Testimony of the St. Regis Mohawk Tribe

United States House of Representatives

Committee on Natural Resources

Oversight Hearing: "Department Of Interior's Recently Released Guidance On Taking Land Into Trust For Indian Tribes And Its Ramifications"'

Wednesday, February 27, 2008

I. INTRODUCTION

The Saint Regis Mohawk Tribe ("Tribe") is pleased to provide testimony for the House Committee on Natural Resources ("Committee") hearing regarding the Department of Interior's ("Department") January 3, 2008 *Guidance on off-reservation land into trust for gaming purposes* ("Guidance"), issued through an internal memorandum signed by Assistant Secretary for Indian Affairs Carl Artman. As the Committee is aware, the Department prepared and issued the Guidance as the basis to deny a number of fee-to-trust applications, including our long-standing application for the development of a major casino project in the Catskills region, approximately 90 miles from New York City. Specifically, the Department illegally created a new binding and enforceable "commutability" rule in the Guidance. In basing its denial of our application on this new rule, the Department violated existing law and ignored more than twelve years of work costing more than $25 million, unprecedented local and state support, numerous environmental review and studies, and numerous favorable determinations and conclusions issued by the Department itself.

II. SUMMARY

This statement addresses general concerns about the Guidance, how it violates federal law, and how it was promulgated in clear violation of the Administrative Procedures Act, in blatant disregard of its own policy pronouncements on this matter, and in contravention to Executive Order 13175 on Consultation and Coordination With Indian Tribal Governments.

This statement also specifically addresses the Department's unfounded and unsupported denial of our fee-to-trust application. Not only did the Department fail to rely on or point to any factual basis to support its denial of our application, the Department also failed to provide our Tribe with an opportunity to address the new "commutable distance" rule created in the Guidance. As discussed below, generations of our professional Mohawk ironworkers have a long and distinguished history of commuting farther distances to build the skyline across major cities

along the northeastern seaboard and in Canada. Clearly, their dedicated service and generations of employment have greatly contributed to America's development while enriching our tribal community.

Moreover, the Department unreasonably delayed action on our application for nearly a year, which set the stage for the immediate development of a competitive project several miles from the Tribe's proposed project site.

III. THE TRIBE'S FEE-TO-TRUST APPLICATION FULLY AND AFFIRMATIVELY SATISFIED ALL APPLICABLE FEDERAL STATUTORY AND REGULATORY REQUIREMENTS FOR APPROVAL.

Before addressing the Department's illegitimate Guidance and its unlawful application to the Tribe's fee-to-trust application, this section summarizes the background of our application, including the statutory, regulatory and policy requirements that were completed and fully satisfied under existing law, all of which demonstrate that our application was wrongly denied.

A. Statutory Authority

The Tribe's fee-to-trust application was prepared and submitted for federal approval to build a casino on the Monticello Raceway site pursuant to and in accordance with:

✓ Section 20 of the ***Indian Gaming Regulatory Act ("IGRA")*** (hereinafter "Section 20"), which authorizes Indian gaming on lands that are acquired into federal trust status for an Indian tribe after October 17, 1988, the date of IGRA's enactment (such lands are referred to as "newly acquired," "after acquired," or "off reservation" lands). The Section 20 process is commonly referred to as a "two part determination" by the Secretary of the Interior ("Secretary") and the governor of the State where the land is located; and

✓ The ***Indian Reorganization Act of 1934*** (hereinafter "IRA") and its implementing regulations codified at 25 CFR Part 151 (hereinafter "Part 151 Regulations") which delegates authority to the Secretary of the Interior to acquire land and hold title in federal trust status on behalf of an Indian tribe, including land that is not within the boundaries of an Indian reservation.

✓ ***New York State Law*** - In 2001 the New York legislature adopted legislation specifically authorizing the Governor to enter into compacts authorizing up to three Indian casinos in Sullivan and Ulster counties.[1]

B. Factual Background Regarding Compliance With Applicable Regulatory Requirements

The Tribe's efforts to develop a casino project in the Catskills region has a long, complex history spanning nearly twelve years. The extensive record of the Tribe's application demonstrates the

[1] N.Y. Exec. L. § 12 (McKinney 2001).

years of effort and analysis by the Tribe, Federal officials, New York State and local officials and elected representatives evaluating, among others, the benefits the project would provide to the Tribe, and all relevant social, financial, and environmental impacts to the affected local community, as required by Section 20 of the IGRA and the Part 151 regulations of the IRA. The following is a listing of major actions taken on the application:

- ✓ On August 1, 1996, the Tribe submitted the fee-to-trust application for the Monticello site to the BIA Eastern Region for processing under BIA regulations and policies.

- ✓ From August 1996 to April 2000, the Tribe's fee-to-trust application and its proposed Monticello project was the subject of two Environmental Assessments under the National Environmental Protection Act ("NEPA") which resulted in two Findings of No Significant Impact ("FONSI") for the proposed federal action: to approve the Tribe's fee-to-trust application for the Monticello casino project. The project was also fully studied and evaluated under the more rigorous and demanding New York State Environmental Quality Review Act ("SEQRA") process. These independent and extensive evaluations concluded there would be no adverse environmental impacts from the Tribe's project.

- ✓ On April 6, 2000, then-Assistant Secretary for Indian Affairs ("ASIA") Kevin Gover issued an affirmative Section 20 determination that the Tribe's application would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. ASIA Gover wrote to then-New York Governor George Pataki requesting his concurrence in this determination, and asserted that the Department would acquire the land into trust upon the Governor's concurrence.

- ✓ For several reasons, the Tribe switched gaming development partners, and from May 2000 through July 2005, explored the viability of pursuing an alternative Section 20 project at a nearby location ("Kutcher's site"). During part of this timeframe, the Cayuga Indian Nation filed its own an application for the Monticello Raceway site and spent considerable time updating and revising the environmental reviews.

- ✓ In July 2005, the Cayugas dropped their application and the St. Regis Mohawk Tribe reactivated its own fee-to-trust application for the 29.31 acre site at the Monticello Raceway site. The Tribe took immediate steps to confirm the validity of the April 2000 Section 20 secretarial determination and then proceeded with updating the environmental work.

- ✓ In September 2005, George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development/Director of Indian Gaming Management Staff confirmed that the April 6, 2000 two part determination issued by then ASIA Gover was still valid, and upon the Governor's concurrence the Department would resume consideration of the St. Regis Mohawk Tribe's application to take land into trust at Monticello Raceway. Skibine also informed the Tribes that environmental work would likely need to be "refreshed" and revised.

- ✓ A year later, on September 8, 2006, after extensive consultations and tedious revisions to the EA and discussions between the Tribe and Departmental officials, the BIA Eastern Region issued a Notice of Availability ("NOA") commencing a 30 day comment period on the draft EA, and on September 12, 2006, published the NOA inviting public comments on the most recent draft EA.

- ✓ On October 31, 2006, the BIA Eastern Region submitted the FONSI and final EA to the BIA Central Office with the recommendation to take the land into trust and issue the FONSI.

- ✓ On December 21, 2006, Associate Deputy Secretary Cason signed the FONSI and sent transmittal letters to the Tribe and to Governor Pataki requesting his concurrence with the Department's Section 20 secretarial determination. The December 2006 FONSI was the third one issued by the Department for the construction of the Tribe's casino project at the Monticello Raceway site.

- ✓ On February 18, 2007, Governor Spitzer signed a letter concurring with the Department's affirmative Section 20 secretarial determination to take the land into trust, and, on behalf of New York State, entered into a gaming compact with the Tribe. Gov. Spitzer requested Secretary Kempthorne to "expeditiously take the land into trust and approve the gaming compact…so that the Tribe can begin construction of the proposed casino."

- ✓ On February 27, 2007, the St. Regis Mohawk Tribal Council sent a letter to Secretary Kempthorne formally requesting that he approve the Tribe's fee-to-trust application and acquire the land into trust for its intended purpose.

- ✓ From February 2007 through November 2007, the St. Regis Mohawk Tribal Council submitted numerous and repeated requests to meet with Secretary Kempthorne to discuss the Secretary's inextricable delay in rendering a final decision on the Tribe's application. Secretary Kempthorne did not respond to any of the Tribe's requests. Other Departmental officials could not provide any specific answers or reasons for the delay, though some of the same senior officials remarked both publicly and privately that the real source of delay was directed by Secretary Kempthorne for what many attributed to be his personal views and objections to "off reservation" gaming. During this timeframe and leading up to the January 4, 2008 denial, neither Secretary Kempthorne nor any official within the Department indicated to the Tribe that the application was deficient or that it lacked any key information.

- ✓ Faced with an intractable impasse, the Tribe filed a complaint against the Department and Secretary Kempthorne in the U.S. District Court for the District of Columbia for judicial review of the continued failure to act on the Tribe’s application, and to compel a decision on the application. The government sought and received an extension to answer the Tribe's complaint – the response was due on January 4, 2008.

- ✓ On January 4, 2008, the Department issued a denial letter to the Tribe based solely on the failure of the Tribe's application to meet a new "commutability" standard, which was

simultaneously issued through an internal memorandum dated January 3, 2008 from Assistant Secretary Carl Artman to the BIA Regional Directors.

C. IGRA - Section 20 Procedure & Requirements

As noted above, the Indian Gaming Regulatory Act's ("IGRA") , 25 U.S.C. §§ 2701 et seq, Section 20 two-part determination process authorizes Indian gaming to be conducted on newly acquired lands such as the 29.31 acres of the Monticello Raceway. Under this authority, the Secretary is required to undertake the following:

- ✓ Consult with the applicant Indian tribe and *appropriate* State, and local officials, including officials of other nearby Indian tribes, **and**

- ✓ Issue an affirmative or negative decision under the two-part determination process on whether the gaming establishment on newly acquired lands (1) will be in the best interest of the Indian tribe and its members, and, (2) will not be detrimental to the surrounding community, **and**

- ✓ If an affirmative secretarial two-part determination was issued, obtain the concurrence of the Governor of the State in which the gaming activity is to be conducted in such determination.

The Department's analysis and evaluation of the Tribe's application under Section 20 was undertaken in accordance with the Department's "Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 Determinations." All of these requirements and processes under the Department's checklist were satisfied for the Tribe's Monticello project.

By letter dated April 6, 2000, then-ASIA Kevin Gover issued an affirmative Section 20 determination that the Tribe's application would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. ASIA Gover's determination included 16 pages of detailed Findings of Fact supporting the two-part determination, which included the following key findings:

- The Tribe's casino project was projected to generate approximately $583 million net revenues to the Tribe over its initial seven years of operation.

- Approximately 260 tribal members were projected to be employed directly by the casino, earning an estimated total of $6.6 million annually, and approximately $23 million in contracts would be awarded to tribally-owned construction enterprises engaged in the construction of the casino.

- The Tribe had some 8,630 enrolled members, with 4,193 living on or near the reservation; approximately 600 members were unemployed and seeking work; no estimate had been made of the number of reservation residents who would relocate to the casino, but tribal members leaving for jobs at the casino "could reduce reservation unemployment by a substantial percentage."

- Significant training opportunities would be provided to tribal members as a result of the casino.

- Revenues from the casino would enable the Tribe to expand its reservation senior citizen center, to construct a day care facility and ambulatory/nursing home, to expand the sewage system, extend a water line to serve the entire reservation, and connect a natural gas pipeline to the reservation, as well as provide funds for scholarships and post-secondary education tuition assistance.

- There would be "no foreseeable adverse impacts on the Tribe associated with the acquisition of the Monticello property in trust for a gaming and entertainment center."

- State and local officials had been consulted, that the Town of Thompson supported the application, and that a Cooperation Agreement met the concerns of the Village of Monticello and of Sullivan County and addressed various project impacts.

- The casino would boost the economy of the region, generate employment and income for local residents, and generate revenues from hotel taxes to local governments.

- An assurance that "***If the Governor of the State of New York concurs with this two-part Secretarial determination, the Monticello Property will be taken into trust pursuant to the requirements of 25 CFR Part 151***."

By letter dated February 18, 2007, New York Governor Eliot Spitzer wrote to Secretary Kempthorne concurring with the April 2000 secretarial two-part determination that acquiring the Monticello site in trust status is in the Tribe's best interest and would not be detrimental to the surrounding community. Governor Spitzer's action in concurring with the April 2000 secretarial determination fully and affirmatively concluded the IGRA Section 20 process.

D. IRA - 25 CFR Part 151 Procedure & Requirements

Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. §465, enacted in 1934, authorizes the Secretary of the Interior to acquire lands for Indian tribes in the name of the United States to hold in trust for the Indian tribe, and to take action on a tribe's request to acquire such lands. The federal regulations implementing the Secretary's authority under Section 5 of the IRA are codified at 25 C.F.R. Part 151. With respect to land that is not located on or contiguous to an existing Indian reservation, the Part 151 Regulations require the Secretary to make the following determinations:

- ✓ The acquisition is authorized by an act of Congress; and
- ✓ The acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing."

The satisfaction of these requirements is evidenced by the Department's consistent findings and conclusions in issuing three FONSIs, the most recent on December 21, 2006, for the Tribe's

Monticello Raceway fee-to-trust application. All of the federally approved EAs and FONSIs for the Tribe's project specifically evaluated the Tribe's fee-to-trust application, and their conclusions address and demonstrate the Tribe's application's compliance with and satisfaction of all existing Part 151 considerations and requirements. Specifically, the below findings and favorable conclusions substantiate full compliance and satisfaction of the applicable provisions in the 151 Regulations:

- ***Section 151.10(a): Statutory authority for the acquisition and any limitation contained in such authority*** - The IRA constitutes an affirmative policy of advancing tribal economic interests. Congress conferred the authority to the Secretary to acquire new trust lands as the primary means to fulfill the government's trust obligation to "rehabilitate the Indian's economic life[.]"[2] The authority extends to acquiring trust lands "within or without existing reservations"

- **Section 151.10(b): The need of the Tribe for additional land** - The EAs and FONSIs issued by the Department specifically found and concluded that "*The Tribe needs a stable economic base to address problems stemming from high unemployment, insufficient housing and inadequate health care."* In evaluating the Tribe's fee-to-trust application for the Monticello casino project, the Department concluded that *"this project clearly presented the best opportunity for a financially successful venture. The best long term employment opportunities [are from] the development of this proposed casino complex[.]"*

- ***Section 151.10(c): The purpose for which the land will be used*** - The December 2006 FONSI concluded that the purpose for acquiring the land into trust is to operate a Class III Native American Gaming facility and associated restaurants, and retail facilities" in order to improve the Tribe's "long term economic condition through the development of the stable, sustainable source of revenue and employment through Indian gaming."

- ***Section 151.10(e): The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls*** - This factor was addressed in detail throughout the EA and NEPA review process. The FONSI details all mitigation, including local agreements wherein the Tribe agreed to pay annually $5 million to the Village of Monticello, and $15 million to Sullivan County, to offset an increase in government services and loss of tax revenue for the 29 acre site.

- ***Section 151.10(f): Jurisdictional problems and potential conflicts of land use which may arise*** – The Tribe's application was fully supported by both the Village of Monticello and Sullivan County in which the project was to be located. The EAs and FONSIs fully addressed how medical, fire services, public safety, zoning and land use would be handled between the Tribe and local entities, and concluded there would be no jurisdictional problems and there were adequate measures in place to address any potential conflicts of land use.

- ***Section 151.10(g): Whether the BIA will be equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status*** – Approval of the Tribe's fee-to-trust application would not have created any adverse impacts or resulted in any

[2] *Id*. at 1016, quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).

additional responsibilities for the BIA. The Tribe agreed to maintain all responsibilities relating to the development and maintenance of the trust parcel, including exercising jurisdiction and control of the property. In addition, the Tribe had entered into agreements to contract with local governmental entities for all additional services.

- ***Section 151.10(h): The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, NEPA Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations -*** On May 24, 2006, the BIA conducted a contaminant Level I survey and site assessment of the proposed parcel. No hazardous materials were detected. A May, 2006, Phase I Environmental Site Assessment Report also concluded that there were no hazardous substances or contaminants within the project site. *See* EA, page 5-4.

- ***Section 151.11(b): The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation –*** the greater the distance from the tribe's reservation, this factor instructs that the "Secretary give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition," and provides that the "Secretary shall give greater weight to the concerns raised" by state and local governments. Akwesasne is approximately 6 hours from the Monticello site, in a remote northern corner of the State. With respect to an analysis of anticipated benefits, the EAs and FONSIs discussed the Tribe's past failed attempts at developing a stable, sustainable, revenue source through development of projects on the reservation, and further considered and rejected the "No Action" alternative to the proposed federal action in approving the Tribe's application. The Department concluded that the proposed project *"clearly presented the best opportunity for a financially successful venture. The best long term employment opportunities [are from] the development of this proposed casino complex[.]"* With respect to giving greater weight to concerns raised by the state and local governments, the Tribe application clearly documents the full support of the state and the affected local governments. Moreover, the 2001 New York state law authorizing the Governor to enter into compacts authorizing up to three Indian casinos in Sullivan and Ulster counties[3] demonstrates broad state policy supporting the application.

- ***Section 151.11(c): The Tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use -*** The Tribe fully complied with this requirement by providing the Department with extensive documentation on how this land would be used and how the Tribe would benefit from the planned use and development of this parcel.

- ***Section 151.11(d): Sets forth procedures for notifying affected local governments and soliciting comments on the impacts of the project -*** As demonstrated by the administrative record, the BIA employed in depth notification and consultation procedures with the state, and local communities, which were engaged and fully participated in these agency's consultation on the proposed project.

In applying the IRA and its existing implementing regulations to the Tribe's Monticello Raceway parcel fee-to-trust application, Tribe's application fully satisfied and fulfilled all of the Part 151

[3] N.Y. Exec. L. § 12 (McKinney 2001).

requirements. Moreover the Department had previously notified the Tribe and the State that it would take the land into trust status following the Governor's concurrence, which demonstrated the agency's acknowledgement that these requirements were fully satisfied. It was a complete miscarriage of justice for the Department to have created a brand new rule one day and apply it the next as the sole basis to deny our application after we satisfied every single requirement and fully complied with every federal process.

In summary, it is hard to find a project that has been the subject of more extensive state, local, and Federal reviews and approvals.

All of these reviews and approvals culminated on December 21, 2006, when the Department issued a "Finding of No Significant Impact" ("FONSI") indicating the Tribe satisfied all of the federal regulations for environmental review necessary to have the land taken into trust status.

IV. JANUARY 3, 2008 "GUIDANCE" CONSTITUTES A BINDING LEGISLATIVE RULE AND ITS ISSUANCE WITHOUT FORMAL NOTICE AND COMMENT VIOLATES FORMAL FEDERAL RULEMAKING REQUIREMENTS

This section summarizes the provisions of the Guidance and demonstrates that the Guidance constitutes an unlawful rule issued in violation of the advance notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

A. Scope of the Guidance

As noted above, 25 CFR § 151.11 sets forth the factors the Department is to consider in deciding tribal fee-to-trust applications, when the land is located outside of and noncontiguous to a tribe's reservation. It provides, in part, that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give:

1) *greater scrutiny to the tribe's justification of anticipated benefits from the acquisition; and*
2) *greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments.*

25 CFR § 151.11(b). The Guidance purports to "clarify" how the requirements for "greater scrutiny" and "greater weight" are to be interpreted and applied, particularly when considering the taking of off-reservation land into trust status for gaming purposes. The Guidance noted that there were 30 pending applications from Indian tribes to take off-reservation land into trust for gaming purposes, and the memo instructed the BIA Regional Directors to review all pending and future applications in accordance with the Guideline and its requirements. Thus, on its face, the Guidance was drafted to apply to the 30 pending (and future) fee-to-trust applications for Class III gaming on lands acquired after the enactment of IGRA and located outside or noncontiguous to a tribe's reservation.

B. Key Provisions – including the "commutable distance" rule

The Guidance articulates a new standard for assessing off-reservation land applications -- "commutable distance" – which it defines as "the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation." The Guidance states that it applies to all applications that involve requests to take land into trust that is off-reservation, but also asserts that it "only provides guidance for those applications that exceed a daily commutable distance from the reservation."

Without any analysis or factual support, the Guidance asserts as a "general principle" that the farther a gaming facility is from the reservation, the greater the potential for significant negative consequences on reservation life. The Guidance announces a blanket statement that if a gaming facility is not within a commutable distance of the reservation, tribal members who reside on the reservation either will not be able to take advantage of job opportunities at the facility or else will be forced to move away from the reservation to do so. In the former event, the gaming facility would not "directly improve" the employment rate on the reservation. In the latter event, the departure of a significant number of reservation residents and their families could be detrimental to the remaining tribal community.[4]

Insofar as the potential concerns of state and local governments are concerned, the Guidance provides that the application should include copies of any intergovernmental agreements negotiated between the tribe and the state and local governments, or an explanation as to why no such agreements exist. The Guidance directs that "[f]ailure to achieve such agreements should weigh heavily against the approval of the application."

The Guidance instructs that the application should include a comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local government, and with the uses being made of adjacent or contiguous land, and whether such uses would be negatively impacted by the traffic, noise, and development associated with or generated by the proposed gaming facility. If the application does not contain such an analysis, the Guidance directs that it is to be denied.

If an application fails to address, or does not adequately address, the other issues identified in the Guidance, the Guidance directs that the application should be denied.

C. Guidance is an illegally promulgated rule

The Administrative Procedure Act ("APA") requires that when federal agencies promulgate "legislative rules" that have the force of law, they must do so by providing advance notice of the proposed rules and giving the public an opportunity to comment on them before they become effective. 5 U.S.C. § 553. These requirements improve the quality of agency rulemaking. *See*

[4] Ironically, the Guidance notes that "tribes are free to pursue a wide variety of off-reservation business enterprises and initiatives without the approval or supervision of the Department" although such enterprises and initiatives might raise the very same issues as off-reservation gaming insofar as the on-reservation employment rate and luring tribal members away from the reservation are concerned.

Sprint Corp. v. F.C.C., 315 F.3d 369, 373 (D.C. Cir. 2003). Failure to comply with these requirements can result in judicial invalidation of the agency's rule. *Id.* at 376-77.

A "legislative rule" is an agency pronouncement that establishes a "binding norm." *See American Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). Likewise, agency pronouncements that make "substantive changes" or "major substantive legal additions" to prior regulations are "legislative rules." *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d 29, 34-35 (D.C. Cir. 2005). The Code of Federal Regulations, including 25 CFR Part 151, consists of legislative rules which were duly promulgated pursuant to the notice-and-comment procedures of the APA.

The APA notice-and-comment requirements do not apply to general statements of policy or to "interpretative rules" issued by an agency. An interpretative rule merely supplies crisper and more detailed lines than the authority being interpreted, or simply provides a clarification of an existing rule. *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d at 38. An "agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise." *Croplife America v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). Congress was concerned that the few specified exceptions to the notice-and-comment requirements should not be broadly defined and indiscriminately used. *See American Bus Ass'n v. United States*, 627 F.2d at 528.

Thus, the issue here is whether the Guidance constitutes a "legislative rule." Plainly, the Guidance establishes a presently binding norm and is not a mere policy statement. For example, the Guidance directs all BIA Regional Directors, without exception, (1) to apply it to all pending and future applications to take off-reservation land into trust status, and (2) if an application fails to address, or does not adequately address, the issues identified in the Guidance, the application should be denied. *See Community Nutrition Institute v. Young*, 818 F.2d 943, 946-47 (D.C. Cir. 1987) (agency's use of mandatory, definitive language indicates binding norm is being established, as does agency's treatment of that norm as binding absent some exception).

Nor can the Guidance be deemed an "interpretative rule" that simply provides a clarification of the existing regulation at 25 CFR § 151.11. Instead, the Guidance makes a series of substantive changes and additions to 25 CFR § 151.11. To start with, it introduces the novel concept of "commutable distance" in terms of assessing a tribal request to take land into trust. A commutable distance factor is not part of the statutory requirements under Section 5 of the IRA nor can it be found in or fairly be interpreted to derive from Part 151 regulations. Instead, based on this new rule, created from whole cloth, the Guidance imposes the following new requirements:

> (1) a specific assessment of the impact of the proposed gaming facility on the unemployment rate on the reservation;
>
> (2) an assessment of how many tribal members (and dependents) are likely to leave the reservation to seek employment at the gaming facility;
>
> (3) an assessment of how will their departure affect the quality of reservation life;

(4) an assessment of how their relocation will affect their long-term tribal identification and the eligibility of their children and descendants for tribal membership;

(5) inclusion of copies of any intergovernmental agreements negotiated between the tribe and the state and local governments and a presumption that failure to achieve such agreements will weigh heavily against the approval of the application; and

(6) a comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local government, and with the uses being made of adjacent or contiguous land, and whether such uses would be negatively impacted by the traffic, noise, and development associated with or generated by the proposed gaming facility.

An agency pronouncement that substantively changes a preexisting legislative rule is itself a legislative rule and can be valid only if it satisfies the notice-and-comment requirements of the APA. *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d at 38. For instance, in *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974), the Parole Board had issued, without advance notice and comment, guidelines specifying many of the factors it would use in deciding whether to parole prisoners. The court concluded that the guidelines were an invalid legislative rule finding that:

> [The guidelines] were of a kind calculated to have a substantial effect on ultimate parole decisions. … Although they provide no formula for parole determination, they cannot help but focus the decisionmaker's attention on the Board-approved criteria. They thus narrow his field of vision, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significant might have been differently articulated had [the notice-and-comment requirement] been followed.

Id. at 1112-13.

This analysis is equally applicable to the Guidance. The Guidance clearly supplants the open-ended provisions of 25 CFR 151.11 -- which speak generally about the weighing of the "anticipated benefits" of an acquisition against the "concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments" – with a set of detailed new requirements that "narrow the field" of decision-making and instructions for decisive reliance on the factors in the Guidance.

Therefore, because it effects substantive changes in the regulatory requirements for taking land into trust, the Guidance is an invalid legislative rule that was issued in defiance of the notice-and-comment requirements of the APA.

D. Process for developing the Guidance violates Executive Order

In addition to violating the APA, the Secretary failed to abide by longstanding guidance on directing federal agencies to consult with tribal governments on a government-to-government

basis. In particular, Executive Order 13175 directs agencies to establish meaningful policies to obtain input from Indian tribes before new policies are announced or applied.

> Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

Executive Order 13175, Sec. 5.

The Guidance unquestionably constitutes a regulatory policy that has "tribal implication," not to mention devastating implications with respect to the Tribe. It is our understanding that legislation may soon be introduced to ensconce this policy as a requirement of federal law. This case also proves that such legislation is necessary and should be enacted immediately.

V. THE GUIDANCE IS INCONSISTENT WITH AND CONTRARY TO THE DEPARTMENT'S POLICIES AND LEGAL INTERPRETATION OF LIMITATIONS ON THE SECRETARY'S DISCRETION TO ESTABLISH A "DISTANCE" REQUIREMENT

The principal legal and policy advisors to then-Secretary of the Interior Gail Norton produced, a document entitled "Indian Gaming Paper" dated February 20, 2004. This "white paper" provided an in-depth legal analysis of Secretarial discretion to approve off-reservation fee-to-trust applications for gaming-related development. The document evidently was the outcome of a two-day work session that included participation by the Secretary's Counselor, the Principal Deputy Assistant Secretary, the Associate Solicitor for Indian Affairs, and the Deputy Associate Solicitor for Indian Affairs. The Chairman of the National Indian Gaming Commission also participated in the Indian Gaming Paper's development and concurred in the document's content.

The Indian Gaming Paper comprehensively explores the legislative history and structure of IGRA, and employs this background to produce a cogent deliberative analysis of the framework for the Secretary's authority under IGRA and the IRA. The Paper's conclusions are strikingly at odds with the Secretary's purported rationale for the Guidance. For instance, the Guidance concludes that IGRA "was not intended to encourage the establishment of Indian gaming facilities far from existing reservations." Yet, the Indian Gaming Paper explains:

> In any event, 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. Nor has Congress amended IGRA to add a distance limitation or any other geographic limitation since its passage in 1988.[5]

Similarly, in light of the remarkably small number of Secretarial two-part determinations and even smaller number of gubernatorial concurrences, the Indian Gaming Paper notes:

[5] Indian Gaming Paper page 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 a limitation on that activity within the law. Moreover, the suggestion that "reservation shopping" has run amok is without a basis. To the contrary, states have exercised their statutory prerogative to deny tribes access to lands for gaming under the two-part determination in all but three instances, proving that the framework of IGRA has been working.[6]

By stark contrast, the Guidance denigrates all off-reservation gaming acquisitions that are not a "commutable distance" from a Tribe's reservation by stating that "the negative impacts on reservation life could be considerable." Yet, the Indian Gaming Paper explains the potentially significant benefits of such facilities:

> Another factor considered in the best interest determination is the impact on tribal employment, job training and career development, including impact to the tribe if members leave the reservation for employment at the gaming facility. For a facility that is located a distance from the reservation, the Department may review whether housing is provided for members working at a proposed facility. However, 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. In addition, even without substantial job creation, a tribe may demonstrate best interest by projecting the benefits to tribe and tribal members from increased tribal income alone. Increased tribal services, improved education and health care are also benefits from increased tribal income that the Department may consider.[7]

The Indian Gaming Paper also explains that Congress made a deliberate choice not to impose obvious distance or other restrictions on off-reservation gaming projects. (Concomitantly, Section 20(c) of IGRA expressly re-affirms the Secretary's "authority *and responsibility*" to acquire trust land.) The Indian Gaming Paper also notes that IGRA imposed "checks and balance" by requiring approval by the Secretary as well as the "high hurdle" of a governor's approval. Nevertheless, IGRA otherwise left tribes with the opportunity to pursue gaming markets that were otherwise denied to them because 19th Century policies favored located Indian reservations in remote areas.

> Further, a plain reading of IGRA and its very purpose supports the conclusion that off-reservation gaming is clearly contemplated by the law. Otherwise the balance of State, Federal, and Tribal power of the two-part determination would be unnecessary. This conclusion also acknowledges (at least implicitly) the history of locating reservations in remote areas so as not to conflict with non-Indian settlers. IGRA marks a departure from this history of blanket isolation of tribes where prosperous non-agrarian economic development is unlikely, in part by

[6] *Id.* page 12-13.
[7] *Id*. page 11.

> employing a structure that envisions state and local participation in a decision to allow off-reservation gaming. IGRA implicitly recognizes the limitations of economic opportunities on the reservation by specifically providing for a mechanism to allow off-reservation gaming and permits a tribe to exercise jurisdiction on new Indian lands for that purpose.[8]

As noted above, in IGRA's twenty-year history, Congress has not seen fit to incorporate any distance limitations to gaming related trust applications. Similarly, the IRA is over seventy years old and it has not been amended to place a geographic limit on the Secretary's authority to take land into trust. The Guidance was created with unmistakable disregard for procedural requirements. Furthermore, it purposefully disregards the obvious conclusions reached in the Indian Gaming Paper concerning IGRA's purpose, structure, and legislative history. Unlike the Guidance, the Indian Gaming Paper is entirely consistent with the Department's previous interpretations of Section 20, including testimony from previous administrations.

VI. THE TRIBE'S APPLICATION MEETS AND EXCEEDS THE NEW COMMUTABILITY STANDARD IN THE GUIDANCE

Even assuming the new commutable distance rule had been authorized by the IRA and that it had been duly promulgated under the formal APA procedures, the Tribe's application meets and exceeds the new rules and therefore, it should have been approved. Specifically, the Guidance dictates that "no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distant gaming facility." In fact, the Tribe's application fully addresses the issues listed in the Guidance that the BIA Regional Directors are now required to address:

- ***What is the unemployment rate on the reservation?*** According to the Department's own findings, the unemployment rate on the reservation is estimated to be between 35 and 40%. Two-Part at 2. (Ironically, the unemployment rate although already unconscionable, would be even higher except for the willingness of Tribal Members to commute substantial distances for employment.)

- ***How will it be affected by the operation of the gaming facility?*** According to the Department's studies and conclusions, the proposed Monticello project is the only alternative evaluated that addresses the Tribe's demonstrable need for "a stable economic base to address problems stemming from high unemployment, insufficient housing, and inadequate health care." FONSI page 2.

- ***How many tribal members (with their dependents) are likely to leave the reservation to seek employment at the gaming facility?*** According to the EA and FONSI, approximately 260 tribal members would be projected to be employed in the facility. (Because the employees have not been identified, there was no empirical way to calculate the number of

[8] *Id*. page 13.

dependents affected. Moreover, there was no "guidance" in place to flag this issue and make it a part of the analysis at the time the Eastern Regional Director processed the application.) In any case, the Guidelines intentionally seek to create a Catch-22; if too many tribal members seek employment the detrimental impacts are too great and the application must be denied; if too few, the benefits on tribal member employment are inadequate and the Secretary may not approve the application. "Head's" the Secretary must deny, "tails" he may not approve. Either way the Secretary may not approve a "non-commutable" application.

- ***How will their departure affect the quality of reservation life?*** The EA calculated projected earnings of the employees and concluded that the employment and associated training would greatly benefit the tribal members. With a population exceeding 12,000 people, the employment of 260 people off the reservation would not be a detriment to the quality of "reservation life" at Akwesasne. On the contrary, the employment earnings would enhance the quality of reservation life because tribal members would continue to maintain close ties to the reservation community and would be able to financially assist other family members on the reservation. The Two-Part determination reports that the estimated annual payroll to tribal members is $6.6 million and approximately $23 million will be realized by tribally-owned construction contractors. Two-Part page 6.

- ***How will the relocation of reservation residents affect their long-term identification with the tribe and the eligibility of their children and descendants for tribal membership?*** Based on the Mohawks long history of commuting far distances from the reservation for employment, there is a strong factual basis to support the conclusion that tribal members commuting to the project site for employment would not adversely affect their long-term identification with the Tribe nor would it affect the eligibility of their children in the Tribe. As far as their descendants, there is no guarantee or way to require them to marry and/or have children in the Tribe. Frankly, such a factor goes far beyond the legitimate scope of fee-to-trust transactions and involves nothing more than conjecture and speculation. Indeed, as noted above, the Guidelines recognize that "tribes are free to pursue a wide variety of off-reservation business enterprises and initiatives without the approval or supervision of the Department" and such enterprises and initiatives could result in comparable off-reservation employment opportunities that lure tribal members away from the reservations. Nevertheless, the Two-Part Determination explains that "[c]asino, business, and general skills training will improve tribal members' job skills for increased opportunities on and off-reservation." Two-Part Determination page 7.

- ***What are the specifically identified on-reservation benefits from the proposed gaming facility? Will any of the revenue be used to create on-reservation job opportunities?*** These questions were conclusively and thoroughly considered by the EAs and FONSIs. "The Tribe is considered an environmental justice community for this proposed action that would receive a significant benefit as a result of project approval." FONSI page 5 (emphasis supplied). There is no question that $23 million in construction contracts will primarily benefit tribal members, who will either commute to Monticello for the duration of these construction projects or, potentially, commute further, perhaps even to Canada, for comparable construction projects.

VII. THE DEPARTMENT WRONGLY CONFLATED THE IGRA SECTION 20 PROCESS WITH THE IRA PART 151 PROCESS

There is substantial overlap with the factors, processes and considerations the Department considers and evaluates under the IGRA Section 20 two-part determination process and the IRA Part 151 process. For example, under the Section 20 process, the Tribe's application has undergone numerous and comprehensive environmental reviews under both SEQRA and NEPA; the application has successfully secured the issuances of several extensive and comprehensive Environmental Assessments (issued in April 1998, revised in February 1999 and again in February 2004, and updated in September 2006) and several FONSIs (issued in September 1998, revised in October 1999 and signed in April 2000, and revised and reissued in December 2006). These processes and related determinations are directly relevant to the Part 151 Regulations the Secretary is required to consider in exercising his discretion to acquire land into trust pursuant to his authority under the IRA.

Although the Section 20 and Part 151 requirements and factors overlap, technically, the Section 20 two-part determination process under IGRA is *separate* from the Part 151 process under the IRA.

Furthermore, the law does not allow the Department to deny the application solely on the basis that the land to be taken into trust will be used for gaming purposes. Specifically, 20(c) provides that "nothing in Section 20 shall affect or diminish the authority and responsibility of the Secretary to take land into trust." Denying this application because the land will be used for gaming purposes would impermissibly allow the Section 20 two-part determination to overtake and thereby diminish the Assistant Secretary's authority to take land into trust. In other words, pursuant to Section 20(c) and the FONSI, the Assistant Secretary (or the Associate Deputy Secretary overseeing the Tribe's Application here) should approve the Tribe's application because the land will be available for gaming purposes. However, he may not deny the trust application because the land is subject to a complete two part determination and can be used for gaming purposes.

VIII. The Tribe has valid legal expectation that its application would be approved

After the FONSI, only two conditions needed to be satisfied before the project site met all of the requirements necessary for gaming to occur. First, the Secretary of Interior needed to finalize the determination to take the land into trust by formally issuing a Record of Decision. Second, New York Governor Eliot Spitzer needed to issue a "concurrence" to the April 2000 favorable Section 20 Secretarial determination, thereby closing the Section 20 process. Governor Spitzer satisfied this condition on February 18, 2007.

Of course the Tribe was elated once it received the Governor's concurrence; and for good reason. In the nearly twenty year history of the *Indian Gaming Regulatory Act*, the St. Regis application is only the sixth positive Secretarial two-part determination. Two of these previous applications were rejected when the respective Governor refused to grant a concurrence. In the other three cases, after the governor's concurrence, the trust status for the land was, understandably, a non-

issue. In two cases the land was already in trust.[9] In the third instance, the land was taken into trust as a matter of course about two weeks after the Secretary's two-part determination.[10]

- The prior history of land-to-trust applications involving two-part determinations, the Department's uniformly positive assessment of the project and its impact on the Tribe, its members, and
- After the Governor's concurrence, the Tribe had every reason to be confident of a positive outcome. A number of factors bolstered our expectations including:
- the unprecedented State and local support for the Project,

Nevertheless, with the stakes so high for the Tribe and in light of the Tribe's good faith commitment to its development partner, Empire Resorts, the Tribe left nothing to chance. Even before the Governor's concurrence the Tribe began contacting the relevant officials in the Secretary's office and the Office of Indian Gaming. One or more of the Three Chiefs met personally or spoke with either Associate Deputy Secretary James Cason or George Skibbine on a regular basis throughout 2007. Sometimes the Chiefs spoke with both Messers. Cason and Skibbine several times in the same week. On each and every one of these conversations, the Chiefs sought or demanded information on the status of the Tribe's application and whether there was anything more the Tribe could submit that might conceivably assist the Department in finalizing the process. Neither the Chiefs nor any other Tribal Official was ever advised that the Tribe's application was deficient in any way. The Tribe was repeatedly assured that its application would be evaluated on an objective and transparent basis. These representations belie the Department's undisclosed contemporaneous effort to develop new standards in order to provide a basis for denying the Tribe's application.

IX. Secretary Kempthorne's unwarranted and unprecedented delay

The Rules of the House of Representatives authorize, empower, and obligate this Committee to investigate "review and study on a continuing basis laws, programs, and Government activities relating to Native Americans." House Rules 2(h). This case cries out for this Committee to exercise its jurisdiction to investigate the following:

- Why did the Secretary postpone a decision on our application for nearly one year?

- Were any Interior Department officials or employees directed or encouraged to either postpone a final decision on the Tribe's application or to concoct a basis for denying the Tribe's application? If so, who provided such directives?

- Did Assistant Secretary Carl Artman participate in the review of the Tribe's application notwithstanding his putative recusal from all New York-related gaming land issues? In light of his recusal, did he unduly interfere with the

[9] Source: Office of Inspector General, Evaluation Report, Process Used to Assess Applications To Take Land Into Trust For Gaming Purposes, September 2005 (Report Number: E-EV-BIA-0063-2003), Appendix 6 (Existing trust lands of Kalispel Tribe and Keweenaw Bay Indian Community converted to gaming uses followed by two-part determination).

[10] *Forest County Potawatomi Community v. Doyle*, 1993 WL 765438 (W.D.Wis.).

Tribe's application? Did he participate in any discussions about whether the new rule could or should be retroactively applied to the Tribe's application?

- Did any third-party encourage the Department to delay a decision or deny the Tribe's application? Who were these third-parties and who, if anyone, did they contact at the Department. Did they contact anyone in the White House?

X. Conclusion

The Secretary's sole basis for denying the Tribe's application is the following statement:

"[T]he Tribe's application fails to carefully address and comprehensively analyze the potential negative impacts on reservation life[.]"

In contrast to this single unsubstantiated assertion, the Tribe has amassed an unassailable and exhaustive assemblage of favorable determinations and approvals, including the following:

- Local Approvals -
  - Sullivan County - May 23, 1996
  - Town of Thompson- September 6, 1996
  - Village of Monticello - September 20, 1996
- Final Environmental Impact Statement (FEIS) Completed & Accepted –February 18, 1998
- NY State Environmental Quality Review Act (SEQRA) Approval – March 10, 1998
- 1st- Federal Finding of No Significant Impact on Environmental Assessment (FONSI) – April 22, 1998
- 2nd - Federal FONSI -April 4, 2000
- Secretarial Two-Part Determination – April 6, 2000 -
  - "*Establishment of [the gaming project] in Monticello, New York would be in the best interest of the Tribe and its members.*"
  - "*There are no foreseeable adverse impacts on the Tribe associated with the acquisition of the Monticello property* [.]"
- NY SEQRA Updated & Confirmed - July 22, 2005
- 3rd - Federal FONSI – December 21, 2006 -
  - "*The Tribe needs a stable economic base to address problems stemming from high unemployment, insufficient housing and inadequate health care."*
  - *"[T]his project clearly presented the best opportunity for a financially successful venture. The best long term employment opportunities [are from] the development of this proposed casino complex[.]"*
  - *"[T]proposed project will improve the socioeconomic conditions for both the Tribe and Sullivan County*."
- Governor's Concurrence with Secretarial Two-Part Determination - February 19, 2007

In denying the Tribe's application the Secretary has arrogated to himself the legislative authority of Congress and this Committee. He has also violated a commitment he made to Congress during his confirmation hearing that he would abide by law, including Section 20,

notwithstanding any personal views he may harbor about gaming or Indian gaming.[11] Allowing the Secretary to evade responsibility for his actions will only serve to encourage a culture of disregard for established law.

The record reflects that the Tribe's application was denied based on a rule that was illegally fabricated behind closed doors solely to justify the Secretary's decision. The Secretary (or his minions) also contrived to make it procedurally impracticable for the Tribe to challenge this action. Apparently the Secretary imposed these additional procedural obstacles out of recognition that the Tribe could have easily satisfied even this fabricated and contrived "commutability" standard if the Tribe had been given an opportunity.

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[11] Kempthorne Nomination, S. Hrng. 109-507 (May 4, 2006) page 60-61.