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**WRITTEN TESTIMONY
BEFORE THE COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES**

**OVERSIGHT HEARING ON THE DEPARTMENT OF INTERIOR'S
RECENTLY RELEASED GUIDANCE ON TAKING LAND
INTO TRUST FOR INDIAN TRIBES AND ITS REMIFICATIONS**

**WASHINGTON, D.C.
FEBRUARY 27, 2008**

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.