TESTIMONY
OF
MICHAEL J. ANDERSON
AT
THE NATIONAL GAMBLING IMPACT STUDY COMMISSION HEARING
TEMPA, ARIZONA
JULY 30, 1998

Attached is the Department of Interior's testimony presented by Kevin Gover, Assistant Secretary - Indian Affairs, on gaming issues relevant to the Study Commission's inquiries. This testimony was previously provided to the Senate Committee on Indian Affairs in regard to proposed amendments to the Indian Gaming Regulatory Act.

STATEMENT OF KEVIN GOVER
ASSISTANT SECRETARY - INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
BEFORE THE COMMITTEE ON INDIAN AFFAIRS,
UNITED STATES SENATE
ON PROPOSED AMENDMENTS TO SECTION 20
OF THE INDIAN GAMING REGULATORY ACT OF 1988 IN S. 1870,
THE INDIAN GAMING REGULATORY IMPROVEMENT ACT of 1998
MAY 12, 1998

Good morning, Mr. Chairman and members of the Committee. My name is Kevin Gover, Assistant Secretary for Indian Affairs at the Department of the Interior. I am pleased to be here today to discuss the acquisition of off-reservation lands for gaming and proposed amendments to Section 20 of the Indian Gaming Regulatory Act of 1988 as set forth in Section 17 of S. 1870, the Indian Gaming Regulatory Improvement Act of 1998. Accompanying me today is Mr. Derril Jordan, Associate Solicitor for Indian Affairs.

The Indian Gaming Regulatory Act, or IGRA, provides the statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. IGRA permits any Indian tribe to engage in Class II or Class III gaming activities if the tribe meets specific requirements set forth in the Act, including the requirement that such gaming occurs on "Indian lands." The term "Indian lands" is defined in IGRA to mean "all lands within the limits of any Indian reservation, and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

When Congress enacted IGRA, it included a special provision regarding gaming activities of Indian tribes on lands acquired after October 17, 1988, the date of enactment of IGRA. Section 20 provides that gaming shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless the land falls within one of several general exceptions listed in Section 20. There are also specific exceptions relating to lands of the St. Croix Chippewa Indians of Wisconsin and the Miccosukee Tribe of Florida. The general exceptions are as follows: (1) The land is located within or contiguous to the boundaries of the tribe's reservation on October 17, 1988; (2) the tribe has no reservation on October 17, 1988, and the land is located in Oklahoma and is either within the boundaries of the tribe's former reservation, as defined by the Secretary, or is contiguous to other land held in trust or restricted status by the United States for the tribe in Oklahoma; (3) the tribe has no reservation on October 17, 1988 and the land is located in a State other than Oklahoma and is within the tribe's last recognized reservation within the state within which the tribe is presently located; or (4) the land is taken into trust as part of (i) a 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.

If none of the exceptions are applicable, gaming can take place on the land if the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby tribes, determines that a gaming establishment 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, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. This last exception, referred to as the "two-part determination" exception, generally applies to off-reservation trust acquisitions.

I will now address more specifically the Department's consideration of off-reservation land acquisitions in

trust for gaming, and the process the Department follows in applying the two-part determination exception of Section 20. It should be noted that Section 20 of IGRA does not provide authority to take land into trust. Rather, it is a separate and independent requirement to be considered before gaming activities can be conducted on land taken in trust after October 17, 1988. Section 20 expressly provides that it does not affect or diminish the authority and responsibility of the Secretary to take land into trust.

When an Indian tribe submits an application to have off-reservation land taken into trust, the Department considers whether to take the land into trust according to regulations set forth in 25 C.F.R. Part 151. Since enactment of the Indian Reorganization Act of 1934, the Department of the Interior has had broad authority to take title to land in the name of the United States in trust for the benefit of Indian tribes and individual Indians. Part 151 of the regulations, first promulgated in 1980, and revised in 1995, established the procedures to be used and the factors to be considered when the Department considers trust land acquisitions. Ever since 1980, these regulations have required examining, among other things, the Indian tribe's "need" for additional land, the "purposes for which the land will be used," the impact on state and local government of removing the land from the tax rolls, and "jurisdictional problems and potential conflicts of land use which may arise." The 1995 revision explicitly addressed decision making on applications to take off-reservation land into trust, requiring, among other things, that as the distance from the reservation increases, "greater scrutiny" be given to the tribe's "justification of anticipated benefits from the acquisition" in trust, and "greater weight" be given to the acquisition's potential impacts on the regulatory and taxing jurisdiction of the state and local governments.

If an application to take off-reservation land into trust meets all the requirements of 25 C.F. R. Part 151, and if the applicant tribe also desires to use the land for gaming purposes, the Department must consider whether the application meets the requirements of Section 20 of IGRA. If the land does not fall within one of the more specific exceptions to the gaming prohibition in Section 20 (*e.g.* initial reservation of a newly-acknowledged tribe, land for a restored tribe), the Secretary must make a finding under the "two-part determination" exception in Section 20(b)(1)(A). The Bureau of Indian Affairs has issued a *Checklist for Gaming Acquisitions and IGRA Section 20 Determinations*. The Checklist sets forth internal guidelines for use by BIA area staff in complying with the requirements of Section 20(b)(1)(A) when reviewing and processing applications to take land into trust for gaming. The two-part determination requirements of Section 20 and the 151 process involve some overlap: both processes require consultation with local governments and both require consideration of gaming's effect on the local community. However, complete congruence does not exist. The *Checklist* was first issued on September 28, 1994, and a revision was issued on February 21, 1997. A copy of this document is appended to my Statement.

In July 1990, then Secretary of the Interior Manuel Lujan adopted a policy requiring that all decisions on acquisitions for gaming, whether on or off-reservation, be made by BIA's Central Office in Washington, D.C. The 1990 policy reflected the more controversial nature of gaming acquisitions. Under Secretary Babbitt, the Department has carried forward the policy that all acquisitions in trust for gaming must be approved by the Department in Washington rather than in the BIA's area offices. This policy was reaffirmed by then Assistant Secretary Ada Deer in a May 26, 1994 memorandum to all BIA area directors.

Since the enactment of IGRA nearly ten years ago, only ten applications to take off-reservation land into trust for gaming purposes requiring the two-part determination under Section 20 have been forwarded to the BIA's Central Office for consideration. A January 8, 1998, document describing the actions of the Department with respect to nine of these ten applications is appended to my statement. Of these ten applications, the Secretary made a positive two-part determination in only five cases. They involved the request of the Forest County Potawatomi Tribe of Wisconsin to take land into trust in Milwaukee, Wisconsin; the request of the Siletz Tribe to take land into trust in Salem Oregon; the request of the Sault Ste. Marie Tribe of Michigan to take land into trust in Detroit, Michigan; the request of the Coushatta Tribe of Louisiana to take land into trust in Allen Parish, Louisiana, and the request of the Kalispel Tribe

of Washington seeking a determination under Section 20 to permit gaming on off-reservation land already held in trust for the Tribe in Airway Heights, Washington. Of these five positive Secretarial two-part determinations, the Governor of the appropriate State has only concurred in one instance: that was for the Forest County Potawatomi Tribe in Milwaukee, Wisconsin. Since the Governor has not concurred in four of these situations, these lands cannot be used for gaming purposes.

As I stated in my testimony before this Committee last month, I believe that Indian tribes should not be deprived of the economic opportunity a gaming establishment in a more economically advantageous market can provide, as long as State and local officials, neighboring tribes, and the Tribe all agree that the gaming establishment will be of mutual benefit. Section 20(b)(1)(A) of IGRA currently provides for this opportunity. The Department believes that the current language in Section 20(b)(1)(A) of IGRA provides adequate safeguards to state and local governments to protect them against off-reservation Indian gaming that is detrimental to the surrounding community. In addition, the Department's policy of having all trust acquisitions for gaming reviewed by the Central Office, and the use of the BIA's *Checklist* ensures a thorough review and strict compliance with the requirements of IGRA. Moreover, the Governor's concurrence in the Secretary's two-part determination is mandatory before any gaming activities can be undertaken on the proposed site. The constitutionality of the Governor's concurrence authority was upheld by the Ninth Circuit Court of Appeals last year in *Confederated Tribes of Siletz Indians of Oregon v United States.*

The BIA's *Checklist* not only guides off-reservation gaming acquisitions, but also on-reservation gaming acquisitions, and proposed acquisitions that are otherwise exempt from Section 20's gaming prohibition on after-acquired lands. In this category, our records indicate that since 1990, only 13 parcels of lands have been taken into trust for gaming. A list of these gaming acquisitions is appended to my Statement. Of these 13 parcels, eight were within the exception in Section 20(a) of IGRA because the lands were either within or contiguous to the tribes' existing reservations or within the boundaries of the tribes' former reservations in Oklahoma or elsewhere. Three more were exempt pursuant to Section 20(b)(1)(B)(iii) because the lands were restored lands for tribes that were restored to Federal recognition. One was exempt under Section 20(b(1)(B)(ii) because it was the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process. And finally, as discussed earlier, land was acquired for the Forest County Potawatomi Tribe of Wisconsin under the two-part determination exception in Section 20(b)(1)(A). There have been no trust acquisitions exempt from the gaming prohibition in Section 20 under the "settlement of a land claim" exception in Section 20(b)(1)(B)(i).

We believe that it is critically important that restored and newly-recognized tribes be allowed the opportunity for economic development on an equal basis with existing tribes. For that reason, we oppose the current provision of S. 1870 that would prevent these tribes from enjoying the benefits of gaming on their reservations. There is no reason to discriminate against newly-recognized and restored tribes when it comes to gaming on their reservations.

The Department is considering proposing regulations in place of the *Checklist* to implement Section 20 of IGRA. Regulations could be useful, among other things, in more precisely defining some of the terms used in Section 20. For instance, regulations could address what is a "nearby tribe" or how the "surrounding community" is defined in Section 20(b)(1)(A); or what constitutes lands taken into trust as part of a settlement of a land claim in Section 20(b)(1)(B)(I).

I will be happy to answer any questions the Committee may have. Thank you.

STATEMENT OF KEVIN GOVER

ASSISTANT SECRETARY - INDIAN AFFAIRS

DEPARTMENT OF THE INTERIOR

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

ON S. 1870 ,

THE PROPOSED INDIAN GAMING REGULATORY IMPROVEMENT ACT

OF 1998

APRIL 1, 1998

Good morning, Mr. Chairman and members of the Committee. My name is Kevin Gover, Assistant Secretary for Indian Affairs at the Department of the Interior. I am pleased to offer the views of the Department on S. 1870, a bill to amend the Indian Gaming Regulatory Act of 1988.

Nearly ten years ago Congress enacted the Indian Gaming Regulatory Act to provide a regulatory framework through which tribes could exercise their right to conduct gaming on Indian lands. Congress also granted states a role in the regulation of Indian gaming through the Tribal-State compact process. Gaming has enabled nearly 200 tribes to generate their own revenue and reduce their reliance on federal dollars to implement a variety of tribal initiatives. Tribes are using gaming revenues to provide health, housing, education, and other governmental services to their people. Tribal gaming revenues have strengthened previously faltering tribal economies, dramatically increased tribal employment rates, and reduced state welfare rates in surrounding communities. After centuries of economic stagnation, Indian tribes have seen gaming draw customers and businesses to their often-remote lands. Indian gaming has proven to be a successful means of stabilizing and improving tribal self-government and addressing various social and economic problems. By way of example, I note that in Michigan, according to a 1994 study on the economic impact of Michigan Indian gaming, the tribal unemployment rate in 1985 was 65%. By 1994, the unemployment rate had dropped to 5%.

Today I reiterate the department's strong support for the right of Indian tribes to engage in gaming activities for the purpose of developing and stabilizing tribal economies. We view the proposed amendments in s.1870 as evidence of Congress' continued support of tribal economic development, tribal self-sufficiency, and healthy Indian tribal governments. For that reason, we support the general intent of the proposed Bill.

As you know, the Secretary's Statutory responsibilities under the Indian gaming regulatory act are quite specific and include the approval of tribal/state compacts; placing land into trust status for gaming; approval of revenue allocation plans for per capita payments of gaming net revenues to tribal members; approval of agreements for services relative to Indian lands under 25 U.S.C. Section 81; approval of gaming related land leases; two-part determinations under section 20 of igra; and promulgating procedures for Class III gaming in certain circumstances where a tribe and state cannot agree on the terms of a compact. The proposed amendments do not alter these secretarial functions except for the proposed role of

the Secretary in negotiated rulemaking under section 8 to develop minimum federal standards, and the elimination of the two-part test under section 20 of IGRA.

We have the following comments on key features of the Bill:

First, the Bill proposes to expand the regulatory and enforcement authorities of the National Indian Gaming Commission over all aspects of Indian gaming. As a general proposition, we agree that an expanded role for the commission is warranted in light of the growth of the Indian gaming industry since the enactment of IGRA in 1988. We defer to the Department of Justice and the National Indian Gaming Commission on the expanded scope of enforcement authority delegated to the Commission in the Bill, because of their expertise in this area. We do recommend that the Bill be amended to provide that the National Indian Gaming Commission be a separate agency, rather than one existing under the Department of the Interior.

Second, the Bill requires the Secretary to establish a negotiated rulemaking committee, in consultation with the Attorney General and the Commission, to promulgate minimum federal standards relating to background investigations, internal control systems, and licensing standards. The Department believes such standards will help address concerns relating to preventing infiltration of organized crime and other corrupting influences on Indian gaming. We also believe, however, that the National Indian Gaming Commission is the proper agency to have the lead role in the development of such standards because these standards fall under the commission's sole jurisdiction.

Third, the Bill provides for Secretarial authority to end an impasse in negotiations between a state and a tribe on a Class III tribal-state compact. The Department currently is proposing regulations that assert the Secretary's authority to mediate when such an impasse occurs. Since an action in court is no longer available as a result of *Seminole v. State of Florida*, either the Department's proposed rules or legislative action is necessary to create a means for such dispute resolution. Although the problem created by *Seminole* may be addressed through either legislative or administrative means, any attempt to do so administratively will draw legal challenges -- challenges that may take years to resolve in the courts. Congress, however, could definitively resolve this problem, thereby obviating years of litigation. For this reason, the Administration believes that a legislative solution to this problem would be preferable. The Administration, therefore, strongly supports the intent of this provision. If, however, Congress is unable to craft a legislative solution, then we will continue our efforts to reach a solution administratively.

Finally, the Bill proposes to remove the exceptions for tribal gaming on land acquired after passage of the initial Indian Gaming Regulatory Act. The Department opposes this section. It Is critically important that restored and newly recognized tribes be allowed the opportunity for economic development on an equal basis with existing tribes. In addition, since location is the single most important factor in the success of any business, when a tribe, a local community, and a state governor find that an off-reservation location for an Indian gaming facility would be a mutual benefit, there should be a mechanism to permit such an establishment. We believe that the current IGRA language on using newly acquired, off-reservation land for gaming should not be changed. We have applied this authority very sparingly, only in consultation with state and local officials and with the concurrence of the governor, and we will continue to do so.

As you know, the Department only recently received a copy of the Bill and will supplement this testimony with technical comments. As your work on the Bill progresses, the Department looks forward to working with the committee and your staff to resolve the important issues raised in this Bill. I am happy to answer any questions the Committee may have. Thank you.