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**HEARING ON THE DEPARTMENT OF INTERIOR'S RECENTLY RELEASED GUIDANCE ON TAKING LAND INTO TRUST FOR GAMING PURPOSES**

**BEFORE THE U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON RESOURCES**

**FEBRUARY 27, 2008**

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.