TESTIMONY
OF
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AT THE OVERSIGHT HEARING
BEFORE THE
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
CONCERNING
GAMING ON OFF-RESERVATION, RESTORED AND NEWLY-ACQUIRED LANDS

July 13, 2004

Good morning, Mr. Chairman and Members of the Committee. My name is Aurene Martin, and I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior. I am pleased to be here today to discuss the role of the Department in implementing Section 20 of the Indian Gaming Regulatory Act of 1988 (IGRA).

Before discussing our role in implementing Section 20 of IGRA, I want to address a common misconception regarding this statutory provision: Section 20 of IGRA does not provide authority to take land into trust for Indian tribes. Rather, it is a separate and independent requirement to be considered before gaming activities can be conducted on land taken into trust after October 17, 1988, the date IGRA was enacted into law. The basis for the administrative decision to place land into trust for the benefit of an Indian tribe is established either by a specific statute applying to a tribe, or by Section 5 of the Indian Reorganization Act of 1934 (IRA), which authorizes the Secretary to acquire land in trust for Indians "within or without existing reservations." Under these authorities, the Secretary applies her discretion after consideration of the criteria for trust acquisitions in our "151" regulations (25 CFR Part 151). However, when the acquisition is intended for gaming, consideration of the requirements of Section 20 applies before the tribe can engage in gaming on the trust parcel.

In enacting Section 20, Congress struck a balance between tribal sovereignty and states' rights. Specifically, Section 20(a) provides that if lands are acquired in trust after October 17, 1988, the lands may not be used for gaming, unless one of the following statutory exceptions applies:

> (1) The lands are located within or contiguous to the boundaries of the tribe's reservation as it existed on October 17, 1988;
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> (2) The tribe has no reservation on October 17, 1988, and "the lands are located…within the Indian tribe's last recognized reservation within the state or states where the tribe is presently located;"
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> (3) The "lands are taken into trust as part of: (i) the settlement of a land claim; (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition."
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> (4) There is also a specific exception for lands taken into trust in Oklahoma for Oklahoma tribes.

Since 1988, the Secretary has approved 32 applications that have qualified under these various exceptions to the gaming prohibition contained in Section 20(a) of IGRA. I have attached to my testimony a document listing the various tribes that have qualified under the exceptions since October 17, 1988.

The decision of whether land that is either already in trust, or that is proposed to be taken into trust for gaming, qualifies under any of the exceptions I just mentioned is made on a case-by-case basis. Through case-by-case adjudication, the Department has developed criteria to determine whether a parcel of land will qualify under one of the exceptions. For instance, to qualify under the "initial reservation" exception, the Department requires that the tribe have strong geographical, historical and traditional ties to the land. To qualify under the "restoration of lands" exception, the Department requires that either the land is either made available to a restored tribe as part of its restoration legislation or that there exist strong historical, geographical, and temporal indicia between the land and the restoration of the tribe. The Department's definition of restored land has been guided by fairly recent federal court decisions in Michigan, California, and Oregon.

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

> (1) gaming can occur on the land if the Secretary, after consultation with appropriate state and local officials, and officials of nearby tribes, determines that a gaming establishment on newly-acquired land will be in the best interest of the tribe and its members, and would not be detrimental to the surrounding community, but
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> (2) only if the Governor of the state in which the gaming activities are to occur concurs in the Secretary's determination.

Since 1988, state governors have concurred in only three positive two-part determinations for off-reservation gaming on trust lands: the Forest County Potawatomi gaming establishment in Milwaukee, Wisconsin; the Kalispel Tribe gaming establishment in Airway Heights, Washington; and the Keweenaw Bay Indian Community gaming establishment near Marquette, Michigan.

Currently, there are eight applications for two-part determinations under Section 20(b)(1)(A) pending with the Bureau of Indian Affairs for sites in New York, Wisconsin, Michigan, and California. Many more applications are rumored to be in development but have not bee submitted to the Department, including potential applications from tribes located in one state to establish gaming facilities in another state. It is within the context of this emerging trend that Secretary Norton has raised the question of whether Section 20(b)(1)(A) provides her with sufficient discretion to approve or disapprove gaming on off-reservation trust lands that are great distances from their reservations, so-called "far-flung lands."

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

Our review indicates that the role of the Secretary under section 20(b)(1)(A) is limited to making objective findings of fact regarding the best interests of the tribe and its members, and any detriment to the surrounding community. Therefore, while the trust acquisition regulations provide broad discretion, Section 20(b)(1)(A) does not authorize the Secretary to consider other criteria in making her two-part determination, thus limiting her decision-making discretion to that degree.

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