the Grand Ronde Community of Oregon, Letter submitted for the record
- Los Coyotes Band of Indians, Warner Springs, California, Statement and questions submitted for the record
- Patterson, Brian, President, United South and Eastern Tribes, Inc., Statement and resolutions submitted for the record
- Silver, Dan, Executive Director, Endangered Habitats League, Los Angeles, California, Letter submitted for the record

