THE SECRETARY OF THE INTERIOR
WASHINGTON

JUN 18 2010

Memorandum

To: Assistant Secretary – Indian Affairs

From: Secretary Ken Salazar

Subject: Decisions on Indian Gaming Applications

BACKGROUND

The issue of Indian gaming engenders strong feelings among many parties. The Department of the Interior, through the Assistant Secretary – Indian Affairs, has the authority and responsibility to review and approve applications to take land into trust for Indian gaming, adhering to the legal standards set forth in federal law, including the Indian Reorganization Act and the Indian Gaming Regulatory Act (IGRA). Under IGRA's implementing regulations, the Department also has the responsibility to determine whether gaming can occur on lands acquired after IGRA's enactment in 1988.[1]

It is important that all interested persons know the facts. Of the 564 federally recognized tribes, less than half, or 238 tribes, operate gaming facilities. Two hundred thirty-two of these tribes operate Class III, or "casino-style," gaming facilities under tribal-state compacts. Most tribal gaming operations are quite small and are located in rural areas.

There is no question that gaming has provided important economic opportunities for some tribes. Indeed, Congress' declared policy under IGRA was to provide a basis for gaming by tribes "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. Revenues from tribal gaming are used for specific purposes, including funding tribal government operations and programs, and providing for the general welfare of the Indian tribe and its members. The proceeds that tribes realize from gaming allow many of them to provide greatly needed services such as health care, education and housing, which increases tribal self-reliance.

GAMING "INDIAN LANDS" DETERMINATIONS

Decisions whether to take off-reservation land-into-trust for gaming purposes, or other gaming determinations, can raise difficult and contentious issues. IGRA prohibits gaming on lands acquired in trust after its enactment in 1988 (so-called "after acquired lands"), except where those trust lands meet certain conditions explicitly specified in IGRA at 25 U.S.C. § 2719. These exceptions can be separated into two types: (1)"off reservation" applications; and (2) reservation or equal footing applications. I believe that the Department needs to provide clarity regarding all

[1] Part of this responsibility is shared with the NIGC under certain circumstances

aspects of how it will review and make decisions on these two distinct types of Indian gaming applications or requests.

"Off Reservation" Land-in-Trust/Gaming Requests Under IGRA, 25 U.S.C. § 2719(b)(1)(A)

The normal rule under IGRA is that a "two part" determination is applied to tribal requests that "off reservation" lands be taken into trust for potential gaming purposes. The "two part" test includes: (1) a determination by the Secretary that the gaming establishment is in the best interest of the tribe and would not be detrimental to the surrounding community; and (2) the concurrence of the state's Governor. The review of these applications is appropriately lengthy and deliberate. Given the complicated issues that applications of this nature raise, and the various levels of review and approval involved, they have been approved rarely despite a number of submissions over the years. In the 20 years since IGRA was passed, only five "off reservation," or so-called "two-part" determinations, have been approved by the Department. In addition, the tribe and the state must negotiate and approve a gaming compact prior to commencement of Class III gaming operations.

I understand the Department currently has nine "two-part" applications under review. For these, I recommend that you undertake a thorough study of these issues and review current guidance and regulatory standards to guide the Department's decision-making in this important area. During this review, your office should engage in government-to-government consultations consistent with the policy of this administration to obtain input from Indian tribes. I realize that engaging in this exercise in connection with the application of the two-part test may cause some delay, but given the Department's discretion in this area, it is appropriate that we take the necessary time to identify and adopt principled and transparent criteria regarding such gaming determinations. Moreover, deliberate government-to-government consultations will lead us to the implementation of a sound policy in this area.

Reservation and Equal Footing Exceptions Under IGRA 25 U.S.C. § 2719(a) and (b)(1)(B)

Certain lands that are acquired after IGRA's passage in 1988 are treated under the statute as though they were part of pre-IGRA reservation lands and, therefore, are eligible for gaming purposes. These types of lands include lands that are located within or contiguous to the boundaries of the tribe's reservation, or are within the tribe's last recognized reservation within the state(s) within which such tribe is presently located.[2]

Lands that are taken into trust for settlement of a land claim, as part of an initial reservation, or as restoration of lands for a tribe that is restored to federal recognition are also excepted from the IGRA prohibition in order to place certain tribes on equal footing.

These exceptions too are rare, as in the 20 years since IGRA was enacted, there have only been 36 applications approved under these exceptions. There are currently 24 applications pending before the Department that request approval based on one of these IGRA exceptions.

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[2] Except for Oklahoma, where the lands must be within the boundaries of the Indian tribe's former reservation or contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma.

For applications or requests submitted under one of these exceptions in IGRA, their approval largely depends upon a legal determination as to whether the application or request meets one of the delineated exceptions under IGRA. I recommend that you obtain such a legal determination from the Solicitor's Office. If the lands are eligible to conduct gaming pursuant to one of the exceptions set forth in IGRA, the tribe may be eligible to conduct Class III gaming on those lands pursuant to a negotiated and approved tribal-state gaming compact.

MOVING FORWARD WITH DECISIONS

It is important that we move forward with processing applications and requests for gaming on Indian lands within the context of objective statutory and regulatory criteria. I expect that you will undertake regular and meaningful consultation and collaboration with tribal leaders to continue to develop sound federal Indian gaming policy, in furtherance of this Administration's commitment to strengthening the unique government-to-government relationship with Indian tribes. In addition, it is important that we keep the United States Congress fully aware of our efforts.

It will be important that your office continues to coordinate closely with the Solicitor's office, and with the Deputy Secretary because your decisions can have significant legal and policy implications. I have full confidence in your exercise of your delegated authority on these important matters.

cc: Deputy Secretary
Solicitor