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June 27, 2018

VIA POSTAL SERVICE & E-MAIL
consultation@bia.gov

Fee to Trust Consultation
Office of Regulatory Affairs and Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street, NW, MS 4660-MIB
Washington, DC 20240

Re: Fee to Trust Consultation; 25 CFR Part 151 Regulations

Dear Acting Assistant Secretary Tahsuda:

The Elk Valley Rancheria, California, a federally recognized Indian tribal government (the "Tribe") received the December 6, 2017 "Dear Tribal Leader Letter."

The Tribe is located in Del Norte County, California. The Tribe was illegally terminated pursuant to the California Rancheria Act, but was restored to recognition through the *Hardwick v. United States* litigation. As a result of that illegal termination, the Tribe was not recognized as a federally recognized Indian tribe and was dispossessed of Tribal land. Further, the Tribe was denied the ability to engage in economic development and land acquisition during those decades of termination. As a result of our history, we write to express our grave concern regarding the notice issued by the Department of the Interior on July 20, 2017 proposing to amend the land-into-trust regulations (25 C.F.R. Part 151) and the related absence of government-to-government consultation.

Tribal trust land is essential to tribal self-governance. Tribes have sovereign authority to regulate and adjudicate activities that occur on their

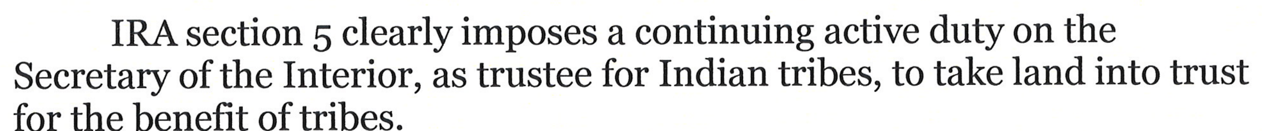
trust lands. This authority is essential for protecting and managing cultural and natural resources, promoting economic prosperity, and providing for the general well-being of citizens of tribal communities. Congress recognized the importance of trust land to the vitality of tribal governments and communities by passing the Indian Reorganization Act ("IRA"), which permits the Secretary of the Interior to take land into trust for tribes and is the statute that authorizes the Department's land-into-trust regulations.

The IRA was a repudiation of the disastrous federal policy of allotment. To put it plainly, the IRA was intended to right a historical wrong. Tribes still endeavor to recover from this wrong as well as more recent termination efforts such as the California Rancheria Act.

Section 5 of the IRA (25 U.S.C. § 5108) provides:

> The Secretary of the Interior is 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... Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

IRA section 5 clearly imposes a continuing active duty on the Secretary of the Interior, as trustee for Indian tribes, to take land into trust for the benefit of tribes.



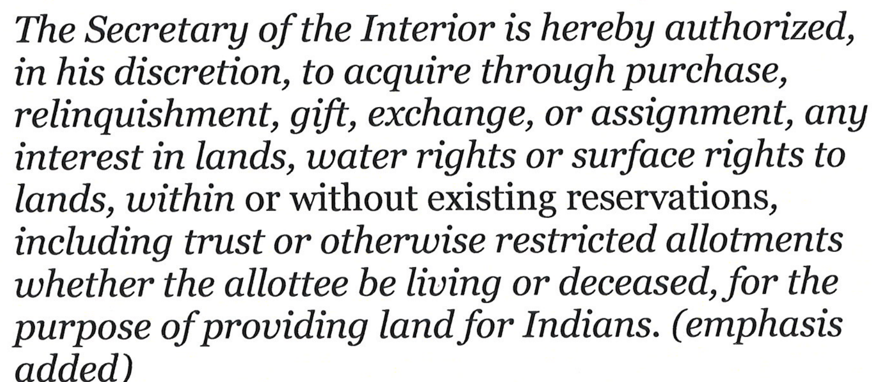
The federal government's role as trustee is rooted in promises made in treaties between the tribes and the United States and the otherwise corresponding relationship between tribes and the federal government. The trust responsibility includes fulfilling fiduciary obligations with regard to trust assets—like tribal trust lands. The Part 151 regulations govern a critical aspect of the federal government's obligations as trustee. The regulations dictate how the federal government determines whether to acquire land in trust for the benefit of tribal governments.

Amending these regulations, i.e., the process by which the trustee places real property assets in the trust, has a "substantial direct effect[] on . . . Indian tribes, [and] on the relationship between the Federal Government and Indian tribes . . . ." Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

1. **What should the objective of the land into trust program be? What should the Department be working to accomplish?**

In short, the objective should be to take land into trust for federally recognized Indian tribes in an expedient and efficient manner.

Congress gave the Secretary of the Interior the ability to place more lands in trust status for Indian tribes in straightforward language:



> *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. (emphasis added)*

Congress intended for the Secretary of the Interior (i.e., the BIA) to put off-reservation land into trust for Indian tribes starting in 1934. This congressional policy has remained unchanged.

2. How effectively does the Department address on-reservation land-into-trust applications?

The Department has processed on-reservation fee to trust applications in a more efficient manner in the last eight years. However, changing Department policies such as Central Office review of pending applications has resulted in a delay in processing all applications, whether on- or off-reservation.

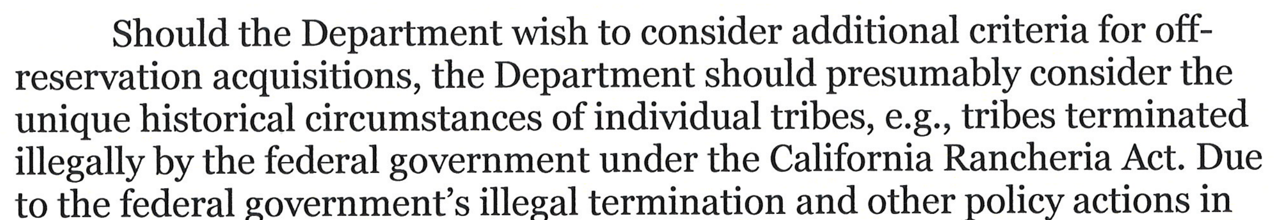
3. Under what circumstances should the Department approve or disapprove an off-reservation trust application?

The current Part 151 process is effective for processing off-reservation trust applications. No change is generally necessary or appropriate for off-reservation trust application.

The 1995 regulation amendments made the process of acquiring off-reservation land into trust more costly and time-consuming, and ensured that considerable weight would be given to local concerns.

Notwithstanding its efforts to placate the concerns of state and local governments about Indian tribes acquiring more land, the Department of the Interior defended lawsuits challenging the constitutionality of the IRA's land-into-trust language. The federal courts consistently rejected those opponents' arguments in cases out of South Dakota, Michigan, and Rhode Island.

Should the Department wish to consider additional criteria for off-reservation acquisitions, the Department should presumably consider the unique historical circumstances of individual tribes, e.g., tribes terminated illegally by the federal government under the California Rancheria Act. Due to the federal government's illegal termination and other policy actions in



Indian country, off-reservation land acquisitions are a necessity in Indian Country.

4. **What criteria should the Department consider when approving or disapproving an off-reservation trust application?**

The current Part 151 process is effective for processing off-reservation trust applications. No change is generally necessary or appropriate for off-reservation trust applications. The BIA's 1995 regulations adequately addressed concerns raised by off-reservation communities regarding the process for review and comment regarding a pending off-reservation trust application.

5. **Should different criteria and/or procedures be used in processing off-reservation applications based on:**

    a. **Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings, or Tribal health care, or Tribal housing)?**

The Tribe does not support any criteria that distinguishes the potential uses of the acquired trust land or changes to the regulations that further impose distinctions between on-reservation and off-reservation acquisitions.

The effects of proposed uses are more properly considered under NEPA and the type of use should not be a factor in whether the land should be acquired in trust. As you are aware, the NEPA analysis must analyze the proposed use and determine whether there are any significant effects to the human environment which would affect Interior's decision to acquire the land in trust status. That being said, the NEPA analysis for proposed acquisitions are time-consuming and expensive. However, depending on the land use and potential continuation of the same use, some applications qualify for categorical exclusions thereby reducing the costs associated with

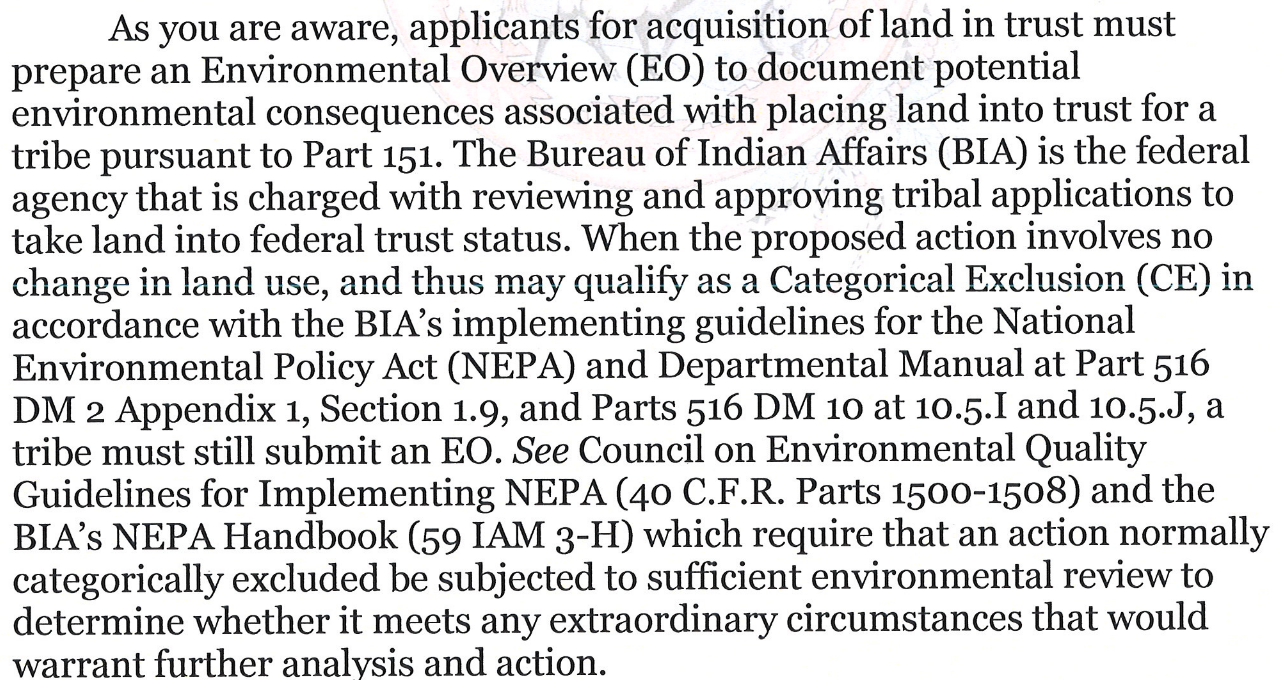
NEPA compliance. When an application is subject to a categorical exclusion under NEPA, the Department's processing of the application should presumably be more expedient.

b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?

Current regulations at Part 292 address off-reservation gaming acquisitions.

c. Whether the application involves no change in use?

Part 151 adequately addresses the acquisition of off-reservation parcels, including those that have no change in use planned. The existing regulations do not require any change as the Department can address applicable categorical exclusions from the NEPA requirements.



As you are aware, applicants for acquisition of land in trust must prepare an Environmental Overview (EO) to document potential environmental consequences associated with placing land into trust for a tribe pursuant to Part 151. The Bureau of Indian Affairs (BIA) is the federal agency that is charged with reviewing and approving tribal applications to take land into federal trust status. When the proposed action involves no change in land use, and thus may qualify as a Categorical Exclusion (CE) in accordance with the BIA's implementing guidelines for the National Environmental Policy Act (NEPA) and Departmental Manual at Part 516 DM 2 Appendix 1, Section 1.9, and Parts 516 DM 10 at 10.5.I and 10.5.J, a tribe must still submit an EO. *See* Council on Environmental Quality Guidelines for Implementing NEPA (40 C.F.R. Parts 1500-1508) and the BIA's NEPA Handbook (59 IAM 3-H) which require that an action normally categorically excluded be subjected to sufficient environmental review to determine whether it meets any extraordinary circumstances that would warrant further analysis and action.

The Department has recently requested comments on the scope of categorical exclusions. However, even in the situation where an application is eligible for a categorical exclusion, fairly lengthy EOs are still required to support the decision to utilize a CE. Depending on the nature of the application and land history, the EO can be quite lengthy and rival the current Administration's proposed page limits for an environmental impact statement (150 pages).

While burdensome, the Tribe doesn't suggest any change in the regulations or distinctions in the Part 151 process due to the type of NEPA review applicable to an application.

6. What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?

Section 5 of the IRA provides the authority for the Secretary to acquire land in trust for the benefit of the tribes and individual Indians. While we appreciate the Department's inquiry regarding trust status versus fee status, the inquiry only serves to create a basis for further attacks on tribal fee to trust applications.

The existing regulations list three categories of acquisitions:

1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

2) When the tribe already owns an interest in the land; or

3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

The current regulations also require a discussion of purpose and need for a trust acquisition despite the fact that the IRA does not contain such a

requirement. Any determination to file a fee to trust application is an individual tribal government decision. The rationale for such a decision is internal to each tribe. Those decisions might be driven by jurisdictional, cultural preservation, natural resource protection, business or market, tax, or other governmental concerns and might vary depending upon a number of considerations for individual parcels of land.

7. **Should pending applications be subject to new revisions if/when they are finalized?**

The Tribe does not support a change in the existing regulations to any standard that would increase the burden or time to process a fee to trust application. Likewise, should the Department amend the Part 151 regulations, those regulations should not have retroactive effect unless a tribe affirmatively chooses to utilize the new, amended regulations for a decision. The Department has utilized such a process for federal acknowledgement purposes (Part 81) and for leasing purposes (Part 162).

8. **How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?**

Local voices currently have multiple opportunities to participate in the Trust Application process. If the land in question is neither within nor contiguous to a reservation, the Secretary will give increasing scrutiny to the Tribe's claim of anticipated benefits and increasing weight to any adverse impact of acquisition on the State or locality's regulatory jurisdiction or tax base as the distance of the property from the Tribe's reservation increases. *See* 25 C.F.R. 151.11(b) and (d).

Much of your October 2017 testimony and the above question implied that local governments lack an opportunity to participate meaningfully in the Trust Application process. However, that implication is simply wrong.

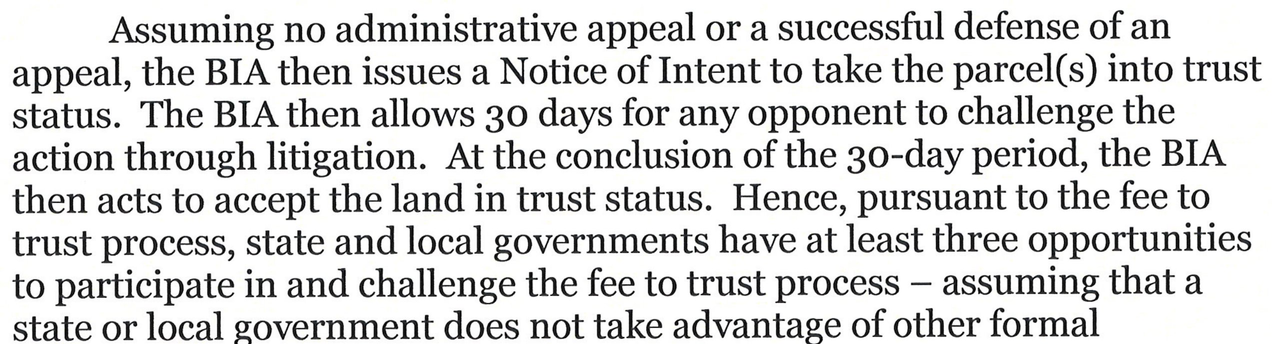
The current fee to trust, tribal-state compact environmental review, and federal environmental review processes contemplate, and practically

mandate, local government participation. Depending upon the requirements of the applicable tribal-state compact; type of land acquisition, and type of environmental review, local governments have as few as seven (7) opportunities and upward of fifteen (15) opportunities to comment and participate in the review process prior to a casino being constructed in conjunction with any Off-Reservation Trust Application.

Please allow the following to describe those opportunities.

A. Fee to Trust Application Process

The federal fee to trust application process is described in federal regulations found at 25 CFR Part 151. Those regulations provide that local governments and other interested parties (including neighboring tribes) will be provided notice of the application to acquire land in trust status. At the time of that notice, local governments are specifically requested to provide any relevant information regarding the impact on tax revenues and potential jurisdictional conflicts. See 25 CFR §§ 151.10(e)-(f); and 151.11(d). Further, upon completion of the fee to trust process, the federal government is required to issue a Notice of Determination. Upon issuance of the Notice of Determination, interested members of the public, such as local and state governments, may within thirty (30) days of the issuance of the Notice of Determination, file an administrative appeal of the federal agency's determination. That appeal would be filed before the Interior Board of Indian Appeals ("IBIA").



Assuming no administrative appeal or a successful defense of an appeal, the BIA then issues a Notice of Intent to take the parcel(s) into trust status. The BIA then allows 30 days for any opponent to challenge the action through litigation. At the conclusion of the 30-day period, the BIA then acts to accept the land in trust status. Hence, pursuant to the fee to trust process, state and local governments have at least three opportunities to participate in and challenge the fee to trust process – assuming that a state or local government does not take advantage of other formal

opportunities to provide comments regarding the proposed trust acquisition, e.g., as a participating or cooperating agency.

B. Tribal-State Compact Environmental Review Process

In California, tribes are required to not only assess the off-reservation impacts of a proposed gaming project but are required to meet and confer with local governments, if so requested. See 1999 Compact § 10.8.

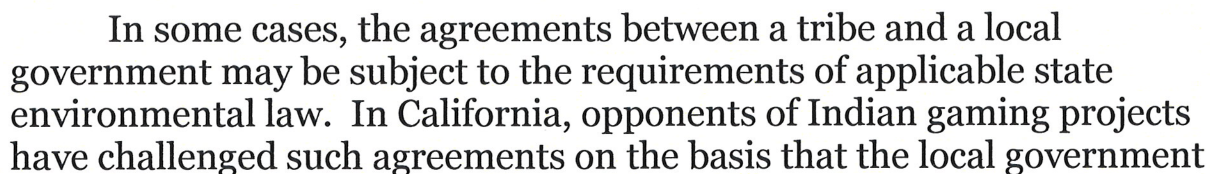
Further, the 2004 tribal-state compact amendments and more recent compacts give local governments an unprecedented role in the development of gaming facilities on Indian lands. See e.g., 2004 Compact § 10.8. Pursuant to said section, tribes must perform a Tribal environmental review and provide that document to the local government for review. Further, a tribe and a local government are required to attempt to conclude an inter-governmental agreement regarding mitigation of off-reservation impacts related to tribal government gaming. If the tribe and a local government cannot successfully conclude a mitigation agreement within the timeframes prescribed in the compact, the parties may proceed to "baseball-style" arbitration, i.e., an arbitrator will review the parties' respective last best offers and accept one, which will be binding upon the parties.

C. Federal Environmental Review Process

In addition to NEPA, described briefly above, the environmental review process provides local governments with a role under the Endangered Species Act, Clean Water Act, Clean Air Act, Coastal Zone Management Act, and National Historic Preservation Act, among others.

D. State Environmental Review Process

In some cases, the agreements between a tribe and a local government may be subject to the requirements of applicable state environmental law. In California, opponents of Indian gaming projects have challenged such agreements on the basis that the local government



failed to comply with the environmental review requirements of the California Environmental Quality Act ("CEQA"). Likewise, depending upon the nature of the project, the California Environmental Quality Act may be applicable to permits necessary for off-reservation work or related agreements.

Balance of State and Local Jurisdiction Concerns; Weight Given to Public Comments

In light of the above, state and local jurisdictions have ample opportunity to express their concerns about the fee to trust application, tax impacts, jurisdictional issues, and environmental issues, among others. The IRA does not require the Secretary to balance the concerns of state and local jurisdictions with tribal applications for trust acquisition. The existing regulations provide a process to consider the concerns of state and local jurisdictions as well as any of the public.

In light of the existing regulatory provisions regarding acquisition of land in trust, the Department must consider those comments and address them. However, little weight should be given to those concerns as the IRA does not require any such balancing and much less a "veto" of an application due to state or local government concerns. Rather, due to the differing relationships between tribes and their respective state and local governments, some "concerns" of state and local governments may simply be antagonistic or worse. Those tribes with better relationships might be able to conclude MOUs (discussed below) while others might simply be forced to proceed over the opposition of their respective state or local governments. Giving credence to otherwise baseless opposition submitted by state or local governments should not derail a fee to trust acquisition.

9. **Do Memoranda of Understandings (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved**

government-to-government relationships, should that be reflected in the off-reservation application process?

Voluntary MOUs and inter-governmental agreements tend to facilitate improved tribal-local relationships. However, mandatory MOUs tend to skew the relationship(s) such that state and local governments threaten tribes with a "veto" of trust acquisitions or otherwise attempt to extort tribes for money or other concessions.

The Tribe understands that the Department does not intend to create a veto situation by requiring MOUs in this process but is considering whether the existence of an MOU would expedite applications. The Tribe does not support any mention of MOUs in the Part 151 regulations as any such provision will be used by opponents as the basis for administrative and court challenges.

10. What recommendations would you make to streamline/improve the land into trust program?

The April 2017 Departmental memorandum removing off-reservation land acquisitions from the BIA Regions and transferring those decisions to Central Office should be rescinded. The local BIA Realty offices know their tribes the best, as well as the surrounding communities. For this reason, it makes the most sense to allow the Region to continue to process such applications. In this manner, Department headquarters can focus its efforts on the small number of acquisitions that are out of the ordinary, or otherwise controversial in nature.

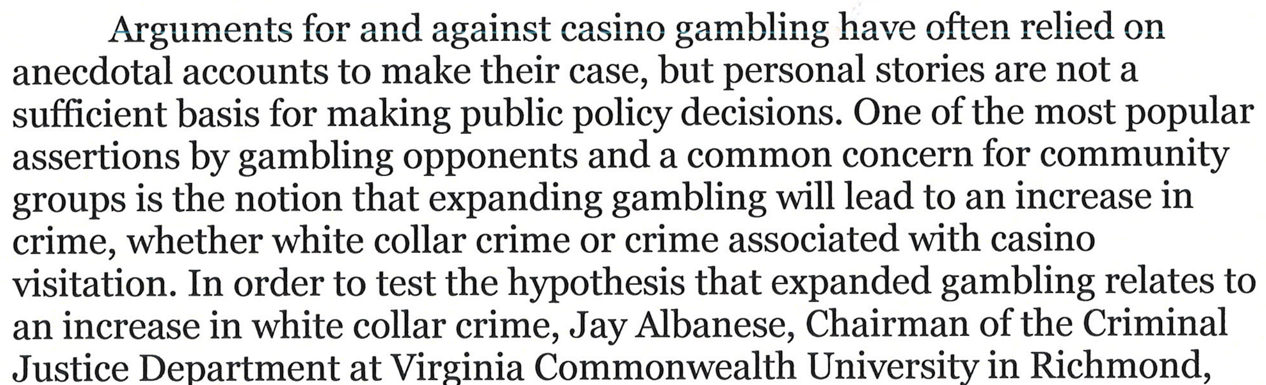
The Department should refrain from making any changes to the current *Carcieri* M-opinion. While the M-opinion adds an additional layer of review for certain applications, it is a necessary tool in light of the *Carcieri* opinion and is a good example of how the Department can actively engage with tribes to fulfill the trust responsibility.

The Department should not reinstate the 30-day stay period between when a decision is made to acquire land in trust and when the Department

actually acquires the land in trust. As stated repeatedly across Indian Country, this policy frustrates tribal interests by encouraging often frivolous challenges to trust acquisitions that take years to resolve, all the while keeping the land out of trust and subjecting the tribe to state and local taxes throughout the duration of the challenge.

Acting AS-IA Testimony – October 4, 2017

On October 4, 2017, you testified before the Senate Committee on Indian Affairs in an oversight hearing regarding the Indian Gaming Regulatory Act. In your written testimony, you stated that Indian gaming "can introduce crime, such as drugs and prostitution" and that "local voices must have a fair opportunity to provide insight and input into these decisions." Further, you implied that the fee to trust process is not "balanced" and that tribes could somehow surprise a community by initiating a gaming operation once land is acquired in trust by the federal government.



The Alleged Relationship between Gambling and Crime

In short, we disagree with your testimony that Indian gaming introduces crime into communities. Numerous studies refute your testimony.

Arguments for and against casino gambling have often relied on anecdotal accounts to make their case, but personal stories are not a sufficient basis for making public policy decisions. One of the most popular assertions by gambling opponents and a common concern for community groups is the notion that expanding gambling will lead to an increase in crime, whether white collar crime or crime associated with casino visitation. In order to test the hypothesis that expanded gambling relates to an increase in white collar crime, Jay Albanese, Chairman of the Criminal Justice Department at Virginia Commonwealth University in Richmond,

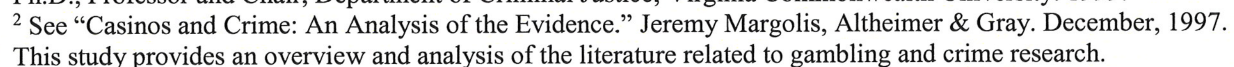
reviewed FBI crime data for nine casino markets.[1] His study is the most comprehensive examination to date of the impact of casino gambling on white collar crime. His main finding is:

> "The results do not support the claim that casino gambling contributes significantly to trends in embezzlement, forgery and fraud. In addition to statistical data that document arrest trends, interviews with convicted embezzlers reveal that single factors do not cause embezzlement...Given the results of interviews with several hundred embezzlers, *it is clear that gambling does not cause white collar crimes.*"

In addition to concerns about white-collar crime, communities contemplating the introduction of casinos are often concerned about increases in other types of crime rates associated with visitation. Studies consistently fail to find a direct link between gaming and crime. Research suggests that communities with casinos are equally as safe as communities without them. In fact, in some cases, the number of crimes and crime rates decreased after the introduction of casinos to a community:

- Atlantic City's crime rate, which peaked in 1982, experienced a steady decline since then, even as visitors and gaming revenues continued to climb.
- Las Vegas has a lower crime rate and is safer than virtually every other major American tourist venue.
- Joliet, Illinois is enjoying its lowest level of crime in 15 years.
- Crime rates in Baton Rouge, Louisiana have decreased every year since casino gaming was introduced.[2]

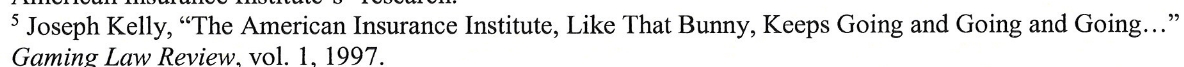
[1] "Casino Gambling and White Collar Crime: An Examination of the Empirical Evidence." By Jay S. Albanese, Ph.D., Professor and Chair, Department of Criminal Justice, Virginia Commonwealth University. 1999.
[2] See "Casinos and Crime: An Analysis of the Evidence." Jeremy Margolis, Altheimer & Gray. December, 1997. This study provides an overview and analysis of the literature related to gambling and crime research.



Common methodologies in the study of the alleged link between gambling and crime include surveys of public perception and measurement of crime rates over time (before and after the inception of gaming). More useful analyses often use regression to analyze rates of specific crimes (typically major crimes, including violent and property crime). Data often comes from the Federal Bureau of Investigation (FBI) or from state or county law enforcement offices. The major overriding methodological issue is whether the crime rates are measured with a population adjusted for visitors or not. When crimes are reported to the FBI, the rates are calculated against the permanent population of the town without taking into account the visitor/tourist population. When the number of visitors to gaming cities is taken into account, the risk and incidence of victimization actually decreases for residents.[3]

Perhaps the most widely quoted source for the alleged link between gambling and crime is the American Insurance Institute (AII), which has been quoted as the source for a common claim that "40 percent of all white-collar crime is related to gambling." This statistic has been cited widely by politicians who argue against casino gambling and noted in a research document by the National Gambling Impact Study Commission.[4] An investigation by professor Joseph Kelly, however, has revealed that the American Insurance Institute does not exist and apparently never did. He also found no basis to support the 40 percent statistic.[5] While there is an intuitive appeal to the notion that crime is related to casino gambling, no systematic data supports this view.

[3] "Casinos and Crime: An Analysis of the Evidence." Jeremy Margolis, Altheimer and Gray, December 1997.
[4] Robert Goodman, *The Luck Business* (New York: The Free Press, 1995) p. 50. Paul Simon, 1995. p. 212. The White paper on casinos and crime produced by the National Gambling Impact Study Commission also cited the American Insurance Institute's "research."
[5] Joseph Kelly, "The American Insurance Institute, Like That Bunny, Keeps Going and Going and Going…" *Gaming Law Review*, vol. 1, 1997.

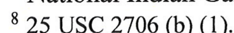


Strict Regulation of Indian Gaming Deters Crime[6]

While tribal governments nearly always invest gaming revenues into improved law enforcement efforts, Indian gaming facilities are also subject to multiple layers of regulation in order to ensure the safety of patrons and the integrity of games, among other objectives. Since tribal gaming is governmental gaming, tribal governments are regulators—in fact, one of many regulators—of tribal gaming (see Figure 1). Regulating the tribal gaming industry is a costly undertaking but a necessary part of the business. Research by the National Indian Gaming Association (NIGA) into the resources dedicated to tribal gaming regulation reveals that tribal governments spend at least $164 million per year on tribal gaming regulation. In addition to funding their own tribal gaming commissions and enforcing tribal gaming ordinances, NIGA found that tribal governments collectively give $40 million to states and another $8 million to the National Indian Gaming Commission in order to support regulation efforts. Tribes also train and employ over 2,800 commissioners and regulators nationally.[7]

Through the Indian Gaming Regulatory Act, Congress created the National Indian Gaming Commission (NIGC) to serve as the federal regulatory agency for tribal gaming. The NIGC is an independent federal commission housed within the Department of the Interior. The NIGC is an essential component of the regulation of tribal gaming and is involved in all the phases of development of a tribal gaming operation as well as directly charged with monitoring Class II gaming.[8]

The IGRA spells out a number of regulatory requirements that must be met before Class III gaming can proceed. The NIGC must review and approve all gaming ordinances. The NIGC also reviews all contracts with outside management companies. This review includes the use of field



[6] See also, "Social and Economic Analysis of Tribal Government Gaming in Oklahoma." July, 2002. Available online at www.ksg.Harvard.edu/hpaied

[7] National Indian Gaming Association, "Indian Gaming Regulation Survey," April 2002.

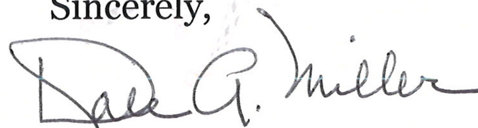
[8] 25 USC 2706 (b) (1).

investigators to conduct background investigations on individuals and entities with management responsibility or related financial interest for a tribal facility. After the gaming venue is operational, the NIGC has a number of important roles. The IGRA requires that all "key employees" and primary management officials of a gaming operation are properly licensed by the tribe. All gaming tribes submit fingerprint cards on key employees along with employee applications, investigative reports, and suitability determinations. The NIGC reviews this information and acts as a channeling agency on behalf of the tribes to process fingerprint cards through the FBI.

The NIGC also has the broad authority to determine whether a tribal gaming operation is complying with all provisions of the IGRA, all NIGC regulations, and all tribal regulations. With this regulatory authority comes broad enforcement authority. If the NIGC determines that the IGRA, NIGC regulations, or tribal regulations are violated, it may issue notices of violation, closure orders, and civil fines up to $25,000 per day, per violation, as can each gaming commission.[9]

We look forward to working with you to ensure these obligations are met and stand ready to assist you in any way that we can.

Sincerely,



Dale A. Miller
Chairman

cc: Elk Valley Tribal Council
General Counsel

[9] Penny J. Coleman, Testimony before the National Gambling Impact Study Commission, July 30, 1998.