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Indian Gaming – The Next 25 Years

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Testimony of Kevin K. Washburn Assistant Secretary for Indian Affairs United States Department of the Interior Before the Senate Committee on Indian Affairs Oversight Hearing on "Indian Gaming – The Next 25 Years"

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Good afternoon Chairman Tester, Vice Chairman Barrasso, and Members of the Committee. My name is Kevin Washburn and I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide the Department's views at this oversight hearing on the Indian Gaming Regulatory Act (IGRA).

Indian Gaming 25 Years After the Enactment of IGRA.

As this Committee is well aware, in 1987 the Supreme Court affirmed the right of tribes to conduct gaming on their reservations. The following year, Congress enacted IGRA to establish a federal regulatory framework for the conduct of gaming on Indian lands. When IGRA was enacted, non-Indian casino gaming was limited primarily to Nevada and New Jersey. At that time, tribal gaming on Indian lands generated estimated annual revenues of between $100 million and $500 million.

More than twenty-five years later, much has changed. Tribal gaming on Indian lands since 1987 has grown dramatically. However, since 2007, Indian gaming revenues have grown very little and have stabilized in the range of $26 to $28 billion annually. Commercial (non-Indian) gaming is now much larger than Indian gaming, and the commercial gaming industry continues to grow, particularly when so-called "racinos" are included. In sum, while Indian gaming growth appears to have plateaued, commercial gaming continues to grow.

Put another way, Indian gaming's overall share of the gaming market is decreasing.

After 25 years, the benefits of Indian gaming are readily apparent. Indian gaming revenues are important for tribal governments. Gaming revenues eclipse, by a large measure, all federal appropriations for Indian tribes. Gaming revenues are devoted to every aspect of tribal communities – from housing to elder care to language revitalization and job training. Gaming provides employment opportunities and spurs business development in many communities that otherwise struggled through generations of poverty. While Indian gaming is not a panacea to poverty for all tribal communities, it has dramatically righted the trajectory for many tribes and helped them to become much more successful and self-sufficient.

While we attribute much of the improvement in the delivery of governmental services in Indian country in recent decades to the development of the federal policy favoring tribal self-governance, Indian gaming has helped to underwrite many of the successes we have seen. Indian gaming revenues have helped to develop tribal governmental capacities in myriad ways. For example, many members of the newest generation of tribal lawyers, doctors and other professionals were supported by scholarships made possible through Indian gaming.

While most of the Indian gaming revenues are used to pay wages, the costs of financing, and other ordinary costs of doing business, the profits from Indian gaming are used primarily to improve the welfare of Indian people. Indian gaming, after all, is required by law to be owned and licensed by tribal governments and to primarily benefit the Indian tribe and Congress has specified that Indian gaming revenues may be used only for specific purposes.

While tribes remain leaders in the industry and continue to dominate in some regional markets, they are facing more and more competition from state-licensed commercial casinos. In contrast to governmental revenues developed by Indian gaming, the profits of non-Indian commercial casinos are used differently. Commercial casinos are ordinary “for profit” businesses and they have a different legal duty: to enrich their shareholders. It is thus disappointing to us, in some ways, that we see growth in Indian gaming slowing and commercial gaming taking an ever larger share of the gaming market.

We frequently face a misperception that tribes are acquiring land and opening gaming facilities at a fast pace. The growth numbers alone belie this argument. Of the over 1,700 successful trust acquisitions processed since the beginning of the Obama administration in 2009, fewer than 15 were for gaming purposes and even fewer were for off-reservation gaming purposes. Also, it is not uncommon for a decade of thoughtful deliberation to pass

between the time a tribe applies for land into trust for gaming and the Department decides on the application and, if successful, takes the land into trust.

The numbers of gaming operations provided by the NIGC in its annual revenue reports confirm that the number of gaming operations has remained flat in recent years. In 2009, the NIGC announced in its annual gaming revenue report that there were 419 Indian casinos operating nationwide, and then it announced 422 in 2010, 421 in both 2011 and 2012, and 416 in 2013. In sum, concerns about dramatic growth of Indian gaming are unfounded today.

In contrast, commercial non-Indian gaming casinos and racinos have grown considerably during the same time period. Expanding commercial gaming makes tribes nervous.

Of course, not all of the potential new competition comes from commercial casinos. Some of the competition comes from other tribes. Though new Indian casinos are rare, they too can cause disruption to existing facilities. Competition can be tough in maturing markets with slower growth. The potential for disruption to existing facilities is a concern that we understand and it is one of the reasons we follow the law so carefully in making decisions. Because of the potential impact on tribes, we know that we must always be very cautious in authorizing new Indian gaming opportunities and that we should do so only with clear legal authorization and careful adherence to existing regulatory procedural requirements.

The Regulatory Framework of IGRA

As you know, IGRA creates a regulatory scheme that seeks to balance tribal, state, and federal interests in regulating gaming activities on Indian lands: Class I gaming is regulated exclusively by Indian tribal governments; Class II gaming regulation is reserved to tribal governments in cooperation with the federal government; and, Class III gaming is regulated primarily by tribal governments in cooperation with the federal government and, to the extent negotiated in an approved compact, a state government. The Department has certain roles in the regulation of Indian gaming; other roles are performed by the National Indian Gaming Commission and tribal or state gaming regulators. Specifically, under IGRA the Department of the Interior reviews tribal-state gaming compacts and fee-to-trust applications for gaming. The NIGC reviews tribal gaming ordinances and management contracts and retains civil enforcement authority for violations of IGRA.

With regard to compacts, IGRA carefully describes the topics to address in a compact. Congress specifically named six subjects related to the operation and regulation of Class III gaming activity that may be addressed in a compact, and also included a limited catchall provision authorizing the

inclusion of provisions for "any other subjects that are directly related to the operation of [Class III] gaming activities." The Department closely scrutinizes tribal-state gaming compacts and disapproves compacts that do not squarely fall within the topics delineated in IGRA. For example, Class II gaming is not an authorized subject of negotiation for class III compacts. The regulation of Class II gaming is reserved for tribal and federal regulation.

As the Committee is well aware, section 20 of IGRA generally prohibits gaming on lands acquired in trust after IGRA's enactment on October 17, 1988, and contains only a few exceptions. These limited and narrow exceptions operate to provide equal footing for certain tribes that were disadvantaged in relation to land. These include: the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, restored lands for tribes restored after termination, and lands acquired in settlement of a land claim. In other cases, off-reservation trust lands are eligible for gaming only if the Department makes a two-part determination that gaming on the parcel is in the best interest of the tribe and not detrimental to the surrounding community and the Governor of the State concurs in that determination. In the 25 years since the passage of IGRA, only eight (8) times has a governor concurred in a positive two-part determination.

The previous Administration promulgated extensive regulations to implement section 20 and the Department continues to apply these rigorous standards to every gaming decision. Also, the Department's review of trust applications – regardless of location or the activity the Tribe proposes to acquire the land for – is lengthy and deliberate. For trust acquisitions, the Department carefully considers the concerns of all stakeholders, including, of course, the applicant tribe, but also the potentially impacted state, local and tribal governments and the public at large. The Department actively solicits the views of these stakeholders to insure that the decision is a fair decision for the entire community.

It is important to note that the public, state and local governments, and other tribal governments have many opportunities to participate throughout the trust-acquisition process. Prior to deciding whether to place the land into trust, the Department seeks comment from state and local governments; the public and local governments are notified and given an opportunity to provide input during the environmental review process under the National Environmental Policy Act (NEPA). Moreover, before off-reservation land can be found eligible for gaming through the two-part determination process, the Department requests additional comments from nearby tribal, state and local governments. Among other interests, the Department is interested in the economic consequences to the local community. Of course, in most cases, significant cooperation occurs between tribes and state and local governments in light of needs for adequate water treatment at new facilities,

resolving traffic, transportation and other infrastructure issues, and sometimes emergency services. As a result of all of this communication, we find that the interests of tribes and their surrounding communities often become accommodated, if not aligned.

Conclusion

The future of Indian gaming is difficult to predict. Revenues from Indian gaming have had a strongly positive impact on tribal governments, helping tribes to build capacity and develop governmental infrastructure. That said, few economic resources remain productive forever. We continue to encourage gaming tribes to diversify economically, just as we encourage non-gaming tribes to be creative in seeking out economic development opportunities.

This concludes my prepared statement. Thank you for inviting the Administration to testify. I am happy to answer any questions the Subcommittee may have concerning our role with respect to Indian gaming.