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U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS, COMMITTEE ON NATURAL RESOURCES
HEARING ON EXECUTIVE BRANCH STANDARDS FOR LAND INTO TRUST DECISIONS FOR GAMING PURPOSES.
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1324 Longworth HOB

Mr. Chairman, members of the subcommittee, thank you for inviting to testify on these important matters. My statement today is going to focus on Executive decisions to authorize gaming on off-reservation land acquired into trust after 1988. More precisely, my comments will address those Executive decisions made pursuant to the two part determination set out in section (b)(1)(A) of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2719(b)(1)(A). These are the decisions which require concurrence by a state governor.

Under IGRA's section 20, gaming is prohibited on lands acquired by the Secretary of the Interior after October 17, 1988, unless such lands are located within or contiguous to the boundaries of an Indian reservation as of that date. The law contains 4 exceptions to this prohibition. Under the so-called "two-part determination" exception, gaming is allowed on off reservation land if the Secretary determines, after consultation with appropriate state and local officials, including officials of nearby Indian tribes, that gaming at that location would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community. In addition, the governor of the affected state has to concur with this determination.

There is almost no legislative history concerning the enactment of Section 20. The concept of a restriction on off reservation gaming seemed to have first surfaced in a Bill introduced by Congressman Bereuter of Nebraska in 1985, (H.R. 3130, 99th Congress.) The idea behind that bill was eventually incorporated by the Senate Select Committee on Indian Affairs when it reported out of Committee an amended version of H.R. 1920, the gaming Bill which had passed the House of Representatives on April 21, 1986. Although H.R. 1920 never passed the Senate, its main components, including the section which restricted gaming on lands acquired outside Indian reservations were incorporated in S.555, the Indian gaming bill which eventually passed the Congress and was signed by the President.[2]

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[2] For an in depth discussion of the legislative history of IGRA, see Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty*, 42 Ariz. St. L. J. 17 (2010).

What the Record Shows:

Since 1988, the Secretary has disapproved 14 two part determinations, 12 of these disapprovals were made in or after 2008, including one in 2011.

Since 1988, the Secretary has approved 15 two part determinations, five of which were approved in 2011 or thereafter. Of these 15 approvals, five were vetoed by state governors, one has not been acted upon yet.

Of the five 5 decisions made since 2011, 4 were approvals, one was a disapproval.

Finally, it is my understanding that there are currently ten applications involving two part determinations still pending at the Department.

One of the more controversial aspect of off reservation gaming is that it may occur at a location far from a tribe's reservation. Of the more recent approvals the record indicates the following:

1. Kaw Nation (Oklahoma): 21 miles from former reservation, 41 miles from Tribal Headquarters.
2. Keweenaw Bay Indian Community (Michigan): 70 miles from reservation and Tribal headquarters. (Governor vetoed).
3. Enterprise Rancheria (Ca.): 36 miles from the Tribal headquarters.
4. North Fork Rancheria (Ca.): 36 miles from Headquarters.
5. Menominee Indian Tribe of Wisconsin: 160 miles from Tribe's reservation.

Of the one recent disapproval, the record indicates that the proposed land was 293 miles from the Pueblo of Jemez (New Mexico).

The purpose of my testimony today is to show that overall, there are more than enough safeguards currently in place to guarantee that the Secretary's decisions to allow gaming on off reservation lands acquired after 1988 will continue to be made rationally and fairly and that the Secretary's discretion will not be abused. These safeguards have been imposed by all three branches of the government.

A. Legislatively imposed requirements.

IGRA contains several important requirements restricting off reservation gaming. The most important one is the one requiring the governor of the state to concur with the Secretary's two part determination. As mentioned above, that requirement has already resulted in five vetoes by state governors. A salient feature of that requirement is that

there does not seem to be any federally imposed standards on the state governors. This means that a state governor may refuse to concur with a Secretary's determination for just about any reason.

Another important requirement is that the two part determination can only be made after consultation with state and local officials. Furthermore, gaming on such newly acquired lands cannot be "detrimental" to the surrounding communities, although the Act does not further define what "detrimental" means in this context.

Another important IGRA restriction is that gaming under the Act is only allowed on Indian lands and the definition of Indian lands indicates that for trust or restricted lands located off Indian reservations, the Indian tribe has to be exercising "governmental power" before such lands can be considered Indian lands under IGRA. This requirement seemed to have played a crucial role in disapproving the application of the Pueblo of Jemez.

Before taking land into trust, the Secretary also has to comply with the requirements of NEPA. Among other things, this means that the Secretary has to give adequate consideration to a reasonable range of alternative sites for the proposed gaming establishments, and has to take a "hard look" at the environmental impacts of the proposed action.

B. Executive Branch's safeguards: The 2008 and 1995 regulations.

In 2008, twenty years after enactment of IGRA, the Interior Department published detailed regulations providing further guidance and direction for the implementation of this section. Subpart C, sections 292.13 to 292.24 concerns the two part determination exception. These regulations contain additional factors a tribe has to meet in order for the land to qualify under that exception.

For instance, in order to assist the Secretary in determining whether the proposed gaming will be in the best interest of the tribe and its members, the tribe must present "evidence of significant historical connections to the land."292.17(i). The tribe must also provide the "distance of the land from the location where the tribe maintains core governmental functions (g). In addition, the tribal application must describe the "projected benefits to the relationship between the tribe and non-Indian communities."(e). In reality, this last criteria has resulted in no land acquisition being transferred into trust without the support of the surrounding community.[3]

[3] Although there seemed to have been one pre 2008 approval (Siletz Tribe of Oregon in 1992) that did not have the support of the local community, the state Governor quickly vetoed the two part determination by refusing to concur with the Secretary's decision.

In addition to comply with the requirements of IGRA for gaming purposes, before land can actually be taken into trust, a tribe also has to also comply with the requirements of the Indian Reorganization Act of 1934 (IRA). Although the IRA does not contain much of a standard, authorizing the Secretary in his discretion to acquire land within or without existing Indian reservations for the purpose of providing land for Indians, the Secretary adopted new regulations in 1995 which for the first time made a distinction between on and off reservation land acquisition and further restricted the discretion previously enjoyed by the Secretary under the Act.[4]

The 1995 regulations contain 11 criteria for taking land into trust. Seven are applicable to all tribal land acquisitions and an additional four are applicable only for off reservation acquisitions. Some of the criteria are hard to reconcile with the trust doctrine and the original purpose of the IRA which was to stop the allotment process and allow Indians to re-acquire some of the land base that had been lost as a result of allotment.[5] For instance under criteria (e) the Secretary has to consider the impact the acquisition will have on the tax rolls of the state and its political subdivisions. Under criteria (f), the Secretary has to consider the jurisdictional problems and potential land use conflicts which may arise from the proposed land acquisition. Finally, for off reservation acquisitions, under criteria (b) the secretary has to give greater scrutiny to the tribe's justification of anticipated benefits and to the concerns raised by state and local officials, the further the lands are from the reservation. These criteria were fatal to at least one proposed land acquisition even though the tribe involved (St. Regis Mohawk) had already successfully navigated all the requirements of IGRA's two part determination.

To tribal advocates, the three criteria just mentioned above are hard to justify especially when one consider how comparatively easy it is to take land out of trust status. As recently noted by Professor Frank Pommersheim, there is currently still more Indian land going out of trust than land being put into trust throughout Indian country.[6]

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[4] For a comprehensive treatment of the fee to trust process, see Frank Pommersheim, *Land into Trust: An Inquiry Into Law, Policy, and History,* 49 Idaho L. Rev. 519 (2013).

[5] It has been estimated that Indian tribes had control of about 138 million acres at the close of the treaty period in 1871. It has been estimated that by 1934, the tribal land base had shrunk to 48 million acres, a 90 million acres loss. See Readjustment of Indian Affairs: Hearings on H.R. 7902, House Committee on Indian Affairs, 73d Cong.2d Sess. 16 (1934).

[6] See Pommersheim *supra*, at note 4.

C. Judicially imposed requirements:

Any overreaching by the Department of the Interior can be adequately controlled by the federal courts. The recent litigation involving North Fork Rancheria of Mono Indians provides a good example of how thorough judicial review can be under the Administrative Procedure Act (APA).[7] Set forth below is a roadmap the Department has to successfully navigate in order to get the proposed land into trust:

First, under the APA any agency decision can be set aside if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Under that standard, the court has to make sure that the agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[8] In other words, the agency action has to be the product of reasoned decision-making. The agency has to consider every important aspect of the problem, and cannot "offer an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." [9]

Secondly, under *Carcieri v. Salazar*, 555 U.S. 279 (2009), the Secretary can only obtain land into trust under the 1934 Indian Reorganization Act for federally recognized Indian tribes that were "under federal jurisdiction" in 1934. According to the BIA's own statement "whether a tribe was under federal jurisdiction in 1934 requires a fact-intensive analysis of the history of interactions between that tribe and the United states."

Third, the courts will scrutinize whether the Secretary adequately considered the impacts of the proposed gaming on the surrounding community. In the *North Fork* decision for instance, the court went into a detailed examination of the following: 1. Problem gambling, 2. Crime, 3. Environmental and economic impacts, 4. Effects on other local Indian tribes.

Finally, under the recent *Patchak* Supreme Court decision,[10] the Quiet Title Act (QTA) no longer prevents almost anyone impacted by the decision to challenge a fee to trust transfer to an Indian tribe even after the transfer of trust title to the United States has already taken place.

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[7] Stand Up for California v. North Fork Rancheria, 919 F.Supp.2d 51 (2013).

[8] Motor Vehicle v. State Farm, 463 U.S. 29, 43 (1983).

[9] Id., at 43, 52.

[10] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012).

Conclusion:

It seems that there are plenty of existing obstacles an Indian tribe has to surmount before it can actually acquire off reservation land for gaming purposes. Regulations implementing both IGRA and the IRA contain many requirements obligating the Secretary to take into account the concerns of both the non-Indian community and other Indian tribes, as well as the distance of the lands to be acquired from the existing reservation or tribal headquarters. Although this distance factor is not included in either the language of the IRA or IGRA, I am not opposed to it being "a" factor. However for the following reasons, I do not think it should be the determinative factor.

First, it cannot be forgotten that many Indian tribes were removed from their traditional territories.[11] Furthermore, tribal economic development was never considered during the removal era. Quite the opposite: Tribes were removed to far-away places to facilitate non-Indian economic activities.

Second, it has to be understood that when it comes to economic development, Indian tribes are not just acting as businesses trying to make a quick buck. They are in the process of raising governmental revenues because they lack the tax base on their existing reservations.[12] To a large degree, the United States Supreme Court is responsible for this state of affairs as it has severely curtail the tribes' power to tax non-members,[13] while at the same time allowing the states more and more taxing power within the reservations.[14]

Third, it cannot be ignored that these off reservation land acquisitions benefit much more than just the gaming Indian tribe. In many of these off reservation acquisitions, tribes have committed to make significant financial contributions to the budgets of local governments. In addition, in all of these gaming operations, most of the casino workforce consists of non-tribal members. Furthermore, these gaming establishments have and will continue to make very positive contributions to the local economy.

Finally, the era when Indians were supposed to be confined to reservations is long gone, and the idea that tribal economic development should solely be a reservation based

[11] The 2005 Edition of Cohen's Handbook of Federal Indian law noted that "by 1850, the majority of Indian tribes had been removed from the eastern states. (at p. 54)

[12] See Matthew L.M. Fletcher, In Pursuit of economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. Rev. 759 (2004).

[13] See Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

[14] See Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989).

activity is no longer in fashion.[15] As a matter of fact, the latest census reveals that far more Indians reside outside Indian reservations than within them. The whole concept of sovereignty as being solely geographically or territorially based has been significantly eroded and has evolved to a more malleable concept recognizing the interrelationship between various sovereign actors.[16] It is this interrelationship between tribes and the surrounding local governments and communities that is being promoted and developed in these off reservation land acquisitions.

[15] See Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 Lewis & Clark L. Rev. 1003 (2008).

[16] See for instance, John Alan Cohan, *Sovereignty in a Postmodern World*, 18 Fla. J. Int'l L. 907 (2006), Helen Stacy, *Relational Sovereignty*, 55 Stan. L. Rev. 2029 (2003), Neil MacCormick, *Beyond the Sovereign State*, 56 Mod. L. Rev. 1 (1993), Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. Chi. Legal F. 373 (2001).