STATEMENT OF ALEX SKIBINE TO THE HOUSE COMMITTEE ON NATURAL RESOURCES ON THE DEPARTMENT OF INTERIOR'S GUIDANCE DOCUMENT CONCERNING TAKING OFF RESERVATION LAND IN TRUST FOR GAMING PURPOSES.

Mr. Chairman, members of the Committee, my name is Alex Skibine and I am currently a professor of law at the University of Utah. Previous to coming to Utah, I was for ten years, from 1980 to 1990, a counsel for this Committee under the chairmanship of Morris Udall. Thank you for inviting me to participate in this hearing. I want to say at the outset that I do not currently represent any clients with any interest in gaming.

The Secretary of the Interior has the power to take land in trust for the benefit of Indians under Section 5 of the Indian Reorganization Act of 1934 (IRA). The actual text of the IRA leaves the Secretary with an extraordinary amount of discretion. Facing a potential court decision that this broad delegation of authority might amount to an unconstitutional delegation of legislative power under the non-delegation doctrine, Interior developed some rules and regulations in the late 1990's, and issued them pursuant to Section 553 of the Administrative Procedure Act (APA).

These rules are applicable to any off reservation land acquisition, not just acquisition for gaming purposes. Under the rules, the greater the distance the proposed lands are to the reservation, the greater the scrutiny to be given to the tribe's justification for anticipated benefits, and the greater the weight to be given to concerns raised by state and local officials. The "guidance document "issued this January 3rd further delineated how the Department should go about giving this greater scrutiny. Essentially, the guidance document came up with two more factors. Concerning the anticipated benefit to the tribe, the document created a presumption that placing lands in trust that are located beyond *commuting distance* from the existing reservation will not be to the benefit of the tribe. Addressing concerns raised by state officials, the document creates a presumption that these have not been satisfied unless there are *intergovernmental agreements* between the tribe and the various local governments.

There are two questions with the Guidance Document relative to whether it is in conformance with the APA. First is whether these two factors creating presumptions against transferring the land in trust are truly "guidance" or really amendments to the previous regulations. If they are amendments such that they have the force of law, the document should have been issued pursuant to the Notice and Comment requirements of Section 553 of the APA. Secondly, the question is whether the two factors, commuting distance and intergovernmental agreements, are legitimate in evaluating the best interest of the tribes and the

concerns of state and local officials. In APA parlance, we ask: are the factors rational and relevant, or are they arbitrary and capricious, an abuse of discretion, or not otherwise in conformance with existing law.

Finally, although I was asked to comment specifically on whether this Guidance Document was issued in accordance with, and meet the standards contained in, the APA, there is also an issue of whether the recent decisions denying the fee to trust tribal applications for the purpose of gaming respected the tribes' procedural due process rights. At its very basic, the core concept of procedural due process means that life, liberty, or property cannot be taken by the government without notice and a hearing. I noted here that the Guidance Document was issued on January 3rd, 2008, and the letters denying the fee to trust applications were sent on January 4th. The Tribes obviously did not have proper notice of the two new factors, and thus, they did not have time to respond or rebut if you will the presumptions these two factors created. Although some may argue that no "property" was taken from the tribes since they do not have an entitlement to have these lands taken into trust, this lack of notice and opportunity to respond at least violates the spirit of procedural due process. It was exactly to avoid such appearance of unfairness that Congress enacted section 553 of the APA, allowing the affected public to be notified of proposed rules and giving the people an opportunity to comment before such proposed rules became final.

1. ARE THE FACTORS SPECIFIC AND DETERMINATIVE ENOUGH THAT THEY SHOULD HAVE BEEN PUBLISHED IN A LEGISLATIVE RULE ACCORDING TO SECTION 553 OF THE APA?

On one hand, policy statements or guidance documents are rather innocuous in that they are, by definition, not legally binding. They are intended to provide guidance as to how the agency might act in the future and therefore may not serve as the basis for enforcement actions and do not have the force of law. This means that on judicial review of an agency decision to deny a fee to trust land transfer, a court of law could overturn the decision of the Agency without giving any deference to this guidance document, unless this document qualified as an interpretive rule in which case, what is known as *Skidmore* deference might apply.

The test used in determining whether a policy statement or guidance document is really a legislative rule that should have been published under 553 of the APA is whether the document creates a binding legal norm on the agency and the regulated public. In making this determination, federal courts generally consider (1) whether in the absence of the Document there would be an adequate legislative basis for an enforcement action or other agency action to confer benefits or ensure performance of duties, (2) whether the agency specifically

invoked its general legislative authority, and (3) whether the rule effectively amends a prior legislative rule. Another simpler way to put it is to ask whether the document will merely influence the decision of the agency, or whether it will in fact pre-determine a certain result. For example, if the document had stated that from now on, there will no longer be any off reservation land transferred into trust for the purpose of gaming unless the lands are within, say, 50 miles of the reservation, this would have been a legislative rule that should have been issued pursuant to 553.

This Guidance Document, however, does not say that. Instead, it identified two factors, the presence of which raise a presumption that the lands should not be placed into trust. Under the first factor, any land transfer not within commuting distance of the reservation is presumed "not" to be in the best interest of the tribe. Under the second factor, a failure to achieve intergovernmental agreements with local communities raise a presumption that the concerns of the local communities have not been addressed, and this absence of agreement is supposed to weigh heavily in favor of not approving the proposed land transfer into trust.

Whether these two factors are determinative enough to be considered amendments to the existing rule is a close call: Good arguments exist on both sides. On one hand, the existing rule already mentioned that the more distance the lands are from the reservation, the more scrutiny will be given the tribe's claim of anticipated benefits and the greater the weight will be given to the concerns of state and local governments. On the other hand, the existing rule never mentioned *commuting* distance or the importance of existing intergovernmental agreements. However, these two factors are only suppose to raise a presumption that can be rebutted. Yet, the fact that the first 11 tribal applications after the Guidance Document was issued were all denied may indicate that in reality, these two factors raise much more than mere presumptions and may, in fact, be binding on the agency. Of one thing I am sure. Even if it was legally permissible to have included these two additional new factors in a non-legislative rule not subject to notice and comment under Section 553 of the APA, it was definitely bad policy to have done so. In addition, as mentioned earlier, it may have violated the tribes' procedural due process rights which at a minimum would seem to require notice of the proposed new factors, and an opportunity to rebut the presumptions raised by these factors.

In the next section, I discuss whether an actual decision based on the Guidance Document and denying a tribal application to take land into trust, is likely to be considered arbitrary and capricious under the APA. .

2. IS COMMUTING DISTANCE TO THE RESERVATION RELEVANT TO DECIDING WHETHER GAMING ON SUCH LANDS WILL BE BENEFICIAL TO THE TRIBE?

Even if the commuting distance is flexible enough of a factor to be considered merely guidance to federal decision makers, any decision made under this guidance document is subject to review under the arbitrary and capricious standard. This means, among other things, that in making these decisions the Secretary has to look at the *relevant factors*. In other words, factors Congress would have wanted him to consider in determining whether the land transfer was to the benefit of the Tribe.

Concerning whether the land transfer is in the best interest of the tribe, the guidance document takes the position that the commuting distance is relevant because one of the benefits to the tribe is employment for tribal members. If this employment is not located within commuting distance, the document claims that it will create significant "negative" effects on the reservation in that tribal members would have to move out and relocate outside the reservation. The document then asks the agency to look at 4 factors. These factors are: (1). how many Indians are currently employed?, (2) how many Indians are likely to leave to work at the casinos?, (3) how will their departure impact the quality of life on reservations? (4) how will working at an off-reservation casino affect the long term identification of a tribal member with the tribe?

The question here is whether it is rational -not arbitrary or capricious- to make commuting distance to the reservation such a preeminent and important factor so that it dwarfs everything else. Perhaps this is important to some tribes. But it is definitely not that important for many other Indian tribes. Accordingly, it seems to me that there are at least four reasons why decisions based on the guidance document could be considered arbitrary and capricious or otherwise an abuse of discretion under the APA:

1. Discounting Non-reservation Indians: Why should the merits of off reservation gaming only be based on the benefits or detriments to Indians who live on a reservation?
The latest census revealed that way over half of all tribal members in this country do not live on reservations. In addition, why should the benefit of gaming as a tool for economic development be primarily restricted to tribes that happen to be closer to big urban centers?

2. Paternalism and Discounting Tribal Determinations: Even if the primary concern with reservation Indians is rational, one has to wonder whether it is rational to think that it is better to have unemployed Indians on the reservations than tribal members gainfully employed say 3 hours away from the reservation.

The issue here is who should really be deciding this, the BIA or the tribes, let alone each tribal member? This seems to be a throw back to the pre IRA paternalistic policy under which Indians were deemed to be too incompetent to decide for themselves and needed the great white father to make such decisions for them.

In addition, it may very well be that some traditional tribes may take the position that gaming on the reservation will have a greater negative impacts on tribal culture and traditions. Among other things, it will make it easier for tribal members to gamble.

3. Discriminating Against Gaming: The next issue that points to arbitrariness is that this guidance document is only applicable to gaming. Is there a rational basis for treating gaming differently than other tribal economic ventures? Perhaps there is, but this is left unexplained in the guidance document.

4. The Impact of IGRA: One sentence in the document stated that the BIA should make sure that, in taking land into trust, the purposes of the IRA should be respected. While this is true, sometimes a decision can be arbitrary and capricious not only if it focused on irrelevant factors, but also if it failed to discuss certain relevant factors. The guidance document seems to minimize, if not ignore the policies of the 1988 Indian Gaming regulatory Act (IGRA). As the Guidance Document accurately stated."The IRA had nothing to do directly to do with Indian gaming." IGRA, however, changed prior law and established the federal policy towards gaming as a tool for economic development. It is mostly the policies of the IGRA that should influence the Secretary's determination as to what is in the best interest of the tribe, not solely the IRA. It seems odd to determine what is in the best interest of the tribe when it comes to gaming by reference to whatever congressional policies may have been in 1934, instead of focusing primarily on what the congressional policies are today or at least, what they were in 1988 when Congress enacted IGRA.

The Guidance Document did summarily state that IGRA"was not intended to encourage the establishment of Indian gaming facilities far from existing reservations." There is a section in IGRA that does impose severe restrictions on gaming on land acquired off the reservations after passage of IGRA. Although this section specifically says that nothing in this section shall affect the power of the Secretary to take lands into trust under other laws, it does say that no gaming shall take place unless the Secretary finds that gaming on such lands shall be for the benefit of the tribe and shall not be detrimental to surrounding communities. However, if one reads the Congressional findings and the declaration of policy in the preamble to IGRA, one does not see a restriction to promote economic development only for reservation Indians. It only says that the policy of congress is "to ensure that the Indian tribe is the primary beneficiary of the gaming

operation." If anything, IGRA encouraged gaming generally as a mean to economic development and self-sufficiency for all Indians and all Indian tribes. To the extent that the guidance document only looks at the impact gaming has on reservation Indians, it seems inconsistent with the policy and spirit of IGRA.

3. ARE THE CONCERNS OF STATE OR LOCAL GOVERNMENTS LIKELY TO GROW THE FURTHER THE LANDS ARE FROM AN INDIAN RESERVATION AND SHOULD THE ABSENCE OF INTERGOVERNMENTAL AGREEMENTS CREATE A PRESUMPTION THAT THESE LOCAL CONCERNS HAVE NOT BEEN ADDRESSED?

Another potential problem with the document is whether giving greater weight to local concerns the farther the lands are from the reservation is arbitrary and capricious. The Secretary has taken the position that jurisdictional problems will be larger the farther the lands are located from the reservation but the Department has failed to provide any meaningful support for this finding. Instead, the Department summarily concluded that it is more likely to disturb "the established governmental patterns," presuming that distant governments have less experience in dealing with tribal governments. Besides this being somewhat dismissive of the capabilities of local governments to adapt to new situations, it also ignores the fact that a local government can be distant from one tribe but not from other tribes and therefore may be very familiar with jurisdictional issues involving Indian tribes. It also ignores the fact that it is often the local jurisdictions closest to reservations that are more concerned about off reservation tribal activities.

Finally, the requirement of intergovernmental agreements with local communities is inconsistent with IGRA. IGRA requires a compact with the State and also requires the Secretarial determination that the land will not be detrimental to the surrounding community to be agreed to by the Governor of the State. The guidance document creates a presumption against taking the land in trust in the absence of intergovernmental agreements. This seems to impose an additional requirement on top of what is required in IGRA. While I agree that the authority to take land in trust is contained in the IRA and not the IGRA, the Department should not issue policies that indirectly conflict and add to the requirements of IGRA, at least not without first acknowledging the issue and adequately explaining its decision.

CONCLUSION:

Although I have just given some reasons why a Secretary's decision under the Guidance Document might be considered arbitrary and capricious, as one of the mainstream administrative law textbook stated "The reason an agency gives

for its policy judgment need not be the best reasons or even a good reason." All the Agency needs to give is an understandable and coherent reason. In other words, even if a federal court disagrees, as I do, with the policy choices made by the Agency, and thinks these are not the best policy choices, this is not the standard on judicial review. The standard is deferential to the Agency. The burden is on the party challenging the agency choice to show that the choices made were unreasonable or irrational enough to amount to something arbitrary and capricious or otherwise an abuse of discretion.

Under existing law, although the Secretary cannot make decisions that are arbitrary or capricious, he is still given broad discretion in the IRA to decide whether lands should be placed into trust and whether gaming should take place outside of Indian reservations. The IRA, however, did not have off reservation gaming in mind. Furthermore, IGRA did not address the precise question at issue. In narrowing his discretion, the Secretary decided to make commuting distance from the reservation a crucial factor. There is no doubt that there should be some factors limiting the Secretary's discretion to put off reservation land in trust for the purpose of gaming. The real question is what those factors should be and who should make those determinations.

Should commuting distance be such a key factor? Should the value of off-reservation gaming be solely assessed by its impact on reservation Indians instead of its impact on the majority of Indians who nowadays live off the reservations? Should the benefit of gaming be solely accessible to Indians who are lucky enough to have a reservation located closer to big urban centers? I think these are not legitimate factors or grounds to refuse to put land into trust for the purpose of off-reservation gaming. I believe there is a good chance the courts will see it my way. However, should the courts decide to grant great deference to the Secretary and uphold his latest decisions, I think this Committee should be prepared to introduce legislation addressing these important issues and give some fresh directions to the Executive Branch.

Thank you.