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Testimony on the Department of the Interior's New Policy on Off-Reservation Acquisitions of Land in Trust for Indian Gaming, before the United States House of Representatives Natural Resources Committee, 110th Congress, Second Session

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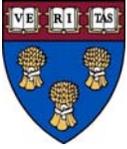
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Testimony of Professor Kevin K. Washburn

On the Department of the Interior's New Guidance on Off-Reservation Acquisition of Land in Trust for Indian Gaming

Before the Natural Resources Committee, United States House of Representatives

110th Congress, 2d Session

February 27, 2008

Thank you for inviting me to appear before the Committee again to discuss important matters related to Indian gaming. You have asked for my views on a recent Guidance Memorandum issued by the Assistant Secretary of Indian Affairs on the acquisition of off-reservation land in trust for Indian gaming.

Introduction

The policy of the United States, as expressed by Congress, is to assist American Indian tribes in restoring some of the 90 million acres that tribes lost during the allotment era in the late Nineteenth and early Twentieth Centuries. See 25 U.S.C. § 465. It is also the policy of the United States, as expressed by Congress, to encourage Indian gaming as a means of “promoting tribal economic development, self-sufficiency, and strong tribal governments.” 25 U.S.C. § 2702. Although Congress has delegated to the Secretary of the Interior the power to help tribes re-acquire lands, public appropriations for tribal land acquisitions have rarely kept pace with tribal hopes and dreams for land restoration. In recent years, gaming has given tribes financial resources, and access to more financing, that will allow them to acquire more tribal lands. Off-reservation acquisitions of land for Indian gaming can be justified by Congressional policies favoring tribal land restoration as well as policies favoring Indian gaming as a source of tribal economic development and self-sufficiency.

However, off-reservation acquisitions for gaming are controversial. For neighboring tribes and for state and local communities, gaming can have ill effects. First, gaming developments, like any construction projects and commercial activity, can have negative effects on neighboring communities, related to noise, traffic, disruption and environmental degradation. Second, casinos may increase social ills, such as compulsive (or pathological) gambling. Third, the economic well-being of many tribes depends on having a monopoly or a quasi-monopoly in the market they serve.

From an economic standpoint, new casinos often cannibalize the business of existing casinos. While competition is generally a positive value in business because it leads to a higher quality product (or a higher quantity of product at a lower price), competition is not necessarily advantageous in gaming. Indeed, as a matter of public policy, we should not necessarily want casinos to “sell more gaming” at a lower cost, or to offer a better product that is more widely consumed. The product itself comes with some social costs.

Thus, as a matter of public policy, we do not value casinos because of the value of the casino “product.” Rather, we *tolerate* casinos for the governmental revenues they produce and in recognition of the inevitability of illegal gaming if we try to prohibit legal gaming activity. If we do not authorize legal gaming from which governments derive revenues, we will nevertheless have illegal gaming from which governments do not. In any event, full free market competition in gaming is not necessarily good. This is why most states now offer state-sponsored lotteries, but they do not allow private vendors to compete for lottery customers.

Because of the controversial nature of Indian gaming, decisions about off-reservation land-into-trust acquisitions often have high political costs. Because of the political costs, federal decision-makers naturally look for ways to avoid facing these difficult questions. Because of the forces of inertia and the power of the status quo, it is often much easier for the Secretary to deny a land-into-trust application than to grant one.

On January 3, 2008, the Assistant Secretary of the Interior for Indian Affairs issued a memorandum providing guidance on taking off-reservation land into trust for gaming purposes (hereinafter “Guidance Memorandum”). The Guidance Memorandum seems designed, first, to make it easier for the Secretary to deny off-reservation land-into-trust applications, and second, to discourage new applications for land-into-trust.

While I understand Interior’s cautious approach toward Indian gaming and its desire for a bright-line rule that will mitigate the political controversy surrounding such decisions, the Guidance Memorandum is problematic for several reasons. First, the policy expressed therein is based on a fundamental misconception of the value and purpose of Indian gaming. Second, it is overly broad, reaching non-controversial trust applications, and thereby departing from the values that ought to drive federal decisions involving Indian affairs. Finally, it seems unfair as a matter of process and ill-advised as a matter of policy. In the testimony below, I will explain some of the problems with the Guidance Memorandum and comment more generally on Interior’s dysfunctional decision-making process in the land-into-trust context.

I. The Department of the Interior’s Guidance Memorandum Misunderstands the Benefits of Indian Gaming; For Tribes, Gaming is about Revenue, Not Jobs.

While the Guidance Memorandum is useful in understanding Interior’s position on land-into-trust, Interior’s analysis is unsupportable and misguided. The Guidance Memorandum claims that an off-reservation gaming operation that lies beyond a “commutable distance” from the reservation has “considerable” “negative impacts” on reservation life in that such a casino “would not directly improve the employment rate of tribal members living on the reservation.” Guidance Memo at p. 4. This conclusion is a non sequitur; it is also flat wrong. It showcases an apparent misconception about the benefits of Indian gaming.

It is likely impossible to find an off-reservation Indian gaming operation that has had negative economic effects on reservation life. The Guidance Memorandum seems to assume that the purpose of Indian gaming is to provide jobs to tribal members. A little perspective is in order. While it is true that an Indian gaming operation can provide some employment advantages to any community, primarily because Indian gaming tends to provide a living wage and reasonably good benefits for low- and medium-skilled workers in the service sector, the vast majority of people who work in Indian casinos nationwide are non-Indians. Indeed, while Indian gaming may have been a “full employment act” for gaming lawyers and for non-Indians in many communities, it has not had the same result for Indian citizens.

This should not, however, be particularly troubling. No serious observer would claim that casino employment for tribal members is the primary benefit of Indian gaming. Rather, gaming has provided a stream of revenue to tribes to improve reservation public safety, healthcare and education, and to pursue other economic development opportunities.

While the Guidance Memorandum misunderstands the importance of gaming jobs, it also misstates the impact of its new policy on reservation jobs. The Guidance Memorandum’s central claim about jobs -- that off-reservation casinos fail to provide jobs on the reservation -- is patently ridiculous. Revenues from off-reservation gaming operations pay for tribal jobs on the reservation in a variety of areas, including healthcare, elderly services, social services, education, law enforcement, and numerous other areas of public service, many of which provide direct services to reservation residents. Indeed, such tribal public service jobs – involving tribal members directly helping other tribal members – may be much more personally fulfilling than casino jobs. Indian gaming pays for these jobs in a very direct way.

In presuming that increasing reservation jobs is one of the most important aspects of Indian gaming, the Guidance Memorandum departs from the Indian Gaming Regulatory Act. IGRA describes the benefits of Indian gaming as tribal governmental revenues, not jobs. Indeed, nowhere in IGRA are jobs specifically mentioned, but IGRA specifically refers to “tribal revenues” or “tribal governmental revenues” repeatedly throughout the Act. *See, e.g.*, 25 U.S.C. §§ 2701(1) & (4), 2702, and 2710(b)(2).

The fact that IGRA was not focused primarily on jobs should not surprise anyone. The closest analogues to Indian gaming operations are state lotteries. Like tribal casinos, state lotteries are not valued so much for the jobs they create. Rather, they are valued for the revenues that they provide, which, in turn, serve other governmental functions. In many states, lottery revenues are devoted to education. Thus, lottery revenues pay teachers’ salaries and increase jobs in teaching. Tribal gaming operations work in much the same way. Tribal casinos pay for teachers, social workers, doctors and nurses, services for the elderly and myriad other jobs. The Guidance Memorandum is flawed in failing to understand this very basic point.

While it is possible to find policy-makers extolling the job-generating virtues of Indian casinos, this is often used to justify Indian gaming within non-Indian communities and to explain the benefits to non-members. In sum, for Indian tribes, Indian gaming is not primarily a jobs initiative; it is a *revenue* initiative.

II. For Indian Tribes, *Off-Reservation Gaming Operations Are in Some Ways Better than On-Reservation Gaming Operations and Should Be Encouraged, Especially When They Are Supported by State and Local Governments.*

A casino is not an unmitigated good for any community. As any Not-In-My-Back-Yard (NIMBY) community group will tell you, a casino may provide some economic benefits in jobs and tourism, but it also has significant social costs. It can increase traffic and congestion, can create or exacerbate public safety issues, and can lead to an increase in gaming-related social harms, such as pathological (or compulsive) gambling. Thus, one rarely sees wealthy communities clamoring for casinos. Gaming tends to be sought by communities that need economic development and are willing to put up with the inevitable negative externalities. Indeed, much of the planning as to location and siting of gaming facilities is focused on mitigating such harms.

For Indian tribes, casinos can have even more particular side effects in that they bring outsiders onto the reservation, sometimes overwhelming the reservation character of the community and interfering with tribal culture, tribal daily life, and even tribal values. Indeed, to Indian communities, the most positive aspect of casinos is the revenues that they provide. Thus, contrary to the conclusion of the Guidance Memo, in some ways, the ideal Indian gaming operation is one that is outside the reservation. Off-reservation casinos can provide all the revenue benefits of Indian gaming without the corresponding interference with tribal life.

The Guidance Memo claims that taking off-reservation land into trust for a casino can “defeat or hinder” the Indian Reorganization Act purpose to restore the tribal land base. This assertion is just as ridiculous as the claim that off-reservation Indian gaming produces no jobs on the reservation. The chief obstacle to restoration of the tribal land base over the past seven decades has been the Department of the Interior’s failure to ask for – and Congress’s failure to appropriate – sufficient funds for tribal land acquisition. Off-reservation gaming operations can give tribes the revenues to overcome this obstacle to land restoration. Gaming off the reservation can be used to support land acquisition on the reservation. Indeed, many tribes use their gaming revenues, in part, to fund reservation land acquisition and land consolidation programs.

III. Off-Reservation Casinos That Are Non-Controversial Should be Approved, Without Regard to Party Politics.

Congressional policy, as expressed in the Indian Gaming Regulatory Act, suggests that land acquisitions for Indian gaming should be encouraged, especially if state and local communities concur. In light of the policy values expressed in IGRA, the Secretary’s recent denial of Indian land-into-trust acquisitions that were supported by local communities and the governor of a state is difficult to understand. It is unclear what federal interest justifies rejecting a project supported by local, tribal and state officials.

While the Secretary has an important role of serving as a buffer between tribes and states in the context of disagreement, the Secretary should not become an obstacle to joint efforts at economic development when tribes and states agree on the value of an off-reservation Indian gaming operation. The Secretary’s denial of land into trust in such circumstances is contrary to tribal self-determination and self-sufficiency. It is also contrary to basic values in a federalist governmental system which suggest that the federal government should intervene in local affairs only when there is a clear federal interest in doing so. While the federal government has a

responsibility to protect tribes from state interference in some circumstances, no federal interest justifies the Secretary's refusal to take land into trust when tribes, local communities and the state's governor agree. To justify taking such action in the face of wide local agreement, Interior should articulate a clear federal interest. In the absence of such an interest, the action appears to represent a decision made on the basis of crass party politics. Indeed, the tortured reasoning in the Guidance Memorandum may be intended to serve as cover for cynical political considerations.

IV. In Light of the Haphazard Development of Interior Policy on Land-Into-Trust for Gaming, a Clear and Consistent Statement of Policy Is a Good Idea, But It Should Be Developed in a Public Process with Tribal and Public Input.

Partially because of the many externalities of casinos (and large economic development projects in general), taking land into trust for tribes is often controversial, especially outside a reservation. Given the political salience of this important issue, land-into-trust policies should not be developed behind closed doors without public input. Much of the weakness of the Guidance Memorandum is directly attributable to the failure to consult on these important policies with tribal governments and other interested members of the public. If Interior had consulted with affected interests, it likely would not have produced a memorandum with such weak analytical conclusions.

Current law anticipates broad public involvement in Executive Branch policy-making on land-into-trust issues. Department of the Interior regulations on land-into-trust, for example, require consultation with state and local government officials on such decisions. See 25 C.F.R. § 151.11. Likewise, although Section 2719 of IGRA generally prohibits gaming on land taken into trust after October 17, 1988, it gives the Secretary discretion to allow such gaming when the Secretary has consulted with "the Indian tribe and appropriate State and local officials" as to whether gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community" and the state governor concurs in such a decision. In other words, the Secretary is given broad discretion, but only in circumstances in which wide public participation occurs (indeed, absent such consultation, the Secretary lacks discretion on these issues and IGRA governs).

Since the New Deal, the notion that the public should have a role in agency decision-making has been a bedrock principle of American government. Given the wide interest and significant local ramifications of decisions about gaming, however, and the very specific responsibilities for consultation with tribes and others in these contexts, decisions about Indian gaming policy should not be made behind closed doors or without significant public participation.

The Clinton administration spent nearly two years attempting to formulate a coherent policy for land-into-trust decisions. Its extensive study of this issue produced a rule that was adopted at the end of President Clinton's second term, on January 16, 2001, to become effective 30 days later. The Bush Administration may have been wise to be suspicious of a rule that was adopted by a lame duck administration so late that it would never apply until after that administration was gone. However, it was unfortunate that the Bush Administration failed to capitalize on the significant sophistication that had developed surrounding this issue. The previous administration had sought significant public involvement on this question.

In light of the current administration's rejection of the previous administration's new rule for off-reservation acquisitions, the problem has festered. In 2004, several high ranking officials produced an "Indian Gaming Paper," ostensibly to answer an inquiry by Secretary Gale Norton on the extent of her discretion to approve off-reservation acquisitions for gaming. Though the Indian Gaming Paper was apparently not developed with public participation, it reached a sensible conclusion. The Indian Gaming Paper concluded that "distance limits should not be grafted onto IGRA. To do so could deny the very opportunity for prosperity from Indian gaming that Congress intended IGRA to foster." Michael Rosetti, et al., Indian Gaming Paper, at *13 (February 20, 2004).

Though it was never formally enacted as a rule, the 2004 Indian Gaming Paper received widespread public attention. For almost four years, Indian tribes relied on this interpretation in myriad ways. They invested substantial resources into negotiating with communities, as well as state officials, private developers and investors. And they submitted land-into-trust applications believing that they could rely on the Department's guidance. During this time, tribes relied in good faith on the belief that distance from the reservation would not be a significant factor in the decision on land-into-trust applications.

Off-reservation acquisitions have continued to occupy public interest. No less than ten Senate Indian Affairs Committee hearings have been dedicated to the issue of off-reservation land-into-trust acquisitions for gaming. Now, four years after the 2004 Indian Gaming Paper established a policy stance upon which the public largely relied, Interior has abruptly changed course, imposing an arbitrary and indefensible standard on land-into-trust applications. While Executive Branch agencies are entitled to – and indeed have the duty to – change course when a policy change ought to be made or can be justified for good reason, they should not change policy for erroneous reasons. While the decision to take land into trust is a matter committed generally to the discretion of the Department of the Interior, Interior presumably must exercise that discretion in a non-arbitrary manner and should not change policy based on reasons that are patently wrong on the facts and inconsistent with broader Congressional policy.

If the Department wishes to make policy in this area, as perhaps it should in light of the importance of the issue, it would be wise to consult with interested parties in doing so. Such consultation could have prevented the embarrassingly weak analysis set forth in the Guidance Memorandum and the inevitable confusion that bad policy can produce.

V. Because the Guidance Memorandum Effectively Operates as a Rule Promulgated in Violation of the Administrative Procedure Act, Its Immediate Use to Deny Applications Is Inconsistent with Basic Principles of Administrative Due Process.

The Guidance Memorandum advises Interior decision makers that "all pending applications or those received in the future should be initially reviewed in accordance with this guidance" and that if an "application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied." Guidance Memo at p. 2-3. By requiring the decision makers in Interior to deny an application that does not meet the newly imposed standards, the "guidance" is more than a mere clarification of the factors set forth in 25 C.F.R. Part 151. It guides Interior's decisions to take land into trust, effectively having the force of law. Since it is effectively a legislative rule, it is unlawful in the absence of the notice and comment procedures spelled out in Section 553 of the Administrative Procedure Act (APA). It runs afoul of basic administrative law principles in several respects.

First, the APA requires an agency to engage in a notice and comment rulemaking procedure when it either adopts a legislative rule or issues an “interpretative rule” or “statement of policy” that “expresses a change in substantive law or policy” which “the agency intends to make binding, or administers with binding effect.” *General Electric v. EPA*, 290 F.3d 377, 382-383 (D.C. 2002) (finding a Guidance Memorandum listing specific requirements applicants must meet to be a legislative rule and vacating because not promulgated in accordance with APA Section 553). The Guidance Memorandum seems to express a change in substantive law by rewriting, rather than interpreting, Part 151.

The Guidance Memorandum seems to be a legislative rule, rather than an interpretive one, because it carries the force of law, as reflected in its binding language and immediate effects. A document has binding effect, even before applied, “if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as ... denial of an application.” *General Electric v. EPA*, 290 F.3d at 383. The Guidance Memorandum explicitly advises tribes that failure to satisfy its requirements will result in denial of their applications. The Guidance Memorandum then goes a step further by binding reviewers to deny applications that do not address the narrow and seemingly arbitrary prescribed factors such as whether the gaming will encourage reservation residents to relocate off-reservation and whether relocation will affect members’ identification with the tribe. Thus, the Guidance Memorandum effectively offers more than mere “guidance.”

Second, the Guidance Memorandum was put into effect immediately and without any notice, reflecting a lack of due process and an appearance of unfairness. Indeed, on January 4, *only a day after the Guidance was issued*, the Secretary rejected numerous applications to take land into trust for gaming on the basis of the reasoning set forth in the Guidance Memorandum, and without even giving the affected parties an opportunity to address the new standard. Indeed, Secretary Kempthorne explicitly indicated that the applications were rejected because the gaming operations would be too far from the reservations to offer jobs to tribal residents, that residents would be forced to relocate as a result, and that relocation of tribal members would “have serious and far-reaching implications for the remaining tribal community.” See Anahad O’Connor, *Interior Secretary Rejects Catskill Casino Plans*, N.Y. TIMES (Jan. 5, 2008).

Third, the rule set forth in the Guidance Memorandum operates in an arbitrary and unreasonable manner. While Part 151 advises the Secretary to “give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition” of trust land “as the distance between the tribe’s reservation and the land to be acquired increases,” it recognizes that each case involves balancing various factors specific to the parties involved. Thus, it instructs the Secretary to “give greater weight to the concerns” of “state and local governments” as the distance increases. 25 C.F.R. § 151.11. However, instead of recognizing the positive as well as the negative impact that state and local governmental views should merit in the “greater scrutiny” review, the Guidance Memorandum identifies two factors that a reviewer should consider: 1) “jurisdictional problems” and “conflicts of land use”; and 2) “removal of the land from the tax rolls.” Guidance Memo at p. 5. The Guidance Memorandum ignores the substantial possibility that state and local governments may have negotiated with tribes around these issues – which is almost necessarily how local support and gubernatorial consent is achieved – and does not instruct a reviewer to consider any positive input from state and local governments. This rule is unfair and makes little sense. Disapproval by the affected non-tribal parties may occasionally tip the scale against

taking land into trust for gaming far from a reservation, but likewise, strong support by the affected state and local government should motivate approval.

Given that the Guidance Memorandum is supported by dubious (and even erroneous) assumptions about Indian gaming, that it was adopted without any public or tribal input, and that it was used to deny applications immediately and without notice to affected parties, it should be withdrawn. Although the Secretary has wide discretion as to whether to take land into trust for any legitimate reason, the Secretary should not decline to take land into trust for illegitimate reasons. The Secretary has broad discretion, but good government and basic principles of administrative law suggest that the Secretary's discretion be exercised wisely and fairly.

Conclusion

Interior should be applauded for focusing on this important issue and attempting to provide guidance. Indeed, good government requires clear rules. The only beneficiaries of a mysterious system with vague rules are the lawyers and lobbyists who can navigate the murky and overly political land-into-trust process, and land speculators who can capitalize on the uncertainty in the process to profit from tribal hopes. Clear rules on land into trust would serve tribes and their commercial partners by providing greater predictability.

Acquisition of land into trust is a difficult political issue for the Secretary. Indeed, while Interior has a clear mandate to work to restore the tribal land base, and to create opportunities for tribal self-sufficiency and economic development that comes from Indian gaming, the Secretary bears the brunt of controversial actions in that area. In light of the longstanding Congressional support for the restoration of tribal lands, and the more recent Congressional support for tribal economic development through Indian gaming, however, the Secretary has political cover for taking land into trust. The Secretary should exercise the discretion to accomplish the policy goals that Congress has mandated.

Interior's caution in this area is sometimes well-motivated. Interior has sometimes believed that it must carefully guard its authority to take land into trust by using this power cautiously. Liberal use of the power might cause widespread public opposition that would motivate Congress to withdraw the delegation of this power to the Secretary. Withdrawal of this power would have the effect of placing the power in an even more political body, i.e., Congress, and could well frustrate the land-into-trust process. That kind of result might harm all tribes. In general, it is good that the Secretary have the authority to take land into trust for tribes. However, Congress has given the Secretary reasonably clear direction and the Secretary should follow that direction until it is changed.

In exercising this important discretion, Interior must do a better job of acting in a fairer (and swifter) fashion. Moreover, whatever rules Interior may adopt as to land-into-trust, the Secretary should be willing to waive the rules when an acquisition is non-controversial. While Congress may have believed that the appropriation process would necessarily serve as a practical limit on restoration of tribal land, Congress likely never intended Interior to be an additional *obstacle* to restoration of tribal lands when tribes could afford to bypass the appropriations process. In any event, when local communities and the governor of the state support a land-into-trust application, the Secretary is not facing a controversial decision. Local and state officials, who are closer to their respective communities, should bear the political fallout of those decisions. Such applications should be approved. When the Secretary of the Interior uses his discretion to deny a

land-into-trust application for gaming when there is agreement between tribal, state and local officials, the Secretary invites speculation that the result is not being driven by good government but by partisan politics.

The Secretary should withdraw the Guidance Memorandum and make a serious effort to develop clear rules. Because of the high political salience of these issues, such rules ought to be developed with tribal consultation and public participation in notice and comment. Such rules ought to reflect real concerns, and not half-baked policy considerations unrelated to the purposes of the laws that support tribal land restoration and Indian gaming.

Thank you for considering these views on this important issue.

Disclaimer: The comments expressed herein are solely those of the author as an individual professor and do not represent the views of the Harvard Law School or any other institution with which the author may be affiliated.

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A bibliography of Professor Washburn's work related to Indian gaming is set forth below:

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Federal Law, State Policy and Indian Gaming, 4 NEVADA LAW JOURNAL 285 (2004) (Essay in Symposium on Cross-Border Issues in Gaming). This essay underlines the close link between

Indian gaming and state law. Under the Indian Gaming Regulatory Act, Indian gaming is lawful only if state law allows gaming for at least some purposes. Yet, Indian gaming is likely to be profitable only in those states that have restricted gaming by commercial entities thus preventing substantial competition against tribal casinos. Indian tribes will have profitable operations only as long as they can continue to maintain artificial monopolistic or oligopolistic power through restrictive state laws. In other words, the economically advantageous position that many tribes currently occupy is precarious and subject to the whims of state legislators. Despite its wild success for some tribes, Indian gaming exists largely at the sufferance of state governments. Over the long term, any successful tribal endeavor that depends on the cooperation of a competing sovereign is destined to come to an end.

***Recurring Problems in Indian Gaming*, 1 WYOMING LAW REVIEW 427 (2001).** This article surveys several of the legal problems that have arisen repeatedly in this industry around the country, often in a state-by-state fashion. It has been cited by the Ninth Circuit in *In re: Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) (majority opinion by Circuit Judge W. Fletcher).

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