

**TESTIMONY
OF
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FOR POLICY AND ECONOMIC DEVELOPMENT
DEPARTMENT OF THE INTERIOR
AT THE OVERSIGHT HEARING
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON SECTION 20 OF THE INDIAN GAMING REGULATORY ACT**

July 27, 2005

Good morning, Mr. Chairman and Members of the Committee. My name is George Skibine, and I am the Acting Deputy Assistant Secretary - Indian Affairs for Policy and Economic Development at the Department of the Interior. I am pleased to be here today to discuss the role of the Department in implementing the exceptions contained in Section 20(a)(1), 20(a)(2)(B), and 20(b)(1)(B) to the prohibition on gaming on trust lands acquired after October 17, 1988, contained in the Indian Gaming Regulatory Act of 1988 (IGRA).

Before discussing Section 20 of IGRA, I want to address a common misconception regarding this statutory provision: Section 20 of IGRA does not provide authority to take land into trust for Indian tribes. Rather, it is a separate and independent requirement to be considered before gaming activities can be conducted on land taken into trust after October 17, 1988, the date IGRA was enacted into law. The basis for the administrative decision to place land into trust for the benefit of an Indian tribe is established either by a specific statute applying to a tribe, or by Section 5 of the Indian Reorganization Act of 1934 (IRA), which authorizes the Secretary to acquire land in trust for Indians “within or without existing reservations.” Under these authorities, the Secretary applies her discretion after consideration of the criteria for trust acquisitions in our “151” regulations (25 CFR Part 151). However, when the acquisition is intended for gaming, consideration of the requirements of IGRA are simultaneously applied to the decision whether to take the land into trust. If the land has already been taken into trust, requirements of IGRA still must be met before a tribe can engage in gaming on the trust parcel.

In enacting Section 20, Congress struck a balance between tribal sovereignty and states’ rights. Specifically, Section 20 provides that if lands are acquired in trust after October 17, 1988, the lands may not be used for gaming, unless one of the following statutory exceptions applies:

- (1) The lands are located within or contiguous to the boundaries of the tribe’s reservation as it existed on October 17, 1988 (Section 20(a)(1));
- (2) The tribe has no reservation on October 17, 1988, and “the lands are located in

a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the state or states where the tribe is presently located" (Section 20(a)(2)(B));

- (3) The "lands are taken into trust as part of: (i) the settlement of a land claim; (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." (Section 20(b)(1)(B));

My testimony today will focus on the above exceptions. However, IGRA also has two additional exceptions: 1) for lands taken into trust in Oklahoma for Oklahoma tribes; and 2) an Indian tribe may also conduct gaming activities on after-acquired trust land if it meets the requirements of Section 20(b) of IGRA, the so-called "two-part determination" exception. Under Section 20(b)(1)(A),

- (1) gaming can occur on the land if the Secretary, after consultation with appropriate state and local officials, and officials of nearby tribes, determines that a gaming establishment on newly-acquired land will be in the best interest of the tribe and its members, and would not be detrimental to the surrounding community, but
- (2) only if the Governor of the state in which the gaming activities are to occur concurs in the Secretary's determination.

Since 1988, the Secretary has approved 26 trust acquisitions for gaming that have qualified under the five Section 20 exceptions that are discussed in my testimony. I have attached to my testimony a number of charts that list the various tribes that have qualified under each of the five exceptions. The charts show that the Department has approved:

- seven gaming acquisitions under the exception in Section 20(a)(1) – four on-reservation acquisitions, two contiguous acquisitions, and one that contained land that was partly on-reservation, and partly contiguous to the reservation.
- four gaming acquisitions under the "settlement of a land claim" exception contained in Section 20(b)(1)(B)(i), although all four parcels are contiguous to each other and are all for the Seneca Tribe of New York.
- three gaming acquisitions for Indian tribes under the "initial reservation" exception contained in Section 20(b)(1)(B)(ii);
- twelve gaming acquisitions for Indian tribes under the "restored land for a restored tribe" exception contained in Section 20(b)(1)(B)(iii); and

- no gaming acquisitions under the exception contained in Section 20(a)(2)(B), the “last recognized reservation” exception.

Finally, please keep in mind the fact that although the Department has approved a trust acquisition for an Indian tribe it does not necessarily mean that the land has actually been taken into trust. For instance, the existence of liens or other encumbrances, or litigation challenging the Secretary’s decision may delay the proposed trust acquisition, often for years.

Currently, there are eleven proposed gaming acquisitions pending before the Department where the applicant tribe seeks an exception to the gaming prohibition under one of the three exceptions listed in Section 20(b)(1)(B) (settlement of a land claim, initial reservation of a tribe acknowledged by the Secretary under the Federal Acknowledgment process, or restoration of lands for a tribe that is restored to Federal recognition). There are no proposed trust acquisitions for gaming pending under either the on-reservation or contiguous to the reservation exception, nor are there any proposed acquisitions pending under the last recognized reservation exception of Section 20(a). We are also aware that there are a number of Indian tribes that are seeking “Indian lands” determinations from the National Indian Gaming Commission for parcels that have previously been taken into trust by the Department for non-gaming purposes.

The decision of whether land that is either already in trust, or that is proposed to be taken into trust for gaming, qualifies under any of the exceptions is made on a case-by-case basis. Through case-by-case adjudication, the Department has developed criteria to determine whether a parcel of land will qualify under one of the exceptions. For instance, to qualify under the “initial reservation” exception for newly-recognized tribes, the Department requires that the tribe have strong geographical, historical and cultural ties to the land.

To qualify under the “restoration of lands” exception, the tribe must have been previously recognized, terminated, and subsequently legislatively, judicially, or administratively restored. The land must be either available to a tribe as part of restoration legislation, or the tribe must establish a strong historical nexus as well as geographic proximity to the land. Furthermore, the restoration of the lands must occur within a reasonable period after the tribe is restored. The Department’s definition of restored land has been guided by fairly recent federal court decisions in Michigan, California, and Oregon, and by “Indian lands” determinations issued by both the General Counsel of the National Indian Gaming Commission and the Office of the Solicitor within the Department of the Interior.

Negotiated settlements of Indian land claims brought under the Indian Trade and Intercourse Act (25 U.S.C. 177) require congressional legislation. Therefore, to qualify under the “settlement of a land claim” exception, the land transaction must have received Congressional approval as required by the Indian Non-Intercourse Act.

The Department recognizes that off-reservation gaming is a growing concern and is evaluating

the circumstances of off reservation gaming and its impacts on local communities. The Department looks forward to working with Congress on opening a dialogue to further define Congress's intent to permit or constrain the prospects for off-reservation gaming. This concludes my remarks. I will be happy to answer any questions the Committee may have. Thank you.