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GAMING

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON LAND ELIGIBLE FOR GAMING PURSUANT TO THE INDIAN GAMING REGULATORY ACT

JULY 27, 2005
WASHINGTON, DC

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GAMING

WEDNESDAY, JULY 27, 2005

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 216 Senate Hart Building, Hon. John McCain (chairman of the committee), presiding.

Present: Senators McCain, Dorgan, and Smith.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. This hearing is the third oversight hearing held by the committee into the implementation of the Indian Gaming Regulatory Act. That act has been very successful for many tribes, yet it has not been without controversy or challenge, as our hearings have shown.

Among the issues that have been both controversial and challenging are the determinations of what Indian lands are eligible for gaming. Under the Indian Gaming Regulatory Act, trust lands outside of a reservation are generally not eligible for gaming if acquired after October 17, 1988, the date IGRA was enacted.

However, IGRA provides exceptions to that ban if the Secretary and Governor agree after making certain findings; also for three specific situations: Settlement of land claims, tribes that are newly acknowledged by the Department of the Interior, and tribes that are registered to recognition.

When IGRA was drafted, notions of fairness led to considerations for those tribes who, through no fault of their own, lost lands or were not recognized by the Federal Government prior to 1988. However, in recent years this committee has been made aware of attempts by some tribes and by some non-Indian developers to expand the use of these exceptions in ways not contemplated when IGRA was enacted.

Recognition of tribes and the creation, restoration or recovery of reservation lands are significant events to Indian and non-Indian communities. When coupled with the establishment of a gaming facility, the impacts to the affected communities are even greater and the need for clarity in the law is especially important. It is time this committee reviewed the uses of these exceptions to determine if they are meeting their intended purpose.

Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator DORGAN. Mr. Chairman, thank you very much.

I think we all agree that Indian gaming has grown very substantially. It has become a very big success for many Indian tribes. They have generated over $18 billion of revenue from gaming, employed over 200,000 people. There are Indian reservations in this country that have substantially reduced their unemployment as a result of gaming activities. I will not go through the list, but I think there is no question but that there are substantial benefits.

The opportunities for Indian tribes to locate gaming activities near large population centers is certainly something that tribe aspire to do to the extent they can. We know that the success in many cases of Indian gaming is primarily determined by location. We know that there are some very large, extraordinarily successful operations, Foxwoods and Mohegan Sun come to mind, and then many other smaller gaming facilities. In my State there are I believe five, all located in generally rural areas, but nonetheless still providing significant jobs for members of the tribes.

The exceptions in IGRA, the three exceptions that we will primarily talk about today are expressly for tribes whose lands were illegally taken, whose governments were wrongfully terminated, or who are just establishing their government-to-government relationship with the our country. The exceptions are intended to correct some of the many injustices that have been bestowed upon Native people. I believe there is a need for these exceptions. I support these exceptions and the need to correct these injustices.

But I do not believe that tribes should use the IGRA exceptions to place itself in a better position than had the injustices not occurred. By that, I mean a tribe historically located in the Adirondack Mountains, for example, should not now be able to use an exception to acquire land and open a casino in downtown Manhattan. I wonder about some of the stories you hear about some tribes willing to settle very large land claims for mere acres in a metropolitan acre or resort area. So that is the issue I raise with respect to the use of the exceptions.

Once again, IGRA provides a mechanism for those tribes seeking to obtain more economically viable lands, but this mechanism is burdensome. It requires local input, gubernatorial support. It is still the proper mechanism to be used in certain cases, and I think this particular hearing will give us the opportunity to learn about the use of the IGRA exceptions and about whether any changes need to be made.

I think this hearing is an important discussion about a significant piece of Indian gaming because we see these pressures all around the country now to find ways to locate gaming facilities in the middle of major population centers.

Mr. Chairman, thank you very much. I am anxious to hear from the witnesses.

The CHAIRMAN. Thank you very much.

We are pleased to have with us Senator David Vitter, our colleague from Louisiana. Please proceed.

STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM LOUISIANA

Senator VITTER. Thank you, Mr. Chairman and Mr. Vice Chairman. Thank you for holding this hearing.

I am really pleased to be here today to express my concerns about the proliferation of, in particular, off-reservation Indian casino gambling. It is an issue that directly affects my home State of Louisiana, but it is also clearly a national issue as well, as both of you have pointed out. Thank you for inviting me to testify.

In 1988 when Congress passed IGRA, gambling on Indian reservations was a very small industry. At the time, virtually no one could foresee the future growth of class III casino-style gambling or that it would become an $18 billion a year industry, with 400 casinos in 30 States. Now, that in and of itself does not mean there are problems with the law, but I do think there are problems with the law that are being unfairly exploited, and you all have alluded to some of those possibilities.

My testimony will mention several problems that my legislation addresses: But the biggest concern is the need to discourage the recent trend known as "forum shopping" or "reservation shopping" by Indian tribes. That is the troubling practice, on the part of a growing number of tribes, of selecting land to which the tribes have little or no connection for the sole purpose of building casinos at the most economically advantageous location.

As widely reported in the press, various tribes are now attempting to claim rights that would allow them to engage in gambling operations in States where they have no reservation or trust land status. Tribes making such claims include landless tribes, as well as tribes with an existing reservation. Affected States include many, including California, Illinois, Ohio, Colorado, Oregon, New York, New Mexico, and Louisiana.

Allow me to quickly summarize of some of these developments. In California, by one account as many as 40 tribes are pursuing off-reservation gambling proposals there alone. California is a State which is already home to approximately 55 Indian casinos. I commend the members of this committee for recently approving, by a bipartisan 10 to 3 vote, a measure authored by our colleague, Senator Dianne Feinstein, which would make it more difficult for one California tribe to proceed with an off-reservation casino.

In Ohio, where there are no federally recognized Indian tribes, the Eastern Shawnee Tribe of Oklahoma is trying to open casinos in multiple Ohio locations. The tribe is pushing its casino proposals with help from non-Indian investors—against the wishes of many folks in Ohio. The tribe has sued the State to seek reparations for tribal lands in Ohio that were taken 170 years ago.

New York offers another example of possible forum shopping. There, several out-of-State tribes and additional in-State tribes have attempted to negotiate for casinos in the Catskill area to settle land claims. And of course, Louisiana, my home State, provides yet another possible example of where a tribe has engaged in forum shopping, that is the Jena Band of Choctaws, who you will hear directly from later today. The Jena Band attempted to take land into trust for gambling purposes in an area of my State that is outside of its traditional service area.

I think the history of the Jena Band's action is instructive. I just use it as an example. There are plenty of examples, but this is an example with which I am very familiar. The Jena Band has been rejected in its pursuit of land for casinos in two counties in Mississippi. It made a number of applications for land across Louisiana. It may have considered land in Texas as well, I understand.

I am concerned about this forum shopping. The Jena Band first received Federal recognition in 1995; and after receiving that recognition, the tribe courted the Rapides Parish Police Jury which is basically the county government, in July 1996, with promises to pay them up to 6 percent of the net profits made off the proposed casino.

However, then-Louisiana Governor Mike Foster opposed these attempts and refused to negotiate a compact. The Jena Band actually filed a lawsuit in an attempt to force the Governor to negotiate, but the judge threw out the lawsuit in December 1996.

The Band then courted the Natchitoches Parish Police Jury in 1998, offering them 50 percent of its "planned local monetary contributions." That was unsuccessful. Then they reached out to Mississippi, actually, and were rejected by two counties there in 2001, Greene and Tishomingo. Mississippi's Governor stated he would refuse another Indian casino in Mississippi. So the Jena looked back to Louisiana; and, in October 2001, on hearing that the Jena might be looking to their parish, the Sabine Parish Police Jury passed a resolution declaring their opposition to a casino.

After that, the Jena Band and former Governor Foster then quietly negotiated a compact centered on the town of Vinton in Southwest Louisiana and sent it to the Bureau of Indian Affairs [BIA] for approval in January 2002. There was a real outcry about that, particularly in the local area. Several leaders joined in that outcry, including myself, Congressman Jim McCrery, Congressman Chris John, and Senator Mary Landrieu, as well as 30 other members of the U.S. Congress. The BIA rejected that proposed compact on March 7, 2002.

The Jena Band has argued that it has the ability to force a State into agreeing to a gambling compact, circumventing the State process designed by Federal law and instead working directly with the U.S. Department of the Interior. The current Governor of Louisiana opposes the expansion of casino gambling in our State, and even the suggestion that the Federal Government would ever force States to accept casinos they oppose is very troubling. That is another distinct issue I address in my bill.

In June, I joined my colleague, Senator George Voinovich, who is here as well, and other members of the Senate in offering a floor amendment to ensure that Governors of affected States will have input when decisions are being made to take land into trust on behalf of Indian tribes for gambling purposes. This amendment was endorsed by the National Governors Association, but we did not call for a vote on the Voinovich amendment due to jurisdictional concerns of this committee.

That amendment actually complements a bill I introduced in June, and I want to spend just a few minutes outlining that bill. It is titled the Common Sense Indian Gambling Reform Act of 2005, S. 1260. It is a nearly identical companion to a House meas-

ure introduced by Congressman Mike Rogers of Michigan, H.R. 2353. Our legislation does not specifically target any particular tribes. Rather, it proposes seven reasonable reforms, which I have alluded to, to current Federal law related to Indian gambling.

First, the bill we introduced would require that an economic impact study be conducted in an area within a 60-mile radius of a proposed new Indian casino. The rationale for requiring such a study is to ensure that we fully understand the effect of a proposed new casino on all surrounding communities.

Second, the bill we introduced calls for more local input. The bill we introduced will eliminate several existing exceptions to the existing ban on Indian casino gambling under IGRA, thereby ensuring that Federal officials must consult with officials of all potentially affected State or local governments, or other Indian tribes, before making what is known as their two-part determination with respect to a proposed Indian casino. Striking these exceptions would simply ensure that State and local input is garnered and honored.

Third, the bill we introduced would ensure an enhanced role for State legislatures. The measure requires State legislatures, as well as each Governor, to concur in the two-part determination. I mentioned just now. The bill would enhance the role of State lawmakers in conjunction with the Governor.

Fourth, under this bill, off-reservation casinos would be virtually rendered impossible. Our bill effectively precludes Indian tribes from proposing new casinos on land to which the tribes have little or no connection. It does so by imposing these conditions. First, an Indian casino must be on a single contiguous parcel of Indian lands for a casino; and second, the casino must be within the State in which the tribe is primarily located and on land to which the tribe has its primary "geographical, social and historical nexus."

Fifth, the bill we introduced calls for additional background checks. The bill would clarify that any financial top-10 interest involved in opening an Indian casino operation will be subject to normal background checks and that the National Indian Gaming Commission would approve all top-10 financial arrangements and would perform the background checks.

Sixth, the bill we introduced would require that tribes declare an intent to gamble when initially making an application for land, and that declaration would be binding in the future.

Seventh, the bill would require that a tribe submit a new environmental impact statement to the Secretary of the Interior if the tribe changes the use of its land from non-gambling or general purpose to a gambling purpose.

As I said, this I think is a widespread and growing set of concerns in the Nation and in the Congress. I thank so many others of my colleagues, including Senator Voinovich here, and Senator Feinstein for joining in this national effort. I look forward to working with you, Mr. Chairman, you, Mr. Vice Chairman and this entire committee in developing and refining legislation in this area. I would urge my colleagues to join us in enacting these sensible reforms.

Thank you very much.

[Prepared statement of Senator Vitter appears in appendix.]

The CHAIRMAN. Thank you very much.

Senator Voinovich, welcome.

STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM OHIO

Senator VOINOVICH. Thank you, Mr. Chairman. I want to thank you and Senator Dorgan for having this hearing. Mr. Chairman, I appreciate your keeping your word to me when I wanted to amend the Interior Appropriations bill that if I backed off from it that you would hold a hearing. You are a man of your word. Thank you very much.

Senator Vitter has done a good job of defining the problem, and that it is not just a problem in Ohio or in Louisiana, but it is a problem that we have throughout the United States of America. I can tell you, it is becoming a real problem in my home State of Ohio. Currently, there are over 400 tribal casinos in 30 States. The tribes who run these casinos have seen a substantial financial benefit to their tribes. Last year, the annual revenue of Indian casinos had grown to almost $19.5 billion. With the continued expansion of Indian casinos, that annual revenue will continue to grow.

To build on this financial success of tribal casinos, some Native American tribes are aggressively seeking to take gambling off reservations and into local communities all across the United States. In this practice, commonly referred to as reservation shopping, tribes are looking to acquire new non-contiguous land to open casinos near large communities or next to major roads with easy access.

A loophole in the law that regulates Indian gaming, the Indian Gaming Regulatory Act, allows the Department of the Interior to take land into trust for a tribal casino, even at great distances from their home reservation. While some casinos on tribal reservations have been very successful, many reservations are located in rural areas at great distances from population centers. These tribes are looking at lands hundreds of miles away from their reservations and near population centers like Cleveland, Chicago, Miami, and the Bay Area of California.

In early 2003, a tribe secretly began courting communities in Ohio with the lure of financial gain from casinos. Since then, agreements have been reached between the tribe and four separate mayors in our State to site casinos in their communities under the pledge that a casino complex would bring new jobs and increase their tax base. All of this has been done without any land claims filed or any determination in terms that the claims would be successful.

The Eastern Shawnee and the developers behind their casino plans are so confident that they can pull off their land claim that they are garnering political support for casinos. Last month, the Eastern Shawnee Tribe of Oklahoma filed a land claim in Federal court for the rights to 146 square miles of land and hunting rights to 4 million acres of land throughout the State. To put this in perspective, Mr. Chairman, 146 square miles is almost the size of Cleveland and Cincinnati combined. This claim is filed against the State of Ohio, 36 counties in the State and a number of cities and private landowners.

As indicated in this article from the Columbus Dispatch, the Eastern Shawnee's lawyer has stated that the tribe will drop the land claim in exchange for the right to put casinos in these communities throughout the State. Mr. Chairman, I ask unanimous consent that this article be made part of the record.

The CHAIRMAN. Without objection.

[Article appears in appendix.]

Senator VOINOVICH. The Eastern Shawnee and the groups financing their efforts in Ohio are clearly blackmailing the State and they are not even being subtle about it. The reality here is that they were looking at location and then looking at the legality of bringing a casino into my State after that. By filing this claim, the Eastern Shawnee Tribe is exploiting loopholes in existing Federal law.

The Indian Claims Commission Act of 1946, which was created expressly to resolve land claims against the Federal Government, required that any claims be filed within 5 years of enactment. Because the tribe is now precluded from suing the Federal Government, they are now suing the State.

The Eastern Shawnee was successful in pursuing a claim against the Federal Government in the Indian Claims Commission. In the 1970's, the commission concluded that claims against the Government were valid and Congress appropriated funds to pay these claims.

Mr. Chairman, I respectfully request that as you develop legislation in your committee, you consider that tribes are now using land claims against State and local governments, as well as private landowners as leverage for casinos. The real goal behind this land claim is to site casinos, not to seek financial restitution.

As you consider this, also consider the need to strengthen IGRA to specifically prohibit tribes from moving across State lines, hundreds of miles from their reservations. Clear language such as this would prevent frivolous lawsuits such as the one that we are experiencing now in the State of Ohio.

Another loophole the Eastern Shawnee is taking advantage of is the ambiguity of how the provision in the Indian Gaming Regulatory Act which determines which gambling activities are permitted. As you know, IGRA defines casino-style gambling as class III, which includes slot machines, blackjack, craps, roulette, some lotteries, and parimutuel racing. This class of gambling activity on Indian lands can only be "located in a State that permits such gaming for any purpose by any person, organization or entity." It is unclear whether this means that the statutory language should be read and applied in a class-wide or categorical sense, or whether it should be read and applied on an activity-by-activity basis.

District and Circuit Federal Courts have both considered this question. In 1991, a district court in Wisconsin ruled that if a State permits one type of class III gaming, then all other types of class III gaming can be conducted in that State under IGRA. On the other hand, in 1993 and 1994, the Eighth and Ninth Circuit Courts of Appeal construed the language of IGRA to mean that class III gaming in a particular State is limited under Federal law to the specific activities that are permitted under the State's laws.

Earlier this month, the 10th circuit revealed that these uncertainties continue by finding in favor of the Northern Arapaho Tribe who want to build a casino in Wyoming. Gambling is illegal in the State of Wyoming except for social and charitable gambling. In this instance, the tribe contended that it is entitled to offer full casino-style gambling on its reservation because the State allows casino-style activities for social and nonprofit purposes.

In Ohio, gambling for commercial purposes is prohibited by the State Constitution. However, parimutuel racing and lottery are both permitted, as well as charitable gambling on a very limited and controlled basis. The Eastern Shawnee and the developers they have partnered with recognize this ambiguity in existing Federal law. In order to address this loophole, I will be introducing legislation today that clarifies congressional intent that the provisions of IGRA which permit class III gambling only apply on an activity-by-activity basis and do not permit the full gamut of gaming.

Mr. Chairman, I respectfully request that you hold a hearing on the questions that are raised by the ambiguity in the law and that you consider my bill as you develop legislation to address the unintended consequences of the Indian Gaming Regulatory Act. The Eastern Shawnee already operate a casino on the reservation at the border of Oklahoma and Missouri. Chief Enyart testified before the House Resources Committee earlier this year that their economic potential is limited by the rural character of where the casino and reservation are located.

This tribe has been courted by investors with the attraction that they can find dollar signs out of State, dollar signs they will make at the detriment of my constituents. Ohio is a much larger and more populated State. In fact, the population of Ohio is more than three times the size of the population of Oklahoma. The Eastern Shawnee and the financial backers of their proposals are promising local communities in Ohio that casinos and gambling will address the economic problems Ohio is facing right now.

Mr. Chairman, that is another issue that I encourage you to consider as your committee continues to investigate this issue. Who is actually funding the efforts to bring Indian casinos off-reservation and across State lines? Who are these people? In Ohio, it is well recognized that the Eastern Shawnee efforts are being paid for by a number of "unnamed private investors." Think about that. Is this the tribe or are these unnamed private investors promoting casinos so that they can benefit substantially from the proceeds that the Indians would garner from locating one of these casinos in a State like Ohio?

With private investors such as these, Indian gaming and its consequences have gone far beyond what was originally intended by Congress when IGRA was passed. This has become a gigantic shell game instead of righting earlier wrongs against tribes. We are no longer looking at giving tribes the self-sufficiency needed for economic gain, but rather lining the pockets of investors with large sums of money.

Mr. Chairman, this issue is ultimately a public policy question. I oppose gambling in all forms, whether commercial or Indian. To me, this is ultimately a question of States rights, one that our founding fathers addressed in the 10th Amendment. I believe that

States should have the authority over whether or not to allow for gambling within their borders. However, in Ohio we are facing blackmail by Indian tribes and the financial backers who are funding these efforts.

I just want to thank you very much for doing this. I think that this proliferation of Indian casinos around the country is something that we all ought to be very, very concerned about. It goes far beyond anything that was anticipated in terms of rightfully reimbursing these tribes for what was done to them or to fulfill the treaties that they signed that the Federal Government did not fulfill.

I thank you very much.

[Prepared statement of Senator Voinovich appears in appendix.]

The CHAIRMAN. I thank you both for being here. It has been very helpful. Obviously, there is some passion associated with this issue. I thank you for your input and we look forward to working with you.

Byron.

Senator DORGAN. Mr. Chairman, let me thank both of the witnesses. I do not have any questions because they have well and very clearly expressed their interest in this, and as you said, with great passion as well.

Let me ask consent to have Senator Inouye's opening statement put in the record at this point.

The CHAIRMAN. Without objection.

[Prepared statement of Senator Inouye appears in appendix.]

Senator DORGAN. Your comments are very helpful to this Committee and we appreciate very much your being here.

The CHAIRMAN. I would just like to add again, as one of the authors of the Indian Gaming Regulatory Act, we never anticipated that gaming would turn into as large and widespread involvement as it has.

As you mentioned, Senator Voinovich, one of the decisions of the courts that basically said that full-blown gaming can take place if there is charitable gaming taking place. In other words, one Las Vegas night a year then equates to a full-blown 24–7 gaming. It was a court decision and that certainly had a great affect on the proliferation of gaming throughout America.

I thank you both very much.

Senator VITTER. Thank you.

Senator VOINOVICH. Thank you.

The CHAIRMAN. Our other panel is George Skibine, who is the acting deputy assistant secretary for Policy and Economic Development for Indian Affairs; and Penny Coleman, who is the acting general counsel of the National Indian Gaming Commission.

Welcome to both of you. George, we will begin with you. Welcome back.

STATEMENT OF GEORGE SKIBINE, ACTING DEPUTY ASSISTANT SECRETARY, POLICY AND ECONOMIC DEVELOPMENT FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. SKIBINE. Thank you, Mr. Chairman and Mr. Vice Chairman. I am pleased to be here today to present testimony on the section 20 exceptions to the gaming prohibition on after-acquired land.

My written testimony will be part of the record.

The CHAIRMAN. Without objection.

Mr. SKIBINE. What I want to discuss today is how we have implemented section 20 since 1988; what is currently pending before the department; and what we hope to accomplish, what we are facing in the future.

For that purpose, we have produced in my testimony a number of charts. Here we have a visual aid that will help with showing what we have. We will start first to discuss briefly the approved gaming acquisition that are on-reservation or contiguous with the boundaries of a reservation. Since 1988, we have had essentially eight of these. You can point to what they are. That is the first chart. That is where they are. Of these, four were on-reservation and three were contiguous to the reservation, or sort of both on and off the boundaries of the reservation. So this exception has not really been used very much. And I think what that shows is that by far the majority of tribes are operating gaming establishments on their reservations on lands that have been part of the trust before October 17, 1988.

Of course, our position is that the definition of Indian lands would authorize gaming by the tribe on the reservation if the land is not in trust as long as it is owned in fee by the tribe. But there are some advantages to taking the land into trust, and essentially that is what has happened for these.

The next exception that I wanted to talk briefly about is the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process. Here, we have approved three of these acquisitions. The first one was for the Mohegan Tribe back in 1995, and the next two were for tribes in Michigan. I want to point out that under this exception, only one has actually gone in to trust. The other two are the subject of a lawsuit, so the land has not been taken into trust. The fact on our chart, we show that those that were approved does not mean that the land itself has been taken into trust because a number of them can be challenged for various purposes.

For instance, even under number one, I think that for White Earth in Minnesota, that land has still not been taken in to trust because there are encumbrances of other issues.

Now, with the initial reservation of Indian tribes acknowledged by the Secretary under the acknowledgment process our position has been that in order to qualify for this exception, the tribe has to show substantial historical, cultural and geographical ties to the land. What we do when we look at the application is we look at the record that is compiled by the Federal acknowledgment process, which are thousands and thousands of pages that essentially follow the history of the tribe and where it has been, and it essentially will tell us in a fairly objective way whether that tribe will qualify under that exception.

The CHAIRMAN. How does that work if a tribe, as testified by the two previous witnesses, want to acquire lands in another State for purposes of a gaming operation?

Mr. SKIBINE. They cannot take advantage of that exception. If they try to take advantage of that exception, it will be disapproved. I think that, for instance, for the Jena Band of Choctaws who will testify later, I know that as Senator Vitter mentioned, we dis-

approved the compact for that tribe for land that was off-reservation. I think the reason for the disapproval was that, well, the reason for the disapproval was not really because there was all this congressional objection. Hopefully, we followed the law, and essentially we found that the payment that the tribe was agreeing to make to the State was in exchange for the Governor's support of the tribe's initial reservation at that location. We felt that that designation is not the Governor's to make, but the Secretary's. Secretary Norton indicated in her letter of disapproval that she, although that was not an issue in the compact, that she would not be willing to approve an initial reservation under this exception, several hundred miles from the tribe's traditional area.

That is why it is a fairly difficult process. We look at the historical record. I know there are tribes where there are pending initial reservations. That is what we do. I know that I have talked to some groups who have challenged whether the tribe actually is from the area where they claim to be. I think we will look very carefully at all the records, not only the one that is submitted by the tribe, but the one that is submitted by the local community or anyone who has an issue with that because I think the Secretary definitely does not want to place a tribe in a community for an initial reservation where they do not belong, in other words, where they are not from.

So the test that we have, we have devised on a case-by-case basis. It has not been applied many times, but that is the one we have.

And that is why, for this exception, to call that reservation shopping is misguided. These tribes are not shopping, the ones that will be approved are not shopping for a reservation far from their homeland. They are tribes that essentially have nothing. They have no land. A lot of them have no money. They have been denied recognition for years, and after a very arduous process, sometimes it takes 20 or 25 years, they are finally recognized. They are seeking to take advantage of that exception for gaming, but really what they want is land for economic development. Because we insist that they have strong geographical and cultural ties to the land, I am not sure that the reservation shopping tag can be applied to that exception.

Let me move on to the next one. That is the approved gaming acquisition for the restoration of lands for an Indian tribe restored to Federal recognition. In that case, we have had 12. In the chart that we have, the chart only concerns those lands where the tribe needed to acquire land in trust, and then the way it works is if the land is not in trust, when the tribe applies and we have to make a determination on whether it fits within the exception. My colleague, general counsel of the NIGC, will delve into this issue in much more detail, so I think I am going to skip over it except to mention that if you look at the list that we have of the 12 tribes that have qualified under this exception, I think all of these have been qualified because they were restored by Federal statute. The land that was the subject of the exception was land that was specifically mentioned in that statute, the restoration statute, as being land that the Secretary could or had to take in trust for the tribe.

Some of these that are listed in our chart are mandatory acquisitions and some of those were discretionary. For instance, I see here that at number eight, we have the Lytton Band that was the subject of the previous hearing before this committee. This was a mandatory acquisition for that tribe. When that happens, of course, we have no discretion at all to say yea or nay, but some of them are discretionary.

Finally, let me briefly mention the approved gaming acquisition for settlement of a land claim. Here, we have had essentially since 1988, it has been applied once, and that is for the Seneca Nation of New York. It is listed four times in our charts, but they are all for the one tribe. Three of these acquisitions, in fact, are gaming related, but not for gaming.

So this was under the 1990 Seneca Settlement Act. I do not think that it was enacted with IGRA in mind, but it just so happened that it would have qualified.

So the bottomline is that if we look at past practices, we really do not see the problem that has been mentioned by the Senator in the previous panel. Essentially, we have had not that many applications. They have been carefully considered. As you can see from the record, it has not been a runaway problem of Indian tribes seeking lands off-reservation.

Now, there may be a problem in the future. We are not discounting that. We share the committee's concern in this regard. For the department, for instance with the Eastern Shawnee Tribe that Senator Voinovich mentioned, we do not have an application. We have not talked to the tribe about that. We have had essentially no communication at all. We are aware of what is going on basically because of clips in the newspapers. That is true in some of these other instances.

I have seen a list, for instance, that a group in California, Stand Up For California, puts together of pending and rumored acquisitions. It is true that, as the Senator mentioned, that there may be close to 40 in there, but in fact what we have pending, and that is the second chart we have. As to the pending Indian acquisitions, we only have about 11 pending right now, certainly not 40. The reason there are 40 is because there is a lot of money to be made in gaming and this is the land of free enterprise and people are looking for opportunities. So these deals are talked about and they are raised by the newspapers, but in fact we have not seen many coming to actual fruition. The reason is that it is a very difficult process.

Briefly, let me mention the two-party termination is not part of this meeting. I have said on many instances, we have only approved three since 1988, and we have about eight pending right now. This is for the two-party termination exception. I think some call it the true reservation shopping exception because it allows a tribe to submit an application when none of these other exceptions apply, for land that could be potentially out of state, and where the tribe has no significant cultural and historical connection. But in effect, it is a very difficult process. It goes through a rigorous test and we have to make a determination that the gaming establishment is in the best interest of the tribe and its members; and it is not detrimental to the surrounding community. We have to con-

sult with local and government officials, and finally the Governor of the State has essentially veto power over that acquisition.

For practical purposes, in all three cases where we have approved these applications, the local community and the Governor have in fact supported it. Even though the local community's support is not mandated under the act, in fact I think that if you take that in connection with the land acquisition regulations that we have in section 25 CFR part 151, it is extremely unlikely that the Secretary here would ever make a positive two-part determination if the local community in fact is opposed to this. When I go around, I stress to tribes who are thinking about this that local community support is absolutely crucial to have this process go forward.

Now this is what we have done, let me just mention briefly what we are doing. As you may know, we published regulations in 25 CFR part 292 back in 2000 or maybe a little earlier that would have implemented the two-part determination. I think the Bush administration when it came over was not really interested in pushing those regulations. We are now trying to revive them, and we are thinking about moving forward again on those. We would essentially put in the regulations not only the implementation of section 20(b)(1)(a), the two party determination, but also the definitions and a test that we have for these other exceptions, like initial reservation, settlement of a land claim, and other things of this nature.

We will see essentially where that goes. We want to work with the committee on addressing the problems that have been identified for the future, to make sure that we understand what was the intent of Congress in 1988 in enacting these exceptions. We definitely would be interested in looking at some of these issues that we think can be nailed down.

With that, I will end my comments and I will be available for questions. Thank you very much.

[Prepared statement of Mr. Skibine appears in appendix.]

The CHAIRMAN. Thank you very much.

Ms. Coleman, welcome.

STATEMENT OF PENNY COLEMAN, ACTING GENERAL COUNSEL, NATIONAL INDIAN GAMING COMMISSION

Ms. COLEMAN. Thank you. Good morning.

Chairman McCain, Vice Chairman Dorgan, Senator Smith, my name is Penny Coleman. I am the acting general counsel for the National Indian Gaming Commission. I really appreciate the chance to come and speak to you. A lot of people do not realize that the National Indian Gaming Commission has an important role in these Indian land decisions. So I wanted to come here to tell you that we do; that it is a very important process to us. These decisions are difficult and we struggle with them. So I wanted to tell you a little bit about that.

Indian lands, that is the foundation on which you have Indian gaming. Indian gaming can only be conducted on Indian lands. IGRA defines Indian lands, requires gaming to be on the Indian lands, and limits the commission's authority to Indian lands. It establishes the general prohibition against gaming on lands after October 1988.

And then of course we have all of the exceptions we have been talking about so far. Those Indian lands are central to our functions because we have to determine whether the gaming facility is on Indian lands and is central to our function because we can only regulate on Indian lands. So we have to know whether or not there are Indian lands there. If there aren't any Indian lands, for instance we took a position in Oklahoma, fee lands, no reservation, and we said, these are not Indian lands. We cannot regulate it. We sent that information to the State, and so now the State has moved to close down that particular facility based on the theory that it is within its jurisdiction.

The CHAIRMAN. When you say "Indian lands," that means Indian-owned lands as well as trust lands?

Ms. COLEMAN. There is so much more to it, because first Indian lands is defined as reservation lands. So if it is within a reservation, no problem.

The CHAIRMAN. That is trust status, yes.

Ms. COLEMAN. But if it is off-reservation, then it has to be either held in trust or restricted status, and the tribe has to exercise governmental authority over it. And to exercise governmental authorities over it, they have to do both present-day exercise. So in other words, they have to have law enforcement, maybe have tribal offices. They have to do actual right-now exercise of governmental powers over it.

But they also have to have that theoretical right to exercise that power. So for instance if you have fee lands off- reservation, as a general matter a tribe is not going to have that theoretical right.

The CHAIRMAN. What about tribally owned lands, not fee, but they buy some land in downtown Denver.

Ms. COLEMAN. Those are fee lands.

The CHAIRMAN. Those are fee lands.

Ms. COLEMAN. Right; those are still fee lands.

The CHAIRMAN. So they set up a police force and a government entity; they own the land. They bought it. Now, is that under your jurisdiction?

Ms. COLEMAN. No; generally not, because the tribe owns those lands in fee and cannot just by buying the lands take them outside of the jurisdiction of the State.

Senator DORGAN. When you say "generally not," are there conditions under which it is under your jurisdiction?

Ms. COLEMAN. I am aware of in Alaska there are fee lands that are held as restricted against alienation. It is a very unusual situation. I have not actually run into it in any other place. It was a result of the unusual history of Alaska where the lands were fee lands that were restricted against alienation.

The CHAIRMAN. So these lands, they have to not only acquire some way, but they have to have it be in trust status.

Ms. COLEMAN. Yes.

So we get into it. We, the commission, both trying to determine whether or not we can regulate this, but also because we have management contracts that are subject to our approval.

The CHAIRMAN. Management contracts are subject to your approval, but consulting contracts are not.

Ms. COLEMAN. That is correct, Senator.

The CHAIRMAN. We have very few management contracts anymore, and we have lots of consulting contracts.

Ms. COLEMAN. We do not have all that many consulting contracts anymore because we have taken a rather broad view as to what consulting contracts mean. So we have taken the view that just because they call it a consulting contract does not make it a consulting contract. It has to actually be one. Where they are providing just very specific deliverables for a specific sum of money, if it looks like a management contract, then we have concluded it is a management contract.

The CHAIRMAN. So have you taken action that has reduced the amount of money that a so-called "consulting" contract, but is actually a management contract?

Ms. COLEMAN. To do that, we issue advisory opinions. Tribes and contractors submit their contracts to us, to the Office of General Counsel. We review them and we look at them primarily for two reasons. One to see if they are management and the other to see if they violate the requirement that the tribe has the sole proprietary interest in the gaming.

The CHAIRMAN. Do you know of any tribe that has had to void a contract because of your determination?

Ms. COLEMAN. Yes.

The CHAIRMAN. Go ahead, please.

Ms. COLEMAN. So besides management contracts, on occasion we do have site-specific tribal ordinances that we have to approve or disapprove. So if the ordinance is site-specific, we will also have to make a decision on those.

The CHAIRMAN. How large is your staff?

Ms. COLEMAN. There are approximately 10 attorneys.

The CHAIRMAN. And there are how many Indian gaming operations?

Ms. COLEMAN. There are approximately 404.

The CHAIRMAN. We have 10 attorneys monitoring the activities of 404?

Ms. COLEMAN. Yes, sir.

The CHAIRMAN. Please proceed.

Ms. COLEMAN. Thank you.

Now, we offer advisory opinions also on these Indian lands, the Office of General Counsel does. The reason why we do that is for a couple of reasons. One is that if the tribe wants to go ahead and game, it is in their best interest and everyone's best interest to find out beforehand whether or not they are going to be able to game on that particular piece of property. So we will review those for them.

Also, though, we will review Indian lands when the tribe has already opened a facility and we have a reason to believe that the property may not be Indian lands. So we need to do that in order to make sure that they are gaming in accordance with IGRA. There have been occasions where they have not and we have had to tell tribes to shut down. That, of course, is not the way to go, to have a facility already in place before you have that kind of determination made.

The CHAIRMAN. Have they fought you in the courts?

Ms. COLEMAN. Pardon?

The CHAIRMAN. When you tell them they have to shut down, have they fought you in court?

Ms. COLEMAN. Absolutely.

The CHAIRMAN. Have they won or lost?

Ms. COLEMAN. Well, there is one that is still pending. In Miami, we won. What other ones have we had?

The CHAIRMAN. Don't look at him. [Laughter.]

Ms. COLEMAN. George is my memory.

Senator DORGAN. You would remember your losses, wouldn't you? Wouldn't you remember your losses?

Ms. COLEMAN. Yes; so we must not have had any. [Laughter.]

The CHAIRMAN. Submit that for the record, would you please?

Ms. COLEMAN. Absolutely.

The CHAIRMAN. Thank you. Go ahead.

Ms. COLEMAN. The reason why I am looking at George is because we share this responsibility with the department. Obviously, the department has a really important role in this. So we entered into a memorandum of understanding with the Office of the Solicitor to share our work and to work together on these issues. The Division of Indian Affairs has a few people who work on these issues. George, of course, does, and then our office. And we provide drafts and we share information. The Bureau of Indian Affairs obviously has the copies of the deeds and a lot of the relevant information we need to make these decisions. So we try to work very closely together.

For many years, the department assumed the primary role for making these decisions, but a gaming has expanded, as there has gotten to be more and more facilities, as we have needed more and more to make these decisions, the Office of General Counsel started writing more of the opinions. It was rather a natural transition. I worked in the Office of the Solicitor before I worked in the Office of General Counsel. So we know and understand what the department's issues are. We try to work really closely with them.

Nonetheless, we wanted to let you know that this is not a small undertaking; that this is difficult; that we have altogether in the last 10 years have probably only issued about 50 full-blown opinions, and that is with the department, too. We have about 50 pending right now, somebody counted them for me. And some of these are really simple. If it is trust land and it is on the reservation, no problem. It is Indian lands. We do not have to spend a lot of time looking into this issue. We do not have to write a full-blown opinion. All we have to do is determine it is.

But there are other ones that are very complex and difficult. The one that was alluded to by George, the restored lands, that exception to the general prohibition for gaming on after October 1988 when lands are taken into trust as part of the restoration of a tribe when it has been restored to Federal recognition.

To fall within the restored land exception, a tribe must establish that it is restored and then it must establish that the parcel has been restored. So to be restored to Federal recognition, you must have been recognized at one point; you must have been terminated; and then you must be re-recognized. Being recognized right now is usually pretty easy. We can look to the Secretary's list of recog-

nized tribes or we can look to recent enactment of Congress where the tribe has been restored to recognition.

But to determine whether somebody has been previously recognized is a lot more complex. There are tribes that are recognized through the BIA's BAR process that were not necessarily previously recognized, but they are now recognized. So we have to look at their relationship back in the 18th and 19th century. We have to look to their political history, their ethnographic history. We work with the tribe. We work with the department. We work with the State. We work with historians and archivists, and just pull all of that information together.

And then we have to go even further when we are trying to determine whether lands are restored. Just because you reacquire lands does not mean that they are restored lands. Every time a tribe acquires land into trust does not mean that just because they are a restored tribe that the lands are restored. We have had several court cases on this, so we have some real guidance on what restored lands means now.

What we do is we look to the factual circumstances of the acquisition. We look to the location of the acquisition. For instance, the location of the acquisition, if the tribe is located in California, are they seeking to acquire the land a mile away from where their population base is? Or are they looking to get it in Nevada? Well, we would say that if they are trying to acquire it in the next State, that is way too far afield. We are looking to where the population base is.

And we are looking to whether or not this land is important to the tribe, whether they still have some relationship with that land; whether it was important to them throughout history; if that was the place where they had village settlements; where they did their hunting and fishing; whether they have burial grounds; whether they have this really important historical nexus besides the present day nexus to the land.

And we look to the temporal relationship to the acquisition. So a tribe that was restored to recognition 40 years ago and acquired land 2 years later, that is going to be its restored lands. The fact that it has been restored to recognition and wants to acquire land now, that does not make it restored lands because that is just too far after the fact. So it has to be close in time.

So for instance in the litigation that we are in in Wyandotte, Ok, the tribe had acquired land into trust in the State of Kansas. We said, population base is in the State of Oklahoma. This land was not important to the tribe as a general matter. They were only located on that property for 11 years. It was transitioning through, essentially, through Kansas. It was 18 years after their restoration that they actually acquired this land into trust, so we concluded that these were not restored lands.

So we are looking very closely at all of this. To do that, the tribe has to provide voluminous historical documents, archaeological evidence. It takes tribes time and money to submit this information. It takes time for us to review it.

Does it mean that we have a really broad exception to the general prohibition? Absolutely not. It is a very narrow exception and there have only been a few that have come within these guidelines.

As George mentioned, most of the restored tribes are actually congressional actions. It is not an action based on looking at IGRA and trying to determine what the terms mean. It is statutory construction instead.

Now, with respect to your notation that there is only 10 of us, we have been criticized by the Office of Inspector General because we are not making these decisions on Indian lands before a tribe opens the gaming facilities, and because we do not really have a systematic approach to making these decisions. We are making the decisions as we determine that they are important, and when we find out that there might be a big problem. That is not necessarily great government.

So we have do share the Inspector General's concern on this. What we are moving to do is to fix that within our office. So just a couple of weeks ago, a team from the Office of General Counsel went down to Oklahoma. We started pulling deeds for the Oklahoma facilities. Our regional director in California hired a title search company to do some title searches. We are developing files with the goal that at some point we will have a file on all 404 and we will be able to pull a file at any point and be able to tell you whether or not it is on Indian lands. We will now whether or not we should be regulating and know whether we should be attempting to close it down.

If we do not make these decisions before the tribe opens, well then we will have litigation. It is just going to be guaranteed. A tribe is going to have to fight us if they have already opened their facility and we say you cannot have a facility. And so consequently one of the things that we are looking at is developing regulations that ties the licensing of the facility to an Indian lands determination. So that we can ask tribes to notify us ahead of time that they are planning on opening. And I don't mean the day before. I mean enough time so we can actually determine this and get all of the information we need to make sure that they are gaming on Indian lands.

So that is our involvement in Indian lands determinations. I thank you very much. If you have any questions, please ask.

[Prepared statement of Ms. Coleman appears in appendix.]

The CHAIRMAN. Thank you very much.

Mr. Skibine and Ms. Coleman, I get the impression from your statements that you think that perhaps the danger here has been somewhat exaggerated, or the problems have been somewhat exaggerated. Is that accurate?

Mr. SKIBINE. Well, I do not think that there has been the problems in the past. As my testimony indicates, we have followed IGRA very carefully and it has not resulted in that many casinos proliferating everywhere. I think potentially we are concerned about what is in the future because of the potential for abuse that is there under the Act currently, but we have not seen that. As I said, with some of these they are to us just rumors and we have no involvement so we do not know for a fact that that is an issue.

The CHAIRMAN. Which means that perhaps some legislation may be necessary in order to prevent some of these things from happening. Do you agree with that?

Mr. SKIBINE. It may be. As I stated, we would be willing to discuss with you what would be the appropriate mechanism and where it needs to change to tighten things up.

The CHAIRMAN. We need to do that, but let me give you examples of why there seems to be concern. Stories about a member of the Bureau of Indian Affairs literally signing recognition papers on his way out the door in his car. I mean, that is a fact. Those were rescinded because of those circumstances of his last day in office. Rumors or stories that are carried that a tribe is willing to trade their claims for half of the State of Colorado, as Byron Dorgan mentioned, so they could establish a casino in downtown Denver.

When these stories start circulating like that, people area asking, what is this all about? You see my point?

Mr. SKIBINE. Yes; and that is an issue. I was in Colorado. The Governor of Colorado had a conference regarding that. I think it is a real issue. With respect to the Colorado issue, I think the department has determined that the claim that is asserted by the tribe is not genuine and lacks merit. So for purposes of the settlement of a land claim, the reason we have only had one so far is that our view is that the settlement of a land claim has to be a settlement that is ratified by Congress, as the Seneca claim was. As a result, there is a phenomenal check on an abuse of that exception. If it has to come before this body, it will be scrutinized to the nth degree so that the settlement legislation is not enacted willy-nilly here.

The CHAIRMAN. So Senator Voinovich's concern about a casino in downtown Cleveland is not, his concern is not as compelling as perhaps we might think?

Mr. SKIBINE. Perhaps. That is right. In our view, there would have to be settlement legislation introduced in Congress. That is our view, and we have a Solicitor's opinion that states that. Now, potentially some tribes may disagree with the view of the department on that and challenge it in court if they apply for settlement of a land claim, and we say you do not have congressional legislation, goodbye. And they may sue us because of that.

So I do not know where that would go. Maybe the act could be tightened on that score to make sure that we are talking about settlement legislation that is ratified here.

The CHAIRMAN. Let me go back with you to one of the fundamentals. When IGRA was passed, as we all know, it was as a result of the *Cabazon* decision, which said that if a State allows a certain level of gaming, then Indian tribes that reside within that State would certainly have the right to engage in gaming at that level. Isn't that a proper interpretation of the *Cabazon* decision in your view?

Mr. SKIBINE. Yes; that is correct.

The CHAIRMAN. But then there was a decision that was made that if a charitable organization has a Las Vegas night once a year where gaming is conducted, therefore you can have a 24–7, 12-month a year gaming operation on an Indian reservation. That changed things rather dramatically, didn't it?

Mr. SKIBINE. Well, yes. The view of the department is really to follow the decision of the Ninth Circuit in the *Rumsey* decision that was appealed to the Supreme Court and the cert was denied, but I think the Solicitor General filed a brief in support of that deci-

sion. Under the Ninth Circuit reasoning, I think that the scope of gaming has to be by activity, so that for instance the issue there was, let's say the State of California authorizes horse racing, which is class III gaming activity. Well, that would mean that all class III gaming activities are open, like slot machines. The court said, no, that gaming activity has to be authorized, and that is our view right now.

Senator DORGAN. But that is not responsive to the question that the Senator asked. He asked the question about a State that allows a Las Vegas night once a year.

The CHAIRMAN. For charitable purposes.

Senator DORGAN. For charitable purposes.

Mr. SKIBINE. Right.

Senator DORGAN. And the consequences of that of triggering an opportunity in a State for something broader.

Mr. SKIBINE. That is correct, because charitable gaming nevertheless is gaming, and if that gaming activity is authorized by charities, then it will be authorized for Indian tribes under IGRA. I think that is our view and certainly would have been the view of the courts right now.

The CHAIRMAN. Is it the department's view that the land claim exception authorizes a tribe to open a casino in geographic locations it has not been possibly more than 100 years? In other words, Ms. Coleman mentioned that one of the reasons why they did not approve of a Kansas acquisition is because they had passed through. In other words, what is the criteria here? Many of these tribes tragically moved all the way from our east coast out to the west, not of their own volition, by the way, but they had various stops along the way.

Mr. SKIBINE. Right. The settlement of a land claim, which as I said we have applied once, I think the way that would work is that the settlement legislation that is introduced in Congress, and if it is eventually passed, will in all likelihood specifically say we settled this land claim, and as part of the claim the Secretary of the Interior is mandated to take land in trust, and it will probably say specifically where it is, by county or even by lot. So that in the Seneca Land Settlement Act, for instance, it was specifically stated in the Act where the land could be taken into trust. That is what we would be looking for.

So what we think is really not important because we would be following what Congress tells us to do in the settlement legislation.

With respect to the Eastern Shawnee, if there is legislation that says that Congress sells the claim, and in exchange for whatever reason, but the Secretary has to take land in trust in Ohio in a specific community, then we will have to do that. But we will look to you to tell us how to interpret that in the law.

The CHAIRMAN. Ms. Coleman, it sounds to me like you could use some more help.

Ms. COLEMAN. Absolutely.

The CHAIRMAN. Thank you very much.

Senator Dorgan.

Senator DORGAN. Ms. Coleman, let me ask a question about licensing. If I am a tribe and there aren't any of these land issues

and I just want to open a casino and our State has gaming, so I want to develop a compact. I have to get a license from whom?

Ms. COLEMAN. From the tribe's regulatory authority.

Senator DORGAN. So that license, based on your testimony, that license may be granted in other circumstances before land claims are settled?

Ms. COLEMAN. Well, as Mr. Skibine testified, the settlement of a land claim exception is so rare, it has only happened once, that it really has not come up. The one time it did come up is the same Wyandotte, KS situation where the land was already acquired into trust and the tribe argued that that acquisition was a settlement of a land claim. We determined that it was not because there was an ICC case and we concluded that ICC cases are not settlement of land claims; that they are settlement of money damages against the Federal Government, but not actually for settlement of a land claim.

Senator DORGAN. But with the size and the growth of Indian gaming, my expectation and I assume yours would be that these things will come up more and more often because the stakes are so high.

Let me just mention, Mr. Chairman, last evening or yesterday late afternoon we finished in the Interior Appropriations Subcommittee, I am the ranking member on that, we finished that piece of legislation. My colleagues from Oklahoma were trying to, and we were not able to do this, I wish we had been, but we were not able to put this in an appropriations bill, but there is an issue which you are probably familiar with in Oklahoma dealing with the Shawnee Tribe Status Act.

That act was passed and somehow it gives the Shawnees, and this is according to the Senators from Oklahoma, it gives the Shawnees the ability to take land into trust so long as it does not interfere with other tribal jurisdictions, and requires the Secretary to approve the land in trust, "shall" versus "may," and they say this loophole would allow the Shawnees to take land into trust within Oklahoma County, in the middle of a major city, and the Secretary would have to approve it.

They say that circumvents existing law and regulation and normal land and trust application. And they feel that is a self-executing circumstance currently in law and they are trying very hard to change it.

The CHAIRMAN. Which I might add was put in an appropriations bill.

Senator DORGAN. Right.

The CHAIRMAN. An omnibus appropriations bill.

Senator DORGAN. Right. But my point about is, there is a powerful reason for tribes to try to find ways through these exceptions to locate a casino in the middle of a major population area. I understand that. If we were able to and our purpose was to be able to run a casino, we would want to be in the middle of a population center. That is a natural market.

And yet we have certain guidelines and restrictions and we rely on our regulatory agencies to deal with them appropriately. We also rely on the Congress to make the right decisions on these things. Occasionally, we do not make the right decisions.

I think one of the things that I have learned from your testimony, Ms. Coleman, is that this issue of the resources that are available to respond to the needs to effectively regulate a very growing industry is an important consideration for this Congress. I think we need to get additional information from you. You indicated that you have not really had a system by which you move things out the door, make judgments and move things, but you are now developing that system. I would say hurry because I think there are going to be enormous pressures from many different directions to find ways through the exceptions.

Mr. Chairman, I have to leave at 11 o'clock, but I know that we have another panel coming and I will be able to hear part of that panel. I thank the two witnesses. Mr. Skibine, thank you again for being with us, and Ms. Coleman, thank you.

Ms. COLEMAN. Thank you.

The CHAIRMAN. Senator Smith.

Senator SMITH. Thank you, Mr. Chairman and Senator Dorgan.

Mr. Skibine, in May you testified that IGRA's two-part determination suggests that Congress sought to establish a unique balance in determining exceptions. Only three tribes, as I understand it, have acquired exceptions under that provision since 1988. But those are in–State, and yet a lot of concerns remain.

My question is, would restricting the two-part determination exception only to in-State lands remedy most of the concerns that remain?

Mr. SKIBINE. I think it will help remedy some of the concerns. I do not think it will certainly address the issue with the settlement of a land claim that was raised by Senator Voinovich here. That tribe would be taking exception of another exception, the land claim exception where there is no restriction on State boundaries under that exception either.

The fact is, we of course have only approved three two-part determinations for tribes since 1988, all within the State where they are located. We currently have eight that are pending, and of those I think all are within the State where they are located except for one, which is the Stockbridge-Munsee community of Wisconsin. At this point, that application is for land in the Catskills and it is submitted as a two-part determination for land in New York, but in fact I think if this goes through, it probably would go through as a settlement of land claim rather.

So in fact, if you discount this one, we really do not have any that are pending under the two-part determination for out-of-State tribes.

Senator SMITH. A question for both of you. I think one of the most unseemly things that has happened on Capitol Hill in a long, long time, frankly seems to grow out of IGRA and the number of developers apparently seeking Indian tribes to pursue gaming interests.

Frankly, that has led to some very shameful things happening. These developers often are looking for a tribe. They pay for the lawyers. They pay for the up-front lobbyist costs. I wonder if this is just perceptional on my part, or are you seeing more applications that are driven by these kinds of non-Indian interests on behalf of tribes to pursue their gaming interests?

Mr. SKIBINE. I am not sure if there is an increase in that. I think if you look back to some of the earliest applications, also the tribes were supported by outside developers. Let's take for instance the Mohegan Tribe of Connecticut was supported by a large gaming corporation out of South Africa. I think that part of the reason for that is that some of the tribes, new tribes especially, have very little means and they essentially are pretty much penniless on their own. I think it is not necessarily what they want to do to come into a partnership with an outside group, but it is certainly something that is, when it is offered, they can see it as an easy way to access capital and to essentially move their applications along and move their plans along.

Whether there is an increase, it could be, based on the rumors that are out there, but we do not really have a handle on that specifically at the BIA. I am not sure, maybe the commission can address that.

Ms. COLEMAN. I don't know as there is an increase. We do know that the harder we make it for tribes that are landless to get land into trust, the more dependent they have to be on the outside resources because tribes that do not have money and have to go through the process, who have to go through the department, go through the NIGC, to acquire land into trust, to get it to be designated Indian lands, that takes time and that takes money. And so they need to look to the outside interests.

In some of these, as I said earlier, they are very difficult. They do take a lot of money. If you have to hire an ethno-historian, if you have to hire an environmentalist to do all of the NEPA work and prove it is restored lands, it is going to require somebody to put up the money.

Senator SMITH. I assume, though, that there is a concern in the Department of the Interior about it. Is there any effort made to identify the tribal interest from the developer's interest and to provide some level of direction that gets in the way of some abuse of tribes?

Ms. COLEMAN. We definitely are aware of that issue all of the time. We want to make sure that tribes do not end up in a situation where it is not really the tribe's gaming anymore. It is one of the driving forces behind our sole proprietary interest advisory opinions, that we have kind of tried to draw a line, saying to a tribe if you give this much of your gaming to this company, well then you are no longer the sole proprietor of this. You have to retain the bulk of it. IGRA is intended for the tribes. They are to be the sole beneficiaries.

So we have taken a pretty hard line on this sole proprietary interest issue. I think it has really helped. We have also been talking to Senator McCain about more background investigations for a larger number of people who are involved in gaming. I think that makes a lot of sense. You want to make sure you have good guys in gaming. A lot of tribes do really good background investigations. Not all tribes have access, though, to like the FBI criminal history checks and the fingerprint checks and all of those kinds of things that the Federal Government has access to.

The CHAIRMAN. Thank you very much. We will look forward to continuing to work with you as we contemplate some legislation to

address some of the issues that continue to come before the committee.

Thank you both for coming.

Mr. SKIBINE. Thank you, Mr. Chairman.

Ms. COLEMAN. Thank you.

The CHAIRMAN. Our next panel is Walter Gray, who is the tribal administrator of the Guidiville Band of Pomo Indians; Christine Norris, principal chief, Jena Band of Choctaw Indians; John Barnett, chairman, Cowlitz Indian Tribe; and Charles D. Enyart, chief, Eastern Shawnee Tribe of Oklahoma.

As you take your seats, I would like to say, Chief Norris, I have read your testimony and let me make a couple of points for the record. First, this hearing is not about Jack Abramoff or the investigation this committee is conducting into his activities. Second, I am particularly concerned about the possibility that this hearing may be used to cast aspersions on the integrity of, in particular, the Senator from Louisiana.

To assure that there will be no further discussion of this issue, I will say the following: Incidental to its reviews of matters within its jurisdiction, the Committee has seen absolutely no evidence whatsoever that Senator Vitter's opposition to the Jena Band's attempt to obtain a gaming facility in Louisiana had to do with anything other than his longstanding principled opposition to the expansion of gaming in that State. I would like to make that very clear.

We will begin with you, Mr. Gray, and thank you and the witnesses for coming. All four of your written statements will be made part of the record.

STATEMENT OF WALTER GRAY, TRIBAL ADMINISTRATOR, GUIDIVILLE BAND OF POMO INDIANS

Mr. GRAY. Good morning, Mr. Chairman. I am Walter Gray. I serve as the tribal administrator for the Guidiville Band of Pomo Indians of California. I would like to thank you for the opportunity to testify this morning.

The Guidiville Band was illegally terminated and is now seeking to restore its land base. We believe that the restored lands provisions of IGRA work and we are here to explain why.

Historically, the Pomos used and occupied land that extends from the San Francisco Bay Area north to what is now Mendocino County. In 1851, the Pomos entered into a treaty with the United States ceding over two million acres of land in exchange for a reservation of 254,000 acres. Unfortunately, at the request of the State of California, these treaties were never ratified and the Pomos, as well as the majority of other California Indian tribes were left landless and without means of support.

The California Indian population was decimated by the deliberate policies of the State of California. As a result, the California Indian population, estimated to be 200,000 at the time of statehood in 1850, was reduced to a mere 15,000 by the year 1900.

In 1915, the Guidiville Rancheria was established by the Federal Government. However, in 1962, the Rancheria was illegally terminated. In 1987, before passage of the IGRA, the tribe filed its lawsuit challenging the Federal Government's actions. In 1991, a Fed-

eral court reversed the wrongful termination, but to date no significant funds have been appropriated for the tribe to reestablish the lands which were wrongfully taken.

When Congress enacted IGRA in 1988, it understood that there were tribes like Guidiville who were terminated and landless at the time of its passage. We believe the exceptions in IGRA demonstrate Congress' commitment to treat tribes equally. As a restored tribe struggling to reestablish a land base and achieve economic self-sufficiency, we applaud Congress' concern about equity when enacting IGRA and we urge this committee not to lose sight of this concern.

As the Federal courts have held, the exceptions in IGRA serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones. The tribe is now faced with the daunting task of restoring its land base. Guidiville has looked hard for nearly a decade to find lands in what may be the most expensive market to purchase lands in the continental United States.

Recently, the tribe has found land which it can purchase, the now-closed naval fuel depot in Richmond, California. The site is several hundred acres and will allow for open spaces and parks, gaming, hotel, and retail facilities, and land for tribal administrative and cultural uses.

Guidiville has worked with the city of Richmond in a transparent process. The city of Richmond held five public hearings with regard to our purchase of the land. This land acquisition will restore the tribe's terminated lands, remediate the environmental contamination on the land resulting from the Navy's use of the property, and produce over 6,000 jobs to help revitalize the local community.

We think that the Congress may be interested in how we have structured our contractual agreement with the city of Richmond. This agreement affords other tribes, local governments, and California citizens the same level of legal protections as non-tribal developments in California. Most importantly, we have accomplished this without infringing upon the sovereignty of the tribe or the city of Richmond.

Though there may be a number of gaming projects that have been proposed, few will meet the high standards required by the Federal agencies. We believe that the current regulatory process is rigorous and will safeguard against ill-conceived projects. Interior and the National Indian Gaming Commission require that a restored tribe show historic and contemporary ties to the land in order for the land to qualify as restored. To our knowledge, there are no gaming projects that have been built after restored lands approval that are causing any significant public policy problem.

In short, the restored lands provisions of IGRA work. They are not broken, nor will they result in the proliferation of tribal gaming facilities. Illegally terminated tribes like Guidiville did not choose to be terminated, nor did they choose to lose their lands. Left to find a solution for ourselves, the Guidiville Tribe has decided to use tribal governmental gaming as a tool to acquire a land base.

We are not here today to ask that the law be changed to benefit the Guidiville Band of Pomo Indians. We are here to let you know that the current law can and does work and that the Guidiville

Band should in all fairness be allowed to complete the restoration of its lands.

It would simply be unfair to change the rules when the tribe is so close to correcting the wrong that was perpetrated 40 years ago when the tribe was illegally terminated.

Thank you.

[Prepared statement of Mr. Gray appears in appendix.]

The CHAIRMAN. Thank you very much.

Christine Norris. Welcome.

STATEMENT OF CHRISTINE NORRIS, PRINCIPAL CHIEF, JENA BAND OF CHOCTAW INDIANS

Ms. NORRIS. Mr. Chairman, thank you for giving me this opportunity to come before you. My name is Christine Norris. I am tribal chief of the Jena Band of Choctaw Indians.

I have been privileged to serve for the past 30 years in the tribal government of my tribe. I thank you for letting me share with you briefly our experience with the fee-to-trust process and IGRA's section 20 process. The Jena Band was recognized through Interior's Federal acknowledgment process in 1995. Because we were a landless tribe, all of our lands that were sought were considered off-reservation. The majority of our tribal members live within the three parishes designated by the Bureau of Indian Affairs as the Jena Band Service Area.

The Jena Band needs a reservation land base where we can provide health, housing, education benefits, social services, as well as land to develop a gaming facility for my tribe because my tribe has almost no other means to generate revenue to fund our government. After recognition, we began to work to identify lands within our service area that could be proclaimed our reservation.

However, the three parishes that compose our service area lie within a very conservative, a very religious part of our State. All three of these parishes voted out gaming in a referendum.

Because of this referendum, former Governor Mike Foster refused to negotiate a gaming compact for a facility located within this three parish service area. He threatened to actively oppose our efforts to acquire trust land for non-gaming purposes within our service area if we persisted in locating a gaming facility. He insisted that we find an alternative parcel in a parish that supported gaming.

In order to cooperate with the government, with our Governor, we worked to identify an alternative site for our gaming facility outside the service area. This was not an effort to forum shop that we have been accused of. To even address Senator Vitter's comments about the Jena Band looking to Texas, looking to Mississippi, we did accept an invitation from Chief Philip Martin of the Mississippi Band of Choctaw to come to his State in a collaborative effort to look at gaming with his tribe. This did not work out.

We did look at areas in Texas. We do say that this was a mistake on our part. We were beginning to worry that we would never find a place to establish a gaming facility. We are pleased that Interior is drafting regulations to govern section 20 exceptions. This will give newly recognized tribes much better guidance as to what is

deemed acceptable. There was not a clear guidance 10 year ago when we started this process.

To work with the Governor, we satisfied three criteria that he had. He said the land had to be not too distant from our service area; the land had to be within a parish that supported gaming; and in our project in particular, the land had to be within an area with which we could demonstrate a historical Choctaw connection. We did this in Logansport, LA.

Logansport is located approximately 64 miles from our service area. Our land there was located in an area with strong Choctaw historical connections. The local municipal and parish government supported us with our facility there. We applied to the Department of the Interior asking that the Logansport land, along with several other non-gaming parcels located within our service area, be taken into trust and proclaimed to be our reservation. In addition, we submitted extensive documentation demonstrating that the Logansport parcel also met the requirements for the restored lands exception in IGRA.

However, the department declined to accept the Logansport parcel into trust as part of our initial reservation. It also declined to issue an opinion as to whether the Logansport parcel qualified for the restored lands exception. Rather, Interior suggested that it would consider our Logansport request under IGRA's two-part determination exception.

At great expense to the tribe, we submitted such an application to the department. Governor Foster repeatedly expressed his support for our two-part application to the tribe, to Interior, throughout the media in Louisiana. With that support, Interior issued a positive two-part determination in December 2003. To our disappointment and surprise, Governor Foster left office a few weeks later without concurring with the Secretary's determination.

Immediately after Governor Kathleen Blanco took office, I asked to meet with her about the two-part determination and about a gaming compact; 15 months later, Governor Blanco sent the tribe a letter stating that she would not support the establishment of another gambling casino. A few weeks before we received the Governor's letter, Senator Vitter had come out in the media warning her not to sign a compact with the Jena Band, whether for Logansport or any other area, even located in our service area.

It appears, or I feel like the Governor's response was influenced by Senator Vitter. He further urged the Governor not to negotiate with the tribe in good faith pursuant to IGRA. Senator Vitter has been a constant and vocal opponent of our efforts in establishing a gaming facility. He put language to be included in Interior's appropriation report that would have prevented Interior from acquiring land for us. He has introduced legislation designed to ensure that we will never have the opportunity to engage in the same economic endeavor that has been allowed the other three federally recognized tribes in Louisiana, and 16 non–Indian gaming facilities in Louisiana.

His bill eliminates the initial reservation exception altogether. In its place, he inserts a provision that would require the Jena Band and other newly recognized Federal acknowledgment process tribes to satisfy a modified version of the two-part determination. It

would require showing that the proposed gaming facility would have no impact whatsoever on the surrounding local, tribal or State government.

This bill also requires the preparation of a costly environmental impact statement regardless of whether the impact of the proposed casino is expected to be significant or not. This requirement is contrary to NEPA's general approach of first preparing an environmental assessment to determine whether preparation of an EIS is necessary.

Finally, Senator Vitter's proposed legislation attempts to rewrite State law for Louisiana and all the other States by mandating that the tribal State gaming compact be approved by both the Governor and the State legislature. Every existing tribal-State compact in Louisiana was executed by the Governor without approval of the State legislature. We respectfully ask that Congress reject these proposed amendments to section 20's initial reservation exception and instead please consider some small amendments that would make it more fair and efficient.

First, Congress we ask impose hard deadlines on the Department of the Interior for taking land into trust for landless tribes. No tribe in the United States is more needy or is more worthy of the department's focus and prioritization than a landless tribe which has survived decades in the Federal acknowledgment process. Congressional direction requiring early designation of a service area and strict time deadlines for initial land acquisition would also go a long way to taking out some of the politics that is fostered by letting fee-to-trust and reservation proclamations linger for extended periods of time.

My second request is that Congress amend the initial reservation exception to clarify that the first parcel or parcels of land taken into trust by the Secretary shall be automatically deemed the newly recognized FAP tribe's initial reservation. This would spare tribes like ours the great expense and the frustration of being made to jump through the hoops that serves no purpose other than to further delay the day when we are put on a level playing field with other tribes.

With these constructive changes, Congress can help, not hinder, newly federally recognized tribes.

Thank you so much for the opportunity to come before you this morning.

[Prepared statement of Ms. Norris appears in appendix.]

The CHAIRMAN. Thank you very much.

John Barnett. Welcome.

STATEMENT OF JOHN BARNETT, CHAIRMAN, COWLITZ INDIAN TRIBE

Mr. BARNETT. Thank you, Mr. Chairman.

Chairman McCain, Vice Chairman Dorgan and respected members of this committee, I thank you for the opportunity to testify this morning.

Mr. Chairman, as you have spent your whole life serving our country, I have spent my whole life serving my tribe. I devoted almost one-third of my life to the fight to regain recognition for the Cowlitz Tribe through Interior's Federal acknowledgment process.

I traveled to Washington, DC more than 50 times over the last quarter-century to represent my people before the Federal Government. I have paid for those trips out of my own pocket.

Now, I have one last goal, one last promise to my people, to regain a homeland so that we may live and prosper on our own lands as our ancestors did before our land was taken from us. Maybe then they will let me retire.

For this reason, I greatly appreciate the opportunity to share our views about the crucial importance of IGRA's initial reservation exception. When Congress passed IGRA in 1988, it understood that newly recognized tribes would be unfairly disadvantaged and thus carved our a limited exception that allows these newly acknowledged tribes to conduct gaming on their initial reservations, just as if that reservation had been in existence in 1988.

By doing so, Congress tried to put newly acknowledged tribes on a level playing field with previously recognized tribes. However, newly acknowledged tribes are significantly disadvantaged in the current fee-to-trust process. The Cowlitz emerged penniless from decades of struggling through the bureau's administrative recognition process only to find that they have no reservation from which to generate revenue to run social, health, and governmental services for our people, or on which to conduct the only form of economic development which almost universally has been proven to be successful, Indian gaming.

As a result, the Cowlitz and other newly acknowledged tribes are immediately thrust into the political controversy surrounding off-reservation land acquisition and Indian gaming. Consider this: Interior's off-reservation fee-to-trust regulations simply were not drafted with landless newly recognized tribes in mind.

Among other things, those off-reservation regulations specifically give greater weight to the views of the local jurisdictions in which the land is located. Consider further that either the community is generally opposed to gaming and so will fight the tribe's fee-to-trust acquisition, or the community may support gaming in which case there likely are established competing gaming interests that will devote significant financial and political resources to fighting the newly recognized tribe's proposed land acquisition.

This presents a terrible no-win situation for the newly recognized tribes. The Cowlitz Tribe has worked hard navigating the fee-to-trust process in an honorable way. We chose a parcel of land located within the service area designated exclusive Cowlitz by both HUD and IHS so it is well placed to serve the modern-day needs of tribal members who live in the surrounding area.

We chose a parcel squarely located within an area where we have strong historical ties, ties that are documented in the Bureau of Indian Affairs' recognition documents and in our Indian Claims Commission land claim litigation. We chose a parcel in a local community that has demonstrated its tolerance for gaming by allowing four non–Indian card rooms to operate there. By choosing a parcel of land with which we have demonstrated modern and historical connections and which is located in a community tolerant of gaming cannot fairly be called reservation shopping.

Congress needs to reject proposed amendments to section 20 that would eviscerate the initial reservation exception. I would respect-

fully suggest a few improvements to the current initial reservation provision.

First, newly acknowledged tribes currently must apply for a reservation proclamation pursuant to section 7 of the Indian Reorganization Act before we may game on that trust land. Did Congress really intend to impose this additional administrative hurdle on newly recognized tribes? We ask that Congress clarify that the first land taken into trust under the exception automatically becomes the tribe's initial reservation so that the tribe is not subjected to yet another expensive time-consuming process.

Second, Congress should impose time deadlines on Interior's processing of fee-to-trust and section 20 applications. The process now takes years to complete and costs millions of dollars. We think the only way to protect the integrity of the system is to require Interior to make decisions within 2 years of receiving the application.

In closing, I would like to recognize the Snoqualmie Tribe from Washington State, whose Chief Jerry Kanim is sitting behind me today. The Snoqualmie, too, are a landless newly recognized tribe struggling with many of the same land acquisition issues as do we.

In addition, I would like to recognize Mark Brown, chairman of the Mohegan Tribe and Tribal Councilman Bruce Two Dogs Bozsum. The Mohegan Tribe completed the Federal acknowledgment process 10 years before we did, and today they are working with us to reinvest in Indian country. We hope that our partnership will show that Indian tribes can and will reach out to help each other. I would hope that the Mohegan's example will encourage other successful tribes to help those who are less fortunate.

All my life, I have served my tribe in the pursuit of what is right and what is just. I have grown old, but my purpose is not complete. That day will come when the Cowlitz have a federally protected homeland that will ensure a brighter day for our future generations.

The Cowlitz Tribe thanks you for the opportunity to provide this testimony and we offer our continuing assistance to the committee as it considers whether and/or how to amend section 20 of IGRA.

Thank you.

[Prepared statement of Mr. Barnett appears in appendix.]

The CHAIRMAN. Thank you very much.

Charles Enyart. Welcome.

STATEMENT OF CHARLES D. ENYART, CHIEF, EASTERN SHAWNEE TRIBE OF OKLAHOMA

Mr. ENYART. Thank you.

Mr. Chairman, I have oral testimony here, but with your permission I would like to address a couple of comments that the Senator from Ohio made at the end of this, if I may.

Good morning, Chairman McCain. My name is Charles Enyart. I am the chief of the Eastern Shawnee Tribe of Oklahoma, a federally recognized tribe whose aboriginal homeland was in what is now the State of Ohio. I appreciate the opportunity to be here today to explain the importance of our land claims in Ohio for our people.

I am here for three reasons: No. 1, to ensure that we have the opportunity to return to our aboriginal homeland in present-day

Ohio; No. 2, to ensure that we have the same rights as other Indian tribes to conduct Indian gaming on our lands under current laws; and No. 3, to advocate for the rights of tribes, States and local communities to work together for their mutual benefit.

The Shawnee want to return to Ohio. Our historic cultural ties to Ohio are undeniable. It was 150 years ago that the tribe was driven out of its homeland in the State of Ohio. Violence against our people, disruptive raids, and the burning of Shawnee Indian villages by the U.S. Army was methodical.

The unauthorized taking of the Shawnee lands by encroaching occurred. Our people were forcibly removed from their villages and sent to reservations first in Ohio, then in Missouri, and ultimately Oklahoma. It was an ugly and shameful time in American history in which our people endured unspeakable fear, intimidation and military violence by the United States and the early Ohioans.

When we return to Ohio, we wish to do so on the same legal basis as other federally recognized tribes. That is, we want the right to conduct activities on our land that would be permissible for any other recognized tribe anywhere in the United States. We do not want to return as a second-class citizen by only being allowed to conduct certain activities. Thus, we would strongly oppose any legislation that would bar a federally recognized tribe with legitimate claims from regaining land in its historical area and using that land for any permissible tribal activities, including gaming.

I am sure you would agree that to bar a tribe such as the Shawnee from using any land it may gain in its aboriginal homeland for federally recognized purposes would create a group of second-class Indians who are only allowed to do limited things on that land. It is clear the people of Ohio are receptive to the establishment of Indian lands and Indian gaming. They desire the introduction of gaming for the unquestioned economic benefits that it produces. There are many reasons for them to prefer Indian gaming over alternatives.

First, there are numerous controls on the scope of tribal gaming which diminish the potential for uncontrolled expansion. Only so many tribes have a historical or cultural connection to any given State. Second, tribal gaming revenues as a matter of law may only be expended for social benefit purposes approved by Congress. Commercial gaming only benefits private interests.

In historic contrast, tribal gaming lifts entire communities out of poverty, educates children who once had little hope for higher education, builds schools, roads, bridges, funds law enforcement and emergency services, preserves languages and cultures, builds clinics and hospitals, and provides dialysis and diabetic centers, and funds charitable activities of every kind.

Gaming has yielded economic benefits to our tribe. Until very recently, our historic legacy was one of poverty and isolation. Left virtually landless for over 1½ centuries, our people had very little realistic hope that things would ever improve. Like other tribes in similar circumstances, we had no economy and no tax base.

Indian gaming has changed our bleak outlook as to our future. The revenues from our modest gaming operation, Bordertown Casino, located in West Seneca, OK, has provided us the means to

make improvements in the lives of our people and to rekindle the hope for a better life for our children and grandchildren.

However, the rural character of the land we now occupy, combined with the economic conditions in the surrounding area, severely restrict our economic potential. The lot of the Eastern Shawnee people has improved, but we have a long way to go to achieve the level of prosperity that once was ours.

Our interest in returning to Ohio is to establish a mutual benefit political and economic relationship with the State of Ohio and the communities that have reached out to us with a vision of what is possible. We do wish to fully resolve our outstanding land claims, but not in a manner that will be detrimental to the people of Ohio. Those with whom we have established a relationship understand our intentions and have welcomed us into their communities to discuss the potential for tribal gaming.

In fact, local communities in the State of Ohio have recently sought out the tribe and asked us if they could help bring the Shawnee back to our homeland. We are committed to working through appropriate governmental channels in Ohio to ensure that we are welcomed back to our homeland.

On June 27, 2005, we filed a valid land claim in Federal court in Ohio. The tribe brought the action to vindicate our aboriginal land rights. We further seek damages for wrongful possession and trespass on our former reservation lands in Ohio. These violations continue today. The tribe has sought redress for these wrongs from the State of Ohio. The State of Ohio has refused to take any action to redress these wrongs or even discuss the matter with us. We had no choice but to take our valid claims to the court for redress.

The full explanation of these claims is contained in material from our attorneys which I have submitted with my written remarks for the record. Tribes with legitimate claims should be allowed to regain portions of their homeland and should be allowed to enter into agreements including gaming agreements that promote economic development and benefit tribal, State and local economies.

Thank you, Mr. Chairman, for this chance to testify to the committee.

Again with your permission, if I may address a couple of comments. The Senator made a comment about secret negotiations. Senator, there have been no secret negotiations. It has been in the newspaper. It is all over TV in Ohio. He talked about the agreements we have with certain communities. That is true. We have four. Only one of the agreements did we pursue ourselves. The other three pursued us, these communities.

He also talked about economic blackmail. Senator, our land claim has never been intended to be blackmail. We have been up front with the State of Ohio. In fact, I have mailed, I think it was in April, a letter to the Governor, Governor Taft, and to Attorney General Petro explaining that we would like to meet with him and discuss our land claim to see if there is something we can work out. At no time was this blackmail.

[Prepared statement of Mr. Enyart appears in appendix.]

The CHAIRMAN. Thank you very much, sir.

Mr. Gray, prior to termination, where was your Band located?

Mr. GRAY. When you ask prior to termination, do you mean when the original lands were ceded? Which territory are you searching for?

The CHAIRMAN. No; the termination that took place in the 1950's, I guess it was.

Mr. GRAY. Okay. The original rancheria is located in what is now Ukiah, CA.

The CHAIRMAN. Which is near?

Mr. GRAY. Mendocino County.

The CHAIRMAN. Do any of the tribe still reside in that area, or do they live in the Bay Area?

Mr. GRAY. When you ask "any of the tribe," are you asking specifically about Guidiville? There are several tribes in the area.

The CHAIRMAN. The Department has testified that it applies a rigorous historical nexus test for restored lands. How do you think you are going to be able to meet that historical nexus test?

Mr. GRAY. Well, it is very difficult, as they testified, and very expensive and time-consuming. The tribe would not pursue this particular piece of land if it did not believe that it had a strong historical tie to the property. So what we would like to see happen is that the exception under which we fall would be left alone as it is and that we be allowed to go through that rigorous process. The tribe is willing to live with the end result.

The CHAIRMAN. How do you answer the charge that your interest in the off-reservation sites is only in conducting gaming?

Mr. GRAY. Well, off-reservation, just the term alone presupposes that the tribe has a reservation.

The CHAIRMAN. But you are interested in off-reservation sites, are you not?

Mr. GRAY. We do not have a reservation. I understand your question. This is within our historical area, and we firmly believe that. But in California where we are from, it is simple economics. In an area where lands at our northern boundary of our territory and lands that are at our southern boundary of our territory are approximately the same, well in excess of $200,000 an acre. It will take us over $100 million just to do the land purchase.

So you have to be able to draw enough people to the casino to make enough money to be able to pay just for the land. That is not infrastructure or any of the other things that need to occur.

The CHAIRMAN. Chief Norris, you indicate that the Department declined to consider your request to have land in Logansport declared restored lands. What was the basis for their decision?

Ms. NORRIS. On Logansport?

The CHAIRMAN. Yes; was it due to a lack of sufficient historical nexus?

Ms. NORRIS. We proved that there were ties to the port in Logansport. We were not saying it was the Jena Band that were originally there, but we were saying that it was the Choctaw Nation. We proved through documentation that there were Choctaw people there during the removal period from the east to Oklahoma.

With the Logansport package, they did give us a two-part determination in that, with the support of our Governor from Louisiana at the time. Unfortunately, all indications were that we were going there for the two-part determination which Interior did issue that

proclamation, but the former Governor Foster did not carry through with his decision before leaving office.

The CHAIRMAN. You state in your testimony that you have a three parish or county service area. How was that service area determined?

Ms. NORRIS. It was determined by the Bureau of Indian Affairs when we began our process for the Federal acknowledgment process. The people in my tribe resided in Grant, Rapides and La Salle Parishes. This is where we would have a delivery service area for health services for our tribe.

The CHAIRMAN. Did the Department indicate that this was the area in which you could have an initial reservation? Or did the Department tell you that there was a certain area where it would take land into trust for your initial reservation?

Ms. NORRIS. No, sir; it did not. It only deemed this area for delivery of services to my people for health care, education, and social services.

The CHAIRMAN. Obviously, you have had a very difficult time.

Ms. NORRIS. Yes.

The CHAIRMAN. If you had to do it over again, what would you have done differently? Anything?

Ms. NORRIS. I think that my tribe I feel during the relationship that I have had in Government for the 30 years, we worked with our State, we worked with our Governor. Perhaps there lies the reason that we have been criticized most in the media because we went to the areas where our Governor, he very adamantly came out and said, I will not give you a compact in those service areas of the three parishes in which you reside because those areas voted out gaming. If you will go where they want you, where the people will accept you, where they already have a form of gaming, I will support you.

Because of that statement that was issued, we sought to seek these places. The three parish area that voted out gaming is where we reside, where we live and go to church. We go to school with these people. We wanted to be good neighbors. I would have not chosen any other course than what we participated in. I believe it was right. I believe we worked with our local government to get to these areas, to get to where we are today.

The CHAIRMAN. You must feel a little betrayed.

Ms. NORRIS. Of course I do. I feel betrayed by the administration in my own State, because of the other three federally recognized tribes. As a leader, as you have heard from the testimony of these other tribal leaders, it is up to me to give my people a better way of living, to improve their quality of life.

That is what I am here for and that is my journey and that is what my mission is to my people. My story has been an open book. It has been published in the media around the country. We have everybody looking at the decisions that are made today based on the Jena Band of Choctaw. It is before you to see and everyone else to see. We have tried to work with governments and with local bodies to do what is right, to do the right thing.

The CHAIRMAN. Chairman Barnett, welcome back.

Mr. BARNETT. Thank you, sir.

The CHAIRMAN. You state that the site you are proposing is 14 miles from the territory identified by the Indian Claims Commission as the traditional territory of the Cowlitz. Why did the tribe not seek a site within the traditional territory as identified by the Indian Claims Commission?

Mr. BARNETT. In 1973, we went through the process, a hearing with the Indian Claims Commission. We were awarded $1.5 million for 1,716,000 acres of land. We were not allowed to include Clark County because we could not at that point in time prove exclusive use and occupancy. There is a reason for that and I think it is a very important reason. The Cowlitz Tribe has always been since time immemorial the resident tribe all the way down to the Columbia River.

When the Hudson's Bay Company built Fort Vancouver, which is just north of Portland, OR, across the river, it changed things, because other tribes, for instance the Umatilla, the Nez Perce, Grand Ronde, those tribes came to Fort Vancouver for the benefits of trade or to get supplies or whatever it happened to be. The Cowlitz were already there. These tribes came, did their business and went back home. We did our business and we stayed there because that is where we were from.

The CHAIRMAN. But the Indian Claims Commission does not acknowledge that.

Mr. BARNETT. That is right. They did not acknowledge that fact that we were there and we have proven all along. And that is one of the problems that we have had with Clark County is that these four card rooms there are throwing tons of money to try and say we do not belong in Clark County, when we have documented proof that we do.

I think that is a very valid point that has to be considered here is that we are different. We are within our aboriginal area, even though the difference between exclusive use and occupancy and just being there, use and occupancy in the area because of the other tribes coming in, makes it a little bit different ball game.

The CHAIRMAN. Does the local community support your efforts to get land and a casino?

Mr. BARNETT. Some do, some don't. I think we are making some progress. There has been a lot of misinformation that is coming out. We have always tried to take the high road and not get into defensive battle with Clark County. I think we are going to have to go on the offensive a little bit here to explain truthfully to the people of Clark County just exactly why we are there. There are some people that say you belong up in Toledo, way up in the middle of Washington, things like that. We find that hard to swallow, but it is something we just have to deal with, and we will be coming out with documentation before this fee-to-trust issue is done that will conclusively prove that this is our aboriginal area, even though we were not paid for it.

I might mention that approximately 500,000 acres of land we are talking about here that were not included by the Indian Claims Commission as a result of this distinction between use and occupancy.

The CHAIRMAN. Chief Enyart, you filed your land claim on June 27 of this year. Isn't that a long time to have waited after you were removed from Ohio?

Mr. ENYART. Yes; it is, Senator, but let me give you a little history of our tribe. We were removed from Ohio in 1832. We eventually wound up in Oklahoma. We were awarded approximately, not quite 59 acres. That is what we had for our tribal headquarters. The only income that the tribe had was moneys that farmers would pay to farm that 59 acres. We had no income. The tribal leaders had to meet in churches, in courthouses, and their budget in the 1940's and 1950's was $50, and that was to get stamps.

So then in the 1980's, we were able to get grants to build some buildings where have a tribal headquarters down there now. And then also the 1980's, we went into gaming. To go on, we did not have the resources to do it. It is only through the gaming that we have been able to have some monies that we can be doing things that we were not able to do at that time.

Gaming has been very good to the Eastern Shawnee. We put our money right back into the tribe. We have all kinds of social programs for our tribal members such as children having clothing allowances, scholarships for people going to college, a trade school. So this money goes right back in.

Yes, it was a long time, Senator, but we did not have the resources then.

The CHAIRMAN. How would you answer people who say you are just looking to leverage a better, more lucrative gaming location?

Mr. ENYART. I would say this, let me tell you my vision for the Indian tribes. I foresee the day, and part of it is now, the Federal dollar is getting harder to get, drying up. In my opinion, the tribes that want to make it in the future need to be self-sufficient. There is only one way that we can do this and that is to use our profits from gaming to get into other businesses so that down the line we can become self-sufficient. We would no longer be dependent upon the Federal Government to take care of us.

It is our homeland. We do want to go back. Is it lucrative? Sure it is, but we are also willing to share in this with the State, with the community. We are not just trying to take all of this for ourselves. We have been very open about this in the press and on TV coverage, too.

The CHAIRMAN. So people are correct when they say you are looking to leverage a better, more lucrative gaming location?

Mr. ENYART. The terminology gets me, Senator. Are we looking for a better economic place to build, yes, but again the funds are going to be used in the State and also in the community and the tribe, so this would not only benefit us, but the State and the community as well. So to put that in, is it 100 percent, I could not say that, no.

The CHAIRMAN. Assuming you obtain the land, are you confident the Ohio Governor would sign a compact with your tribe?

Mr. ENYART. The present Governor? No, if Governor Taft is in there. I am sure you are familiar with a famous Oklahoman, Will Rogers. Well, Will Rogers used to say, all I know is what I read in the paper. Well, that is all I know about the Governor and the

Attorney General because we made an effort to meet with them. They didn't even respond to my letter.

So the only thing I know is what I see in the paper and what I read and what is forwarded to me. He has made comments that he would not sign that. Again, I understand that he made the same comments when the lottery was coming in. He made the same comments, but lottery was approved.

The CHAIRMAN. Are there any limits to where a tribe should be able to return to exercise sovereignty either in geography or in the amount of time that has elapsed?

Mr. ENYART. I think if you have a legitimate land claim, you have historical data that proves that you were there, I don't think there should be any limits on it.

The CHAIRMAN. Shouldn't that be a decision of the Indian Claims Commission?

Mr. ENYART. Well, I am sure that they would like to have part of that, but also it is a legal question. If we have legal reasons to go and file land claims, why can't we pursue those legal reasons? Now, it would be determined in court anyway.

The CHAIRMAN. Do you want to respond to that question also, Chief Barnett? Are there any limits to where a tribe should be able to return to exercise sovereignty?

Mr. BARNETT. Sovereignty is an issue I think that all tribes, whether we are federally recognized at one time, restored through the acknowledgment process. Senator Inouye told me at a fundraiser for Maria Cantwell, I sat next to him for dinner. He was the keynote speaker and he said two things and they really impressed me. He said, always protect your sovereignty and always protect your traditions. Those words I think are true and I think all Indian tribes adhere to those words, that if we are going to survive as tribes, we have to do that.

But in this day and age, we do have to make certain adjustments to the way we do things. Indian gaming is one of the things. As a landless tribe, you might say, well, are we reservation shopping? Well, how can you be reservation shopping when you do not have a reservation to begin with? That is our problem and it is the problem of having to say that we are in our own aboriginal area, and I think that "aboriginal" word is important because that means that we have been there since time immemorial.

The CHAIRMAN. I was speaking because of the odious practices of the Federal Government tribes were moved from east to west and resided in certain areas for long periods of time before they were finally relocated, if that is the right word. Do you see my point?

Mr. BARNETT. Yes; I do. In our situation, for instance, we did not sign a treaty. The reason we did not sign a treaty was because we were asked to move by Governor Isaac Stevens, 200 miles away over to the coast of Washington, to be on the Quinault Reservation with eight other tribes. At that point in time in our history, there was slave-taking between the Cowlitz and the Quinaults. You know, it was a situation where we would not even consider those types of things. We stayed on our aboriginal lands because that is where we wanted to be, and that is where we want to make our living and that is where we want our children to come.

I agree with you on reservation shopping, if there are valid reasons, this gentleman here, I do not know that much about his situation, if there are valid reasons and if the legal situation is there to take it to court, I think that is certainly their prerogative to do.

I think the big issue here on reservation shopping is the opportunists that get involved. They are there for one reason, to convince tribes that may not have as much smarts that this is the way you are going to make yourselves lots of money. And oh, incidentally, we might make some at the same time. And there is a lot of that going on. I do not know how you people are going to handle it, but I know that you will handle it in an equitable way. I am confident of that.

The CHAIRMAN. We have seen ample evidence of what you just stated.

What is your next step, Chairwoman Norris?

Ms. NORRIS. Our next step is to pursue gaming in one of our home parishes of Grant Parish. We went the route, as I explained earlier, with the Governor and the movement of the State. We are back home in our parish area. How can they deny us a gaming facility, Federal land to be taken into trust?

We are waiting for it to be declared initial reservation. With the three other tribes who are federally recognized that have gaming facilities in Louisiana, we will be the next. I do not look at it as a form of expansion of gaming. I look at it as this is our right to be there to pursue this economic development.

Unfortunately, gaming is the most lucrative in economic development. I wish it wasn't. I wish there was something else. I feel like we are put in a box.

The CHAIRMAN. I think that is their view in New Orleans.

Ms. NORRIS. Yes; I feel we are put in a box by these gaming developers with the money. Unfortunately, as everyone has stated here before, landless tribes, we do not have any money to pursue economic development. We do have to depend on, but we still maintain our Indian sovereignty by making these decisions to accept or not to accept.

So my next move will be to establish a facility in the Grant Parish area.

The CHAIRMAN. Thank you.

Again, since you mentioned Senator Vitter, I would repeat the committee has seen absolutely no evidence that Senator Vitter's opposition to your attempt to obtain a gaming facility has had to do with anything other than his longstanding principled opposition to the expansion of gaming.

Mr. Gray, what is your next move?

Mr. GRAY. Hopefully with the assistance of the committee, we will continue to pursue the project that we have proposed under the existing rules. We hope that they are not changed. We have made extreme investments of money and time into the process and we feel we are halfway there. We do not feel that the rules are broken and we hopefully will be able to continue to pursue the project under those rules.

The CHAIRMAN. Thank you.

I thank the witnesses. It has been very helpful.

This hearing is adjourned.

[Whereupon, at 11:50 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Thank you Mr. Chairman.

Today is the sixth hearing of the 109th Congress in which the committee will receive testimony about off-reservation gaming, with today's hearing focusing on the exceptions specified in the Indian Gaming Regulatory Act.

As the original sponsor of the Indian Gaming Regulatory Act, I want to assure everyone that the exceptions for conducting off-reservation gaming were thoughtfully considered and deliberately included. At the time the act was drafted, the committee was well aware of the United States' responsibilities to, and past actions toward, the Indian tribes.

I am sure that most of those present today know that history but it is important that it be restated. For the Federal Government's past treatment of Indian tribes was a shameful period in our history and is part of the reason that the exceptions were included in the Indian Gaming Regulatory Act.

Indian tribes were forced to sell millions of acres of land to the U.S. Government through treaties that were never honored. Some treaties were not even signed without providing any notice to the signatory tribes, thus leading them to believe that they had a valid agreement with the United States.

Lands reserved by the Indians were usually the lands that the United States felt were the least undesirable as were the lands upon which the United States forced other Indian tribes. Even then we did not stop our dishonorable treatment. Many of the lands reserved by Indian tribes were divided up and provided to the individual Indians in an attempt to break tribal ties. So-called excess lands were sold to non-Indians.

But we did not stop there.

We went through an era of terminating our government-to-government relationship with some tribes and continued to ignore our obligations to others. Although we restored our relationship with some tribes, others were and are still forced to go through an administrative process at the Department of the Interior in order to gain Federal recognition.

But gaining Federal recognition does not ensure that the United States will honor its responsibilities and obligations to tribes. It does not guarantee that a tribe has the land or the tools necessary to fully exercise its sovereignty or to provide for its members.

And that is why we purposefully included a mechanism for off-reservation gaming. The exceptions were intended to acknowledge the Federal Government's dishonorable treatment of Indian tribes. They were intended to be a mechanism for Indian tribes to gain a measure of economic self-sufficiency and to further tribal self-governance and self-determination.

I am confident that the exceptions have not been abused. It is estimated that since 1988, approximately 27 applications have been approved pursuant to the exceptions. A few months ago, the Department of the Interior testified that only eight land into trust applications under the section 20 exceptions have been approved

since 2000, and three of those applications were on-reservation. Under the two-part determination exception, State Governors have only concurred in three of the decisions by the Secretary of the Interior. While the Department testified that there are 11 pending applications, the Department also testified that it is a lengthy, time-consuming process.

Some tribes have been criticized for attempting to conduct gaming off-reservation while others have been accused of abusing the exceptions. I am confident that the exacting processes established by the Department of the Interior will prevent any such abuse.

It saddens me that there are those who ignore the purpose of the exceptions included in the Indian Gaming Regulatory Act. For doing so seems to also ignore Congress' continuing responsibilities, the Federal Government's past actions, the sovereign status of Indian tribes, and the benefits that gaining provides to Indian tribes.

I have repeatedly made it clear—I do not support gaining. But Indian gaming is about tribal sovereignty and the Federal Government needs to start living up to its responsibilities. While it must be well-regulated, I am confident that the regulatory mechanism included in the Indian Gaming Regulatory Act does that.

Indian gaming has provided the resources necessary for Indian tribes to strengthen their governments. It provides jobs in Indian country. It has helped to alleviate the deplorable conditions that exist in Indian country. Most of all, it has helped tribes meet the needs of its members for which the Federal Government is responsible but has failed to do. Yet there is still so much more that needs to be done.

Thank you.

PREPARED STATEMENT OF PENNY J. COLEMAN, GENERAL COUNSEL [ACTING], NATIONAL INDIAN GAMING COMMISSION

Chairman McCain, Vice Chairman Dorgan and members of the committee: My name is Penny Coleman. I serve as the acting general counsel for the National Indian Gaming Commission. Thank you for allowing us to speak with you today. We appreciate the opportunity to testify today about the Commission's involvement in Indian lands questions.

Indian land is the foundation upon which Indian gaining is built. The Indian Gaming Regulatory Act [IGRA] defines Indian lands; it requires that gaming take place on Indian lands; it limits the National Indian Gaming Commission's regulatory authority to gaming that takes place on Indian Lands; it establishes a prohibition against gaming on trust lands acquired after October 1988; and it exempts many lands from that general prohibition.

Thus, Indian lands are central to many of the Commission's functions. The Commission must determine whether gaming facilities are located on Indian lands in order to determine whether the IGRA permits gaming on those lands and permits the Commission to regulate it. If a facility is not located on Indian lands, the NIGC has no authority whatsoever over any gaming occurring there or any jurisdiction to stop the activity. The Commission is also required to decide whether a specific parcel is Indian lands when a management contract or a site-specific tribal ordinance has been submitted to the Commission for approval; such determinations are part of our final agency actions on management contracts and tribal ordinances.

The Office of General Counsel also issues advisory opinions on Indian lands. These opinions are often intended to advise tribes whether they should attempt to proceed with gaming on a given site. Sometimes our opinions confirm that a specific parcel is Indian lands. Sometimes they warn a tribe that we do not consider the gaming to be legal.

We share the responsibility for deciding Indian lands questions with the Department of the Interior. The Department makes decisions on lands when a tribe seeks to acquire land I

into trust, seeks a trust-to-trust transfer for gaining, or seeks approval of a land lease or a tribal-State compact.

For many years, the Department of the Interior assumed the primary responsibility for making Indian lands determinations. However, as gaming expanded in recent years, the Commission's need to make such decisions became more and more pressing. The Commission thus began making these decisions on its own. Because of the shared responsibility with the Department, we entered in a Memorandum of Understanding that requires each agency to notify the other when Indian lands questions are pending and to provide advice and assistance on the Indian lands determinations.

This is not a small undertaking. Altogether, the Department's Office of the Solicitor and the Office of General Counsel have issued over 50 written opinions and the Commission has made decisions on over 40 management contracts.

Right now, the Commission has approximately 50 Indian lands determinations pending. Some of these will be simple decisions. The land will be held in trust and within the tribe's reservations boundaries, and no lengthy analysis will be required.

Many Indian lands determinations, however, are complex and difficult. For example, IGRA exempts from the general prohibition of gaming on lands acquired after the date of its enactment when "lands are taken into trust as part of...the restoration of lands for an Indian tribe that is restored to Federal recognition." To establish that a tribe's lands fall within the restored land exception, a tribe must establish that it is a tribe restored to Federal recognition and that the parcel on which the gaming is being conducted is restored land.

For a tribe to be restored to Federal recognition under the IGRA, it must have been previously recognized; it must have lost its recognized status; and it must be returned to a recognized status. This last can be straightforward, for, in most instances, it will or will not have been included by the Secretary of the Interior on her list of federally recognized tribes. The first two elements, however, require much delving into our history. Beyond looking to 18th and 19th Century Treaties and laws, the specific political and ethnographic history of the tribe must be reviewed. Just gathering the relevant information requires a large, cooperative effort among the tribe, various divisions within the Department of the Interior, and perhaps historians and research archives.

Beyond all of that, determining that lands are restored lands requires the casting of an even broader research net, for not all lands re-acquired by a tribe are "restored" lands within the meaning of IGRA. Whether lands are restored lands requires a case-by-case determination.

We must look to the factual circumstances of the land acquisition. We must look at the location of the acquisition and consider such questions as whether it is close to the tribe's population base and important to the tribe throughout its history. We must look at the two temporal relationship of the acquisition to the tribal restoration (in other words, was this land acquired 1 year after the tribe was restored to recognition or 30 years later and after the tribe acquired 20 other parcels). All of this requires the tribe to hire historians and ethnographers and also to produce voluminous historical documents and archaeological evidence, which, of course, can take time to assemble and submit, not to mention time for the NIGC to digest.

A number of our determinations have also resulted in litigation, which slows down our ability to make decisions even further, and to add to the complexity, Congress has the ability to, and occasionally does, legislate the status of lands belonging to individual tribes, and that can change the Indian lands analysis completely.

The Commission and the Department have been criticized by the Department's Office of Inspector General for failing to decide the Indian lands questions before a facility opens and for failing to have a systematic approach to making such decisions. We share the Inspector General's concern on this. Good government requires that regulators know the extent of their jurisdiction. Furthermore, if we decide that a tribe should not have opened a facility because the lands did not qualify for gaming under the act, extensive litigation is guaranteed and, if the Commission is correct, the tribe will have incurred millions of dollars in debt with few options for repaying the debt.

We are, therefore, developing a system which is designed to track Indian lands determinations and to identify new problems quickly. Recently, we sent a team to the State of Oklahoma to obtain copies of deeds, maps and other documentation on some of the gaming sites. In California, we also hired a title company to conduct title searches on some sites. This information as well as other information we obtain will be used in establishing the central file system for the Indian lands documentation. We hope to convert this file system into an electronic system in the near future. We are also considering regulations that would require a tribe to establish that a gaming operation is on Indian lands before it licenses the facility.

We thank the committee members and staff and stand ready to assist you as you continue to review these Indian lands questions. If you have any questions, I would be happy to answer them.

Cowlitz Indian Tribe

TESTIMONY OF THE HON. JOHN R. BARNETT, CHAIRMAN

THE COWLITZ INDIAN TRIBE OF WASHINGTON

SENATE COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARING ON IGRA EXCEPTIONS AND OFF-RESERVATION GAMING

JULY 27, 2005

Chairman McCain, Vice-Chairman Dorgan, and respected members of this Committee, I thank you for the opportunity to testify this morning. To our friend Senator Maria Cantwell, I again bring you warm greetings from your Cowlitz constituents at home in Washington State.

For over 25 years I have been traveling to speak to this great body on behalf of my Tribe -- more than fifty trips -- always on my own dime, and always focused on righting the historical wrongs that have been committed against my people.

Most recently, over the past few months I have testified before this Committee on behalf of the Cowlitz Tribe about the burdens imposed on us by the Department of the Interior's administrative Federal Acknowledgment Process (FAP) and about the challenges we face as a newly recognized tribe. As you know, we were finally recognized through the Federal Acknowledgement Process in 2002, a process that took over twenty-five years. But no challenge has been greater for us than the process of acquiring land for our people. For this reason, I very much appreciate having this opportunity to tell you about the Cowlitz Tribe's views on acquiring land in trust and how the Indian Gaming Regulatory Act's (IGRA's) Section 20 exceptions affect us.

There is so much talk and controversy about "off-reservation" gaming and about "reservation shopping." We fear that in the rush to "fix" the Section 20 exceptions, Congress and the Department of the Interior may fail to remember that newly recognized landless tribes are poor tribes in desperate need of the United States' active assistance. We fear our friends in Washington may have forgotten that newly recognized tribes face daunting obstacles to self-governance and self-sufficiency precisely *because* we are landless

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and poor. Without a land base, we are unable to provide housing to our members, unable to build health clinics, unable to participate in federal programs that are tied to being "on or near a reservation,"[1] and, perhaps most importantly, unable to conduct the economic development necessary to generate the revenue a tribe must have to provide governmental, health and housing services to its members.

I am here today to ask that Congress continue to insist that there be a fair and equitable mechanism to put newly recognized tribes on a level playing field with tribes that were lucky enough to have had a reservation on October 17, 1988. IGRA's current "initial reservation" exception serves that purpose, and it must be preserved.

The Initial Reservation Exception

As you know, the Indian Gaming Regulatory Act prohibits the conduct of Indian gaming on lands acquired in trust after October 17, 1988. In its wisdom, however, Congress understood that it would be wildly inequitable to apply this prohibition under certain circumstances. One such circumstance, and I would argue the most compelling of these circumstances, is the one that allows a tribe newly recognized through the Department of the Interior's Federal Acknowledgement Process to game on its "initial reservation." *See* 25 U.S.C. § 2719(b)(1)(B)(ii).

I think it needs to be made clear that there are relatively few FAP-recognized tribes. Over almost 27 years that the administrative process has been in existence, the Department has recognized only 15 tribes. *To the best of our knowledge, there are only six FAP-recognized tribes which are landless today, including the Coulitz and our good friends of the Snoqualmie Tribe, also of Washington State.* I would like to recognize representatives of the Snoqualmie Tribe who are also here today at this hearing. We extend our greetings and best wishes to them as they struggle with the same land acquisition issues as do we.

Even though there are so few landless FAP-recognized tribes, the deck is heavily stacked against our efforts to get land in trust, particularly where we want to use the land for economic development involving gaming. Despite the fact that Interior has the authority to acquire land for newly recognized tribes (through the Indian Reorganization Act), Congress has not appropriated funding for land acquisition since 1950. For that reason, a landless newly recognized tribe must identify appropriate land, find the financial means to acquire title to the land, and complete a wide variety of expensive, time-consuming studies, data preparation, and other work relating to the fee-to-trust process with no financial assistance and very little technical assistance from the federal government. I trust then it comes as no surprise that newly recognized tribes are hard pressed to generate the funds needed to pay for these things.

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[1] Examples of federal programs that are tied to having a reservation land base include the Indian Business Development Program, 25 U.S.C. §§ 1521 et seq., 25 C.F.R. Part 286; the Employment Assistance Program, 25 C.F.R. Part 26; and the Vocational Training Program, 25 C.F.R. Part 27. Further, because Interior's fee-to-trust regulations impose more burdensome requirements for "off-reservation" acquisitions, future acquisitions that are not contiguous to parcels proclaimed as the Tribe's reservation will also be deemed to be "off-reservation."

It also must be understood that, by definition, any land a newly recognized tribe identifies for trust acquisition is treated by Interior as an "off-reservation" acquisition because newly recognized tribes do not have reservations. That means the tribe has to comply with Interior's more rigorous "off-reservation" fee-to-trust regulations. Most notably, where the tribe plans to use the land for gaming, the Tribe will have to find the money to pay for an exhaustive environmental review – in most cases, like ours, this means the preparation of an Environmental Impact Statement (EIS) under NEPA.[2] For the Cowlitz, preparation of the EIS alone will cost much more than $1 million.

Of course, any land that a landless FAP tribe acquires will, if taken into trust by Interior, come off the local tax rolls and be withdrawn from local jurisdiction. As you can imagine, this rarely makes the newly recognized tribe popular with the local community. Further, if, as in our case, the newly recognized tribe acquires land in a local community that generally supports gaming, there likely already is another gaming establishment there that will fight the newly recognized tribe to the death in order to protect its profits. Conversely, if the newly recognized tribe identifies land where there is no nearby existing gaming facility, it's probably because the local community is disinterested in – or possibly even hostile to – hosting a gaming facility. Again, not a way to gain popularity in the tribe's local community. For these reasons, it is little wonder that newly recognized FAP tribes find themselves in the middle of public debates and controversies – controversies often fueled and well-funded by other gaming interests trying to protect their own turf and profits. Imagine, then what will happen to us if federal legislation is enacted to require the affirmative concurrence of local governments before land could be acquired in trust for gaming for a newly recognized, landless FAP tribe?[3] Certainly such treatment of a landless tribe is inconsistent with the United States' general trust responsibility. Congress' wisdom in including the initial reservation exception in IGRA in 1988 should not be undermined in 2005.

The Cowlitz Tribe's Efforts to Obtain Land

The Cowlitz Tribe has identified a parcel of land that is located squarely within the service area established for us by the federal Indian Health Service and by HUD's Office of Public and Indian Housing, where many of our tribal members currently live. That parcel of land is also squarely within an area to which the Cowlitz Tribe has strong historical connections, as reflected in materials prepared by the Department of the Interior' Office of Federal Acknowledgment (formerly the Branch of Acknowledgment and Research). In addition, our historical ties to this area were documented in the Indian Claims Commission (ICC) litigation, and the parcel is only fourteen miles south of the boundary drawn by the

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[2] *See* March 2005 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations under Section 20 of the Indian Gaming Regulatory Act, at 10.

[3] We are particularly concerned about proposed legislation introduced by Congressman Rogers (H.R. 2353, section 6) and Senator Vitter (S. 1260, section 2). Congressman Rogers' bill would require approval by the "State, city, county, town, parish, village, and other general purpose political subdivisions of the State with authority over land that is concurrent or contiguous to the lands acquired in trust for the benefit of the Indian tribe for the purposes of gaming." Senator Vitter's proposal eliminates the "initial reservation" exception all together and would require a Tribe to satisfy a significantly more onerous version of the current "two-part" exception.

ICC that delineated the area used and occupied exclusively by the Cowlitz.[4] It is one mile southeast of the Lewis River, where the Cowlitz Tribe historically lived, hunted, gathered and fished, and there are a multitude of other historical connections to the surrounding area recognized by the ICC and the federal government that are too numerous to mention here. These lands are some of the very lands that we lost as a result of the federal government's wrongful actions so many years ago. Given these circumstances, the Cowlitz's efforts to re-acquire this land in trust can hardly be considered "reservation shopping."

It has been particularly painful for us to be the subject of a misinformation campaign launched by non-Indian gaming interests maligning our connections to this land simply to protect their monopoly on gaming in southwestern Washington. Their mischaracterization of our ties to this land is ironic given that we became landless precisely because we refused to move from our traditional lands to a reservation in another tribe's territory when Governor Isaac Stevens came to secure a land cession treaty from us in 1855. Despite the fact that we did not cede our lands and no reservation was established for us, President Lincoln opened our lands to white settlement by Executive Order in 1863. As non-Indians settled our traditional lands, we became entirely landless and scattered throughout southwest Washington. As a consequence of our landless status, the Department of the Interior eventually came to view us as unrecognized.

Even more ironic, we brought suit before the Indian Claims Commission in 1946 to obtain compensation for our lost lands. The ICC issued an order in 1969 finding that we had never been paid for the lands taken from us and that we were entitled to compensation. The Tribe insisted that any settlement legislation implementing the ICC judgment must set aside some of the money for land acquisition, but for over thirty years the Department of the Interior opposed the draft settlement legislation on the grounds that unrecognized tribes could not acquire tribal lands and that all the money had to be distributed on a per capita basis. Because we refused to take payment for our lost lands until some of that money was set aside for land acquisition, we did not obtain legislation authorizing the payment of our ICC damages award that included a provision setting aside settlement money for land acquisition until just *last year.*

In short, the Cowlitz Tribe lost both its land base and its federal recognition because it *refused to move from its home territory, the same territory in which we now seek to put land into trust.* The irony is that if we had agreed to a reservation outside our historical area, we would not have suffered from a century-and-a-half of non-recognition and landlessness. And we almost certainly would not be suffering now from the disingenuous and inflammatory attacks of our opponents.

Working Within the System

The Cowlitz Tribe is working hard to work within the system. We are painstakingly following all the rules established by the federal government, as evidenced by our twenty-five year ordeal completing the federal acknowledgement process, our submission of a fee-to-trust application identifying the parcel we want to acquire in trust for gaming, our support of BIA's decision to prepare an EIS for the trust acquisition, and

[4] The Cowlitz shared occupancy in the area in which the parcel is located with a Chinookan group that unfortunately was entirely destroyed by European disease and encroachment by non-Indian settlers. *See Simon Plamondon v. United States*, 21 Ind. Cl. Comm. 143, 171 (I.C.C. 1969).

our submission of a management contract to the NIGC for approval. We have done these things at significant cost to the Tribe.

Further, my Tribe is not beholden to unscrupulous developers or anyone else that is trying to manufacture tribal connections to maximize their profits. We have been very fortunate in that we have found a partner in Indian Country to help get us on our feet. While we entertained offers from a number of top-tier development companies, we are proud to be working with and learning from the Mohegan Tribe of Connecticut. In 1994, the Mohegan Tribe also successfully emerged from the Federal Acknowledgement Process as a newly recognized, landless tribe. Today the Mohegan Tribe is reinvesting in Indian country, helping their Cowlitz cousins from across the country. We are grateful for the opportunity to work with the Mohegan Tribe, and we hope that this partnership will demonstrate that tribes can use gaming development to achieve good things for Indian people. I would like to take this opportunity to recognize and express our sincere gratitude to Mark Brown, the Chairman of the Mohegan Tribe, who is with us here today. He and his Tribe have shown that Indian tribes can and will reach out to help each other and will succeed if given half a chance. Mr. Chairman, we applaud you for encouraging successful tribes to help those who are less fortunate. We are the beneficiary of your efforts.

Improvements That Should be Made

In the context of our strong view that the federal government has an affirmative and solemn obligation to assist newly recognized landless tribes, we respectfully offer that there are a couple of improvements that could and should be made to the existing initial reservation exception.

First, the Department of the Interior has taken the position that the initial reservation exception of IGRA Section 20(b)(1)(B)(ii) requires that the Secretary of the Interior issue a reservation proclamation pursuant to her authority under Section 7 of the Indian Reorganization Act (25 U.S.C. § 467) before the FAP tribe may game on land acquired in trust for it. To obtain a reservation proclamation a tribe must apply to an office within BIA that is entirely separate from the offices which process the fee-to-trust and Section 20 applications. Further, BIA has taken the position that the reservation proclamation process is subject to NEPA, thereby in some cases adding additional process and financial burdens to newly recognized tribes.

While the Secretary's interpretation of Section 20(b)(1)(B)(ii) may be plausible, in fact we have been able to find no IGRA legislative history supporting the idea that Congress in fact had intended to graft this additional administrative/procedural requirement onto the land acquisition process for newly recognized FAP tribes. As you can imagine, imposing yet another application process (one handled by an entirely different office within BIA) on top of the already applicable fee-to-trust, Section 20, and NEPA processes simply adds more time and expense to the process for the FAP tribe without any clear cut public policy benefit being achieved. Hence, we would ask that Congress seriously consider clarifying that the first land taken into trust for a newly recognized FAP automatically becomes that tribe's initial reservation so that the tribe is not subjected to yet another expensive, time consuming process.

Second, and very importantly, Congress should impose time deadlines on Interior's processing of fee-to-trust/Section 20 applications. The process can and always does take *years* to accomplish. Some of this time is legitimate – certainly it takes some time to review an application and to properly complete NEPA compliance work. I know this Committee is concerned about the political influence brought to bear on Indian lands decisions. We are worried about that too. We think the only way to protect the integrity of the system is direct the Department of the Interior to make decisions within specified time frames. This will help force substantive decisions to be made rather than allow for political forces to prolong the process indefinitely. In our view, it is reasonable to require that Interior process and make a decision on a landless FAP tribe's fee-to-trust application within two years of it being submitted.

Conclusion

We understand that there have been abuses in the way fee-to-trust applications and the Section 20 exceptions have been handled by a few tribes, and certainly there are situations in which developers and lobbyists have tried to manipulate the system in order to maximize their business opportunities. But that is not happening here, and we do not think it is appropriate or just that the initial reservation exception, which applies only to a handful of tribes, should be sacrificed on the altar of political expediency. The misdeeds of a few should not become the basis for wholesale revisions to IGRA that fail to take into account the unique histories and modern circumstances of individual tribes. I am asking that, as the lawmakers for our nation, you act with due care and deliberation before altering the balance of federal, state and tribal interests created by the Section 20 exceptions, particularly the initial reservation exception. A rush to embrace any one-size-fits-all solution that is meant to address the actions of a very few tribes and a few greedy developers is likely to cause harm to the very tribes who most need your help -- tribes like mine that are simply trying to find a piece of land to call our own, on which we can rebuild our tribal government, promote our sovereignty and self-determination, and create economic opportunities for our people.

The Cowlitz Tribe thanks you for the opportunity to provide this testimony, and we offer our continuing assistance to the Committee as it considers whether and/or how to amend Section 20 of IGRA.

SNOQUALMIE TRIBE

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Senator John McCain, Chairman
241 Russell Senate Office Building
Washington, DC 20510

Dear Senator McCain:

JULY 27, 2005 STATEMENT OF THE SNOQUALMIE TRIBE

As a member of the Senate Indian Affairs Committee, you are no doubt considering the issues being raised about the Indian Gaming Regulatory Act and the land into trust process. We know that there have been discussions and hearings held about possibly amending IGRA to address concerns about tribes taking land-into-trust for gaming purposes in states in which the tribe is not located and other "off-reservation" acquisitions. We are confident that you will consider these matters carefully and deliberately and so do not opine about our view of any particular course of action in that specific matter. However, we are aware that review of the interstate acquisition of "off-reservation" lands may touch on the issue of "initial reservation" acquisitions. From that perspective, we would like to briefly share our views and our story.

The Snoqualmie Tribe is a signatory to the 1855 Treaty of Point Elliott and has since time immemorial occupied the lands of western Washington within and surrounding the greater Snoqualmie Valley. Our membership lives, works, and attends school, and maintains a distinct tribal community, as it has for generations, in this area. For a number of years we have had an "initial reservation" application before the Bureau of Indian Affairs to take a small parcel of land into federal trust for our Tribe. We have expended considerable, time, effort, and money to obtain this trust status in the way in which the process has been set out in accordance with federal law and BIA regulation. For the reasons outlined below, we urge you not to change the rules in mid-stream as it applies to "initial reservation" acquisitions of land.

Our History

The Snoqualmie Tribe was one of the signatory tribes to the 1855 Treaty of Point Elliott, which paved the way for non-Indian settlement of the greater Seattle region. In exchange for this agreement, the Snoqualmie Tribe was to receive a reservation. That reservation was never provided by the United States as promised. Nevertheless, the Snoqualmie Tribe continued to occupy the area of the Snoqualmie Valley and maintained its

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tribal cohesion. In 1953, during the Termination Era, the United States chose to end federal recognition of tribes that had no land. Ironically, the Snoqualmie Tribe was notified by the United States in that year that as a result of its landless status, it no longer had federal recognition.

Despite being "terminated" by the United States, the Snoqualmie Tribe continued to occupy the area of the Snoqualmie Valley and despite the hardship of doing so, continued to operate as a distinct cultural and social entity and continuously maintained a tribal government. For more than twenty-four years, the Snoqualmie Tribe struggled without any external support through the Federal Acknowledgement Process ("FAP") to regain its status as a federally recognized tribe, and in 1999, after all administrative appeals were exhausted, the Snoqualmie Tribe resumed its seat as a federally recognized tribe. Through FAP, the Snoqualmie Tribe had righted a fifty year old wrong.

Our Effort to Obtain a Reservation

Almost immediately upon receiving recognition under FAP, the Tribe sought, without any financial assistance from the United States, to acquire a land base promised long ago but never provided, within the area its membership has always occupied. Mindful of non-Indian concerns about tribal land acquisitions and the concerns of political entities, the tribe began a tedious process in identifying a land base that was within its homelands, but would also be supported by the surrounding community. To effectuate these goals, the Snoqualmie Tribe invited the state, county, and local governments as well as civic organizations and environmental groups to participate directly into the selection of a land site where the Tribe could establish its initial reservation. Some eighteen sites were examined until one site was selected that had uniform support. This 57 acre site borders the City of Snoqualmie, in the Snoqualmie Valley, within miles of the Snoqualmie Falls (one of our sacred sites), and just west of nearby Snoqualmie Pass. It resides in the shadow of our sacred mountain, Mount Si.

While we are well aware that historically the process of taking land into trust has in some cases caused consternation with neighbors, localities, and other governments, our process has thankfully not seen those results. Instead, we have entered into a publicly acclaimed services agreement with the City of Snoqualmie, which has been held up as a model for intergovernmental cooperation between tribes and municipalities in the State of Washington. We have gratefully received written endorsements for our application from King County, the

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City of Snoqualmie, the City of Duvall, an adjacent municipality, and Mountains to Sound Greenway Trust, an environmental land trust organization. Additionally, we have held meetings with federal, state, and local officials as well as civic groups and members of the public at large to inform them of our intended use of the property and sought their input and comments. We believe the broad-based support for our acquisition is a direct result of the manner in which we have invited public scrutiny and participation in this land acquisition process.

Requested Action

We do not hold up our experience as a model to be imposed on other tribes or to bring acclaim to ourselves. We use our experience to demonstrate to you that there exists a process wherein tribal acquisitions of land can and do occur without rancor and venom. We urge you in the strongest terms possible not to treat all applications to take land into trust with the same broad brush. We believe that there exists a very distinct and critical difference between "off-reservation" and "initial reservation" acquisitions. The latter designation applies to a very limited number of tribes, probably less than six, and because of the necessity of being a FAP tribe and landless for this section to apply, generally serves to correct a wrong. We ask you not to change the rules as it applies to our "initial reservation" application. By allowing us to proceed in the course in which the law and regulations existed when we began this effort, you effectively give us the opportunity to correct a wrong that this very year is one hundred and fifty years old.

Respectfully,

THE SNOQUALMIE TRIBE

Jerry Kanim Enick

Jerry Kanim Enick
Tribal Chief

Tribal Chairman: Bill T. Sweet, Vice-Chairman: Mary Anne Hinzman, Secretary: Arlene Ventura, Treasurer: Margaret A. Mullen, Lifetime Council: Katherine Barker, Council: Ray Mullen, Elsie Erickson, Frances K. De Los Angeles, Nina Repin, Vyonda Juanitia Rose: Nathan (Pat) Barker: Chief: Jerry Enick . Alternates: Shelley Burch, Karen Moses Gray.

Written Testimony of Chief Charles D. Enyart
Eastern Shawnee Tribe of Oklahoma

Before the Senate Committee On Indian Affairs
United States Senate

July 27, 2005

Chairman McCain and members of the Committee, my name is Charles Enyart. I am the Chief of the Eastern Shawnee Tribe of Oklahoma, a federally recognized Indian Tribe whose aboriginal homeland encompasses what is the present day state of Ohio. These written comments expand on my oral testimony presented to the Committee on July 27, 2005. I appreciate the opportunity to explain the importance of our land claims in Ohio for our people. Our claims are important for at least three reasons: (1) to ensure that we have the opportunity to return to our aboriginal homelands in present day Ohio; (2) to ensure that we have the same right as other Indian tribes to conduct Indian gaming on our lands under current law; and (3) to advocate for the right of tribes, states, and local communities to work together for their mutual benefit.

The Shawnee want to return to Ohio. The legitimacy of our historic and cultural ties to Ohio is undeniable. One hundred fifty years ago, the Tribe was driven out of its homeland: lands in the state of Ohio. The historical record is full of accounts of violence against our people including destructive raids and the burning of Shawnee villages by the United States Army and the unauthorized taking of the Shawnee's lands by encroaching settlers. Our people were forcibly removed from their villages and relegated to a series of reservations first in Ohio, then in Missouri, and ultimately Oklahoma. It was an ugly and shameful period in American history in which our people endured unspeakable fear, intimidation, and military violence used by the United States and early Ohioans.

When we return to Ohio we wish to do so on the same legal basis as other federally recognized tribes. That is, we want the right to conduct activities on our regained land that would be permissible for any other recognized tribe anywhere in the United States. We do not want to return as second class citizens by only being allowed to conduct certain activities. Thus, we would strongly oppose any legislation which would bar a federally recognized tribe with legitimate claims from regaining land in its historic area and using that land for any permissible tribal activities including gaming. To bar a tribe such as the Shawnee from using any land it may gain in its aboriginal homeland for federally recognized purposes would create a group of second class Indians who were only allowed to do limited things on their land.

The Ohio State Legislature, years before the Eastern Shawnee Tribe began exploring the possibility of gaming in Ohio, anticipated Indian gaming in the state. In fact, the Ohio legislature enacted legislation effective in 1997 authorizing legislative approval of tribal-state gaming compacts negotiated by the governor. It is, therefore, apparent that the State has taken steps to inform itself about the Indian Gaming Regulatory Act and tribal gaming, and to pave the way to one day proceed with a tribal-state gaming compact.

It is clear that the people of Ohio are receptive to the establishment of Indian lands and Indian gaming. They desire the introduction of gaming for the unquestioned economic benefits that it produces. There are many reasons for them to prefer Indian gaming over other alternatives. First, there are numerous controls on the scope of tribal gaming which diminish the potential for uncontrolled expansion. Only so many tribes have a historic or cultural connection to any given state. Second, tribal gaming revenues, as a matter of law, may only be expended for socially beneficial purposes approved by the Congress. Commercial gaming only benefits private interests. In stark contrast, tribal gaming lifts entire communities out of poverty,

educates children who once had little hope for higher education, builds schools, roads, bridges, funds law enforcement and emergency services, preserves languages and cultures, builds clinics and hospitals and provides dialysis and diabetes centers, and funds charitable activities of every kind.

Gaming has been of economic benefit to our Tribe. Until very recently, our historic legacy was one of poverty and isolation. Left virtually landless, for over a century and a half our people had very little realistic hope that things would ever improve. Like other tribes in similar circumstances, we had no economy and no tax base. We did not even have the means to fully redress the wrongs against us, which is why certain of our claims remain outstanding. Indian gaming has changed our bleak outlook as to our future. The revenues from our modest gaming operation, BorderTown Bingo located in West Seneca, Oklahoma have provided us the means to make improvements in the lives of our people and to rekindle the hope for a better life for our children and grandchildren. However, the rural character of the land we now occupy, combined with the economic conditions in the surrounding area, severely restrict our economic potential. The lot of the Eastern Shawnee people is improved, but we have a long way to go achieve the level of prosperity that once was ours.

Our interest in returning to Ohio is to establish a mutually beneficial political and economic relationship with the state of Ohio and the communities that have reached out to us with a vision of what is possible. The Eastern Shawnee seek to reestablish a presence in Ohio as part of a welcome and mutually beneficial relationship conducted on a government-to-government basis both with the State and the local governments that may one day be our neighbors once again.

We do wish to finally resolve our outstanding land claims, but not in a manner that will be detrimental to the people of Ohio. Those with whom we have established a relationship understand our intentions and have welcomed us into their communities to discuss the potential for tribal gaming. In fact, local communities in the state of Ohio have actively sought out the Tribe and asked us if they can help bring the Shawnee back to our homeland. We are committed to working through appropriate governmental channels in Ohio to ensure that we are welcomed back to our homeland.

On June 27, 2005, we filed valid land claims in Federal Court in Ohio. The Tribe brought the action to vindicate our aboriginal land rights wrongfully held by the respective Defendants – over 60 in all. We seek a declaration that we retain title to 92,800 acres of former reservation lands in Ohio. We also seek a ruling that the Tribe has use and access rights to approximately 11,315 square miles including all or a portion of lands in thirty-six counties in central and western Ohio for hunting, fishing, and gathering purposes. The Tribe further seeks an award of damages for wrongful possession and trespass by Defendants of its former reservation lands in Ohio and other parcels that were and are illegally conveyed to non-Indians in violation of federal law representing the value of the parcels, including all taxes, rents, issues and profits, including subsurface resources removed from the Tribe's lands, that were and are unlawfully withheld from the Tribe. These violations of the Tribe's rights continue unabated today. The Tribe has sought redress for these wrongs from the state of Ohio. The state of Ohio has refused to take any action to redress these wrongs. We had no choice but to take our valid claims to the courts for redress. The full explanation of these claims is contained in material from our attorneys which I am submitting with my written remarks for the record.

Tribes with legitimate claims should be allowed to regain portions of their homeland and should be allowed to enter into agreements including gaming agreements that promote economic development and benefit tribal, state, and local economies.

Thank you, Mr. Chairman and Committee Members for this chance to testify to the Committee.

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April 25, 2005

Jim Petro, Attorney General
Office of the Attorney General of Ohio
State Office Tower
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428

Re: Eastern Shawnee Tribe of Oklahoma's Claims Concerning Lands in Ohio

Dear Attorney General Petro:

The Eastern Shawnee Tribe of Oklahoma ("Eastern Shawnee" or "Tribe"), is a federally recognized Indian tribe that is a political and legal successor in interest to certain tribes, bands, and groups of Shawnee who occupied what is now the State of Ohio and who signed the Treaty of Greenville, August 3, 1795 (7 Stat. 49). This letter is notice of the Tribe's intent to pursue claims against the United States, the State of Ohio, and private landowners within the State of Ohio concerning title and use of Shawnee aboriginal lands in the state.

The Eastern Shawnee's claims concern the following areas: (1) western portions of the Virginia Military District lands; (2) lands in the western portion of what was known as Royce Area 11; and (3) 640 acres of land northwest of present-day Bellefontaine on the Great Miami River. The Eastern Shawnee are also prepared to pursue use right claims to additional areas of Ohio reserved by the Shawnee for hunting and gathering. These claims, if left unresolved, could cloud title to substantial areas of land in Ohio for the indefinite future. In addition, the claims include claims for damages, accounting, and disgorgement of all benefits unjustly received by the United States, the State of Ohio and private landowners, and possibly ejectment. The letter provides a brief history of Shawnee use and occupancy in Ohio and then addresses each of the Eastern Shawnee's claims concerning its aboriginal lands and continuing rights to use those lands in Ohio in detail.

1.0 Brief History of Shawnee Occupancy of Ohio

The Shawnee have a long history of use and occupancy of, and subsequent forcible removal from, the lands that now comprise the State of Ohio. While this history is marred by repeated destructive raids by the United States Army and the unauthorized taking of the Shawnee's lands by encroaching settlers, history also shows that the Shawnee thrived and endured in present-day Ohio for more than 170 years.

There were five aboriginal clans of Shawnee, known as "septs."[1] These septs of Shawnee used and occupied lands in the Ohio Valley as early as the 1660s. For instance, the Indian Claims Commission notes that archaeological evidence from sites around Cincinnati, Ohio, indicates the possible presence of Shawnee Indians in that area as well at or around 1660. *Strong v. United States*, 31 Ind. Cl. Comm. 89,153 n.2 (1973).

Because vast areas of Ohio remained undeveloped and unexplored until the early to mid-1700s, the first evidence of Shawnee villages in Ohio appears in approximately 1731. These first villages were Wapatomica / Wakatumaki on the Muskingum near Dresden, Ohio, Upper Shawnee Town (Conedogwinit, three miles north of the Kanawha River), and Lower Shawnee Town / Sinioto at the mouth of the Scioto River. At the conclusion of the French and Indian War in 1755, the Shawnee, feeling threatened because they had supported the French, fled from the Ohio River to the Scioto River Valley and established villages near present-day Frankfort, other Ross County locations, the Pickway Plains, and near present-day Circleville in an effort to avoid retaliation by British troops. One village was established at the site of present-day Columbus, but was later given to a group of Indians friendly with the Shawnee known as the Mingoes, or Seneca Indians.

With the onset of the American Revolutionary War, two of the Shawnee's five septs moved further west to establish villages on the Little Miami River in present-day Greene County and on the Mad Rivers in present-day Clark County. The Shawnee remaining on the Pickaway Plains moved in 1777 to the current Bellefontaine \ West Liberty area. However, the Shawnee still used a few of their former villages in the Scioto Valley as gathering sites for hunting parties throughout the 1790s.

In a scene of violence that was repeated *ad nauseam,* the Shawnee villages at Chillicothe in present-day Greene County and Piqua, in present-day Clark County, were burned and destroyed by the United States Army in 1779 and 1780. The Shawnee at these villages were forced to move to the Great Miami River and established the villages of Lower and Upper Piqua in present-day Miami County. These villages were subsequently burned and destroyed by General George Rogers Clark in November 1782. United States Brig. Gen, Logan destroyed the Shawnee Villages in the Bellefontaine and West Liberty area in October 1786.

In all, until the Shawnee were forcibly driven out of Ohio and forced on to reservations first in Ohio, then in Missouri, and ultimately in Oklahoma, the Shawnee established twenty-seven (27) villages in Ohio from 1731-1786. *See* Ermine Wheeler-Voegelin, *An Ethnohistorical Report on the Indian Use and Occupancy of Royce Area 11, Ohio and Indiana, ceded by "the tribes of Indians called the Wyandots, Delawares, Shawnees, Ottawas, Chipewas, Putawatimes, Miamias, Eel –river, Weea's, Kickapoos, Piankashaws and Kaskaskias" pursuant to the Treaty of Greenville on August 3, 1795* (entered in ICC Docket Nos. 13-G, *Chippewa et al.*).

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[1] The five Septs are as follows: Chillicothe (Calaka, Chalaakaatha, Chalahgawtha); Hathawekela (Oawikila, Thaawikila, Thawegila); Kispoko (Kiscopocoke, Kispokotha, Spitotha); Mequachake (Maykujay, Mekoce, Mekoche); and Piqua (Pekowi, Pequa).

The Shawnee also used and occupied vast hunting grounds, which can be divided into three general areas. The first Shawnee hunting ground is located in the Muskingum Valley leading to the Ohio River, and was primarily used by those Shawnee living at Wapatomica / Wakatumaki near present-day Dresden, Ohio, and those living at Upper Shawnee Town on the Ohio River. The second Shawnee hunting ground was much larger. This hunting ground stretched east from the Hocking River and west to the Little Miami River, and was bounded by present-day Columbus, Ohio in the north and the Ohio River on the south. The third Shawnee hunting ground stretched from the Little Miami and Mad Rivers to the Great Miami River. The Shawnee were still using these hunting grounds after they were forced from their homes in the Scioto and Miami Valleys. Shawnee use of these areas use continued after the signing of the Treaty of Greenville. The Tribe continues to hold these use rights, as guaranteed in the Treaty of Greenville, through the present-day.

In addition to the fear, intimation, and violence used by the United States and early Ohioans to force the Shawnee from their lands in Ohio, the United States also used its treaty making power. The Shawnee were a party to eighteen ratified treaties between the Shawnee, other tribes, and the United States between 1784 and 1867. The four treaties entered into by the Shawnee with the United States prior to the Treaty of Greenville in 1795 were declared null and void by that Treaty. *Strong,* 31 Ind. Cl. Comm. at 195 (noting that Article X of the Treaty of Greenville declared all treaties entered into after 1783 void). The Shawnee expressly refused to sign other treaties (the Treaty of Ft. Stanwix and the Treaty of Ft. Harmer) and were also a party to an unratified treaty, the Treaty of Fort Finney (January 31, 1786).

The Eastern Shawnee seek to vindicate the longstanding federal policy to protect Indian land rights. There is no question that the Shawnee aboriginally used and occupied large portions of present-day Ohio for more than 170 years. Likewise, there is no question that the Shawnee were violently dispossessed of their lands, forced onto reservations far away from their aboriginal homeland, and denied fair and just compensation for the unlawful taking of their lands. The time to make the Shawnee whole has come.

2.0 Claims to Western Portions of Virginia Military District Lands

CONCLUSION: The Eastern Shawnee have legal claims based on aboriginal use and occupancy concerning the western portion of the Virginia Military District lands near present-day Xenia and Bellefontaine, Ohio.

DISCUSSION: The Virginia Military District ("VMD") lands are located in twenty-three counties from the Ohio River north, between the Scioto and Little Miami Rivers. These lands are contained within central Royce Area 11.[2] *Strong v. United States* (Dkt. Nos. 64, 335 & 338),

[2] The term "Royce Area" comes from land area designations developed in the *18th Annual Report of the Bureau of American Ethnology* (1899). Each Royce Area is assigned a number for cataloguing. Royce Area designations generally describe land areas used by particular aboriginal groups and, accordingly, were used by the Indian Claims Commission when discussing lands used and occupied by Indian tribes. Central Royce Area 11 is bounded on the

31 Ind. Cl. Comm. 89, 123 (1973). The VMD encompassed 750 square miles and contained approximately 4,204,800 acres of land. T. Ferguson, *Ohio Lands* at 3. These lands were reserved by Virginia after it relinquished its other claims to Ohio and the Northwest Territory to the Confederation in 1784. *Strong*, 31 Ind. Cl. Comm. at 123. Ohio was admitted to the United States on March 1, 1803. *Id.* at 188.

When Virginia relinquished its claim, Virginia "possessed the exclusive right of preemption over the existing Indian rights of occupancy thereto." *Id.* at 124. When that title passed to the United States, so did the exclusive right of preemption. *Id.* However, the Indian Claims Commission concluded that:

> [t]he titles of both Virginia and the United States were subject to Indian rights of occupancy, which were not relinquished until the 1795 Treaty of Greenville, when the Indians relinquished their rights to the United States.[3] Under these circumstances, the United States could be liable to the Indians with respect to lands located within the Virginia Military District.

Id. (emphasis added) (internal citations omitted). In so finding, the Commission rejected the government's contention that the VMD lands never became part of the public domain. Therefore, the Commission correctly noted that the United States could be liable for taking those lands from the Shawnee.

That the Commission reserved this issue for future litigation is clear from a review of the plain language of the Commission's decision. The VMD lands determination was distinct from that of central Royce Area 11. The Commission discussed the VMD lands separately, after discussing the evidence that it was presented with concerning Shawnee exclusive use and

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east and the south by the Ohio River, on the west by the drainage between the Scioto River and the Great Miami and little Miami Rivers (which may be described as a north/south line from northeastern Logan County on the Greenville Treaty line to the southeastern corner of Brown County on the Ohio River), and on the north by the Greenville Treaty line from a point in northeastern Logan County east to the northeast corner of Knox County. *Strong v. United States* (Dkt. Nos. 64, 335 & 338), 31 Ind. Cl. Comm. 89, 157 n. 6 (1973). The predominant topographical feature of this region is the Scioto River which flows into the Ohio River at present-day Portsmith and the Scioto's tributaries. *Id.* In central Royce Area 11, "the Shawnees were predominant." *Id.* at 98.

[3] Based upon the Treaty of Greenville, no surveys were made by VMD surveyors north of the Greenville Treaty line. After the 1817 Treaty, VMD lands north of the Greenville Treaty line were entered and surveyed. However, prior to Treaty of Greenville, acting upon the unratified Ft. Finney Treaty, the United States erroneously permitted VMD surveyors to enter and survey land south of the Greenville Treaty line, from 1788-1795. As this land had not yet been ceded by any formal agreement prior to entry and survey by the United States, the government's actions were unlawful, and any conveyance of such lands prior to 1795 is likely void.

occupancy in central Royce Area 11. *Strong*, 31 Ind. Cl. Comm. at 123. Thus, while the Shawnee had a claim to compensation for the VMD lands based on the United States' liability, that claim, based on aboriginal occupancy of those lands, was not squarely presented to the Commission for review.

While the Commission did find that the Shawnee's aboriginal lands in central Royce Area 11 encompassed part of the VMD lands, specifically, the area of the VMD west of Columbus to approximately present-day Wilmington,[4] the Commission did not make a finding as to the rest of the VMD lands.[5] Moreover, the Commission's conclusions were not dependent on the VMD findings.[6] The Commission's observation that the United States "could be liable" reserves the Tribe's right to pursue legal action concerning these lands today.

Within the VMD lands reserved for future consideration by the Commission, the Shawnee had six villages. One Shawnee village was near present-day Xenia. This village was Chillicothe, which the Shawnee occupied exclusively from at least 1774 through 1780. There is some evidence that this Shawnee town was actually established in 1756. This village was established by the Chalahgawha Sept of Shawnee on the Little Miami River near the junction of Massie's Creek near present-day Oldtown, Greene County, three miles north of Xenia, Ohio. The village was burned by Col. John Bowman's Kentucky Militia on July 10, 1779, and

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[4] "[T]he Shawnees continuously used and occupied [central Royce Area 11] from the late 1730s until they were forced to abandon these lands in the late 1770s." *Id.* at 122. Until they were forced out in the late 1770s, the Indian Claims Commission concluded that "the Shawnees had established Indian title to the area bounded on the north by an east-west line running along the 40° north latitude and on the south by a straight line running from the City of Athens in Athens County west to the town of Highland in northern Highland County, and bounded on the east and west by the lines described in the aforementioned footnote as the east-west boundaries of central Royce Area 11." *Id.* at 123, 136. In settlement of the Shawnee's ownership of 1,667,496 acres, the Shawnee were awarded $1,745,146.86, a little more than one dollar an acre. *Strong v. United States*, Findings of Fact On a Compromise Settlement, 40 Ind. Cl. Comm. 161, 161, 173 (1977).

[5] Ambiguous and vague findings concerning certain issues in a decision bar the application of issue preclusion in subsequent litigation. *See, e.g., Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991); *Barnes v. Hodel*, 819 F.2d 250, 252 (9th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1987) (decision that almost 2 million acres did not pass to a party because of mineral character of the land did not identify specific lots in issue in the subsequent case and did not preempt relitigating the issue).

[6] For preclusion to apply, the judgment must have been dependent on determination of the issue in question. *See, e.g., Whitley v. Seibel*, 676 F.2d 245, 248 (7th Cir. 1982), *cert. denied*, 459 U.S. 942 (1982); *Red Lake Band v. United States*, 607 F.2d 930, 934 (Ct. Cl. 1979) (findings of fact by court are not conclusive if judgment was not dependent upon those findings).

subsequently destroyed by General George Rogers Clark in 1780. After their forceful eviction, the Chalahgawha Sept moved to Lower Piqua on the Great Miami River, Miami County.

Five other Shawnee villages were in this portion of the VMD lands, including the following:

1. Pigeon Town (1777 – 1786). This village was located three miles north of West Liberty, in Logan County, on the Mad River. The village was destroyed by Brig. General Logan in October 1786.

2. Moluntha's Town (1777 – 1786). This village was located one mile east of present-day West Liberty, Ohio on the Upper Mad River, in Logan County. The village was burned and destroyed by Brig. General Logan in October 1786. Moluntha was subsequently killed while under the protection of Brig. General Logan.

3. Mackachack / Micochekay / Michacheck / Macucha / Maycockey Town (1777/1778 – November 1786). This village was located one mile east of Moluntha's town and one mile north from Macochee Creek at its junction with Mad River, east and a south of present-day West Liberty. The village was two miles downstream from Tarhe's Town, a Wyandot Village. The village was burned and destroyed by Brig. General Logan in October 1786.

4. Wapatomica / Wappotomatick / Wapatomeky / Waketomakie / Wactomica (1777 – November 1786). This village was located on the west bank of the Mad River, 2.5 miles southeast of Zanesfield, Logan County. Shawnee formerly living at Wakatumaki on the upper Muskingum River established this village. The village was burned and destroyed by Brig. General Logan in October 1786.

5. McKee's Town / Kispokotha / Kismagogee / Cospeco (1778 – 1786). This village was located on McKees Creek in Logan County, 2.5 miles southeast of present-day Zanesfield. McKees Town and Kispokotha were separate, adjacent villages that merged. The village was burned and destroyed by Brig. General Logan in October 1786.

The Shawnee exclusively used and occupied these village sites from 1777 until 1786. This period of use and occupancy, lasting until the Shawnee were forcibly removed from their homes, demonstrates Shawnee exclusive use and occupancy of these lands to establish compensable aboriginal title to these areas. *See United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941) (aboriginal title requires that actual possession be continuous and exclusive unless it was during a period of forcible, involuntary dispossession).

The Shawnee did not relinquish their claims to these areas until the Treaty of Greenville. The Indian Claims Commission never reached these claims. The Tribe is entitled to compensation for the unlawful taking of these lands within the western portion of the VMD without compensation.

3.0 <u>Claims to Western Portions of Royce Area 11</u>

CONCLUSION: The Eastern Shawnee have claims based on aboriginal occupancy concerning lands in western Royce Area 11 (outside of the VMD lands) near present-day Piqua and Bellefontaine based on the documented presence of five Shawnee villages.

DISCUSSION: Western Royce Area 11 was defined by the Indian Claims Commission as "bounded on the east by [the western boundary of Central Royce Area 11 (the drainage between the Scioto River and the Great Miami and little Miami Rivers (which may be described as a north/south line from northeastern Logan County on the Greenville Treaty line to the southeastern corner of Brown County on the Ohio River))], on the south by the Ohio River, and on the north and west by the Greenville Treaty Line. The predominant topographical feature here is the drainage system of the Great Miami and Little Miami Rivers." *Strong*, 31 Ind. Cl. Comm. at 160 n.7.

The Indian Claims Commission noted that the Shawnee were known to have hunted extensively in this area and had "as many as sixteen villages on the upper Great Miami River and its tributary, the Mad River." *Id.* at 125. This area appears to have been most frequently used by the Shawnee residing in the area of what is now Bellefontaine and West Liberty. No other tribe used this area. The entirety of the area known as "Between the Miami Rivers" was under the exclusive control of the Shawnee. The Shawnee were the first tribe to settle in these areas, and accordingly, controlled settlement in these areas by other tribes. Inexplicably, however, the Commission found that period of use and occupancy of this area by the Shawnees was "not sufficiently long enough to establish aboriginal title." *Id.* Only six sentences of the Commission's opinion are devoted to a discussion of western Royce Area 11 and no further reasoning is provided other than what is recited above.

At least five Shawnee villages existed in western Royce Area 11 before the Treaty of Greenville. These were ignored by the Commission. These villages are in the area of present-day Piqua, Ohio and Bellefontaine, Ohio. The five villages are as follows:

1. Lower Piqua Town (1780 - 1782). This village was established by the Chalahgawha Sept on the Upper Great Miami at Loramie Creek, near present-day Piqua, Miami County. The village was burned and destroyed by General Clark in November 1782. The Shawnee living there moved to a location on the Auglaize River.

2. Wills Town (Unknown date - November 1782). This village was located on the Great Miami River north of present day Piqua, Ohio. The village was destroyed by General Clark in November 1782.

3. Upper Piqua (1780 -1782). This village was established by the Peshawar Sept and was located on the Great Miami River three miles above Lower Piqua. The village was burned and destroyed by General Clark in November 1782. The Shawnee living there moved to a location on the Auglaize River. These Shawnee villages were in existence from 1780 - 1782 until they were destroyed by the United States.

4. Blue Jacket's Town (1777 - 1786). This village was located at the present-day site of Bellefontaine, in Logan County. The village was burned and destroyed by Brig. General Logan in October 1786.

5. Waupaughkoneta / Waapuckinah / Wapakoneta (1778 - November 1786). This village was located south of present-day West Liberty on the east side of the Mad River in extreme northern Champaign County. The village was destroyed by Brig. General Logan in October 1786.

There is no mention of these villages in either the Commission or the Federal Claims Court decisions. This is curious, as evidence of these five villages demonstrates exclusive use by the Shawnee of the area near present-day Piqua and Bellefontaine sufficient to establish a claim based on aboriginal title.

Aboriginal possession, also referred to as original Indian title, is a question of fact for a court to decide when the lands in question "were included in the ancestral home of a tribe of Indians, in the same sense they constituted definable territory occupied exclusively by that Tribe as opposed to being wandered over by many tribes." *Santa Fe Pacific Railroad Co.*, 314 U.S. at 345; *Mitchell v. United States*, 34 U.S. 711 (1835).

The Indian Claims Commission and the Federal Claims Court did not address aboriginal title claims with respect to these five villages in western Royce Area 11. The Commission decision and the Federal Claims Court decision affirming the Commission as to "overall Royce Area 11" were based on alternate grounds. The Commission's decision as to at least part of western Royce Area 11 turns on the fact that the Shawnee had not occupied the area for a sufficiently long amount of time, despite the Commission's finding that sixteen villages had been located there and that it was an area of "Shawnee concentration." *See, Strong*, 31 Ind. Cl. Comm. at 125, 174-75. There was no specific finding as to western Royce Area 11; the Commission only stated that the evidence suggested that none of the tribes aboriginally held title to other areas ceded in the Treaty of Greenville. *Id.* at 138.

In contrast, the Federal Claims Court found that no tribe had presented evidence that entitled it to claim aboriginal title to "overall Royce Area 11" based on the fact that none of the tribes claiming lands exclusively used the area. *Strong,* 518 F.2d at 561. The Federal Claims Court never discussed western Royce Area 11 in particular and never discussed these Shawnee villages. Moreover, "exclusiveness," relied upon by the Claims Court, was not the basis of the Commission's holding; rather, the Commission relied on length of occupancy.

As a result, these two decisions are impermissibly vague. The Commission and Claims Court decisions concerning those portions of Royce Area 11 outside of central Royce Area 11 appear to be based on multiple, mutually exclusive grounds that fail to address western Royce Area 11 with specificity. Neither basis for rejecting aboriginal title to "overall Royce Area 11"

is conclusively established.[7] Neither decision addressed the existence of the aboriginal Shawnee villages listed above.

However, the Eastern Shawnee had documented villages in western Royce Area 11. As noted above, these areas were not specifically dealt with by the ICC. The Tribe has a valid claim for unlawful taking of these lands within the western portion of Royce Area 11.

4.0 Claims to 640 Acres northwest of present-day Bellefontaine

CONCLUSION: The Eastern Shawnee have a claim based on aboriginal and recognized title, and the operation of the Non-Intercourse Acts, concerning 640 acres northwest of present-day Bellefontaine originally purportedly deeded to Joseph Moore and Nancy Stewart by Shawnee Chiefs, but never approved by the United States.

DISCUSSION: On October 2, 1810, Shawnee chiefs purported to deed certain lands to Joseph Moore, a "half breed of this said tribe and to his heirs but not his assigns...." The parcel was "...a tract of land one Mile square or six hundred and forty acres on the west Bank of the Miami River immediately above and adjoining the present boundary between the United States and us." The 640 acre grant was located on the west bank of the Miami River and north of the Greenville Treaty line encompassing Township 7S, Range 8E, Section 27. The deed provided that Mr. Moore could not alienate the land and that it would descend to his heirs. Mr. Moore recorded his deed on August 19, 1815. The purported conveyance was never confirmed by the United States. Mr. Moore had no heirs and went missing soon after the deed was recorded.

In 1813, the Shawnee chiefs also purported to deed land to Nancy Stewart, "daughter of the late Shawnees chief Blue Jacket." This grant comprised 640 acres on the east bank of the Great Miami River, adjacent to the Joseph Moore deed. Ms. Stewart recorded her deed on the same day that Mr. Moore did, i.e. August 19, 1815.

Subsequently, the United States approved a land patent to Ms. Stewart for 640 acres, 480 acres of which overlapped the Shawnee deed to Ms. Stewart and 160 acres of which overlapped the Shawnee deed to Mr. Moore. This grant was apparently pursuant to the provisions of Article 8 of the 1817 Treaty (as confirmed in the 1818 Treaty), which provided for conveyance of land to Ms. Stewart.

The Stewart conveyance was confirmed by a U.S. land patent to Ms. Stewart dated July 30, 1824. Thus, at this point, the United States had purported to cede 480 acres to Ms. Stewart,

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[7] *See, e.g., National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 909-10 (6th Cir. 2001), *cert. denied*, 151 L. Ed. 2d. 1019 (2002) (holding that prior decision had clearly relied one ground as primary basis for decision, rendering alternate ground unnecessary to outcome of prior case and thus subject to relitigation in present case); *Arizona v. California*, 530 U.S. 392 (2000) (finding that settlement of Indian Claims Commission Dk. No. 320 did not have a preclusive effect as to current boundary claim because the settlement was "far from clear" and could not have necessarily and universally relinquished the Tribe's claim to continuing title).

which had also been ceded by the Shawnee Chiefs, plus 160 acres to her, which the Chiefs had already ceded to Mr. Moore. The United States never confirmed the purported deed from the Shawnee conveying the remaining 160 acres to Ms. Stewart nor the remaining 480 acres to Mr. Moore. Those conveyances are therefore invalid under the Indian Non-Intercourse Acts.

A year after the Constitution reserved to the federal government the power to regulate commerce with Indian tribes, Congress enacted the first in a series of acts that came to be known as the "Indian Non-Intercourse Acts." Trade and Intercourse Act, July 22, 1790, U.S. Statutes at Large, 1:137-38. The Act was re-enacted, in slightly modified form, on March 1, 1793, and again in 1796, 1799, 1802, 1822, and 1834. The Act is now codified at 25 U.S.C. § 177, and provides that "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ." The Act, embodies the policy of the United States "to acknowledge and guarantee the Indian tribes' right of occupancy," *Santa Fe Pacific R. Co.*, 314 U.S. at 348, to tribal lands and "to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges." *United States v. Candelaria*, 271 U.S. 432, 441 (1926).

All conveyances after 1790 of Indian lands held pursuant to aboriginal or reserved title are void, unless approved by an unambiguous act of the United States. *County of Oneida v. Oneida Indian Nation*, 470 U. S. 226, 235 (1985); *Cayuga Indian Nation v. Cuomo*, 758 F.Supp. 107 (N. D. N. Y. 1991). Here, the United States never formally approved or consented to the alienation of a total of 640 acres of these deeds from the Shawnee (480 acres that were originally deeded to Mr. Moore and 160 acres that was originally deeded to Ms. Stewart).[8] That these deeds were never approved by the United States violates the Non-Intercourse Act. Since the time of the deeds, the State of Ohio and/or private landowners took possession of these lands. That possession violates the Tribe's federal common law right to possession of the lands. These actions by the State of Ohio and/or private landowners are a trespass on the Eastern Shawnee's lands.

As such, the Eastern Shawnee have a claim for these lands that may include use, possession, and occupancy of 640 acres near present-day Bellefontaine.

5.0 Claims to Use Rights over Certain Lands in Present-day Ohio

CONCLUSION: As a corollary to land claims based on aboriginal title, aboriginal hunting, fishing, and gathering rights give rise to claims for use of vast areas of Ohio The

[8] The 640 acres of land that was granted to Nancy Stewart by the United States in fee patent in the Treaty of 1817 is not subject to this notice of intent to pursue claims.

Eastern Shawnee has a legal claim concerning use rights for hunting, fishing, and gathering purposes to central Royce Area 11 and portions of western Royce Area 11.[9]

DISCUSSION: The U.S. Supreme Court has held that this aboriginal right to occupy and use an area for hunting and fishing purposes "[was] considered as sacred as the fee simple of the whites." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 668 69 (1974) (quoting *Santa Fe Pacific R. Co.*, 314 U.S. at 345. The concept of original Indian title embraces within it the right to hunt and fish on land held under such title.

These rights can exist anywhere within Shawnee territory recognized to be held aboriginally by the Indian Claims Commission (*e.g.*, central Royce Area 11) and other areas found to be occupied aboriginally (*e.g.*, the portions of the VMD lands and portions of western Royce Area 11 discussed above). The Indian Claims Commission acknowledged some of the Shawnee hunting grounds within the state of Ohio, finding that the "Shawnees are also known to have hunted extensively in western Royce Area 11. *Strong*, 31 Ind. Cl. Comm. at 125 (emphasis added). Historical evidence suggests that the Shawnee were the only tribe in the Miami Valley and may have controlled the entire Miami Valley from the headwaters of the Great Miami River to the Ohio River. There is additional evidence that the Shawnee may have had hunting grounds to the east and south of their recognized aboriginal territory. Even if the Shawnee cannot claim aboriginal title to these lands, hunting and fishing use rights may still exist. Non-exclusive fishing rights have been held to exist "irrespective of a tribe's ability to prove aboriginal title to lands, and it also exists independent of congressional recognition." *Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778, 785 (Ct. Cl. 1968); *see also United States v. Washington*, 626 F.Supp. 1405, 1527 (W.D. Wash. 1985) (test for determining areas where tribes hold treaty-reserved fishing rights).

Congress did not extinguish Shawnee hunting and fishing rights. Article VII of the Treaty of Greenville provided that the Shawnee shall be "at liberty to hunt within the territory and lands which they have now ceded to the United States. . . ." *See also Strong*, 31 Ind. Cl. Comm. at 186 ("Article VII permitted the Indians to hunt on the lands they ceded"). Shawnee hunting and fishing rights were recognized and reaffirmed in subsequent treaties. *See, e.g.*, Treaty with the Wyandot, etc., July 4, 1805 (7 Stat. 87), art. VI ("said Indian nations . . . shall be at liberty to fish and hunt within the territory and lands which they have now ceded").[10] The

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[9] They may have rights in other areas as well. We simply do not address those areas in this notice. Preclusion doctrines do not apply to the Shawnee's hunting and fishing rights claims. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 923-26 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999) (holding that previous Claims Commission litigation did not bar fishing and hunting rights claims because such rights were not actually litigated and decided). Likewise, the "equal footing doctrine" does not bar the Shawnee's hunting and fishing claims. *Id.* at 926; *Tulee v. Washington*, 315 U.S. 681 (1942).

[10] The other treaties with the Shawnee are silent as to hunting and fishing rights. Rights are reserved by implication if they are not expressly relinquished, and a contrary conclusion is

United States knew how to draft a treaty to revoke fishing and hunting rights but did not do so here. *Mille Lacs Band*, 124 F.3d at 920.

The Eastern Shawnee's hunting, fishing, and gathering rights based on aboriginal use and occupancy continue to be exercisable just as other non-reservation rights are under treaties, statutes, agreements, or executive orders. These rights include hunting and fishing for commercial purposes, and are not limited to use of any particular techniques, methods, devices, or gear. These rights extend to lands owned by the State of Ohio and private landowners and include a right of access, even if over private land, for tribal members to exercise these rights.

6.0 The Validity of All or a Portion of the Settlement of Shawnee Land Claims is Questionable.

Finally, we note that the settlement procedures used to settle some of the Tribe's claims in the Indian Claims Commission cases, involved an organization that likely did not have had the authority to approve the settlement in a representative capacity for the Shawnee people.

The stipulation for entry of final judgment for Docket Nos. 64, 335, and 338 was entered into and approved by the Eastern Shawnee, the Absentee Shawnee, and the so-called Cherokee-Shawnee. *Strong,* 40 Ind. Cl. Comm. at 165-67. The actual parties to the Dockets, however, with the right to sue in a representative capacity were the Eastern Shawnee and the Absentee Shawnee (Dockets 335 and 338), and the "individual plaintiffs in Docket 64 . . . on behalf of all members of the Shawnee Tribe of Indians of Oklahoma." *Strong*, 31 Ind. Cl. Comm. at 145.

The Cherokee-Shawnee is a group of Shawnee who signed an agreement in 1866 with the Cherokee Nation and were absorbed into the Cherokee Nation at that time. This group has never received federal recognition. There are only three recognized political successors in interest to the Shawnee that signed the Treaty of Greenville: the Absentee Shawnee, the Eastern Shawnee, and the Shawnee Tribe of Oklahoma. *See* 67 Fed. Reg. 67,179, 68181-82 (Dec. 5, 2003) (listing recognized tribes). The government apparently used the Cherokee Shawnee to approve the settlement in a representative capacity for the Shawnee Tribe of Indians of Oklahoma. *Strong,* 40 Ind. Cl. Comm. at 166-67.

It is not clear why the Indian Claims Commission and the Bureau of Indian Affairs permitted the Cherokee-Shawnee to act in a representative capacity of the Shawnee Tribe of Oklahoma for purposes of settlement. This group was not expressly authorized to bring suit in a representative capacity of the members of the Shawnee. This calls into question the quality, extensiveness, and fairness of the procedures in the Indian Claims Commission case. "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kramer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, *reh'g denied*, 458 U.S. 1133 (1982). As such, certain issues purportedly resolved by

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inconsistent with the use of the resource by the Indians at the time of the treaties. *See United States v. Wheeler*, 435 U.S. 313 (1978).

the settlement may be subject to redetermination. This situation buttresses the Eastern Shawnee's claims in this matter.

7.0 Conclusion

The Eastern Shawnee have suffered indisputable injustice concerning their lands and rights in what is now the state of Ohio. They are prepared to move forward with claims concerning over substantial lands in Ohio to rectify this injustice.

Thank you for your consideration of these important matters.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

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STATEMENT OF
WALTER GRAY
TRIBAL ADMINISTRATOR
GUIDIVILLE BAND OF POMO INDIANS

BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

JULY 27, 2005

INTRODUCTION

Chairman McCain, Vice Chairman Dorgan, and members of the Senate Committee on Indian Affairs. My name is Walter Gray and I am the Tribal Administrator for the Guidiville Band of Pomo Indians. I thank you for this opportunity to testify on behalf of the Guidiville Band of Pomo Indians. I hope our input will be valuable to your inquiry.

The Guidiville Band of Pomo Indians was illegally terminated pursuant to the California Rancheria Act. 72 Stat. 69 (1958), and restored pursuant to Scotts Valley v. United States, No. C-86 3660 VRW (N.D. Cal. Filed 1986). As a restored tribe, we are trying to acquire lands in trust to replace our reservation lands that were illegally terminated by the United States. A very small part (less than 1%) of the new reservation land we seek is for gaming purposes. We are using a gaming project as a tool to attract investment for our land restoration efforts, as it is presently the only way we can pay for the land and the extensive cost prohibitive process to restore our reservation.

We are concerned that any proposed amendments to the Indian Gaming Regulatory Act (IGRA) may create additional, significant barriers to the already high threshold tests of acquiring lands under the restored land exception of section 20 (b)(1)(B)(iii) of IGRA. Some proposed IGRA amendments would grant an inappropriate veto authority to States and political

subdivisions of the states as well as other neighboring Tribes that conflict with the status of tribal governments as described in the US Constitution. We do not believe that IGRA was only intended to "protect" the States and their political subdivisions but, that it was also meant to allow Tribes, the Federal Government and state and local governments a regulatory basis to promote self-determination and economic development for Tribes using gaming as a tool.

There is already an extremely high threshold for tribes to meet for new lands, especially for gaming purposes. For tribes who do not presently have reservations; or for those tribes still suffering from unlawful termination; or for those tribes still seeking federal acknowledgment, making it more difficult to use gaming as a tool would add yet another destructive federal statute to the long list of failed federal policies.

A look at any legislation affecting tribal governments, especially in California, should not proceed without a thorough understanding and a consideration of the history of the Tribal-Federal relationship.

To a large extent the federal government is responsible for the situation that has left tribes landless and seeking new reservation lands (*see* summary timeline of California History below). The "Termination Era" in California began with the passage of the Rancheria Act. This Act was the basis for the federal government to illegally terminate many California Tribes. Litigation against the federal government followed termination. A common result for many California Tribes was for the US Department of Justice to admit wrongdoing on the part of the United States for the termination and liquidation of land and then stipulate to a settlement that restored the tribal government to federal recognition. Unfortunately such settlements left the tribes entirely on their own to find a way to acquire a replacement trust land base on which to rebuild their tribal governments.

Some Tribes such as Paskanta, Auburn, Graton and Lytton were fortunate enough to secure legislation mandating the federal acquisition of a replacement land base in trust for the benefit of their respective tribal governments. Other tribal governments such as Guidiville, Scotts Valley, and Lower Lake to name but a few, are still trying to recover from the devastating effects of that termination and liquidation of their trust land base. Abandoned by the federal government, such tribal governments have had to do what they can to find ways, on their own, to acquire new lands and transfer those new lands to trust status. Tribal governments negatively effected by destructive federal Indian policy have turned to the prospect of tribal government gaming as a tool to attract investment dollars to purchase lands to restore their reservation land base.

Further amendments to IGRA that would make it even more difficult for tribal governments such as Guidiville to acquire lands for gaming purposes would eliminate an important source of financing and make the already difficult prospect of restoring a tribal trust land base even more out of reach than it is today.

Tribal government utilization of gaming to address a problem created by the United States is one of the reasons there are so many gaming land acquisition proposals today. The fundamental problem behind these many gaming proposals was created long ago by the United States. To date, the United States has failed to correct this fundamental problem. Fortunately, just as Congress created the problem it has the tools to correct this problem.

As an illegally terminated tribe under the 1958 Rancheria Act, we are still trying to recover from the many devastating effects of our terminated federal relationship that occurred over 40 years ago. Having reestablished the basic tribal government in recent years, we have turned our focus to restoring our federal trust land base by seeking to secure former federal lands

as our replacement lands. As recommended by the 1997 congressional Advisory Council California Indian Policy (ACCIP) report, we are seeking to acquire former federal lands to replace our illegally taken lands and are using the potential for tribal government gaming as a tool for the tribe to attract investment dollars. We are using the restored lands exception under IGRA as the federal authority to transfer the former federal land to trust and to conduct gaming on those lands. As such, we have a keen interest in and specific subject matter knowledge of this portion of IGRA. We thank you for the opportunity to provide the Committee our first hand perspective of the restored lands provisions.

CALIFORNIA SITUATION

No discussion about tribal land issues in California would be effective without first understanding the context of the very recent history of California and how that history has created the current situation for California Native Americans.

California Indians have endured the wrath of almost every destructive federal Indian policy or legislation enacted by the United States. As a result, roughly 2/3 of California's Indian population is still unrecognized by the federal government (roughly 80,000 individual Indians). Over 40 California tribal groups have pending petitions to the federal government for recognition. Of the 41 California tribes that were illegally terminated in the Termination Era (1944-1969) roughly 32 tribes have been restored to federal recognition and of the 32 restored tribes approximately 8 tribes still remain landless. Consequently, it is clear that unrecognized California tribes will continue (although slowly) to successfully be recognized by the federal government and the landless tribes will successfully continue their quest to restore their terminated land bases.

SUMMARY CALIFORNIA TIMELINE

The following is a summary timeline of some of the milestone events in California Native American History.

- 1776, prior to contact with non-Indians roughly 500 different bands of Indians occupied California lands with an estimated population of approximately 300,000.
- 1769 to 1848 tribes enjoyed limited protection of their lands during the Spanish-Mexican control of California.
- The 1848 treaty of Guadalupe Hidalgo ended the Mexican American War and resulted in the cessation of all of modern-day California to the United States.
- In 1849 California is entered into Statehood
- During this time indentured servitude, slavery and extermination of the California Indian was encouraged by the State of California to assist the rapid influx of miners and settlers from the California gold rush era and the State's drive for statehood. California was settled faster than any other state in the union.
- On September 30, 1850 Congress appropriated funds for three commissioners to negotiate treaties with California Indians. The commissioners met with 402 Indian chiefs and headmen. Eighteen treaties were signed by 139 of these representatives which ceded almost the entire State of California to the federal government in exchange for roughly 4.5 million acres of lands in various parts of California. At the demand of the California delegation, the United States Senate refused to ratify those treaties and the treaties were locked away hidden from public for roughly 50 years. The tribal treaty signers were never made aware of the fact the treaties were not ratified or valid.
- In 1851, the California Indian population was estimated at 150,000 to 200,000.
- In 1887, Congress passed the General Allotment Act, which divided any remaining tribal land bases and allotted them to individual Indians. Any unallotted parcels were then made available to non-Indian settlement. Nationwide the General Allotment Act had the effect of significantly reducing any remaining land that had been held by Native Americans.
- At the dawn of the 20th century, a short 39 years from California statehood and the discovery of gold, 96% of the California Indian population had been eliminated leaving 15,283 individuals who had survived the previous half-century of genocide and neglect. Most were landless and living in deplorable conditions, poverty stricken ill and isolated from the non-Indian population.
- In 1905, the injunction of secrecy that the Senate had placed on the 18 unratified treaties in 1852 was removed by the order of the Senate. For the first time in roughly 50 years, the public and tribes were made aware of the unratified treaties.

- In 1905, the Indian Appropriations Act appropriated funds for C.E. Kelsy to study the California Indian problem. As a result of his investigation, Congress passed a series of appropriations to purchase lands in central and northern California for landless Indians. These parcels resulted in what has been referred to today as the Rancheria System.
- In 1928, Congress passed the California Indian Jurisdictional Act, which permitted the California Attorney General to bring claims against the United States on behalf of California Indians for compensation due under the non ratified treaties. The case was litigated in 1944 resulting in two distributions to California Indians of roughly $600, dollars for the loss of 4.5 million acres of land promised in the 1851 treaties. The first distribution took place in the 1950's and the second payment took place in 1974.
- In 1934, Congress passed the Indian Reorganization Act (IRA) in an attempt to strengthen tribal governments, however that era was short lived in California.
- In 1944, not more than 10 years after the passage of IRA, Congress began the termination era.
- In 1946, Congress passed the U.S. Indian Claims Commission Act concerning compensation for land that had been ceded under non ratified 1851 treaties. The lawsuit that was brought as a result of this Act was, for the most part, settled in 1963, although some claims remain outstanding yet today.
- In 1953, a concurrent resolution by the House or Representatives sought to terminate, "*at the earliest possible time the rights of all Indian tribes and individuals in the states of California New York, Florida and Texas*" as part of an attempt to assimilate Indians to society. Later that year, Congress passed Public Law 280 transferring criminal and civil jurisdiction to the states included in the Act. California was one such state.
- In 1958, Congress passed the Rancheria Act which undertook to terminate the status of 40 California Rancherias. During the termination era, specific promises of land, assistance, infrastructure health care etc., were made to California Indians in exchange for agreeing to termination of the federal government's trust responsibility. As later court records would show, the federal government actively participated in a plot to make sure the funds appropriated by Congress to implement the promises and benefits were never received by tribes.
- In 1967, California Indian Legal Services led the charge to litigate against the United States for breach of the termination agreements. These lawsuits would continue until the mid 1990's.
- In 1988, Congress passed the Indian Gaming Regulatory Act.
- By the 1990's roughly 27 of 40 terminated Rancherias had been restored to federal recognition through litigation. Unfortunately, during the time it took to litigate the illegal termination, the federal government had liquidated the small

remaining land bases of the Rancherias leaving the majority of the California tribes essentially landless.

- In 1992, Congress passed PL. 102-416 (October 14, 1992), as amended by PL. 104-109 (February 12, 1996) to provide advice and recommendations to Congress on the special status problems of the California Indians. The Advisory Council submitted its report to Congress in September 1997 and has been made available to every California Tribe, every member of Congress and is available in all California public libraries.
- In 1993, two Tribes, The United Auburn Rancheria and Paskanta Bands were restored by acts of Congress. The legislation also granted them rights to acquire federal land base.
- In 1994, the Ione Band was recognized by administrative recognition but the administrative act did not designate a federal trust land base.
- In 2000, Congress restored the Graton Rancheria to federal recognition through legislation and ordered the Secretary of Interior to acquire a trust land base.
- In 2000, Lower Lake Pomo Tribe was recognized by administrative recognition but did not designate or order a federal trust land base.
- In 2000, the Congress ordered a federal trust land base for the Lytton Pomo Indians through federal legislation.

Presently the Indian land base in California consists of approximately 475,000 acres, including both tribal and individual Indian trust lands, distributed among California's 107 federally recognized tribes. This is far cry from the 4.5 million acres originally negotiated by Tribes in the 1851 treaties.

EFFORTS BY CONGRESS TO STUDY THE SPECIAL CALIFORNIA SITUATION

In 1992, Congress passed PL. 102-416 to provide advice and recommendations to Congress on the special status problems of the California Indians. The Advisory Council submitted its report to Congress in September 1997 and has been made available to every California Tribe, every member of Congress and is available in all California public libraries. The ACCIP Termination Report included recommendations to Congress about how to begin to rectify the BIA's illegal termination of the 41 rancherias. **One of those recommendations was that Congress should enact legislation to assist newly restored tribes in identifying and acquiring public and other federal lands for the purpose of meeting housing and economic**

development needs. It has been almost eight years following the issuance of the ACCIP report, and Congress has done little (with the exceptions of Lytton, Graton, Peskanta and Auburn) to act on the recommendations of the ACCIP to help restore a land base for the illegally terminated tribes and those tribes in California still seeking recognition.

Congress has the tools to address many of the problems for California Indians created by the federal government, yet it has chosen not to.

It should be of little surprise to Congress therefore, that tribes are doing what they can today to reacquire their terminated land bases. Left to their own limited choices, tribes have successfully used Indian gaming as a mechanism to pay for the cost prohibitive process of land restoration and federal recognition. The reason there are so many Indian gaming proposals in California specifically, is because of the high number of terminations and pending federal recognition applications in California. If the federal government will not provide assistance to landless, or terminated, or terminated and restored tribes one can be assured that those tribal governments will do what they can however they can for the betterment of their citizens.

GUIDIVILLE PERSPECTIVE

Illegally terminated tribes like Guidiville did not willingly and knowingly choose to be terminated, nor did they choose to have their lands liquidated by the federal government. Our Tribe's long history with the federal government has taught us that we cannot count on the federal government to honor past promises, correct past wrongs, allocate appropriate funds or fix the problem the United States has created. However, just like our sister tribes, who were lucky enough to never be terminated or have been successful in getting the courts or Congress to assist with tribal land restoration, we must, as responsible tribal governments, do the best we can to exercise our sovereignty and right to self-determination for the benefit of our citizenry. Left to

find a solution for ourselves, the Guidiville Tribe has decided to use tribal government gaming as tool to acquire a land base. How ironic is it that we, as one of the illegally terminated and subsequently restored rancherias, find ourselves here pleading with Congress not to effectively shut the door or change the rules regarding our efforts to re-acquire a trust land base. What a cruel irony it would be if we were further punished by changes in IGRA that frustrated or prohibited our ability to exercise a federally recognized and protected right enjoyed by other federally recognized tribes.

IGRA COMMENTS

Those responsible for drafting language in IGRA in 1988, rightfully had the foresight that there were tribes that were terminated, tribes seeking restoration, tribes involved in land claims with the federal government, tribes that were landless at the time of the Act and tribes still yet to be recognized that needed to be accommodated. We believe the exceptions demonstrate Congress' commitment to fundamental fairness. As a restored tribe still struggling to re-establish a land base and achieve a level of economic self-sufficiency, we applaud Congress' concern about fairness and equity when enacting IGRA, and we urge this Committee not to lose site of those concerns in its current deliberations regarding off-reservation gaming. Federal courts in stating that "the exceptions in IGRA serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones" also appear to agree with the foresight of Congress to include exceptions for tribes with special circumstances such as ours. The Court further emphasized "the role that IGRA's exceptions play in the statutory scheme, is to confer a benefit onto tribes that were landless when IGRA was enacted."

While there are a lot of proposals for gaming under the general exceptions of IGRA we believe that of those proposals that strictly follow the process in place, very few will actually ever come to fruition. Given the nature of the process and the high thresholds to adhere to we are not entirely sure that our proposed land acquisitions will ever be approved either.

We wish to reiterate that theme here today, **and in fact cannot identify one actual project that has been built by a restored tribe that is causing significant public policy problems**. For restored tribes, the system works.

The process that is in place today allows for participation of all outside interests. Unfortunately there are parties that do not really wish to follow the existing process and indeed are acting to usurp it before it has a chance to work.

With the exception of Indian lands and other Federal lands held by the US tribal trust land acquisition today involves extracting lands under the jurisdiction of some existing government. Because of that fact tribes must locate and structure their land acquisitions in ways that fit into and benefit the local community in order to garner outside community support.

In 1995, the United States Navy closed the 300-acre Point Molate Naval Fuel Depot in Richmond, California. In 2003, the City of Richmond and the Navy commenced an RFP process to select a developer who could redevelop the Point Molate site in a manner that would create local jobs and business opportunities for Richmond residents, preserve open space and shoreline areas, and accelerate the site's environmental remediation. Through that public process, the Guidiville Band, along with its partners Harrah's and Upstream, negotiated an agreement with the City to allow the Tribe to redevelop the site. The Guidiville Band's redevelopment plan of the base calls for the construction of hotels, conference and entertainment facilities, retail, restaurants and a gaming facility, tribal administration facilities, cultural/educational/ceremonial

facilities, and extensive enhancement to public transportation facilities. It also provides for remediation of the environmental damage that resulted from decades of use as a Navy Fuel Depot, with 190 acres of shoreline parks and hillsides committed for permanent open space that is compatible with the Tribe's cultural and administrative requirements.

In the case of Guidiville, we structured a land acquisition partnership with the City of Richmond, California, that achieves numerous tribal, local, state and federal public policy objectives, including acceleration of cleanup at a former Navy base, restoration of a historic village on the property, establishment of reliable ferry service between Richmond and downtown San Francisco, preservation of 2/3 of the site as open space and parks accessible to the public, and a local job training and hiring program that will transform the economics of this impoverished city and simultaneously establish a sustainable economy and land base for the Guidiville tribal government. A very small portion (less than 1%) of the new reservation land we seek is for gaming purposes.

Finally, and most significant, we have structured our agreement with Richmond in a way that affords **the same legal rights for non-tribal agencies, governments and citizens as projects approved under the Laws of the State of California without infringing upon the sovereignty of the Tribe, or the City of Richmond.**

We think that Congress and other tribes may be interested in learning more about this mechanism for working with established communities.

CONGRESS MUST RECOGNIZE, ACKNOWLEDGE AND PROTECT TRIBAL GOVERNMENTS STANDING IN THE FAMILY OF GOVERNMENTS UNDER THE UNITED STATES CONSTITUTION AND MUST FURTHER RESPECT THE RIGHTS OF TRIBES, CITIES, COUNTIES AND STATES AND OTHER POLITICAL SUBDIVISIONS THEREOF TO ENTER INTO TO BINDING GOVERNMENT TO GOVERNMENT AGREEMENTS THAT BENEFIT THEIR RESPECTIVE CITIZENS.

Participating in this union requires that all governments must respect and accept those actions taken by the federal government.

It is clear that the public outcry being generated by individual non-Indians, anti-casino groups, local governments, county governments, state governments and a limited number of tribal governments against tribal proposals for trust land and corresponding gaming facilities is driving the politics for further clarifications/restrictions within IGRA. States and their political subdivisions and some Tribes are seeking jurisdictional authority over other tribal governments in a quest that conflicts with the fundamental notion that tribal governments are sovereigns. Considering that tribal governments enjoy a standing under the U.S. Constitution equal to that of states, this quest to secure authority over another sovereign is inappropriate and must be protected against. Governmental entities seeking to exercise jurisdiction over other tribal governments is no different than the State of Nevada asking Congress to grant veto authority over something the State of California may wish to do. Continuing the analogy, California has the full sovereign right to pursue an initiative it believes is right for its citizens even if it has a negative affect on the citizens of Nevada. As basic and simplistic as this analogy is, it is exactly what those seeking amendments to IGRA are looking for.

We believe the present Senate Indian Affairs Committee understands and supports the status of tribal governments and the United States responsibility to protect and honor that status. When considering any amendments to IGRA we encourage you first and foremost to continue to honor, preserve and protect, this unique relationship. Further, it is imperative that the other

members of Congress the general public, the State and its political subdivisions all have a through understanding of this relationship.

POLITICAL REALITIES REQUIRE LOCAL SUPPORT

Because all lands in the U.S. today are (if not under tribal or federal tribal jurisdiction) under some other jurisdiction and because the Bureau of Indian Affairs (BIA) all but requires tribes to garner community support for land acquisitions (and we think this attitude may come at the request of congressional representatives) it is inevitable that tribes without reservation land bases today will be forced to negotiate with host communities for gaming and non gaming land acquisitions.

It is our experience that the greater the veto power of cities, or counties, or other tribes and/or states, the greater the bargaining power they have to extract revenue sharing from tribes who can least afford it. Therefore any future amendments to IGRA should also cap revenue sharing payments, and they should continue be permissible only in exchange for substantial economic benefit, such as the exclusive right to offer certain gaming activities or state concurrence for a land acquisition. Likewise, Congress should make clear that payments to local governments must be based on some reasonable estimate of the actual costs of impacts and mitigation measures.

Any proposed amendments to IGRA should not increase the power of any community to veto land acquisitions because it will be used against tribes to extract additional concessions that would not otherwise be possible were there no veto power. However, Congressional concerns over sovereignty should not affect the rights of tribes to exercise their fundamental governmental authority to enter into agreements with other sovereigns (meaning other tribes, states, counties, cities, or other political subdivisions of states) for the benefit of their respective citizenry.

ECONOMICS ARE DRIVING INDIAN GAMING

As a responsible tribal government, it is our charter to provide our elders with homes and healthcare, we must assure our families live in decent and affordable housing, we must promote job creation for our members and their children, we must protect and preserve our culture and we have a responsibility to create the opportunity for members to obtain a decent education. Regardless of whether the federal government will provide assistance or not, tribes must find ways to accomplish these objectives.

Congress has never appropriated significant funds for the acquisition of land by Indian tribes, landless or otherwise. As a result, in our land restoration process not only do we have to pay for the land that was illegally liquidated, we must also subsidize the federal government by funding the environmental studies needed for National Environmental Protection Act ("NEPA") compliance on trust transfers because the BIA does not have enough appropriated funds to pay for them even though such studies are a federal, and not a tribal, responsibility. We further supplement the federal government by using our very limited federal dollars to pool with other tribes to augment the number of federal employees at the BIA to conduct work for the Tribe. These are examples of the extent tribes have gone to in order to secure new lands.

We are disappointed to have to report, but non-Indian gaming developers have done more than the United States to help landless tribes acquire land, start the engine of economic development for tribal communities, and finally begin to bring about an end to centuries of poverty and despair. In essence, the private sector is helping to fulfill the trust responsibility that the United States has ignored, and it should not be vilified because it expects a return on its investment, just like other American businesses.

Simple risk reward economics are driving casino development not tribal or developer greed. In California, land is expensive. The land and process is just as expensive and just as risky no matter where a proposed gaming facility is located. Rural areas have their own problems with lack of infrastructure, roads that can cause safety issues, utilities, pollution, and other problems that are just as expensive to mitigate as in urban areas. In fact, urban areas with the appropriate infrastructure to handle large volumes of people are often better locations than remote rural areas that can be negatively affected by large volumes of visitors.

If there were a way for a tribe not have to purchase replacement land that was illegally terminated land in a more rural setting with (appropriate infrastructure) without having to go through an enormously expensive process, it is likely they could create just as much benefit for tribal members than in an urban location. However, because there is such a costly and high regulatory threshold, combined with a high cost of land, mitigation, state revenue sharing, local revenue sharing, and an uncertain outcome the risk drives the economics to higher revenue markets.

CURRENT FEDERAL REGULATIONS SAFEGUARD AGAINST ABUSE AND ALLOW FOR APPROVAL OF EXCEPTIONAL PROJECTS

The process for the acquisition of land for gaming purposes for restored and newly-recognized tribes contains safeguards to prevent abuse. Amendment of Section 20 is not required. Though recently, newspapers have been full of reports of ill-conceived, misguided gaming projects, these proposals will not receive federal approval. The bulwark of regulations and federal requirements will serve their purposes and these projects will be rejected. The federal land into trust process is lengthy and arduous. As designed, only exceptional projects will be approved.

In order for a restored tribe to acquire lands for gaming, it must comply with 25 CFR Part 151. Part 151 requires the Department of Interior:

a. To evaluate the proposed acquisition by looking at the tribe's need for the land; and

b. To analyze the impact on state and local government removing the land from the tax rolls, potential jurisdiction problems, and possible land use conflicts.

Additionally, Section 151.11 requires the Secretary to give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition and greater weight to the concerns of the state and local governments as the tribe's distance from the reservation increases.

State and local governments with jurisdiction over land proposed for trust acquisition receive notice of the proposed acquisition from the BIA and they are afforded an opportunity to provide comments to the BIA. Compliance with the NEPA is also required and allows for additional community input.

Judicial review of the Secretary's decision is available under the Administrative Procedures Act; and the Secretary's decision can be overruled by a court, if it is found to be arbitrary and capricious, or not in accordance with law.

The fee to trust process triggers both NEPA and the Endangered Species Act (ESA). To comply with these statutes, any significant impact on the environment and any adverse impact on endangered species must be fully vetted and addressed with adequate mitigation, or the project simply does not move forward. Additionally, CEQA, California's strict environmental protection law also applies to the City of Richmond's actions required for the land acquisition to move forward.

Interior has in place now, a comprehensive checklist that looks to every aspect of any proposed gaming project in any fee-to-trust application. The current checklist is a refinement of a formal rule Interior proposed in 2001. The practical effect of these regulations is that tribes seeking to acquire land for gaming purposes must negotiate with state and local governments to address their reasonable and legitimate concerns. The development of a constructive relationship must occur before any project ever gets off the ground. If the project is wrong for the tribe and wrong for the surrounding community, it simply cannot overcome the high hurdles already in place. Both the comprehensive checklist and CEQA assess and address social and economic impacts in addition to environmental concerns.

Additionally, based in large part on federal court decisions, Interior and the NIGC have established a comprehensive test that a Tribe must meet to qualify as restored lands. The strict criteria regarding the Tribe's historic connection to the land and the relevance of the acquisition to the establishment of a governmental land base are in place to ensure that only legitimate projects are approved.

Together, all these high hurdles, Part 151, Interior's comprehensive checklist, NEPA, ESA, CEQA and NIGC's restored lands review, set the current rules. Not only has Guidiville complied with these rules, it has embraced them and has structured the project to manifest the intended objectives of each of the laws. The rules should not be changed in the middle of the game. The concerns raised in the recent debate are addressed by making sure that the current rules are properly applied.

THE GUIDIVILLE BAND OF POMO INDIANS HAS STRUCTURED A PROJECT WITH LONG TERM PUBLIC AND TRIBAL BENEFITS.

The Tribe recognizes concerns being raised about the environmental impacts of Indian gaming projects; however, the Tribe's proposal to remediate a closed U.S. Naval fuel depot, acquiring several hundred acres upon which to build its reservation, will provide significant environmental benefits. The site was significantly damaged by the Navy's use for over 50 years. Under the Tribe's stewardship, the environmental clean-up will be significantly accelerated. Open-space shoreline parks and an important completion of 1.5 miles of the San Francisco Bay Area Trail system will be implemented. Also, an extraordinary collection of buildings on the National Historic Register will be renovated and preserved.

Through an innovative contractual relationship with the City of Richmond, the Tribe and the City have required that the City of Richmond must amend its general plan to be consistent with the tribal development. In doing so the California Environmental Quality Act must be followed and will provide legal and binding assurance to the local communities that current and future adverse environmental impacts will be mitigated, without compromising the sovereignty of either the City or the Tribe. Of course, the federal fee-to-trust process and the process for approval of the management contract will also require a full Environmental Impact Statement ("EIS") pursuant to the National Environmental Protection Act. Moreover, the BIA and the City have entered into an MOU to conduct a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the transfer of the property into trust for the Tribe and for the discretionary approval as necessary by the City and a number of other local and state agencies. A Joint Scoping Hearing was held on March 31, 2005. A Joint Scoping Report was issued on July 8, 2005.

THE GUIDIVILLE BAND OF POMO INDIANS HAS DEVELOPED A STRONG RELATIONSHIP WITH THE CITY OF RICHMOND.

The Tribe's acquisition and placement into trust of the Point Molate site has the strong support of the surrounding City of Richmond (please refer to the letter from the Mayor of Richmond to Governor Schwarzenegger and the local editorial prepared by the Mayor of Richmond attached as exhibits to this testimony). After a lengthy, transparent Request for Proposals process, including five public hearings, Richmond entered into a Land Disposition Agreement, contemplating the transfer of the property into trust for the Guidiville Band of Pomo Indians upon the satisfaction of a number of closing conditions. The terms of the Agreement were arrived by discussion and negotiation between the City and the Tribe and are the product of each entity protecting its sovereignty and promoting its interests, most of which are mutual and complementary, rather than exclusive and competing. The terms are rigorous and address each of the parties' concerns, including such matters as finance, protection of open space and development of the project, the tribal building codes, the Tribe's policies relating to wages and the substantive requirements of the federal Davis-Bacon Act, fire protection and emergency response services, roads and traffic circulation, utilities, sewer and storm drainage, and a number of other factors.

The Point Molate land acquisition will be a significant opportunity to achieve multiple economic, environmental and social goals of the Tribe, the federal government, the State and the City on a unique and historic site. The proposed acquisition will reclaim and transform this abandoned and polluted U.S. Navy base into a world class destination resort village that will bring career opportunities back to tribal members and the City of Richmond, provide needed revenues for police, fire, schools and libraries, and provide for a range of hospitality, entertainment, shopping and recreational facilities for the Tribe and the local community.

The Guidiville Band of Pomo Indians, the City of Richmond and the project stakeholders all recognize that a project of this type would require a fresh approach to intergovernmental relationships. Rather than limiting ourselves to existing models, we incorporated numerous innovative checks and balances into the agreements to sell the Point Molate property. These innovations provide for a comprehensive environmental review of the project and the project alternatives. The City and the Tribe will also cooperatively participate in the site design, implementation of construction, the protection of existing shoreline and open space resources on the site, and the provisions for local participation in jobs and job training.

If the Point Molate acquisition becomes a reality, the benefits to the Tribe, the region, the state and the federal government are not just significant, they are enormous. The acquisition will result in the creation of an economically sustainable restored land base for the Guidiville Rancheria that will create more than 6,600 local jobs at the resort and in the community. These are jobs that not only represent a paycheck, but long-term community benefits, like professional development and skill training for career growth and advancement. The $800 million private investment into the Tribe's economy will reverberate, not only throughout Richmond, but the entire regional economy.

The Tribe has accomplished all of this while maintaining tribal sovereignty.

CONCLUSION

The Guidiville Band of Pomo Indians believes strongly that it is possible for tribes to restore their lands, mitigate any adverse impacts from gaming, and solid, lasting relationships with local communities under the current laws. We are happy today to have the opportunity to highlight areas of the law that are currently working.

Our proposed federal land into trust action would serve three critical objectives:

(1) Restore the Guidiville Tribe's land base that was illegally terminated by the federal government over 40 years ago and approve the Tribe's request for a reservation proclamation pursuant to the federal court's order in Scotts Valley vs. United States (September 6, 1991);

(2) Bring economic development opportunities to the region consistent with economic development objectives of the base closure process that provide for the transfer of the property from the Navy to the City of Richmond; and

(3) Establish a sustainable, economic base for the Guidiville Band of Pomo Indians to fund the land purchase, development costs, community building and government programs; and at the same time, generate revenues which will mitigate any adverse impacts to the local community.

We are not here today to ask that the law be changed to benefit the Guidiville Band of Pomo Indians. We are here to let you know that the current law can and does work, and that the Guidiville Band should in fairness be allowed to complete the restoration of its lands and its government. It would be simply unfair to change the rules of the game when the Tribe is this close to correcting the wrong that was perpetrated on the Tribe 40 years ago when the Tribe was illegally terminated. We ask you to help us complete our restoration.

Thank you.

EXHIBITS TO THE JULY 27, 2005 TESTIMONY OF WALTER GRAY

DESCRIPTION	EXHIBIT
Final judgment entered in Scotts Valley Band of Pomo Indians, et al. v. United States of America, No. C-86-3660 WWS	A
Record of Decision for Disposal and Reuse of the Fleet Industrial Supply Center, Naval Fuel Depot Point Molate, CA	B
Letter from Mayor Irma Anderson to the Honorable Arnold Schwarzenegger, Governor of California dated August 2, 2004	C
Guest Commentary of Mayor Irma Anderson entitled "The future of Point Molate is the future of Richmond," Contra Costa Times, dated April 30, 2005	D

EXHIBIT A

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria; Lytton Indian Community of the Lytton Rancheria; Guidiville Band of Pomo Indians of the Guidiville Rancheria; Me-Choop-Da Indians of the Chico Rancheria; Douglas Ray, Ignatius (Steven) Elliot, Keith Pike, Carol J. Steele, Eleanor Lopez, Robyn D. McHenry, Loretta Lynn, Roberta J. Clements, Dennis E.Ramirez, Clara Wilson, Eileen Gladys Wilson, individually and on behalf of all others similarly situated, Plaintiffs, v. United States of America; Manuel Lujan, Jr., Secretary of the Interior, Eddie Brown, Assistant Secretary of the Interior for Indian Affairs; Ronald Jaeger, Area Director, Sacramento Area Office, Bureau of Indian Affairs; Lewis Sullivan, Secretary of Health and Human Services, Defendants.	No. C-86-3660-VRW CORRECTED ORDER FOR ENTRY OF JUDGMENT AND JUDGMENT
Gerald R. Stewart, <u>et al.</u>; County of Sonoma; City of Chico, Defendants-Intervenors.	

Pursuant to Fed.R.Civ.P. 60(a), this Order corrects the earlier Order For Entry Of Judgment And Judgment entered by the Court in this matter on August 30, 1991.

On August 30, 1991, this matter came on for hearing on approval of proposed settlements[1] pursuant to the order prescribing notice of settlement and hearing on approval of settlements issued by the Court on May 23, 1991. This action has not been certified as a class action; however, the Court previously determined that it was proper to proceed under the procedures of Fed.R.Civ.P. 23(e) to ensure that the settlement and dismissal of plaintiffs claims would not prejudice the interests of the putative class. See Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401, 1408 (9th Cir. 1989).

Having reviewed the Stipulation For Entry Of Judgment (Scotts Valley and Guidiville), filed March 15, 1991, the Stipulation For Entry Of Judgment (Lytton), filed March 22, 1991, the Certificate Of Counsel, filed August 23, 1991, setting forth the plaintiffs' and Federal defendants' reasons for supporting the settlements, the Report Of Counsel Re: Objections To Proposed Settlement, filed August 23, 1991, and the other pleadings and papers on file, including the briefs and declarations of counsel and others; and having fully considered the arguments of counsel and any objections to the proposed settlements, the Court finds that:

1. Notice was duly given to putative class members as

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1. Two settlements are involved. One disposes of the claims of the Scotts Valley and the Guidiville Indian plaintiffs. The other disposes of the claims of the Lytton Indian plaintiffs.

ordered by the Court.

2. The Stipulations For Entry of Judgment compromising and settling the claims of the Scotts Valley, Guidiville and Lytton Indian plaintiffs will result in a judgment that is fair, just and reasonable, is not collusive, and will not prejudice the interests of the putative class.

3. There is no just reason to delay entry of a final judgment in accordance with Fed.R.Civ.P. 58 disposing of the claims of the Scotts Valley, Guidiville and Lytton Indian plaintiffs[2] in accordance with the terms of the respective stipulations for entry of judgment.

Accordingly, IT IS ORDERED THAT final judgment be, and hereby is, entered according to the terms of the Stipulation For Entry Of Judgment (Scotts Valley and Guidiville), filed March 15, 1991, and the Stipulation For Entry Of Judgment (Lytton), filed March 22, 1991.

Dated: September 6, 1991

VAUGHN R. WALKER
United States District Judge

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2. The claims of the Mechoopda Indian plaintiffs (Chico Rancheria) remain before the Court for further disposition.

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NORTHERN DISTRICT CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SCOTTS VALLEY BAND OF POMO INDIANS OF THE SUGAR BOWL RANCHERIA, et al. Plaintiffs, v. United States of America, et al., Defendants.	NO. C-86-3660 WWS STIPULATION FOR ENTRY OF JUDGMENT

Plaintiff Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria and plaintiff Guidiville Band of Pomo Indians of the Guidiville Rancheria and federal defendants, by and through their respective counsel, enter into the following stipulation for the purpose of reaching a compromise and final settlement of the claims alleged by said plaintiffs against the federal defendants in the Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages, filed herein on August 25, 1987. The settling parties understand that this stipulation shall provide the basis for entry of a judgment by the court which will serve to implement, in an orderly and timely fashion, the substantive and procedural matters agreed to herein. Accordingly, the parties stipulate and agree as follows:

1. Federal defendants agree that the Scotts Valley and Guidiville Rancherias were not terminated, and the rancheria assets were not distributed, in accordance with the provisions of the Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390 ("the Rancheria Act"). Federal defendants further agree that the Indian status of the persons named as distributees in the distribution plans of the Scotts Valley and Guidiville Rancherias was not terminated in accordance with the Rancheria Act. The status of distributees who have been parties to a

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MAR. 83

prior judicial determination as to the Federal government's compliance with the Rancheria Act shall, however, be consistent with such prior judicial determination.

2. Federal defendants agree that, except as otherwise provided in this stipulation and prior judicial determinations, the distributees and dependent members of the Scotts Valley and Guidiville Rancherias and their lineal descendants, will have the individual and collective status and rights, including the rights to organize for their common welfare and to govern their affairs, which they had prior to termination. Federal defendants further agree to deal with these Indians on the same basis on which they deal with other Indians of a similar status.

3. Federal defendants agree that within 30 days of the Court's approval of the entry of judgment pursuant to this stipulation the Assistant Secretary will transmit to the Federal Register for publication a proclamation stating:

a. that the Scotts Valley and Guidiville Rancherias were not lawfully terminated and their assets were not distributed in accordance with the provisions of the Rancheria Act, Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390;

FORM OBD-183
MAR 83

b. that the distributees of the Scotts Valley and Guidiville Rancherias are eligible for all rights and benefits extended to Indians under the Constitution and laws of the United States; and

c. that the Scotts Valley and Guidiville Rancherias and their members shall be eligible for all rights and benefits extended to other federally recognized Indian tribes, including Indian tribes defined and organized under the provisions of the Indian Reorganization Act, 25 U.S.C. § 461 et seq., and their members; provided, the rights and benefits, if any, extended to those members who have been parties to a prior final judgment determining their rights under the Rancheria Act shall be consistent with such prior judgment.

4. Effective as of the date of entry of this stipulation by the Court, both the Scotts Valley and Guidiville Bands shall, consistent with Federal law, have the right to determine their own membership and otherwise to govern their internal and external affairs as tribal entities consistent with their status prior to termination. When and if either of the groups reorganize pursuant to federal statute, the federal defendants agree to add them to the list of federally recognized tribal entities then being used and will include

them on any list of tribal entities published in the Federal Register. Because the Scotts Valley Band rejected the Indian Reorganization Act, 25 U.S.C. § 461 et seq., it is not eligible to reorganize pursuant to that statute. However, the Federal government had dealings with the Scotts Valley Band as a distinct Indian entity prior to its purported termination and the purpose of this stipulation is to reestablish the status quo prior to termination. Based on these unique considerations, the federal defendants do not object to the Scotts Valley Band reorganizing to exercise powers consistent with its status prior to termination. Further, the federal defendants agree to add Scotts Valley to the list of federally recognized tribal entities then being used and will include them on any list of tribal entities published in the Federal Register. The name of the tribal entity entered on the list(s) shall be the name chosen by the reorganized rancheria in its governing document. The Federal defendants further agree to advise the Commissioner of the Internal Revenue Service promptly that the rancherias have reorganized to exercise governmental functions and have been added to the list of tribal entities.

5. Lands Within Former Boundaries and Currently In Indian Ownership

Federal defendants agree to accept in trust status any land within the boundaries of the former Scotts Valley and Guidiville Rancherias that:

(a) is currently in Indian ownership and

(b) was deeded or passed as a direct consequence of termination to:

(1) the Sugar Bowl Association, the Guideville Village Association or any other Indian community organizations formed for the purpose of accepting distribution of rancheria assets, or

(2) any distributee who received land under a rancheria distribution plan, or

(3) any dependent or Indian heir, or successor in interest to such distributee, provided any successor in interest is an Indian from the rancheria. (As used herein, "Indian of the rancheria" shall include distributees and their dependent members, and their Indian spouses and lineal descendants.)

Federal defendants further agree to discharge any tax liens against the property and to discharge those specific liens, deeds of trust, or mortgages listed in Exhibit A, attached hereto, which were incurred by the Indian owner after the purported termination for the purpose of improving the habitability of the subject property; provided that the

FORM OBD-183
MAR. 83

Federal defendants shall not be required to accept in trust any land for a distributee who has been a party to a prior judicial decree settling claims by owners or occupants of the land arising out of the purported termination, nor shall the Federal defendants be required to discharge any liens on such lands.

6. Lands Outside the Boundaries of the Former Rancherias and Currently Owned by Certain Indians

Since persons listed in the plans for distribution of assets of the Scotts Valley and Guidiville Rancherias may have acquired interests in trust lands outside those rancherias and which interests may no longer be held in trust because of the purported termination of the Indian status of the listed persons, Federal defendants agree to accept in trust any fee interests in trust or former trust allotments issued to such persons, if such interests are currently held in the name of the distributee, or of his/her dependent or Indian heir, or successor in interest, provided the successor is an Indian of the rancheria or reservation where the allotment is located; provided further that the Federal defendant shall not be obligated to accept in trust any land held in the name of a distributee who has been a party to a prior judicial decree finally determining the claims of such distributee under the Rancheria Act.

FORM OBD-183
MAR. 83

7. Process for Restoring Trust Status

Federal defendants agree that restoration of lands to trus status under the provisions of Paragraphs 5 and 6 above shal be accomplished as follows:

(a) Notice - Publication: Federal defendants shall publish a copy of the judgment in a newspaper of general circulation within the Counties in which Scotts Valley and Guidiville Rancherias are located. Additionally, a copy of this judgment shall be mailed to:

(1) each individual Indian person listed in the Termination Proclamations for the Scotts Valley and Guidiville Rancherias, and

(2) such other persons, based on all available information in the possession of the Federal defendants and any other information supplied by plaintiffs Scotts Valley and Guidiville Bands, who may be related to or descended from any such individual, for whom the Bureau of Indian Affairs has a current or last known address;

(b) Election to Convey:

(1) General Rule: Each Indian or Indian organization of either the Scotts Valley or Guidiville Rancherias who has retained any

interest in or to the lands or assets of any of said rancherias (however acquired), shall be entitled to elect to convey his, her, or its interest to the United States, to be held in trust for the benefit of such Indian member(s) of either the Scotts Valley or Guidiville Bands (as defined under the constitution or bylaws thereof), or for the benefit of the Indians of either the Scotts Valley or Guidiville Bands or an entity which may be formed to govern any of the said rancherias, as may be specified in the instrument of conveyance.

(2) Direct Result of Termination: Each Indian of either the Scotts Valley or Guidiville Bands who has retained any interest in or to allotted lands, fee patent to which was issued upon or, in the judgment of the Secretary, as a direct result of the purported termination of either the Scotts Valley or Guidiville Rancherias, may make a similar election, except that any such individual may specify the person for whom the land is to be held in trust by the United States without regard to membership in or affiliation with either the Scotts Valley or Guidiville Bands, so long as the person so named is related by blood or, at the time of

FORM OBD-183
MAR 83

this decree, is the individual's spouse and is otherwise eligible to have land held in trust as an Indian by the United States for his or her benefit;

(c) Form of Conveyance Instrument; Conditions and Restrictions: Before accepting any instrument of conveyance which has the effect of restoring trust status to and within either the Scotts Valley or Guidiville Rancherias, the Secretary of the Interior shall be entitled to approve or reject said instrument as to form; however, the existence of such liens as are identified in Paragraph 5 above, shall not constitute a basis for declining to accept any such conveyance. Conveyance of title to the United States made pursuant to this stipulation and the judgment entered thereon may, at the election of the grantor, provide that the United States will hold title in trust for an Indian, Indians, or tribal entity of either the Scotts Valley or Guidiville Rancherias, and be subject to such conditions or restrictions as set forth in the instrument of conveyance; provided such conditions and restrictions are acceptable to the United States; and, provided further, that the United States shall not unreasonably withhold its acceptance;

(d) Recording Conveyance: Upon acceptance of any instrument or instruments conveying to the United States title to lands within or without either the Scotts Valley or Guidiville Rancherias pursuant to this stipulation and the judgment entered thereon, the Secretary of the Interior or his designee shall promptly record said instruments with the County Recorder of the County in which said lands are located.

8. Future Land Acquisitions Within Former Boundaries by Certain Indians

Federal defendants agree to accept in trust any land within the former boundaries of the Scotts Valley and Guidiville Rancherias which is subsequently acquired by any distributee, their dependent or lineal descendant, or by either the Scotts Valley or Guidiville Bands; provided that the Federal defendant shall not be obligated to accept in trust any land held in the name of a distributee who has been a party to a prior judicial decree finally determining the claims of such distributee under the Rancheria Act.

9. Nothing in this stipulation shall be construed to require the Secretary to accept in trust any land which has on it hazardous substances or contaminants. Before the Secretary accepts any land in trust pursuant to this stipulation, a hazardous substance determination shall be made in accordance

with 602 DM 2 and the instructions for implementing that chapter of the Department Manual described in 54 BIAM Bulletin 1, dated March 9, 1990, and any duly adopted revisions of the manual or instructions. Copies of 602 DM 2 and 54 BIAM Bulletin 1 are attached as Exhibits B and C, respectively.

10. Should lands be acquired in the future on behalf of the Guidiville Band, if organized under the IRA, the Secretary shall within 180 days consider and respond to a request to issue a proclamation in accordance with 25 U.S.C. § 467 that such newly acquired lands constitute an Indian reservation.

11. The Federal defendants will, following the execution of this stipulation by their counsel, prepare comprehensive needs assessments for the Scotts Valley and Guidiville Bands, including the projected needs of the bands for Federal programs and services through Fiscal Year 1994.

The Federal defendants will provide workshops prior to March 1992 to be conducted by a technical team comprised of representatives from the Bureau of Indian Affairs, the Indian Health Service, the Department of Housing and Urban Development, and such other consultants as may be necessary, for the purpose of providing needed technical assistance to the Scotts Valley and Guidiville Bands. The scheduling and content of the workshops will be developed by the Federal defendants in consultation with representatives from the

Scotts Valley and Guidiville Bands and will be designed to provide, at a minimum, specific information regarding Federal programs available to Indian tribes, including the tribal contracting requirements of Public Law 93-638, and an overview of those Indian programs available to meet the developmental needs of individual Indians, such as health care, education and vocational training. The Federal defendants shall cover the costs of attendance at the workshops of at least one representative each from the Scotts Valley and Guidiville Bands.

12. The plaintiff Scotts Valley and Guidiville Bands will provide the federal defendants with the names, current or last known residential address of each potential class member to whom it has given notice of this proposed settlement and the names and ages of all minors who are dependents of potential class members. Plaintiff Scotts Valley and Guidiville Bands will give written notice of the terms of the settlement to all members of the plaintiff class, as such class is defined in Paragraph 10 of the Second Amended Class Action Complaint, filed herein on August 25, 1987. The costs of giving such notice shall be borne solely by the Federal defendants. The form of notice, the deadline for responding to the notice, and other procedures for class members to opt in or out of the settlement, shall be set forth in a separate stipulation to be filed with the Court.

13. The plaintiff Scotts Valley and Guidiville Bands, in consideration of the above agreements by the federal defendants, will (a) release and forever discharge federal defendants from and against any and all liability, including attorneys' fees and costs, arising out of this litigation and settlement, provided, this release and discharge shall not apply to claims relating to hazardous substances or contaminants which may be identified in any survey conducted in order to make the determination required by paragraph 9 of this agreement; and (b) will dismiss with prejudice all money damages claims alleged herein against the federal defendants, including any individual and tribal claims.

14. It is agreed that plaintiff Scotts Valley and Guidiville Bands will not seek, and federal defendants will not agree, to reestablish the former boundaries of the Scotts Valley and Guidiville Rancherias, and that no action taken in connection with this settlement shall be construed as reestablishing the former rancheria boundaries. As to those lands within the former rancherias that remain in Indian ownership, the authority of the respective tribal governing body shall extend to such lands only if the individual Indian landowner(s) shall consent to the tribe's authority.

15. It is understood that none of the terms of this agreement shall deprive a federal official of his authority to revise, amend or promulgate regulations, nor shall this agreement be construed to commit a federal official to expend funds not appropriated by Congress. Furthermore, the sole remedy of the plaintiff Scotts Valley and Guidiville Bands for the failure of the Federal defendants to comply with its terms shall be to initiate such proceedings in this action as may be available, or file a new action in the United States district court, to enforce the provisions of this stipulation and the judgment entered theron.

Dated: March 15, 1991

CALIFORNIA INDIAN LEGAL SERVICES

Stephen V. Quesenberry

STEPHEN V. QUESENBERRY

CALIFORNIA INDIAN LEGAL SERVICES

Attorneys for Plaintiffs

Dated: March 14, 1991

Glen R. Goodsell

GLEN R. GOODSELL, Attorney

United States Department of Justice

Environment & Natural Resources

Division

EXHIBIT A

Scotts Valley Rancheria:

(1) Assessor's Parcel No. 005-040-05 (Boggs, Theresa Pearl - deceased)

(a) Delinquent taxes, including penalties, for 1983-1990 totalling $1,880,60.

(b) Estimated taxes for 1990-1991 in the amount of $127.00.

(2) Assessor's Parcel No. 005-040-06 (Elliott, Bennett)

(a) North Lakeport Water District assessment of $4,108.30, payable over a 25 year period at an annual assessment in the amount of $285.00.

(b) Current taxes are minimal because of homeowner's exemption. Taxes, combined with Fire District assessment of $22.50, totalled $23.20 in 1989-1990.

Guidiville Rancheria:

(1) Assessor's Parcel No. 182-270-03 (Cooper, Nora - deceased)

(a) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $90.00.

(2) Assessor's Parcel No. 182-270-09 (Elliott, Jesse - deceased)

(a) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $230.00.

(3) Assessor's Parcel No. 182-270-19 (Young, Irene)

(a) Deed of trust in the amount of $12,323.00, dated 08-24-84, to secure indebtedness incurred for housing rehabilitation.

(b) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $350.00.

(4) Assessor's Parcel No 182-270-20 (Whiterock, Paul)

(a) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $320.00.

Exhibit A

Nat . Resources Library
U.S. Department of the Interior
Washington, D.C. 20240

DEPARTMENTAL MANUAL

TRANSMITTAL SHEET

PART	SUBJECT	RELEASE NUMBER
602 DM 2	LAND ACQUISITION	2856
FOR FURTHER INFORMATION, CONTACT Office of Management Improvement	Hazardous Substances Determinations	DATE JUN 2 1989

EXPLANATION OF MATERIAL TRANSMITTED:

This release, 602 DM 2, converts the provisions of Secretary's Order No. 3127 dated December 15, 1988, to the Departmental Manual. Some changes were made to the material to more accurately reflect the intent of the Secretary's Order.

Charles E. Kay
Deputy Assistant Secretary of the Interior

FILING INSTRUCTIONS:

Remove:	Insert:
None	602 DM 2 (1 sheet)

Exhibit B

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:

MAR 09 1990

54 BIAM BULLETIN 1

Memorandum

To: Holders of 54 BIAM

From: Deputy to the Assistant Secretary - Indian Affairs (Operations) Walter R Mills

Subject: Instructions in the Implementation of 602 DM 2, Land Acquisition: Hazardous Substances Determinations

This release provides interim instructions in the implementation of the Departmental Manual at 602 DM 2 [see Manual Release No. 2856]. 602 DM 2.3 sets forth a new Departmental policy which prohibits the acquisition of real estate containing hazardous substances "if an expenditure of Departmental funds is required for cleanup of such real estate, except at the direction of Congress, or for good cause with the approval of the Secretary."

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601 et seq. (hereinafter the Superfund Act), authorizes certain federal actions in response to releases of hazardous substances, pollutants, or contaminants which threaten the public health or the environment. Hazardous waste sites which are owned or operated by the federal government are subject to most of the requirements of the Superfund Act. In particular, federal facilities are subject to enforcement actions of the Environmental Protection Agency and citizen suits. While the Department continues to take the position that hazardous waste sites on land which the United States holds in trust for Indians are not federal facilities and thus not the responsibility of the Department, the matter has yet to be resolved with the EPA. Moreover, in a recent letter to the House Committee on Interior and Insular Affairs, the Department of Justice summarized the problem, as it relates to trust acquisitions, as follows:

> "The law governing potential federal liability for cleanup of Indian trust lands is not fully developed. However, a recent decision in the Eighth Circuit Court of Appeals in Blue Legs v. United States Bureau of Indian Affairs, 867 F. 2d 1094 (1989), indicates that caution is warranted where . . the United States is to gain title to Indian reservation land which is contaminated . . . The decision was premised, in part, on a theory that there exists a trust-based federal duty under the Snyder

BULLETIN EXPIRES: September 8, 1990

Exhibit C

> Act to insure the cleanup of contaminated sites on reservation land . . . So long as this decision stands, the utmost care is required with respect to federal acquisition, for Indian reservation purposes, of contaminated lands."

In order to implement the above-referenced Departmental policy, and to thereby reduce the risk of federal liability, the acquisition of land has largely been conditioned upon a finding that such land is not contaminated.

THE MANUAL PROVISIONS

602 DM 2.2 defines the scope of the new policy as follows:

> . . . this chapter shall apply to any interest in land (including but not limited to fee title, easements, rights-of-way, lapses, reverters, trust lands and leases) to be acquired by the Department or a bureau. Such acquisitions may be by purchase, condemnation, donation, exchange or otherwise.

The Office of the Associate Solicitor, Indian Affairs, has informally advised that the provisions of 602 DM 2 shall apply to fee to trust acquisitions (on behalf of individual Indians and tribes) and administrative transfers from other federal agencies, but not trust to trust acquisitions.

602 DM 2.4 assigns to the Assistant Secretary the authority to perform the functions described in 602 DM 2.5A, 2.5B, and 2.5D. 602 DM 2.5A requires that pre-acquisition surveys be conducted to determine the "possible presence of hazardous substances." In addition, 602 DM 2.5A requires that all surveys be reported to the Assistant Secretary - Policy, Management and Budget, and stipulates that such reports must:

> ...include a review of previous ownership and uses of the site (and) advise that a survey was done, what hazardous substances, if any, were found, the estimated costs of remediation, any potential problems related to hazardous substances, the possibility of the existence of unfound hazardous substances, any proposed future action and a certification that the pertinent Assistant Secretary has personally reviewed the report.

602 DM 2.5B suggests that acquisitions may be routinely approved, after the surveying and reporting requirements imposed by 602 DM 2.5A have been satisfied, where (1) no evidence of hazardous substances was found or (2) if there was such evidence, there will be no estimated increased costs to the taxpayers.

DECLARATION OF SERVICE BY MAIL

Re: Scotts Valley Band of Pomo Indians, et al., v. U.S.A., et al.,
No. Civ. No. C-86-3660 WWS

I, the undersigned declare:

I am a citizen of the United States, over the age of eighteen years, with my place of business at 510 - 16th Street, Suite 301, Oakland, California 94612, employed in the County of Alameda and am not a party to the within action.

On the 15th day of March, 1991, I served the within:

STIPULATION FOR ENTRY OF JUDGMENT
(Scotts Valley Band and Guidiville Indian Community)

in said action, by placing a copy thereof enclosed in a sealed envelope with the correct postage thereon fully prepaid, in the United States mail at Oakland, County of Alameda, California, addressed as follows:

Glen Goodsell, Esq.
General Litigation Section, Room 857
Environment & Natural Resources Division
Department of Justice
Benjamin Franklin Station
Washington, D.C. 20044-0663

Francis B. Boone,
Assistant United States Attorney
Office of the United States Attorney
450 Golden Gate Avenue
San Francisco, CA 94102

Tara Harvey, Deputy County Counsel
County of Sonoma
575 Administration Drive, #116 A
Santa Rosa, CA 95403-2881

Mark D. Peters, Esq.
Senneff, Bernheim, Kelly & Kimelman
50 Old Court House Square
Santa Rosa, CA 95402

Claudia Wilken (delivered to office)
U.S. Magistrate
United States District Court
450 Golden Gate Avenue
19th Floor, Room 19426
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 15, 1991, at Oakland, California.

Nancy L. Swanson

EXHIBIT B

Federal Register / Vol. 67, No. 119 / Thursday, June 20, 2002 / Notices 41967

DEPARTMENT OF DEFENSE

Department of the Navy

Record of Decision for Disposal and Reuse of the Fleet Industrial Supply Center, Naval Fuel Depot Point Molate, CA

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The Department of the Navy (DON) announces its decision to dispose of the Fleet Industrial Supply Center, Naval Fuel Depot Point Molate near Richmond, CA.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Lee, Southwest Div, Naval Facilities Engineering Command, 1230 Columbia St, Suite 1100, San Diego, CA 92101, telephone (619) 532–0975, facsimile (619) 532–0940.

SUPPLEMENTARY INFORMATION: Under the authority of the Defense Base Closure and Realignment Act (DBCRA) of 1990, Public Law 101–510, 10 U.S.C. 2687 note at 582–606, and pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. Section 4332(2)(C) (1994), and the regulations of the Council on Environmental Quality that implement NEPA procedures, 40 CFR parts 1500–1508, and the Department of Navy regulations implementing the federal regulations, 32 CFR 775, the Department of the Navy announces its decision to dispose of Fleet and Industrial Supply Center, Naval Fuel Depot Point Molate (NFD Point Molate), Richmond, CA. Disposal of this property will permit productive reuse of this surplus federal property. Several reuse alternatives were evaluated in the Environmental Impact Statement (EIS), including the Preferred Alternative (Alternative 2), light commercial and light industrial development.

Alternatives Considered

The proposed action is the disposal of the NFD Point Molate property. The Final EIS analyzed effects of the Preferred Reuse Plan, and effects of two other reuse plan alternatives. The No Action Alternative was also evaluated.

Alternative 1, Residential/Commercial, would use about 55 acres for residential development, 27 acres for commercial activities, 6 acres for light industrial activities, and 325 acres, including 100 acres of submerged land, for open space/recreation.

The Preferred Alternative, Alternative 2, Industrial/Commercial, would use about 27 acres for commercial activities, 61 acres for light industrial activities, and 325 acres, including 100 acres of submerged land, for open space/recreation.

Alternative 3, Recreation/Commercial, would use about 27 acres for commercial activities, 8 acres for light industrial activities, and 378 acres, including 100 acres of submerged land, for open/space recreation.

No Action Alternative, NFD Point Molate would not be disposed and would remain in Federal caretake status. The Navy would maintain the physical condition of the property by providing security and making repairs essential to safety. Because the No Action Alternative has less potential for adverse environmental impacts, it is the environmentally preferable alternative. However, the No action Alternative would not promote local economic development nor create jobs and, therefore, is inconsistent with the statutory direction contained in the DBCRA.

Environmental Impacts

DON analyzed the direct, indirect, and cumulative impacts of each alternative on the environment. Potential significant impacts that could result from Alternative 2 are discussed below.

Expansion of the existing sewage treatment plant or construction of a new sewage treatment plant and operation of a winery on site could result in incomparability between these land uses and other development on site. Until a specific project is identified, it is not possible to identify the amount or type of commercial uses that might be proposed in the Waterfront Park Beach priority use area. Proposed uses could be inconsistent with the San Francisco Bay Plan. The EIS includes minimization and avoidance measures that the developer could implement that would reduce these potential impacts to insignificant levels. There is also the potential for exposures of occupants of the property to accidental releases from a nearby refinery. However, most occupants would not be staying overnight and overnight stays would be limited to guests and staff of a hotel or bed and breakfast facility. The Bay Area Air Quality Management District (BAAQMD) does not consider these occupants sensitive receptors. Because there would be no sensitive receptors on site as defined by the BAAQMD this potential impact is considered insignificant.

The proposed redevelopment would increase the demand for police, fire, and emergency medical services. The distance between NFD Point Molate and local city fire stations could require the city to establish a fire crew and fire truck at the existing fire station. Although the existing water system at NFD Point Molate has inadequate water pressure to meet firefighting requirements, the Preferred Alternative includes upgrading the water system to satisfy these requirements.

Five cultural resources at NFD Point Molate have been identified: Winehaven Historic District and four archeological sites. The Winehaven Historic District is the only property at Point Molate listed on the National Register of Historic Places. Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, 36 CFR part 800, the Navy has completed consultation with the Advisory Council on Historic Preservation (ACHP), the California State Historic Preservation Officer (SHPO), and the Bay Miwok Band American Indian tribe. As a result of these consultations, the Navy has agreed to several actions to avoid or minimize adverse impacts to cultural resources. These obligations are set forth in a Memorandum of Agreement among the Navy, the ACHP, the SHPO, and the Bay Miwok, dated January 29, 2002. Before conveying any property at NFD Point Molate, the Navy will submit an amendment to the National Register of Historic Places for the Winehaven Historic District. The amendment will distinguish between the contributing and non-contributing buildings and structures within the District. The Navy is also applying to the California Historical Resources Commission to reduce the Winehaven Historic District boundary as it appears on the California Register of Historic Resources, so that non-contributing properties are excluded. The Navy is nominating a historic Shrimp Camp (CA–CCO–506H) to the National Register and will formally evaluate the National Register eligibility of three prehistoric archeological sites (CA–CCO–282, CA–CCO–283, and CA–CCO–423), and if they are determined eligible, nominate them to the National Register.

There are no Federally listed threatened or endangered species known to occur on the NFD Point Molate property under the Endangered Species Act.

The Preferred Alternative could have significant impacts on transportation, traffic, and circulation. Projected traffic could cause substantial delays during peak commuting hours at three intersections of freeway ramps and roadways near NFD Point Molate. On one ramp, a local agency planning threshold would be exceeded. In

addition, off-site road segments between NFD Point Molate and the nearby freeway are substandard and access to the property is lacking from one direction of the freeway. Significant impacts could be mitigated by the local and state governmental agencies through widening the road accessing the property, road restriping and other modifications detailed further in the EIS.

The Navy analyzed the impacts on children pursuant to Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, 3 CFR 198 (1998). Under the Preferred Alternative children could be present for short periods in the bed and breakfast establishments, small hotels, and recreational areas. NFD Point Molate is within the toxic or flammable endpoints for accidental releases by Chevron Refinery and General Chemical Corporation, as assessed in conformation with the Risk Management Program Rule (40 CFR 68.130; Section 112(r) of the Clean Air Act). Since children are less able to metabolize, detoxify, and excrete some toxic substances than adults, in the event of an accidental release of substantial quantities of toxic contaminants, there could be disproportionate health and safety risks to children at NFD Point Molate.

Mitigation

The Navy will take certain actions to implement existing agreements and to comply with regulations. Once property is conveyed outside of federal control, land use is solely a function of state and local planning and zoning authorities. The DON cannot impose post conveyance restrictions on land use absent specific statutory authority to do so such as that provided for the imposition of land use controls under Comprehensive Environmental Response, Compensation, and Liability Act. As a result, the DON has no authority to require that parties acquiring the former NFD Point Molate property impose the mitigation measures identified in the Final EIS or this Record of Decision.

Response to Comments Received Regarding the Final EIS

After the Final EIS was distributed to the public the Navy received one comment letter from Contra Costa Health Services. Their concerns had already been addressed in the Final EIS and do not require further clarification.

Conclusion

Although the No Action Alternative is the environmentally preferred alternative, it would not promote local economic redevelopment and create jobs. Keeping the property in caretaker status would not be the highest and best use of the property because it would not take advantage of the property's physical characteristics and infrastructure.

Based on the analysis contained in the Final EIS and the associated administrative record, I have decided, on behalf of the Department of the Navy, to dispose of the Fleet and Industrial Supply Center, Naval Fuel Depot Point Molate.

Dated: June 4, 2002.

Duncan Holaday,

Deputy Assistant Secretary, (Installations and Facilities).

[FR Doc. 02–15540 Filed 6–17–02; 8:45 am]

BILLING CODE 3810–FF–M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On June 11, 2002, a 30-day notice inviting comment from the public was inadvertently published for the Application for the "Annual Performance Report Forms for the FIPSE US-Brazil Higher Education Consortia Program" in the **Federal Register** (67 FR 41220) dated June 17, 2002. This notice amends the public comment period for this program to 60 days. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, hereby issues a correction notice on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before August 19, 2002.

ADDRESSES: Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 1941. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202–4651 or should be electronically mailed to the internet address *vivian_reese@ed gov*. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346.

FOR FURTHER INFORMATION CONTACT: Joseph Schubart (202) 708–9266.

Dated: June 17, 2002.

Joseph Schubart,

Acting Leader, Regulatory Information Management, Office of the Chief Information Officer.

[FR Doc. 02–15631 Filed 6–19–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No. 84.336C]

Teacher Quality Enhancement Grants Program—Teacher Recruitment Competition; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2002

Purpose of Program: This program provides grants to States and to partnerships to promote improvements in the quality of new teachers with the ultimate goal of increasing student achievement in pre-K–12 classrooms.

Eligible Applicants: States (including the District of Columbia, Puerto Rico and the insular areas) and partnerships comprised, at a minimum, of an institution of higher education with an eligible teacher preparation program, a school of arts and sciences, and a high-need local educational agency (LEA). These terms are defined in section 203 of the Higher Education Act and in regulations for this program in 34 CFR 611. States and partnerships that received an FY 1999 grant under this program are not eligible for this competition.

Applications Available: June 20, 2002.

Deadline for Transmittal of Applications: July 25, 2002.

Deadline for Intergovernmental Review: September 24, 2002.

Estimated Available Funds: $8,920,000.

Estimated Range of Awards: $195,000 — $465,000.

Estimated Average Size of Awards: $372,000.

Estimated Number of Awards: 24.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Page Limit: The application narrative is where you, the applicant, address the selection criteria reviewers use to evaluate your application. You must limit your narrative to the equivalent of no more than 50 pages. In addition, you must limit your accompanying work plan to the equivalent of no more than 10 pages, your budget narrative to the

EXHIBIT C

Printed on Recycled Paper

MAYOR
Irma L. Anderson

August 2, 2004

The Honorable Arnold Schwarzenegger
Governor of the State of California
State Capitol Building
Sacramento, California 95814

Peter Siggins, Esq.
Legal Affairs Secretary
Office of the Governor
State Capitol Building
Sacramento, California 95814

Re: Proposed Development of World-Class Gaming, Retail and Hotel Project, Point Molate Naval Fuel Depot in Richmond, California

Dear Governor Schwarzenegger and Mr. Siggins:

The City of Richmond is excited to inform you that we are nearing conclusion of a detailed negotiation with the Guidiville Band of Pomo Indians, a landless federally recognized tribe, Upstream Investments, a local developer, and Harrah's Entertainment, Inc., on this critically important project, and a formal agreement will be presented for consideration and approval to the City Council on August 17, 2004. The proposed project will develop a proposed $700 million world class tourist and business destination resort that is anchored by a proposed Indian gaming, hotel and retail facility within the City of Richmond. The site is a unique, waterfront development site consisting of approximately 415 acres located at the foot of the Richmond-San Rafael Bridge and is more commonly referred to as the former Point Molate Naval Fuel Depot.

The proposed project at Point Molate is perhaps the most important development project that Richmond has entertained in recent years, and includes a wide range of gaming, hospitality, retail, entertainment and recreational uses. The mixed-use development, which balances both gaming and non-gaming development with open spaces, will reinvigorate the city's economic engine, and provide a unique asset to the entire San Francisco Bay Area. The construction and operation of the Project will provide the City of Richmond with thousands of direct and indirect jobs, and given the current needs of Richmond and surrounding East Bay communities, the revenues and jobs the project will generate will provide a critical stimulus to the local and regional economies.

P.O. Box 4046 Richmond California 94804

telephone: 510-620-6503
fax: 510-620-6542
irma_anderson@ci.richmond.ca.us

This is a first-of-its-kind project in so many ways, most importantly the unique partnership is proposed between the Tribe and the City of Richmond. Where most other local communities have struggled to find common ground with proposed Native American projects, the proposed agreement between the City of Richmond and the Tribe address a range of issues including: protection of open spaces, acceleration of the remediation of this former Navy fuel depot, improvements to the Bay Trail and development of a shoreline park with unlimited public access, preservation and restoration of 150 acres of open space on the edge of San Francisco Bay, rehabilitation of historic structures on the site including the Winehaven historic village, development of a ferry terminal to be integrated into the regional ferry system, use of proven job training programs to target upcoming jobs to underserved communities within Richmond, and other benefits. Additionally, the proposed agreement with the City provides upwards of $400 million over 20 years to the City to help Richmond revitalize itself and includes reimbursements for lost tax revenues, law enforcement and other public services provided to the Tribe. The proposed agreement provides for needed City infrastructure and community benefits including restoration of library services, parks and other programs that will help put Richmond back on its feet. Not only will this project go a long way to heal some of the severe economic woes of the City of Richmond, but it will restore the Guidiville Tribe's land base that was terminated by the federal government in the 1960's, providing a unique opportunity to marry economic opportunity and social justice, values I know you share.

The proposed agreement with the Tribe provides for consistency with design guidelines, environmental review and building standards. The proposed agreement also calls for the establishment of a standing Joint Tribal-City Advisory Committee, which will include participation by community representatives – thereby building local involvement and strengthening government to government relations.

We believe that this unique and comprehensive proposal between the City of Richmond and the Guidiville Tribe represents a landmark achievement for both parties. In short, we believe the unique set of community benefits combined with the world-class development and design standards set for the project provide positive a model for how Cities and Tribes working together can use gaming to attract new tourist and business dollars and benefit their respective communities.

The City strongly supports the Tribe in its efforts to obtain a Compact. While we understand that the State of California is deserving of a significant economic share of the project, we respectfully ask that the City of Richmond's interest be considered in the Compact process. The City has already negotiated for a huge package of financial and other costly benefits, and has helped craft the project vision that requires an unprecedented up-front investment by the Tribe in site infrastructure and facilities to make this a unique asset to Northern California. As the State negotiates its share, please recognize these contributions already made, as a state revenue share over the available cash-flow threshold would directly reduce the size and investment in the project and thus reduce the overall benefit to the local and regional economy. We

urge the State to consider the entire package, including the level of investment, the number of direct and indirect jobs created, the local construction and operational spending, the regeneration of a difficult historic military site and the package of benefits to the City and State taken as a whole.

We are moving quickly to consider and finalize our agreement with the Tribe and hope that the State will expeditiously negotiate a Compact that works for everyone, making possible the unprecedented level of projected investment within the City of Richmond. It would be our hope to make a joint announcement about this exciting project in August, subject to our Council consideration and vote on the proposed agreement. Perhaps you will be able to visit Richmond and join me personally to announce our respective agreements on this model project.

Very truly yours,

CITY OF RICHMOND
Irma L. Anderson,
Mayor

cc: Rich McCoy, Assistant City Manager
John Knox, Orrick, Herrington & Sutcliffe, LLP
Jim Levine, Upstream Investments
Harrah's Entertainment, Inc
Rich Mirman, Senior Vice President, Business Development
Jan Jones, Senior Vice President, Government Relations
Michael Derry, Chief Executive Officer, Guidiville Band of Pomo Indians

EXHIBIT D

CONTRA COSTA TIMES

Posted on Sat, Apr. 30, 2005

GUEST COMMENTARY

The future of Point Molate is the future of Richmond

GUEST COMMENTARY

TWO WEEKS ago, the Contra Costa County Board of Supervisors voted to oppose any new casinos in Contra Costa County without examining the specifics of the proposals actually being considered within the county. The vote by the Board of Supervisors -- which was symbolic, with no legal impact -- was triggered by public concern over numerous gaming proposals in the East Bay, and possible effects on county services.

The supervisors' actions didn't consider a thoughtful analysis of how gaming within a world-class destination resort could achieve multiple regional economic and social goals.

The vote was a political statement rather than a legitimate public policy statement.

Nobody wants to see casinos developed within existing neighborhoods in the county. It's clear that a carefully designed resort project that is linked to existing tourist destinations, brings new tourism and business revenue to the county and submits itself to the rigorous environmental review that all other development projects go through should be carefully analyzed.

And that is exactly what the city of Richmond is doing with the resort proposed for the closed Navy Base at Point Molate.

The city will make its determination about the type of project to be built at Point Molate, whether it will include gaming and what mitigation measures are required, after a full review of the facts developed through a unique, groundbreaking process for tribal gaming -- a project Environmental Impact Report led by the city.

Since Richmond is charged with determining the future of Point Molate, and we are on the front line of revitalizing a local manufacturing economy in decline, we are forced to dig beneath the surface to analyze our options.

While Richmond was once an important center of military production, we harbor no illusions that those jobs will return and provide employment to Richmond residents.

With the transformation of our economy and the continued export of manufacturing overseas, tourism is one of the opportunities that we can capture. The Point Molate site is an opportunity that we can't overlook -- extraordinary views of the Bay, the San Francisco skyline, and Mount Tamalpais, potential ferry linkages to San Francisco, and a rich history.

If done correctly, the Point Molate resort project will be a significant opportunity to achieve multiple economic, environmental, and social goals of the city, the federal government, the tribe, and the state on a unique and historic site.

The proposed resort will reclaim and transform this abandoned and polluted U.S. Navy base into a waterfront village that will bring career opportunities back to Richmond, provide needed revenues for police, fire, schools and libraries, and provide a range of hospitality, entertainment, shopping, and recreational facilities for our community.

The resort will be a jewel on the Bay and a destination for tourists, people attending business conferences, and outdoor enthusiasts.

The city, the Guidiville Band of Pomo Indians, and the project developers all recognized that a project of this type would require a fresh approach to intergovernmental relationships.

Rather than limit ourselves to existing models, we incorporated numerous innovative checks and balances into the agreement to sell the Point Molate property.

Those innovations provide for a comprehensive environmental review of the project and project alternatives, and the ability of the city to approve, modify or reject the project after such review.

The city also will participate in the oversight of site design and construction, the protection of existing shoreline and open space resources on the site, and the provision for local participation in jobs and job training.

If the Point Molate resort becomes a reality, the employment opportunities are not just significant, they are enormous.

The proposal calls for a resort hotel, convention space, shops, restaurants and entertainment facilities that will create more than 6,600 local jobs at the resort and in the community.

These are jobs that not only represent a paycheck, but long-term community benefits like professional development and skill training for career growth and advancement.

The $800 million private investment directly into Richmond's economy will reverberate throughout the regional economy.

If the potential project impacts can be fully mitigated, the Point Molate resort project can bring extraordinary benefits to Richmond and the region, even beyond the economic, employment, and financial transformation we expect.

The resort will appeal to new tourists and people attending business conventions on a scale equivalent to Pier 39, bringing upscale shopping, dining, cultural and entertainment opportunities to Richmond.

Typically, communities are forced to sacrifice potential tax revenue and provide other incentives to attract these kinds of benefit from a developer or major company.

If we do it right, our community will reap the numerous benefits of this proposed destination resort. The Point Molate resort is an incredible opportunity to strengthen our future and revitalize our economy -- all without a dime of taxpayer money.

We understand some residents and the East Bay Regional Park District want the Point Molate site dedicated exclusively for public parks and open space.

In hearings before our City Council, they stated it was someone else's job to find employment for Richmond's residents, not theirs. They're right; it's our job.

The Navy gave us the land at Point Molate with the requirement that it would become an economic opportunity for our community, balanced with the environmental protections provided by law.

The Point Molate resort is one project that could become the East Bay's crown jewel and a symbol of what tribal-local government relationships could look like in California. If we ultimately approve this project, the city of Richmond will not settle for less.

Anderson is mayor of Richmond.

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LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA DRIVE • BELLINGHAM, WASHINGTON 98226 • (360) 384-1489
DEPARTMENT_____ EXT._____

STATEMENT OF DARRELL HILLAIRE, CHAIRMAN
LUMMI INDIAN NATION, STATE OF WASHINGTON
FOR THE RECORD OF THE OVERSIGHT HEARING ON LANDS ELIGIBLE FOR GAMING PURSUANT TO THE INDIAN GAMING REGULATORY ACT

Wednesday, July 27, 2005
Submitted to
The Senate Committee on Indian Affairs

Recommendation: Congress should understand the constitutional foundations to who is a tribal Indian and what it meant to be classified as '*excluding Indians not taxed*' and what it meant to be a 'tribal nation' in 1787; because it still has constitutional ramifications to modern tribal governments per *treaties-made* and *Indian commerce.* Recognizing an indigenous tribe aboriginal to a specific continental geographic area and correlated lands is well documented in the history of treaty-making. A determination must be made as to whether the respective tribal nation still exists, and had aboriginal connections to the lands, even with or without imminent federal recognition, backlash impacts will be felt by other (recognized) tribes and must be taken into consideration.

The Lummi Nation recognizes that there is a great debate as to which tribes are indigenous to various areas that are close to major metropolitan areas- due to the importance of the location in the modern business of 'Indian Gaming'. Of course, we track history and find that there were no unclaimed aboriginal lands in America. The lands of the American continent were not '*terra nullius*'. The lands were occupied by tribes, with numerous tribal members. While European-derived diseases wiped out the majority of the 'tribal Indians' well before first contact between the races, it is recognized now that there were numerous tribes throughout the territories. The last vestiges of these 'tribal Indians' and 'Indian nations' that once occupied the aboriginal territories, and held aboriginal titles (as recognized by M'Intosh, and impacted by the Discovery Doctrine), still exist in many areas of the continental United States today. They continued to remain

together and refused to be broken apart or to lose their tribal ways. Their identification and recognition as tribal Indians and as Indian Nations has great ramifications to the demographical areas identified, to the laws of the states and cities impacted, and to the surrounding tribes that had incorporated them or gave them refugee status (eventually enrolling them to be tribal members as a direct result of BIA controlled reservation census taking, or head counts of Indians, and the resulting government roles used for tribal enrollment purposes).

The Lummi Indian Nation is very concerned as to the definition of who is a 'tribal Indian'. And, the nation believes that the definition must be defined in light of constitutional intent devised by the Founding Fathers of 1787. At the time, there were two types of Indians understood to exist. One was an Indian person that had completely alienated himself from his tribal people and tribal nation and had become totally enculturated into the populace of the (United States) colonies (states). The other was the '*tribal Indian*'. The tribal Indian was a member of their tribal Nation and community, living completely separate from the populace of the United States. They owed no duty or allegiance to the United States or individual states.

In drafting the Constitution, the Founding Fathers recognized this separate status of the tribal Indians. They were not a part of the people that were entitled, "We the People of the United States'. They were not a part of the People that were delegating powers to the national government. They were not a part of the people that would be represented by the Federal Government. They were not a part of the people that would be taxed to cover the costs of representative government. They were defined as '*Excluding Indians not taxed*' (Article I, Section 2, Clause 3).

These 'tribal Indians' lived under the rule of their own tribal governments and were represented by their own leadership. If the United States wanted to enter into relationships with the tribal Indians and Indian Nations then it could utilize the other delegated powers secured from the "People" of the United States. They could negotiate treaties with the Indians (Article II, Section 2, Clause 2). They could enter trade relationships and govern over the activity of their U.S./state citizens/people (Article I,

Section 8, Clause 3) to ensure there would be no unfair trade practices that could cause war by disgruntling the Indian Nations. The "People" were represented in the debates and votes of members of the House of Representatives. The States were represented in the Senate debates during debates over treaty ratification, and approval of treaty or Indian Affairs appropriations originating from the House. The individual states could not enter into treaties with the Indians (Article I, Section 10, Clause 2). The Judiciary could review 'treaties-made' (Article III, Section 2, Clause 1). And, treaties-made or which shall be made became 'Supreme law of the land' (Article VI, Clause 2). If we utilize the Cherokee ruling of Supreme Court Justice Marshall, where tribes were held to be 'states' then Tribal/State compacts could be authorized (Article I, Section 10, Clause 3). Modern day examples are the many Tribal/State Indian Gaming Compacts authorized per IGRA.

The constitutional powers addressed above were not applied to 'individual Indians' that were living amongst the colonies or states as members of those communities. These were not constitutional powers to be exercised and applied to every relationship with every individual Indian. These powers helped structure the government-to-government relationship between the Indian Tribes and the United States. In negotiations, the tribal nations represented the 'excluding Indians not taxed' population that was acknowledged as being 'separate' from the United States and the individual states.

This status of 'tribal Indians' classified as 'excluding Indians not taxed' was not changed by the 14th Amendment. The records of the Reconstruction Debates of the 39th and 40th Congresses confirm that this separate status was to be preserved and recognized. Section 1 of the Amendment provides the wording, '*subject to the jurisdiction thereof*'. These words were in reference to the 'tribal Indians' that owed their allegiance to their Indian Nations first and foremost, and were not subject to the jurisdiction of the United States. It was recognized that if the U.S. wanted relationships with the tribal Indians it could use the treaty power or commerce clause to do so. Section 2 reiterated '*excluding Indians not taxed*' to make sure that the individual states could not make Indians citizens

if the United States could not under Section 1 and original constitutional intent. This same constitutional intent was reinforced with the enactment of the Post-Civil War Civil Rights Act passed by the 39th/40th Congress, which excluded the tribal Indians from its application.

Under Article IV powers of the Constitution, and under guidance of the 1787 N.W. Ordinance, the United States required 'states' to disclaim jurisdiction over tribal Indians. Indian Affairs was a matter of national power and not enjoyed by the individual states. This did not mean, however, that the states could not regulate the conduct of individual Indians living in cities of the state and away from the reservations. Even though the 'tribal Indians' were being 'colonialized' and placed onto treaty or executive order established reservations, it was recognized that they were, still, collectively separate from the People of the United States and individual states. The evolving new states west of the Mississippi and Missouri Rivers used two governmental vehicles to 'disclaim jurisdiction' over the tribal Indians; one was territorial organic (legislative) enactments attached to the eventually approved state constitution, and the second was a constitutional disclaimer inserted in the original state constitution that could only be removed by amendment (e.g., Washington State Constitution, Article XXVI of 1889). Washington State's constitution used the wording 'tribal Indian' in other places as well.

Tribal governments had inherent sovereignty and criminal jurisdiction over their tribal Indians exclusively. This was all well and done until the Supreme Court ruled that there was no jurisdiction to try and punish an Indian for murder of another; so, the Congress responded by enacting the Major Crimes Act, asserting federal jurisdiction over a list of major crimes committed in Indian Country. The general idea, though, was the recognized separation of tribal Indians from the rest of the U.S. populace, even for reasons of criminal prosecution, did exist.

In dicta, in the case of U.S. v. Wong Kim Ark, the court addressed the fact that 'tribal Indians' were separate from the rest of the people of the individual states and the United States, and were not born or naturalized as citizens. This was followed by the case of Elk v. Wilkins (1884) which held that 'John Elk' was an Omaha 'tribal Indian' and not a citizen of the state or United States. Simply by separating himself from the tribe did not

relieve Elk of his affiliation and allegiance to his people & Indian Nation or automatically entitle him to become a 'citizen' (Indian) of the state or United States. While many tribal Indians, that served in the armed forces of the United States during war, were naturalized for their services, not all Indians automatically became citizens. The 1887 General Allotment Act, and some of the earlier Indian Homestead Acts, authorized the making of 'tribal Indians' into individual citizens. But, these acts were specifically drafted in order to brake up the 'tribal community' and allegiance owe to the tribal nations.

In 1924, the Indian Citizenship Act passed Congress in order to provide Indians with First Amendment Religious Freedom. The 'religious freedom' reasons for passage of the Indian Citizenship Act failed to manifest. But, the IRS took notice of a whole new set of 'citizens' that were not paying federal income taxes. The question arose as to whether or not Indians, as new citizens, had to pay federal income taxes the same as other citizens. The question was sent to the Solicitor for the Department of Interior, in November 1940. The opinion tracks the evolution of the '*excluding Indians not taxed*' language well. We, as tribal governments, do not agree with the conclusion but the opinion which left a track record to follow the evolution of the separated 'tribal Indians' into U.S. Citizens.

Indian Tribal people, as members of their Indian Nations and communities, have a collective awareness of what it means to be a traditional, tribal member of a tribal society. We are families, extended families, and hold sacred our sense of community and traditional obligations of membership. We maintain extended relationships with other tribes in our surrounding environs. We are connected by traditional culture to each other and other (nearby) nations. We exercise a collective awareness that ties us to our ancestry and our aboriginal territories. Tribes exercise 'popular sovereignty' that is a reflection of the collective will of the tribal membership.

We, as tribal communities, find it inconceivable that 'three people' can exist as a tribe. This is the case in California in which the BIA recognized a sister and two brothers as a tribe (for the purpose of Indian gaming). This is not a tribe it is a small family that could not even identify with other tribal groupings or affiliations. Their culture and orientations were developed upon their experiences as urbanites. This 'Three Person

Tribe' gained national fame after securing their Indian casino and hotel. The sister is alive, her brothers were suddenly killed after the casino opened. Now, she has become her 'own tribe'. She is her 'own people'. We must remember that 'popular sovereignty is the foundation to tribal governance. How is the collective, sacred consciousness of her 'tribal' people manifested here? Where is the traditional sense of the community? If this was the rule at Lummi then our 4,500 members would turn into 1500 separate tribes.

Some individuals have formed their own 'tribes' inside urban centers. An example is the modern-day alleged tribe of 'Dwamish' of the general Seattle Area. This group is composed of (unenrollable) individuals from the Seattle urban community that wanted to secure fishing rights back during the U.S. v. Washington case era (Post-Boldt Decision, 1975). They were a lose collection of individual, unemployed 'urban Indians'. They were not even listed on the Congressionally mandated 'Dwamish Final Enrollment' of 1966 (See: 25 U.S.C. Section 1131 per P.L. 89-660) that listed 1178 recognized tribal members, represented by elder Dwamish living on the several Point Elliot Treaty reservations. Now they (these alleged Dwamish) argue that they should be recognized as a tribe. The fact is that because Chief Seattle and his Traditional Dwamish did not get a reservation in or around the City of Seattle (their aboriginal village site, or in the Renton Valley or along the Dwamish River or around what was known as Lake Dwamish), they were forced to relocate onto several of the Point Elliot Treaty reservations (12 Stat. 927). Chief Seattle, himself, had to relocate to the Suquamish Reservation. At Lummi alone there are about one thousand traditional Dwamish that have continued to live as 'tribal Indians' with their Lummi relatives. Other traditional Dwamish are primarily located on Swinomish, Suquamish, Muckleshoot, and the Skokomish Indian Reservations.

If we take a close look, retroactively, at the newly recognized 'Samish Tribe' and 'Stillaguamish Tribe' of Washington State, then we see a pattern emerging. The 'tribal Indians' from the local reservations, with tribal blood ties to the two sample tribes, *were used* to argue that they (the Samish and Stillaguamish) still existed as a tribal people with a continual sense of community and traditional culture. Once these tribes were recognized, after meeting the BIA controlled Federal Acknowledgment Process standards, the newly recognized tribes dis-enrolled the 'tribal Indians' that were visibly

Indian and practicing their traditional ways (the Indians from the reservations). They forced the real Indians out and enrolled their own distant relatives (who would be non-Indian by any other standards, except for very minute genetic ties).

The Lummi Nation recognizes the hardship this caused many members of the modern-day Lummi Nation that were genetically 'Samish' and helped the *new* Samish get recognized only to be forced out of the Samish Tribe it received it's federal recognition. These dis-enrolled individuals then had to be re-enrolled as Lummis, so as not to experience unnecessary hardship. Tribal (reservation) Indians that were enrolled as a part of the *new* Stillaguamish, at the time of federal recognition, were later forced out and had to get (re-) enrolled as Snohomish or Swinomish or Upper Skagit tribal members to secure any rights as tribal Indians.

Simply having genetic connections to 'tribal Indians' does not make you a tribe or a tribal Indian. Being Indian is a way of life, it is a way of practicing life, it is a way of relating to others within your tribal community. It is a relationship with traditional spiritual societies and practices, as well as a way of choosing your leadership and holding them accountable to the tribal collective. For example, the world famous speech of Chief Seattle references '*tamanamus*' and the '*young men painting their faces black*'. The Traditional Dwamish on the various reservations know what this means. They know the type of spiritual songs that go with this power or the type of (spiritual) paint mentioned. They can sing the traditional song that was the source of the Great Chief's spirit power. They know how to use his 'spirit rattles' and the shape of those rattles. They are a part of the intertribal and tribal traditional societies that practices this form of spiritual awareness. They are not a part of the 'Pow Wow Indians' of inner-city Seattle that have no traditional culture- so they are forced to practice the Plains Indian Style of dances and spiritual observances (Sun Dance, Sweatlodges, use of sage, etc.).

In the sense of the Traditional Dwamish located at the Lummi Reservation, they are a part of those 'tribal Indians' that refused to surrender their tribal affiliations and refused to surrender their sense of traditional cultural continuity. The traditional Dwamish only located upon the several reservations pending resolution by the United States of their rights to a reservation in the Seattle area. At one time they gathered at 'Old Man House'. This was the gathering place of the Suquamish, Dwamish Alliance, from

1692 to 1890's –when the Sheriff of King County burned it down. Governor Isaac Stevens was the treaty negotiator and it was understood, we have been told over the generations, that the Traditional Dwamish would receive their reservation; but, Governor Stevens died in the Civil War and never returned to correct the treaty omissions.

The traditional Dwamish are not urbanites. They are not lost inside an urban center. They did not separate from their tribal ways. They never affiliated with the urban group that self-proclaimed themselves to be the *new* Dwamish. Some of the new Dwamish do not even have genetic ties to the Indian blood lines but were enrolled as a form of gratuity for services rendered- such as the young non-Indian lawyer that began to represent them, and their urbanite relatives. These alleged '*new Dwamish*' do not have ties to the aboriginal territory that compose the City of Seattle and its environs. The aboriginal landlords are located on the reservations, waiting for the United States to keep its promise that they shall have their own reservation.

Tribal Indians still practice the traditional ways of their ancestors. A primary reason is that they have aboriginal 'treaties' that tie them to the territory, the different categories of nature, and the form of spiritual & ceremonial observances that evolved with them as a tribal collective. Being a 'tribal Indian' should mean more than the fact that a BIA bureaucrat had decided you met the BIA requirements to be classified as 'Indian' or recognized as an 'Indian Tribe'. Inherent Indian sovereignty is derived from the tribal membership, it is a manifestation of tribal 'popular' sovereignty that is ancient. It is not a social compact structure between urbanite 'Wanna-be Indians'. Our traditional leadership earned the right to represent the people, to be respected by them, and were acknowledged for their sacrifices made over time toward the preservation of the tribal peoples' rights.

An individual that had surrendered their ties to the reservation, traditional communities made a choice that benefited them socially and economically. They chose not to suffer on the reservations alongside their traditional relatives. They chose to disengage their 'Indian-ness'. They chose 'citizenship' above and beyond 'tribal membership'. Indian-ness and being a 'tribal Indian' is not a social club; it is an ancient

way of identifying with the tribal collective consciousness, the land, territory, and spiritual aspects of creation. It is the way you are raised and how you recognize your tribal relatives. As a collective, you are aware of your rights as a treaty nation. You are aware of the fact that a 'traditional form' of government defends your rights not to be terminated or driven into extinction. Your rights to exist is solidified by the teachings of the elders from one generation to the other.

We agree with Hoopa Nation leadership that stated, "*that it is not the fault of some of the smaller Indian nations that the United States took their land & territory and failed to ratify their treaties (as is the case of the California Tribes, or the tribes that refused to relocate upon treaty created reservations)*". The test remains, however, as to whether or not they continued to live 'in-community' with a constant awareness of their separate status as 'tribal Indians' with on-going efforts to transfer their traditional culture from one generation to the next.

We are very much aware of the Father Sierra conflict and history in California in which the California Indians were enslaved and attached to specific 'Catholic Missions' to produce products for the mission as oppressed human beings. The Church, as much as government, was an oppressor of the traditional tribal Indians as well. The united actions of the churches helped destroy traditional cultural continuity amongst Indian societies. It is a part of the Indian holocaust. It is a part of the Historical Traumatization of the Indian Collective Consciousness. It is a part of the process that marginalized the Indians.

This latter idea is very much a united product of cooperation between the churches, states, and federal government- to completely eliminate all aspects of the 'tribal Indian' awareness that existed amongst the traditional Indians located in Indian communities or on Indian Reservations. The saying was, "*Kill the Indian, to save the man*". This meant to kill the collective awareness in the tribal community that constantly reinforced the individual's ability to identity as a 'tribal member' with ancestral kinship lines in a specific tribe and intertribally (due to intertribal marriages to maintain intertribal peace). The multiple, long-term goals of non-Indian society was to destroy tribal society, tribal government, tribal languages, tribal religions, tribal housing constructs, tribal extended family affiliations, tribal subsistence patterns, tribal

dependence upon off-reservation aboriginal territories for foods & medicines, and intertribal alliances (as in the Dwamish, Suquamish Alliance that formed in 1692, or the Iroquois Confederation that formed around the year 1200 A.D.).

Our example of 'Peace' at Lummi, and membership in the intertribal alliance, required the leadership of the Lummi (Xwlemi People) to be arranged into marriages with other tribes (S'Kallum, Dwamish, Semiahmah, Saanich, et. al.), to cement the peace time relationships. Thus, as a matter of traditional Dwamish government, the Dwamish married into other tribes and therefore were accepted to find (refugee status) safe- haven after being displaced from their greater Seattle territory and village sites. This is why Peter James, Walter James, and Richard Phare, as Traditional Dwamish leadership, were located at Lummi. This is why the Moses Brothers were located at Muckleshoot, and the other extended family members of the Dwamish families are found at the other treaty reservations (Chief Seattle's and his daughter's bloodline can be traced to the Suquamish Reservation, but the Old Chief's sisters were married into the other tribes' leadership families). They never gave up their ancestry. They never surrendered their rights to exist. They had preserved their ancestral rights as tribal Indians by living as tribal Indians until justice is delivered.

In conclusion, the Lummi Nation believes that research and investigation should be started to look at the foundations to the constitutional intent to recognize that the 'tribal Indians' were separate from the urban Indians. The tribal Indians were constitutionally defined as 'excluding Indians not taxed'. These are the ones you (the United States) entered into treaties with. These are the ones you regulated trade & commerce with. These are the ones you forbid the states from exercising jurisdiction over. These are the ones that were punished under the 'Indian Religious Crimes Code' (DOI Circular #1665) for practicing Indian ceremonials, songs, dances, and observances. These are the ones on the established reservations that had the general allotment laws (1887, as amended up to 1910) applied to them and then declared individual 'citizens'.

If the Congressmen and their staff do not understand the history of the constitutional relationship with the 'Indian tribes' and 'tribal Indians' then they are bound to become confused as to who is entitled to be referenced and recognized as a 'tribal

Indian'. There was a constitutional test and it should be understood. The Lummi Nations finds it unacceptable to believe that every two or three people that claim to be Indian can be recognized as their own tribe inside an urbanite setting. This whole idea belittles the idea of tribalism and tribal nationhood. Would you (the U.S. Congress) enact a special commerce law to address government-to-government relationships specifically with those three 'citizen' (urban) Indians? Would you enter treaty negotiations with these three citizen (urban) Indians? Would you keep them separate from state politics & laws, giving them their own unique sovereignty exemption from the application of state laws inside urban centers? To recognize three people as a tribe is a threat to the integrity of all reservation tribal governments and tribal people.

The Lummi Nation shall continue to remain concerned because the federal government forced the Traditional Dwamish (as our sample tribe) to locate on our treaty-established reservation (another numerous tribal group within our modern tribal collective is the Semiahmah People, originating from our northern boundary). As a result, nearly a thousand modern day tribal members are really Traditional Dwamish and are absorbing and using up Indian health, education, and housing benefits that belong to the Lummi proper in exchange for the lands the Lummi (Xwlemi) ceded to the United States. Our nation is under "Priority One Status' which means if you are not dead or dying then do not expect comprehensive health coverage, regardless of the treaty commitments made by the United States. Our children are falling out of school because there is not enough funding to cover all of them from primary school to post-graduate levels. The United States needs to take responsibility for the 'treaty relationship' it entered into with the Traditional Dwamish. It is not the responsibility of the modern day Lummi Nation to have to carry this burden and expense.

This holds true of several of the Point Elliot Treaty Reservation governments. The United States reneged on its commitment to Chief Seattle and his people. They tricked him into believing that his people will receive their own reservation and treaty entitlements. Instead, by trick of the written word, they forced the Traditional Dwamish upon the lands of other tribes and never delivered up their treaty promises. Chief Seattle's people are entitled to their own reservation and lands in the Greater Seattle area. This was

promised by Isaac Stevens. It was never fulfilled. They were forced to take the Indian Claims Commission Settlement by the BIA simply distributing 'sixty-eight dollar' checks to poverty-stricken, hungry, dislocated Traditional Dwamish Indians.

The Lummi Nation, and the original members of the Dwamish, Suquamish Alliance must be engaged in the debates over any lands located in the Greater Seattle area that may be recognized, for the purposes of gaming, as aboriginal to the Traditional Dwamish. There are several thousand Traditional Dwamish located on the Point Elliot Treaty Reservations that are consuming the health, education, and housing benefits of the other tribes. Each of the treaty tribes ceded portions of their aboriginal territories in consideration for promises made at the treaty negotiations. The Traditional Dwamish know (from oral history) that the United States has secreted-away and located up, with time limitations, the promises made to Chief Seattle regarding the recognition of his people and their entitlement to a reservation of their own. Lummi, and these other tribes, should not have to carry the burden of the promises made by the United States to the Traditional Dwamish. We ceded our share of our aboriginal territory to secure our treaty rights, and the Traditional Dwamish ceded theirs for the same.

The key question becomes who is a 'Traditional Dwamish' versus the *new* Dwamish operating in Seattle? Who is a tribal Indian? And, who is a 'Wanna-be Indian' for the simple enrichment from gaming and other treaty rights or reserved rights? The Lummi Nations knows who should be transferred to the Traditional Dwamish roles (beginning with the 1966 Congressional order sent to the BIA to finalize Dwamish Enrollment). The Lummi Nation is entitled to relief. The congressional appropriations for providing services and benefits to our membership (proper) is exhausting the tribal treasury. In the last two years alone, our nation has had to supplement federal financial shortfalls in 'Lummi Indian' health and education services by several million in tribal hard dollars. We cannot continue at this rate and must find means to limit the revenue drain from our general funds- as needed to perform essential government functions and deliver essential services to Lummi proper.

The Lummi Nation recognizes that many of the Lummi Traditionalists live on the Lummi Reservation, and practice the traditional forms of spirituality that is common to the Coast Salish. The attempts of the federal & state governments, working in unison with the established churches, to squash the traditional Indian identity is a part of the Indian holocast and its impact is evident in the manifestation of historic trauma experienced by the tribal Indians in general. We pray that this statement will provide you with a greater awareness of what it entails to be a tribal Indian in the United States and the Pacific Northwest. The Lummi story is not the only tale of holocastic, collective traumatization, and forced marginalization as a tribal people living at the edges of modern day American society and its long-term economic successes made off of our aboriginal land bases.

The location of the dislocated traditional Dwamish upon the several reservations is not the only story of this kind. It is a story that was evident in the Trail of Tears and the forced march of the Eastern Seaboard tribes to 'Indian Territory'. Many of the eastern tribes were forced to relocate (west of the Mississippi and Missouri Rivers) upon treaty reservations reserved for and by their historical enemies. Many were forced to accept the dislocation of those tribes that were aboriginal to the chosen Indian Territory (modern State of Oklahoma), so as to make way for them. But, these tribal collectives have not forgotten who they are and where they aboriginated from. The Traditional Dwamish are just a part of the sad legacy of dislocated tribal people waiting for the United States to honor its committee (treaty) word.

Then, again, there are those tribes that absolutely refused to leave their aboriginal territories, such as member nations of the Six Nations, or the Eastern Cherokee, or the Mississippi Choctaw. Many had to live as unrecognized tribes under both federal and state laws for over a century. We commend their endurance and perseverance.

The Lummi Nation attaches, hereunder, additional testimony for the Hearing Record. The piece is entitled, **"AMERICAN INDIANS ARE THE LITMUS TEST TO THE CONSTITUTIONAL FOUNDATIONS OF DEMOCRACY IN THE UNITED STATES".** The reason it is important is that it tracks the government-to-government relationship between the Indian Nations and the United States. It reviews some of the

historical relationships as molded constitutional authorization, and as established by the treaty relationship. If you ask an enlightened politician, that has been involved in Indian Affairs, what authority exists for them to recognize Indian tribal rights today then the usual reference is to the treaty powers or the Indian commerce clause of the Constitution. The actual history of that relationship is more complex and involved. We, as tribal leaders, believe a comparison may be understood in the use of a 'vehicle'. When you drive to work you recognize that the whole vehicle must be put together in a working condition- it involves the whole vehicle, the body, the motor, the electrical system, the fuel system, the wheels, etc. The same holds true, in our belief, with the constitutional relationship between the Indian tribes and the United States. If we can understand the whole constitution, and how all the parts work together, then we can understand the relationship understood by the Founding Fathers. But, over the numerous congresses, we have forgotten the intended relationship for the convenience of imposing the 'Trust System' over all of Indian Affairs.

The Founding Fathers recognized that 'tribal Indians' and 'Indian Nations' were separate from the United States, the individual states, and the population that was delegating powers to the constitutional form of government. Federal Recognition has been the road block that is used to prevent Indian Nations from securing their treaty promised rights. The only option that has been made for them was that of recognizing they do not exist under federal law and policy. For many unrecognized tribes and people, it has been a waiting game. If they can 'physically and socially' survive as a community and aboriginal people, then one day they hope they will find justice and witness the federal government recognizing that they still have rights- nationally and internationally.

The Lummi Nation would like to thank the Senate Committee on Indian Affairs for holding this oversight hearing on the Indian Gaming Regulatory Act.

Hy'shqe.

AMERICAN INDIANS ARE THE LITMUS TEST TO THE CONSTITUTIONAL FOUNDATIONS OF DEMOCRACY IN THE UNITED STATES

by Jewell Praying Wolf James, Policy Analyst

"Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestricted power over Indian Nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the Institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted with a fundamental contradiction between our political rhetoric and our political realities."
(Milner Ball, Constitution, Court, Indian Tribes, American Bar Foundation Research Journal, Volume 1987, Winter, Number 1, p.3)

After the Korean "Police Action" was over in the early 1950's, the United States stayed to "assist South Korea" in recovering from the after-effects of war torn strife upon the people, nation, and their economy. Placing itself as a "savior" the presence of the United States soon turned into a new dominant foreign power over Korean people and sovereignty. The modern dilemma of South Korea was to liberate itself of the occupation of the United States. Today, with the withdrawal of the United States, the Korean Nation is economically self-sufficient and an international competitor for world markets. Self-government and self-determination has become the main force behind Korea's recovery. The stagnation of the Korean sovereignty, and its economy, was weighted down with U.S. "Paternalism." Once this was removed, then Korea moved forward on its own.

This "paternalism" has been a cultivated trait and policy of the United States that has evolved since Chief Justice Marshall presided over the U.S. Supreme Court and began to lay the foundations for U.S. Indian Law and Policy. Self-determination and self-government has been a subject of international law that rapidly moved to the front of nation-to-nation relationships after the termination of hostilities of World War II. The new United Nations, and active member states, played a key role in the liberation of many "colonialized" nations. However, the United States, as a super power nation, saw this as a direct threat if applied to the Native American Indians. "Termination" of tribal

peoples, governments, and their legal claims to vast natural resource holdings became the public and political passion of the day. Campaigns that alleged "equal citizenship" was the true need for Native American Indians became the flag that covered up this "final solution" of the "Indian problem."

The Indian people have been a constant problem in the eyes of the land and natural resource hungry United States. Early on, when men went to war for the United States they were paid with access to more Indian lands. The only problem that prevented immediate access to these vast land holdings was the "Indian problem." People with economic demands created political passions that usually resulted in more federal treaties, laws, and policies that sought to eliminate the Indian from hindering the White man's "Manifest Destiny-" to own and rule over the whole continental United States. The politicians of Congress and the White House historically sought the ultimate "final solution" to the continuous Indian problem. When the duty of law prevented the illegal takings from Indian Country then the law was changed to justify the actions taken or to be taken; regardless of anything in the U.S. Constitution to the contrary.

If the American Indian governments are given true self-determination and self-governance over their people and remaining natural resources then the success of South Korea becomes a role model. But, if the United States continues to maintain a "paternalistic" stranglehold over Indian Affairs then the current impoverishment of the majority of the Indians shall continue. This is coupled with the phenomenally high death rates, extremely short life expectancies, and high infant mortalities. The reservation Indians continue to be surrounded by crippling socio-economic forces prevalent within the tribal communities. Very few of the several hundred Indian Nations have been able to benefit from the National Indian Gaming ventures. The winners are those that have reservations near high population densities.

History will show that the United States, and the United Nations, have worked diligently to force the "German people" to recognize the errors they made in causation of the World War and the implementation of "genocide" as a "final solution" to the "Jewish problem." Who are most guilty of war crimes? Is it the Nazis with the final solution applied to the Jews in one decade or the United States who applied the same program of "extermination and elimination" to the Native American Indians over two hundred years? Did the Nazis openly declare war upon the Jews? No! Did the United States openly declare war upon the American Indians? No! And, yet, both waged a war of extermination.

Using public hindsight, it is generally known that the symbol of the German National Socialist Party, during the Second World War, was the direct opposite of a Native American symbol typified in the traditional arts. The Nazi symbol, today, is emotionally charged with memories of the atrocities of racial wars waged on an international scale. At the time, the actions of the German State against the Jewish People were justified for the good of the German citizens, nation, and Christian religion (Hitler was a Catholic). In reaction, it was convenient for the German citizen to ignore the truths behind their government's actions. The German citizen rationalized that the concentration camps did not really exist or were needed to keep the enemy under control and protect the general

public or was retribution for "what the Jews did to Christ." What is horrid is the average American Citizen, and their state and national governmental leadership, can continue to rationalize along the same lines their paternalistic treatment of the American Indians. As the "Great White Father" (Aryan), the U.S. justifies using "plenary power" (absolute power) as a necessary tool to govern Indian Affairs and commerce.

There is parallel irony. The American Indians were models for the constitutional democracy and republican forms of government existing in America today. But, modern day politicians argue that the Constitution does not protect Indian rights, property, or government. In fact, all the harmful actions directed toward Indian country, by the United States and individual state governments, has been justified as essential to the common good of citizen and state. Is there really much difference between a German society that practiced genocide for a few short years versus a U.S. society that practices it slowly over two hundred years, as has happened. Remember, by 1910 there were only 210,000 recognized Native Americans registered in the United States. The extermination campaign nearly wiped the U.S. Indians from the face of the earth. The consistency in the extermination of Indian people, government, and society by the United States should be considered as a warning shot across the bow of those nations and states that want to be constitutional democratic republics like the United States.

Hitler wanted Germany to have access to the sea and expanded national territory. The United States called this "Manifest Destiny" that allowed them to expand their territory from the Atlantic to the Pacific Ocean. Hitler wanted a national German religion (called Catholicism) that held the Jews accountable for what they did to Christ. The United States called it "Christianity" and advocated its religion(s) as the savior of the savage Indian peoples (the new Jews- the Lost Tribe of Israel). Hitler wanted a national government with one despotic leader to govern the interests of the nation, a leader that had complete control for the best interests of the nation. The United States, although the Constitution forbid such, called this despotic power over Indians Affairs an exercise of "plenary power" (defined as "absolute power" over the internal and external affairs of the Indian nations, lands, and people). Hitler advocated a strong national German economy as best for the German people that were suffering an economic depression- resulting in conquest of nations with access to the seas and the nationalization of "Jewish" estates. The United States always used legislative and military powers to use "Indian territory" as a means to increase and expand the economic opportunities of the American Citizens and states- especially under laissez faire economics. Hitler advocated one national party to represent the people. The United States, although having a constitutionally defined three branch government, used its political might to unilaterally create federal policies that would advocate resolution of the Indian problem- through extermination, termination, or forced assimilation. Hitler sought to protect the interests of the "Aryan" people from the Jews and other racially inferior people. The United States sought to protect the interests of the citizen against that of the Indians. Hitler called his resolution of the "Jewish problem" the "final solution." The United States called it the "Federal Indian Policy." What does all this say about the American State today? The rest of this paper seeks to explore how this American Indian Policy development of the United States came about.

INDIAN NATIONS AS A MODEL DEMOCRACY- A HISTORICAL TRUTH

There is a tendency to talk about the need of guarantees of self-determination and self-government for tribal government today. This is not a new concept to Indian America. The irony is that the United States has been considering "giving it to the Indians." Indian people were the models for America's form of government. The U.S. Congress, in 1987, introduced Senate Concurrent Resolution #76, which passed the 100th Congress as House Concurrent Resolution #331 in 1988. This resolution was a part of the observance of two hundred years under the 1787 Constitution. Partially quoted here, the resolution proclaimed:

"Purpose: To Acknowledge the Contribution of the Iroquois Confederacy of Nations to the Development of the United States Constitution and to reaffirm the Continuing Government-to-government relationship Between Indian Tribes and the United States Established in the Constitution.

Whereas, the original framers of the Constitution, including most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts, principles and governmental practices of the Six Nations of the Iroquois Confederacy; and,

Whereas, the Confederation of the original thirteen colonies into one Republic was explicitly modeled upon the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself; and,

Whereas, since the formation of the United States, the Congress has recognized the sovereign status of Indian Tribes, and has, through the exercise of powers reserved to the Federal Government in the Commerce Clause of the Constitution (Article I, Sec. 8, Cl.3), dealt with Indian Tribes on a government-to-government basis and has, through the Treaty Clause (Article II, Sec.2, Cl.2), entered into 370 treaties with Indian nations; and, . . ."

The Senate (Select) Committee on Indian Affairs has recorded the testimonials of expert witnesses that attested to the truth behind this statement. And, authors such as Bruce Johannsen in his 1982 edition of "Forgotten Founding Fathers" and Jack Weatherford in his 1988 edition of "Indian Givers" have both brought forward historical notes as to the validity of this claim. However, due to a large academic outcry and opposition to the recognition of this truth, Mr. Johannsen has had to write a second edition with 700 citations of historical fact, entitled "Exemplars of Liberty."

The Indian Nations and peoples of the New World were discovered to have freedoms unknown in the Old World. As Weatherford (page 123) quoted one of the Huron Indians at early contact: *"We are born free and united brothers, each as much a great lord as the other, while you are all the slaves of one sole man. I am the master of my body, I dispose of myself, I do what I wish, I am the first and the last of my Nation. . . subject only to the great spirit."*

Weatherford continued to point out, "*Freedom does not have a long pedigree in the Old World. When it appears in the ancient literature of the Mediterranean, freedom usually refers to the freedom of a tribe, a nation, or a city from the domination of another such group, as in the freedom of the Jews from Egyptian bondage or the freedom of the Greek cities from Persian rule. In this sense the world echoes our contemporary notion of national sovereignty, but it resembles only slightly our concept of freedom as personal liberty.*" (1988, p.121)

The very Indian nations that were models for America's Constitution and freedoms are unrecognized as legitimate governments today, in their aboriginal/treaty-protected territories. City, county, and state governments constantly petition the federal system with statements that Indian governments are only localized special interests and not really sovereign nations. The horrid ability of the United States to suppress the modern day Indian nations is only surpassed by its historical treatment of the Indian peoples and their national governments. Erdich wrote, in "WHERE I OUGHT TO BE: A WRITER'S SENSE OF PLACE," N.Y. Time Book Rev., July 28, 1985, at 1, 23:

"Many Native American Cultures were annihilated more thoroughly than even a nuclear disaster might destroy ours, and others live on with the fallout of that destruction, effects as persistent as radiation, poverty, fetal alcohol syndrome, chronic despair.

Through diseases such as measles and small pox, and through a systematic policy of cultural extermination, the population of Native America shrunk from an estimated 15 million in the mid-15th century to just over 200,000 by 1910. That is proportionately as if the population of the United States were to decrease from its present level to the population of Cleveland. Entire pre-Colombian cities were wiped out, whole linguistic and ethnic groups decimated. Since these Old World diseases penetrated to the very heart of the continent even faster than the earliest foreign observers, the full magnificence and variety of Native American Cultures were never chronicled, perceived, or known by Europeans."

TODAY INDIAN COUNTRY SUFFERS IN SILENCE

The conditions of Native Indians is indicative of what it shall be like for the majority of the citizenry in the near future, unless safeguards are initiated and corrective actions taken. The average citizen should consider whether or not they could survive under the conditions the Indian people live within. In 1986 the Department of Interior issued its "REPORT OF THE TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT." While conservative in its estimates, the conclusions portrayed extreme conditions of suffering by the Indian peoples. They were documented as having the highest unemployment, highest underemployment, lowest educational or vocational attainment, highest infant mortality, shortest life expectancy, highest poverty, lowest average

incomes, poorest housing, and added on top was the blatant racism directed toward them as a politically identifiable race. It did not matter if the Indian lived in urban or reservation settings their socio-economic conditions were the same.

Many Americans see all the land and natural resources that Indian people still own. And, they argue that failure to develop the same is directly relevant to socio-economic sufferance of the tribal communities. But, first there is a clash in cultural values for defining what is acceptable development. Today many U.S. Industries and local governments see Indian country as undeveloped dumping grounds ripe for the deposit of solid waste, nuclear waste, and toxic chemicals. Since the Indians are not using the lands for other purposes they easily rationalize it as available for other purposes.

However, the Indian land ownership has been destroyed under the "guardianship" status implemented by the Bureau of Indian Affairs. Since the majority of the visible Indian lands are in undivided status, and left in multiple party ownership, the land title is so encumbered as to make economic development unrealistic. Land ownership patterns have become legal nightmares for the federal and tribal governments both. The solution for the federal government was to enact the Indian Land Consolidation Act and tell the tribes to resolve the problem it (the federal government) created by mismanagement of their fiduciary responsibilities. This is a burden for the tribal person since the tribe cannot afford to clarify the land titles and the federal government denies its responsibility.

Added to the heap, there exist the fluctuating laws and policies of the national government. Each of the three federal branches had historically reacted favorably to non-Indians lobbying for special interests and changes in the status of Indian people and property ownership. The Presidency, the Congress, and the Court has been influenced time and again to create laws or policy or doctrines that destroyed tribalism and self-governance and removed legal protections applied to native lands and resources. Most Indian reservations have economically suffered in the aftermath of the Congress enacting the General Allotment Act. Under this law, the President implemented the taking of Indian lands, and the Supreme Court confirmed the "legitimacy" of the illegal taking of nearly 90,000,000 treaty-protected acres of Indian land that is now considered outside the reservation boundaries. Even today, "new settlers" demand protection from "encroachments by the Indians and their governments" upon their "rights" to the reservation properties. They demand "white government for white citizens" and are finding allies in all branches of local, state, and national governments. The lands they live on are lands that were taken out of trust protection by provision of the General Allotment Law and sold to non-Indians. Thus, non-Indians argue that even though their land is surrounded by Indian trust land, their property is external to tribal government jurisdiction (i.e., checker-board).

Indian country has had more legislation passed affecting their rights and resources and status as a racially-identifiable people than any other group in America. The resulting legislation most typically was an act of taking rights and resources or retroactive legalization of past unlawful takings from Indians. Such enactments have been to the

benefit of the rich and influential land barons, oil barons, fish barons, timber barons, uranium barons, farm barons, and many other profiteers that gained from the wrongs done to the Indian people. Most often their actions were made politically correct by presenting it as in the "best interests" of "civilizing" and "Christianizing" the Indians. We believe this may be a thing of the past. But, the Navajo and Hopis suffer relocation today to remove them from lands that are rich with oil shale and uranium. They had to be removed to open the land up for the oil companies and DOD access to uranium. They have been pitted against each other. Now, the Hopi/Navajo Resettlement is projected as for their best interests. In the mean while, the area has been classified as a National Sacrifice Zone for the best interests of the United States.

INDIAN PEOPLE ARE INDICATIVE OF THE FUTURE OF AMERICA

Most people today cannot comprehend how they and their government could be held responsible for such actions that took place in historical America. This is because the damages are viewed over extended periods of time and as isolated actions. But, if one is forced to consider it all at once, for its full cumulative affects, then we could understand what Felix Cohen meant by his "Miner's Canary" analogy of 1953, as follows:

"Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of the American Indian, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. . ."

Cohen was charged with collecting and compiling one document on federal Indian law and policy. During his research he had an insight as to the truth behind the American Indians' relationship with the United States. His statement was a warning to an apathetical Congress, Presidency, Judiciary, and public. In order to grasp the full impact of his insight, we have to review the U.S. Constitutional provisions that are applicable to the relationships between the Indian tribes and the United States. The information reviewed comes from different forums. However, our quest for truth began with the U.S. Congressional hearings on House Con. Res. #331 of 1988 (Senate Con. Res. #76 of 1987), the 1987 Philadelphia Convention on the U.S. Constitution held by the Alliance of American Indian Leaders, and books currently available on the subject matter, and most directly from the tribes' experiences. The article by Milner Ball, entitled Constitution, Court, Indian Tribes, was very stimulating in this regard. To find the truth behind federal Indian law, we would need to go back to the writings of Bartolome de Las Casas (1474-1566), research his references, and move forward in time. We cannot do that here (due to length considerations), but we can at least explore the corruption of the U.S. Constitution that has been justified as law in order to take away more Indian rights and lands.

We begin with the premise that the U.S. Constitution has been sacrificed to give legal sanction to political economies that were ruled by the passions of greed. This sacrifice has been condoned consistently and theoretically in the best interests of the average

American citizen- the very citizen whose collective sovereignty is the foundation to the U.S. Constitution. We should reflect upon this every time we read the Preamble words "*We the People of the United States, in Order to form a more perfect Union…*".

IT APPEARS THAT VIOLATIONS OF THE U.S. CONSTITUTION BY THE NATIONAL AND STATE GOVERNMENTS ARE JUSTIFIED IN THE NAME OF PUBLIC GOOD.

It has been a pattern for lawyers, in defense of the rights of Indians and their governments, to take a very narrow look at the U.S. Constitution. Rather than read and understand the whole document, they tend to repeatedly go to two provisions in the Constitution- the Treaty-making powers and the Indian Commerce Clause. However, when you study the Constitution as a whole, and research its historical development, then you come to realize that the United States relationship with the Indian Nations (and their citizens) was a matter of constitutional law for all three branches of the national government. In addition, it included negatives on the powers of the state governments in their relationships with the Indian Tribes. The legal fictions created by the U.S. Supreme Court, as addressed by Milner Ball in his 1987 article cited above, are political lies that sound constitutional. This political maneuvering around the constitutional intent in governance of the relationship with the Indian tribes cheapens the republican form of government. Failure to address the whole constitutional relationship intended by the Founding Fathers in 1787 destroys the value of the Constitution as a living document. The original language found in the 1787 Constitution, as applicable to the Indian Tribes, is still contained in the document today. Keep this in mind as we explore the subject.

Because the provisions of the Constitution that apply to Indian country were incorporated into the original 1787 Constitution, we would immediately question whether or not the Constitution had been amended to change the legal relationship with the Tribes. With a quick review of the Constitution, we conclude that the amendment power has never been used to change this constitutionally defined order that governed the government-to-government relationship with the Indian tribes.

During the 39th and 40th Congresses (right after the Civil War) there was consideration as to the necessity of an amendment that included the Indians. This question was to address the continuing separateness of the (tribal) Indians from the general public. However, at the end of debates, the constitutional relationship was specifically preserved- as pertains to (tribal) Indians not being a part of the popular sovereignty of the United States. The 14th Amendment was not to include the Tribal Indians. Thereafter, all three branches of government simply continued to ignore the amendment provision requirements as applicable the Indian tribes and people. Instead, the Presidency and Congress stepped back while the U.S. Supreme Court created legal fictions to justify unconstitutional assumptions of jurisdiction over Indian Country and takings of Indian

Before we actually get into the details of how the U.S. Constitution governs the relationships with the Indian tribes, we need to recognize the Articles of Confederation. This was the original document to create a Union of individual states. The theory of the Articles, however, was founded on "states rights." The individual states claimed to have replaced the King- in his executive, legislative, and judicial capacities. By replacing the King, they theoretically pre-existed- the rights, powers and sovereignty of the King was now in the hands of the new states. Thus, the Articles were drafted to protect "states rights, powers and sovereignty." However, this state sovereignty experiment was rapidly failing and leading toward a civil war. Thus, the new Union was formed under the 1787 Constitution, after great debates and compromises over state powers versus that of the national government and the new federal system.

The new Constitution was a based on the concept of "popular sovereignty." The "People" and not the "states" were the foundations of sovereignty. The people delegated their power and authority to the new national government. The states still existed but the source of power was based on delegated authority of the populace. This is why we find the Preamble of the 1787 Constitution worded differently from the opening paragraph of the Articles. The Articles provided: *"TO ALL WHOM these Presents shall come, we the undersigned Delegates of the States ....".* Article II provided: Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress Assembled." Here we find reflected the states rights form of sovereignty as the source of governmental power. While the 1787 Constitution begins, in the Preamble, with "*WE THE PEOPLE of the United States, in order to form a more perfect Union, ...*". This was a major shift away from state sovereignty to popular sovereignty.

However, as pertains to the Indians, even the Articles of Confederation recognized that Indian Affairs was a national concern beyond the individual states. Under Article IX it was provided: "*The united states in congress assembled shall also have the sole and exclusive right and power of ....- **regulating the trade and managing all affairs with the Indians, not members of any of the states**, provided that the legislative right of any states within its own limits be not infringed or violated-...*". Here it is generally conceded that no individual state had absolute control over Indian Affairs and that the same must be subjected to the national interests of all states, in Congress assembled. Remember, under the 1763 Proclamation, the King claimed all power over Indian Affairs as being beyond the colonies, as a part of his sovereign powers. Even though the states replaced the King, under the Articles, they collectively conceded their inability to trust each other to govern over Indian Affairs individually. Note that there are two types of Indians being addressed- those that are regulated as separate from the state and those that are possible members of the state. The former would be, of course, the tribal Indians. The latter would be those individuals that left tribalism and gone to live with citizens of the states and accepted as members of that state and non-Indian society.

We find in the 1787 Constitution that not only is state sovereignty second to popular sovereignty; but, the subject matter of Indian Affairs is spread throughout each branch of government (executive, legislative, and judicial) and balanced by each other. To understand the diverse role and influences each branch of government has played in Indian Affairs, we have to understand their source of delegated authority under the Constitution.

Very few of us have ever read the U.S. Constitution. Those that have usually never paid much attention to the different provisions that are applicable to Indian Country and the relationship with the United States or individual states. We need to start at the being of the Constitution and read through it to find the various parts that are applicable to the Indian people and tribes.

But, first, we need to understand right from the beginning that the tribes were intentionally kept separate from the United States. Indian tribes were separate and had their own sovereign status, as was common knowledge during the formation of the Union. There were "Indians" that were members of their tribes and not considered U.S. citizens. They were the tribal Indians or the Indians that had not severed their relationships with their tribes and tribal lifestyles. However, those individual Indians that had left their people and joined the society of the states and the United States, while few in number, did exist. These individual Indian persons could become U.S./state citizens just like any foreigner. The constitutional relationship we are concerned about is that of the "tribes and their people" as separate popular sovereignties.

We begin with the Preamble. It starts with *"We the People of the United States,…"*. This statement is a reflection of the concept of popular sovereignty- where the power of government comes from the people as a collective body politic delegating their powers to the national government. Under the Confederacy, the state governments claimed the sovereignty of the ousted King. When the Confederacy failed then the argument was that sovereignty is derived from the people, not a king or some state that formed after the fact. Thus, "We the People" formed the government. People from foreign nations and Indian Tribes were not included in this collective that was delegating power. They were not the "people" creating the democratic republic that was emerging and would not be counted.

The Constitution defines what powers the "People" delegated to the new national government and how that power was separated into parts so to avoid the dangers of a despotic or monarchic government ever forming. It addressed, as well, the power to regulate relationships with other peoples and governments; Indian Tribes were a part of that concern. Although the relationships with the Indian Tribes were well understood at the time of the Constitutional Convention in 1787, it is confusing today. Only by going through the whole Constitution will we be able to understand the intent of the Founding Fathers to keep the Indians separate, to recognize that the Indian Nations had their own separate sovereignty. For that reason, we shall go through the individual parts of the Constitution that are applicable to Indian Affairs.

However, first, I assume the reader does not know the general lay out of the 1787 Constitution. So, I will briefly summarize it as follows. The Preamble reflects the source of sovereignty as coming from the People (Popular Sovereignty). Article I creates the Congress- with the House representing the people and the Senate representing the states. Article II creates the Presidency/Executive. Article III creates the Judiciary. Article IV addresses admission of new states, and regulation of the territory. Article V addresses the power to amend the Constitution. Article VI addresses the "supreme law of the land." Article VII addresses ratification by the states. Thereafter, we find all the amendments that have been added since 1787. The first ten amendments were added in 1791 and are known as the Bill of Rights. Amendment IX preserves rights retained by the people. Amendment X preserves undelegated rights in the states or people. The last amendment to the Constitution was ratified in 1992.

Now that we know the general framework of the Constitution, we can begin to look to those parts that address the relationship with the Indian tribes. Keep in mind that the Founding Fathers intended to create a constitutional government in which the powers of the executive, legislature, and judiciary were balanced. In addition, to assure no one or two branches of the national government became to powerful, each branch would have a "check" to balance the powers of the others. This "check and balance" system is derived from the whole document. You will not find these actual words used in the document in this light. It is recognized, however, that this was the Founding Fathers' intent. The Constitution has to be read as a whole document, a unity that is interrelated to conceive of how the checks & balances systems works. This same concept applies to understanding how the Constitution governs the national relationship with the Indians- the Constitution has to be read as a whole, an integrated unity.

Generally, we find that powers over Indian Affairs of the legislature (Article I) were split between the House and Senate. Presidential powers (Article II) over Indian Affairs was shared with the Senate (as pertains to treaties) and the House (as pertains to appropriations to implement treaty agreements or statutory duties and obligations created by legislation). The judicial review (Article III) of treaties, acts of Congress, or the application of constitutional provisions, as pertains Indians would end up in the Supreme Court. Under Article IV, new states had to surrender any claims to jurisdiction over the Indians to qualify as an equal member of the Union (constitutional disclaimers). After the Civil War, the 14th Amendment (per Article V) was debated and resolved so as to not include tribal Indians as state or national citizens. Legal questions (as per Article VI subject matter) derived from the Constitution, federal law, and treaties have gone to the Supreme Court, as such may legally relate to Indian Affairs. The case of Marbury v. Madison (1 Cranch 137 (1803)) ruled that "a law repugnant to the Constitution is void, and that courts, as well as other departments are bound by that instrument." While this case ruled a law of the (national) Congress to be void when repugnant to the Constitution, the same would hold true of state laws contrary to the Constitution (Article VI). We should keep this subject matter in mind when considering cases that affect Indian rights and resources within state judicial systems, and the reasons why we submit appeals to the federal circuit courts up to the U.S. Supreme Court.

The following articles, sections, and clauses of the U.S. Constitution apply to Indian Affairs per the national government and the limitations of state jurisdiction over the same. Remember, the respective parts of the Constitution reviewed hereunder have not been amended. The language is still as it was written in 1787.

Article I, Section 2, Clause 3- the Apportionment Clause does address Indian Citizenship status in the United States. It provides:

"Representatives and direct taxes shall be apportioned among the states which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole Number of free persons, including those bound to Service for a Term of Years, and ***excluding Indians not taxed****, three fifths of all other persons."*

This article was changed by the 14th Amendment; during the 39th and 40th U.S. Congresses, right after the Civil War of the 1860's. The amendment was ratified on July 9th, 1868, and Section 2 of the amendment specifically reinstated the language that was applied to the Indian people, as follows:

"Representatives shall be apportioned among the several States according to their numbers, counting the whole number of persons in each State, ***excluding Indians not taxed."***

The intent of the 1787 Founding Fathers and the ratifying states was to keep the Indians separate from the citizens that were represented by the constitutional government. While the 1868 amendment made the "Negro, Gypsy, Hindu" and others citizens, it excluded the Indians, after extensive debate. In fact, the first section of the act specifically excluded Indians from being represented by the national government, under the words *"subject to the jurisdiction thereof."* In the amendment debates of the 39th Congress (1866), it was concluded that Indians are not subject to the jurisdiction of the United States, they are subject to their own government and people. The second section was written so as to assure that the states could not attempt to make tribal Indians state citizens. The language used in the second section was "excluding Indians not taxed." Under the 14th Amendment, Indians could neither be a state or national citizen.

This subject was addressed in the case of Elk v. Wilkins, 112 U.S. 94 (1884). There the question was: *"whether an Indian, born a member of one of the Indian tribes within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residency among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution."* The court ruled that Elk was not made a citizen of the United States under the provisions of the Fourteenth amendment.

At the time the 1787 Constitution was ratified, there were Indians that lived separate from any recognized tribal communities. They were, many times, members of tribes that no longer "legally" existed within the boundaries of any of the established states of the Union. Later, some were individuals Indians that were not relocated to Indian Territory in the 1830's, after their tribes were forced to relocate. Elk, on the other hand, was born a tribal Indian and remained so, in the decision of the court, without proof to the contrary. Outside of special treaty language where "tribal Indians" were given the collective opportunity to become U.S. citizens, there were a few statutes that authorized such status. After the treaty negotiations establishing reservations, some Indians chose not to locate on the reservations. Instead, they exercised "Indian Homestead" rights under federal law and received "trust patents" that protected their land ownership against alienation and taxation for twenty-five years. Thereafter, they received fee patents and became tax paying citizens like all others. Their acceptance of the homesteads, by these statutes, and their complying with the "homestead" requirements, made them non-tribal Indians. Still, there were Indians that lived on the established reservations and lived under the protection of their own tribal governments- they were tribal Indians. In addition, there were and continues to be federal laws that protect their rights and resources as individual tribal Indians and as members of the federally recognized tribal collective. This collective is the group that the self-determination and self-governance laws apply too.

An example of the violation of Article I, Section 2, Clause 3, and the 14th Amendment, Sections 1 and 2, is found in the passage of the 1924 Indian Citizenship Act. This enactment was hypothetically necessary to provide Indian people freedom from persecution under the Department of Interior's Religious Crimes Code (Circular #1665). Theoretically, the act was to provide Indian people with religious freedom under the First Amendment. But, the 1978 enactment of the American Religious Freedom Act and the subsequent declaration of the U.S. Supreme Court that the First Amendment does not protect Indian religious freedom are indicative of the failure of this unconstitutional enactment. Keep in mind that a constitution cannot be amended by an act of legislation (as the Indian Citizenship Act was). Attempts to amend a written constitution by legislative enactment makes a mockery of the people's power and control over the establishment of government by constitutional format.

What the citizenship act did accomplish was to open the doors for the U.S. Treasury-Internal Revenue Service to begin a systematic application of the U.S. Tax Code to Indian affairs and resources. Much blame originates with the Department of Interior's Solicitor's Opinion of November 1940. This opinion held that basically Indians were citizens, all citizens pay taxes, therefore Indians should pay taxes to the federal government. The opinion cites numerous reasons why taxation of Indians that kept their tribal status active was not taxable. But ends with the conclusion desired by the government officials.

Article I, Section 8, Clause 3 is the (Indian) Commerce Clause, which provides:

."The Congress shall have the Power. . . To regulate Commerce with foreign Nations, and among the several States, ***and with the Indian Tribes;. . ."***

This clause is used to empower the Congress to regulate the trade relations with foreign countries such as Canada, Japan, the European Community members, and other foreign nationals. It allows the Congress to regulate its part of the trade relationship. It is not authority to rule over the lands, resources, peoples, and activities of foreign countries. The only influence the United States has over foreign nations is to decide to not conduct trade with them, as a means of penalty or to force desired changes. The article allows the national government to regulate certain aspects of trade and commerce in the United States that crosses interstate boundaries as well. What is unregulated by the national government is then regulated by the individual states as a part of their singular power to regulate commerce originating and operating within their exterior boundaries. There are joint efforts of the national and state governments to work collectively as in the development of the Uniform Commercial Code and subsequent enactment by the individual states.

Likewise, the article gave the Congress power to enact legislation, and the President as Chief Executive could enact regulations, to govern the conduct of trade with the Indians. This constitutional power was intended to be used to regulate the actions of the nation, the states, and their citizens. It was not a delegation of power over the affairs of Tribal Indians. The "People" did not have popular sovereignty over foreign nations and Indian tribes. They could not delegate a power they did not have. The Constitution is a delegation of the inherent powers of the people to their central government. What is not delegated is reserved to the states or people. What cannot be delegated are powers they do not have- such as power to control the inherent sovereignty of other people outside the jurisdiction of the established United States. As to the commerce power that has been delegated, the power is plenary as pertains to interstate commerce. Thus, the U.S. has plenary power over national commerce (see Brown v. Board of Education). As relates to the nation's commercial relationship with foreign nations, the power is plenary.
This power governs the U.S. interests and activities associated with commerce with foreign countries and on an interstate level. It is not intended to be a constitutional source of power that allows the national government to assume complete control over state and foreign governments.

However, in application of the commerce clause to the Indian Tribes the national government has taken a step beyond. This clause has been ruled as being the source of "plenary power" over the Indian affairs, lands, natural resources, and peoples. The Marshall Court in the Cherokee trilogy of cases argued that this is the foundation for the "guardian/wardship" theory of federal/Indian relationships. However, in U.S. v. Kagama, 118 U.S. 375 (1886), the Court held that it would be a very strained construction to make the Commerce Clause support the exercise of Plenary Power over Indians. This has, however, not stopped the Court from continuing to apply and develop the court fiction of plenary power over the Indian nations. In Kagama, the Court rationalized that the intrusion upon tribal governments, by the federal government (the guardian), was justified by the dependent status of the Indian wards.

Article I, Section 10, Clause 1 applies to the States. It provides:

"No State, shall enter into any treaty, alliance, or confederation. . ."

The experience of the colonies was that one colony could cause a war with the mighty Indian Nations to the destruction or sufferance of the rest. In order to prevent the states from taking such individual actions, the power to "treaty" was reserved for the central, national government. The newly forming states joining the Union were required to install into their written state constitutions "disclaimer clauses" of the jurisdiction over Indian affairs, rights, and natural resources. The new states could only enter the Union on an equal footing by taking this action, leaving jurisdiction and governance of the relationships with the Indians to the national government. In the Northeast, most recently, there were a series of land claims on illegal takings by agreements states had entered into with the Indian tribes. Tribes were recovering some of their loses due to the illegal nature of the states actions- based on the constitutional fact that states could not treaties with the tribes. In the 1980's, the non-Indians in possession of these lands attempted to get the U.S. Congress to give them title. They were denied legal and Congressional relief. In the end, they had to resolve the matter by working with the legal owners- the tribes.

During the Termination era the Congress considered transference of certain jurisdiction from the federal government to the state governments, provided the states amended their constitutions to remove the "disclaimer clauses." In the Colville case the failure of the State of Washington to abide by the federal enactment requirement to remove the disclaimer clause from its Constitution was addressed by the U.S. Supreme Court. The Supreme Court simply reasoned that the state meant to abide by the law, although it did not. Consequently, the Court justified an illegal action by simply ignoring the impacts to the canons of construction of written constitutions. And, it allowed assumption of taxation jurisdiction by the State inside Indian Country under an enactment that had nothing to do with taxation. Although the state was required to have the constitutional disclaimer inserted therein, it was not required to amend the state constitution to remove it. The Court simply ruled that this was a matter of state law. This side stepped that issue of whether states had to honor constitutional law- which was the foundation for the original addition of the language (per Article IV powers).

Article II, Section 2, Clause 2 is the treaty-making power of the President, and the ratification powers of the Senate. It provides the following:

"He [the President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . ."

As applied to Indian country, the treaty-making power was exercised about 800 times by the Presidents (1778-1871). The Senate used its ratification powers to approve 367 treaties with the Indian tribes. The treaty-making power was the primary means for establishing government-to-government relationships between the United States and the Indian tribes. The tribes were sovereigns that entered the treaty relationship as such. In

some limited situations the treaty negotiations were resultant of one or two tribes being conquered in act of wars with the United States. But, most treaties were conventions of peace and friendship between the nations. Indian people were solely members of their nations and their representatives negotiated treaties with the United States. We will not address the unfair dealings of the U.S. treaty commissioners associated with treaty negotiations at this time. The Supreme Court had recognized this and in consequence created the doctrine that the treaties will be interpreted as the Indians understood them.

In 1871, the House of Representatives pressured the Senate into agreement on an Appropriation Rider- which would theoretically limit the powers of the President and Senate to utilize their treaty-making powers in relationships with the Indian tribes. This statute effectively paved the way for the U.S. Congress to take over the governments of the diverse Indian nations through legislative enactment. The "rider" should have been declared an unconstitutional infringement upon the treaty-making powers of the President and Senate. However, instead the Presidency simply began to issue Executive Orders in lieu of negotiating new treaties. The Senate quit ratifying treaties with the tribes. Both the Presidency and Senate conceded due to pressures the House placed upon them by its power over controlling the appropriations process.

What forced the Presidency and Senate to concede on the treaty-power question was the House of Representatives refusal to appropriate funds to honor and implement treaty agreements. The House controlled the "power of the purse" and all such bills originated there and not with the Senate or President. Thus, in a sense, money bought off the opposition. Rather then have a constitutional show down, the President and Senate conceded to the appropriation rider. This "rider" was not a formal amendment to the constitutional powers of the President or Senate. Both could still treaty with Indian Tribes if they choose, under the current constitutional language.

Article III, Section 2, Clause 1 addresses the judicial power of the national government, as follows:

"*The Judicial power [of the United States] shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States,* ***and Treaties made****, or which shall be made, under their authority; . . .*"

The Supreme Court reviews federal enactments that have been applied to Indian Affairs. It has power to review treaties that have been entered into with the tribes. And, it has reviewed the application of various sections of the U.S. Constitution to Indian Affairs. This Clause is the foundation for that review power over treaty relationships. With the use of the power of review, Indian Country has witnessed the Supreme Court take more away from Indian Country, through its decisions, then it has actually protected. For example, the U.S. Supreme Court ruled that Indians had no protection under the First Amendment for Religious Freedom. This resulted in legislative amendments of the 1978

American Indian, Eskimo, and Native Hawaiian Religious Freedom Act the Congress in the 1990's. It ruled that the tribes had no protection under the Fifth Amendment from unjust property taking. It has allowed the unconstitutional Indian citizenship act to stand as legitimate cause for taxation of Indian rights and resources. It has allowed states to violate treaties entered by the national government. It had even proceeded to stretch its imagination to rule that the "guardianship" was the foundation for exercising "plenary power" over Indian affairs, people, and their governments. Knowing this, we should seriously heed the warnings of Justice Cooley, in his commentaries in "Cooleys Constitutional Limitations," 68-69 (6th Ed., 1890):

"A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have changed as perhaps to make a different rule in the case seem desirable. A principle share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. . . Public sentiment and action effect such changes, and the courts recognize them; ***but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty****. The violence of pubic passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people themselves, to make such* changes as new circumstances may require. ***The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. The object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it."***

United States plenary power over Indian Affairs and government is a legal fiction. The Constitution does not delegate this power to either the states or United States. The citizens are the source of "popular sovereignty" that empowers the government. They cannot delegate to the national government that which they did not have; i.e., plenary power over Indian Country. Legal fictions are being created because the whole constitution is read in piece meal and not considered as a whole- as is necessary to extrapolate the existence of the "checks and balance system" of the constitutional government.

Article IV, Sections 3 and 4 provided, respectively, as follows:

Section 3. "New States may be admitted by the Congress into this Union; ……"

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; ;and.....".

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall ……..".

The application of this Article to the relationship with the Indian Tribes seems obscure. However, this is because the average reader does not understand the history of land grants by the King(s) and their impact upon the emerging United States under the Constitution. We must remember that the 1763 Proclamation placed all powers and rights to secure lands from the Indians with the King, to the exclusion of the colonies. The Articles of Confederation, and later the Constitution, make this a matter of national concern and power. But, this was the result of a great compromise of those colonies/states that had received land grants that stretched clear to the South Seas (Pacific Ocean). Virginia, New York, and a couple other states had large land grants. These colonies (before the 1776 Revolution) received the charters and land grants from the King. It was generally believed that North America was like the narrow strip of land of Middle America. The King had no idea that the South Sea was nearly three thousand miles away west and not just a couple hundred miles.

After the Revolution, the newly formed states, especially Virginia, with large land grants needed to cede their rights and control of the majority of this land grant to the new national government. The large states did so with the condition that new states would be created from the lands and made an equal member of the Union. In the beginning the Territory would begin filling with people. After a certain number of people were present then they could organize and qualify for establishing a territorial government, and later become a state. The type of government to be devised for the emerging new state was "republican" – i.e., deriving its power from the people (popular sovereignty).

Under Article IV, New states were required to have a state constitution (Republican form of government). These constitutions would have to have a "disclaimer" that clearly stated the new state did not have any jurisdiction over the Indians. The development of federal policy to govern the creation of and admission of new, equal states was undergoing developmental trials. The earlier "new" states in the territories near the Mississippi and Missouri River areas had "territorial legislative" disclaimers. As the system became more refined, during the next century (ending with the admission of Hawaii and Alaska), the states in the more western territories were required to have constitutional disclaimers (e.g., Article XXVI of the Washington State Constitution). Making new states equal with the original states included forcing the new states to constitutionally acknowledgement that the national government controlled Indian Affairs. The development of new states was strictly controlled by Article IV powers- controlling admission as new states, imposing requirements to assure republican forms of state government, and retaining federal governance over the territory of the United States.

Article VI, Clauses 1 and 2 address the validation of Prior Debts and Engagements, Treaties and the Supremacy Clause, as follows:

"All Debts contracted and Engaged into, before the Adoption of this Constitution, shall be valid against the United States under this Constitution, as under the Confederation."

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be make, under the Authority of the United States, shall be the supreme Law of the Land; and judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

As been noted, the United States negotiated hundreds of treaties with the Indian tribes. The Senate ratified 367. By 1871, a total of 138,000,000 acres of treaty-protected land was still in the ownership of the Indian tribes under ratified treaties. Without a war of conquest, without re-negotiation of treaties or entering new treaties, to secure access to these treaty-protected lands the U.S. was legally limited (under the laws of Nations) in opening up new lands to the land hungry immigrants/migrants.

To get around the treaties, the U.S. Congress passed the 1887 General Allotment Act. This act was the alleged authority to take 90,000,000 treaty-protected acres and reclassify them as surplus lands available through the federal government for its citizens. This land scheme took two-thirds of what remained of Indian Country and transferred it to the public domain. The land was then opened up for homestead claims by land hungry non-Indians. Public passion motivated the Congress and Presidency to free up this "surplus" Indian lands. To the land hungry non-Indian the Indians were wasting the land.

In reviewing the question as to the legality of the general allotment laws, the Supreme Court could have ruled that the lands were protected by one of the three types of supreme law of the land (constitution, federal legislation, and treaties). However, the Court has upheld the taking by the federal government under the fiction of "plenary power." The Court turned its back upon the legal duty owed the tribes based on the ratified treaties. Today, every ratified Indian treaty has been violated in whole or part.

DOES INDIAN SELF-GOVERNANCE HAVE A FUTURE?

In this day and era, the tribes that have been advocating "self-governance" and entering such agreements with the United States have to be weary of how fast self-governance can become "self-termination." The tribes have continued to advocate this program since the late 1980's. What began as a dialogue with leadership in the House of Representatives had manifested into new laws that provide self-governance in the areas historically serviced by the Bureau of Indian Affairs and Indian Health Services. Tribes have been taking over the functions and services performed by these divisions of the federal government. Self-government was the next logical step beyond self-determination. Because not enough progress was developing in line with self-determination of tribes, tribal leaders began to demand self-government over the objections of the federal

bureaucrats. While the tribes have succeeded in bringing tribal self-government into national policy and law, we must remember that even termination was held out as in the best interests of the Indians themselves. It is our duty to make sure self-government does not become self-termination. We should not be using self-government as a vehicle to prepare to become a political subdivision of the individual states.

Today, about half of the recognized tribes have entered into the self-governance program. This is a phenomenal increase over the original eight that began the political movement. At the time, Assistant Secretary of Interior Ross Swimmer was testifying that the BIA had not lost a billion dollars in federal Indian trust monies. He argued that it was only four hundred million; and, that if the Indians could do better then he would like to see them try. In addition, he had testified that ninety-percent of the monies that was appropriated for Indian Affairs by the Congress was used by the BIA on itself, and ten percent was distributed to the tribes (as well as the urban Indian programs). Tribal leaders, such as the late Joe De La cruz of the Quinault Nation came forward and advocated that the Indians could do better. This was the birth of the modern day self-governance initiatives, contrary to the position of Mr. Swimmer.

This was not the first time that Indian self-governance was advocated. Bartolome' de Las Casas argued the same necessity "In Defense of the Indians" four hundred and fifty years ago. He argued this before the Spanish Crown and the Holy Roman Church officials. It was Spain and the Church that gave birth to The Laws of the Indies- which set the pace for justification of Indian enslavement and colonial domination. This "law" became the foundations for U.S. laws of "Conquest." If there was a conquest then it was by legislative initiative, presidential policy, and court decision, and not resultant of any acts of war and conquest. In international law people that have been conquered are in a much different category then nations that had entered treaties of peace and friendship. Under the treaties, the Indians of the United States never surrendered self-governance.

Today we have a Republican President that is reputed to be an advocate of "states rights." The sovereignty of the individual states, as manifested in the Articles of Confederation, and superceded by the U.S. Constitution of 1787, has taken a substantial second place status due to the "popular sovereignty" movement that created the 1787 U.S. Constitution, and guided it amendments time and again. At one time women and colored people had no rights, but by amendment they are a part of the electorate population. At one time the states had control of the selection of the state's U.S. senators, but now the people chose the senators. At one time eighteen years olds could not vote but by amendment they are a part of the electoral population. These amendments were "popular" movements of the people. The people used the amendment power to keep the constitution alive and make it fit the modern politics of popular sovereignty.

At one time the elite of the electoral college chose the presidential candidates, now the popular primary system has placed the decision making in the hands of the majority of people (while less than forty percent of the states still use the outdated electoral college system). Because of the Florida dispute over the current presidential campaigns, this should probably change by the people advocating an amendment. While this may or may

not be enough of a crisis to give fuel to an amendment movement, the Indians have never been cause to amend the constitution- to give legal foundation to the laws that have been enacted to take away Indian rights and resources.

We must ask what is in store for Indian self-determination and self-government? Does U.S. policy of the Congress and Presidency have an impact on the relationship or is it one solely to be determined by the U.S. Supreme Court, as it sees fit? At various times, the Presidency and the Congress agreed on the extermination of Indian people (by war, disease, or starvation), the assimilation of individual Indians and the termination of tribal governments. In the test of time, these policies were changed to self-determination first and evolved into self-governance, as founded on provisions of the U.S. Constitution. But, in the Courts, the termination policy is still alive and well. The Court is slowly eroding essential tribal governmental powers, authority, responsibility, and jurisdiction, and incorporating tribes into the fabric of the state politic. Now, instead of assimilating the individual by policy of the President or Congress, the Court is assimilating tribal governments through its "incorporation" rulings. The purpose here is to pursue this termination of tribalism trail left by the Supreme Court.

A CONSTITUTIONAL EXPERT FINDS TRIBES ARE "CALVES FATTENED FOR THE FEAST!"

In 1987, Milner 5. Ball, a constitutional expert wrote an ABF Research Journal paper entitled, "Constitutions, Courts, Indian Tribes" (1987:1,No.1). He traced the evolution of major decisions of the U.S. Supreme Court; since the time of Chief Justice Marshall in the 183O's to the present. He addressed the sovereignty of tribes, discussed their transformation to "dependent domestic nations" that were "extraterritorial" to the states, and then the Supreme Court's efforts to gradually "incorporate" tribes into mainstream America- subjected to all the powers and authority of the individual state politic. He noted that the Court would develop doctrines of its own invention, fictions alleged to factually define the history and constitutional basis of the United States relationships with the Indian Tribes.

We must review Ball's comments on Williams v. Lee, 358 U.S. 217 (1959), which was a case decided during the Termination Period. Here the Court defined when it believed actions of the state would or could infringe on tribal self-government. Keep in mind that originally states had no jurisdiction over Indian country (See: discussion on Worcester, below). But, now the court was going to say when state governments are justifiably inside of Indian boundaries and when they are not impacting essential tribal self-government. Ball, at page 75, stated it thus:

"Self-government is not an end in itself for Indians as it is for non-Indians. According to Black, the purpose of encouraging tribal self-government is not self-government. The goal is not tribes that can sustain themselves, but tribes fit for assimilation into the states. In the Black view, the tribes presently fail to meet the standards for consumption by the states. Self-government is encouraged so that tribes can be found worthy of the

states- calves fattened for the feast. In Black's terms, by strengthening tribal government, "Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American Society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the education and economic status of the Indians permits the change without disadvantage to them (Id. at 220-21)."

The original self-governance project tribes, such as Lummi, were on a critical path that dealt with the tribe/BIA relationship. This relationship was being experimentally redefined by tribal agreements negotiated with Congress. There are political paths that can, and will, impact this experiment. The legal and political paths address the tangents of tribal/federal/state relations that must be focused upon by the tribal politic. For example, self-government should not mean that the tribes are finally qualified to be declared by the Court as meeting all the requirements for final incorporation as political subdivisions of the states. This was a potential situation facing the tribes in Washington State- which had, at one time, legislatively attempted to get tribes to select non-voting representatives for the state legislature. Is this the final step toward actual incorporation of tribes by states? If the Supreme Court has left us with a message then the answer is, Yes! This is the feast being prepared for the states by the court.

The following is a brief summary as to why we believe this to be so. We have to review the broad picture of the federal, state, and tribal relationships, as is being defined by the Supreme Court, the U.S. Congress, and the Presidency today.

THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE INDIAN TRIBES BASED ON THE U.S. CONSTITUTION

In 1986, the Senate passed Senate Concurrent Resolution 76. The House passed House Concurrent Resolution #331. These resolutions recognized the contributions the Six Nations Iroquois Confederacy and the Choctaw Confederacy made to the formulation government under the 1787 U.S. Constitution. Simultaneously, the resolutions declared the relationship between the Indian tribes and the United States was one of government-to-government, as based on the intent of U.S. constitutional provisions. The Self-governance Demonstration Project (now made law to support the 200 participating tribes) was an extension of this policy into action. The government-to-government policy was endorsed by the Reagan Administration and continued by the first President Bush. The irony of the whole process is the lack of support the constitutional provisions receive in the U.S. Supreme Court, as so much applies to Indian self-governance. And, the general lack of information or knowledge the U.S. populace has as to the significance the constitution has in governing the federal/state relationships with the Indian tribes.

We have noted there was historical intent for the government-to-government relationship between the tribes and the United States designed by the Founding Fathers at the Constitutional Convention of 1787. The original articles that applied to the Indians

and Indian tribes are still in the Constitution. (See: Article I, Section 2, Clause 3 [Apportionment Clause]; Article I, Section 8, Clause 3 [Indian Commerce Clause]; Article I, Section 10 [Prohibition against States entering Compacts]; Article II, Section 2, Clause II [treaty-making powers]; Article III, Section 2, Clause 1 [judicial power]; Article IV, Sections 3 & 4 (Admission of new states and regulation of U.S. Territory) Article VI, Section 1 and 2 [Validation of Prior Debts and Engagements/ and Supremacy Clause]; and, the Fourteenth Amendment, Sec. 1 & 2.

For the modern citizen, it would be hard to believe that the Founding Fathers would have so much awareness of the Indian Tribes. But the fact is that Indian Tribes and their members were very much a part of the evolved "Americanized mind of the Revolutionary." It was known that Indian societies were models of republican forms of governance, governance that held the leaders to be accountable to the people. Aboriginal governance recognized that the people retained rights. Native government was structured so that women held great influence over selection and removal of leadership. These types of influences were found amongst the new leaders of the emerging thirteen states and the national government. The Revolutionary Patriots held great respect for the role model that natives played in the emergence of the "Americans." A greater understanding of how much respect was found can be reviewed in the book entitled, "Exemplars of Liberty."

The new constitution addressed the individual Indian that could be a citizen, much like any foreigner would eventually qualify versus those that were in "tribal relations" and under the protection and governance of their tribes/nations. Tribal Indians, with their own forms of government, were not included in the population of the United States. Thus, provisions were incorporated into the constitution, by the Founding Fathers, to address official government-to-government relationships with the tribes. Each of the articles cited above touched upon this constitutionally structured and delegated relationship.

As noted above, all new states were required by national law and policy to insert a "disclaimer clause" in their constitutions before entering the Union on an equal footing. This clause obliged the new states to leave the handling of Indian affairs with the national government. This was a specific subject of concern with the King of England before the Revolution, as well as the new states during formation of the Unites States. The prohibition on states per their relationships with Indians was well addressed at the Constitutional Convention specifically denying any such power to the states (See: The Foundations of the Constitution by Hutchinson, 1975, Ch. IX). The disclaimers were the federal means to assure the new states did not attempt to assume any type of control or jurisdiction over Indians and their lands & natural resources.

Also, incorporated into the 1787 Constitution was an amendment process which could be used if the constitution proved unacceptable to the constituency. It is this amendment power that makes the U.S. Constitution a living document, unlike the unamendable Articles of Confederation that preceded it and failed as the first experiment in national self-government. Any time since 1787, this amendment process could have been used to change the constitutional relationship with the Indian tribes. The use of Article V has

always been available to both the Congress and people. The problem is the national constitutional powers have not been fully used for the protection of Indian tribes. It has been too convenient to hold that matters of federal law and the constitutional governance of the relationship can be conveniently changed as a political question issue- which is a way of saying the federal government can do to the Indians as its deems fit. For over two hundred years, the original constitution has never been amended to change the intended government-to-government relationship with the tribes.

The U.S. Supreme Court's interpretation of constitutional obligations owed to the tribal Indians manifests the Courts unwillingness to adhere to canons of construction that support tribal self-governance. The decisions of the Court, as pertains to Indian tribes, are predictable to mean a lost of authority and power by the tribes to the enrichment of the individual states. Very rarely have the treaties or constitution been found to stop state incursions into traditional spheres of tribal governance. Instead, the Supreme Court continues to create or employ legal fictions to justify the assumption of state jurisdiction inside Indian Country. The current republican court will be even less friendly or likely to assume a strong constitutional line to protect tribal self-governance and reverse the terminationist's incorporation process that has continued to gain ground since the 1950's.

The fluctuating policies, laws, rules, and regulations of the Presidency, Congress, and Bureau of Indian Affairs has caused great problems for Indian Country; but, it is the Supreme Court that has become the largest threat today. Indian nations are being conquered by words, words echoing from the chambers of the U.S. Supreme Court. This trend does not appear to be ending under the advocacy of the present bench membership. It appears the doors of justice for the American Indian has closed, at least the doors that lead to the constitutionally guided judiciary. The current question is not will the court give standing to Indian cases; but, rather, will the court give constitutional protections to the government-to-government relationship with Indian tribes and their right to self-determination, self-governance, and jurisdiction within their own boundaries- extraterritorial to state attempts to assume the same. The answer appears readily to be No! Today, Indian Country is more afraid of the Supreme Court than the Red Neck next door. The Supreme Court has joined in an unspoken alliance with the state governments to undermine tribal sovereignty.

FROM DISCOVERED NATIONS TO MINERS CANARY

The American Indians have continued to occupy a strange place in America's constitution and the canons of construction devised by the U.S. Supreme Court over the past two centuries. Felix Cohen warned about this in his 1953 Miners Canary. We must consider how constitutional provisions have been continuously discarded in cases involving the Indian nations. This is a Pandora's box for the citizenship. Destruction of the foundations of the constitution began with the Indians. It will be followed by impacts to every citizen of the Nation if left unchecked. For two centuries, we have seen the U.S. Supreme Court willfully ignore the constitutional mandate on treaty-relationships

with the tribes. Additionally, it has refused to give a legitimate reading to the commerce clause application to Indian affairs- the proper application of this clause is to govern the non-Indians and not the Indians (tribes govern and regulate their people).

In the beginning, it was claimed by the European nationals that Indians' lands were taken by "discovery." The Indian nations were treatied with, just like with any foreign nation. In the eyes of the judiciary, the tribes would evolve from sovereign Indian nations into "dependent domestic nations" or "quasi-sovereignties." The tribes would, since then, continue to confront renewed efforts (legally, politically, judicially, economically, socially, and religiously) to terminate their tribal existence. Today, Indians are considered more the citizens of the United States then citizens of their own nations. In fact, what remains of tribal citizenship has been equated to membership in a special community and no more. Without wars of conquest and with hundreds of negotiated treaties (with 367 ratified by the U.5. Senate) of peace and friendship on record how did this quasi-dependent status come into existence? Who conquered the Indian Tribes?

The Presidency, Congress, and Judiciary each have played a part in the poisoning of America's democratic atmosphere. The passions of public greed and demand for Indian resources have continued to evolve in to a pattern of constitutional neglect. Most recently, the Judiciary, at times considered a defender and ally of the Indians, has become the anti-Indian (anti-Indian Self-government) element of a (un)constitutional federalism that is protective of an ever expanding role of state jurisdiction over Indian Affairs. We are in search of how the state's power over Indians came into existence.

The Indian tribes, as nations, have long been recognized among the European sovereignties during the course of their "discovery" of America. This policy of respect for the Indian Nations and their rights to the territory was the basis for the 1787 N.W. Ordinance; which, in turn, reinforced the necessity of U.S. treaty negotiations with the tribes. One of the first cases to define the concept of Indian nations was Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), as Marshall wrote:

"The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate that the first discoverer of the coast of the particular region claimed; and this was a restriction which those of European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaties"

and "nation," are words of our language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense." 31 U-S. 559-60

Justice Marshall began the analysis of the relationship between the Indian tribes and the United States. It was widely accepted, up to this point, there existed sovereign Indian nations. The new fledgling United States had defined a constitutional relationship with the Indian nations; a relationship that would be under the control of the federal government and not the individual states. The lack of state jurisdiction over Indian Territory was quickly challenged by the State of Georgia. Marshall would conclude that the state attempt to assume jurisdiction was "extraterritorial" and not allowable under the constitution. Marshall wrote:

"The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." Id. at 561

One of the first Indian cases that came before the U.S. Supreme Court would initiate the evolution of a special extra-constitutional relationship with the tribes. It would eventually be interpreted to justify anything the United States may choose to do to the Indian nations. This erosion of Indian nationhood began with the Court in Cherokee Nation v. Georgia, 31 U.S. (5 Pet.) 1 (l835). Here the Cherokees sought standing to sue for transgressions of the state. However, the court would conclude that the Cherokee lacked original standing in legal disputes that maybe comparable to that of foreign nations. The Cherokee Nation was not a foreign nation for jurisdictional purposes. Indian nations he said:

"may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." at 17.

For now, the powers of the state were limited by the powers the U.S. Constitution invested in the federal government. State jurisdiction could not extend into Indian Country. But, the status of sovereign Indian nations changed with the words of the court- Indian nations were "quasi-sovereign, and they were like "wards" in the pupilage of the

United States. Since Worcester and Cherokee Nation, the nation-to-nation relationship would undergo even more drastic changes, most constantly to the enrichment of the United States, the states, and the citizens. This process began the impoverishment of Indian nations as governments representative of their own body politic.

This "wardship" finding would begin the "incorporation" of Indian nations into whichever status the court would decide to mold them. The Indian nations had entered treatied-relationships with the United States, under the same constitutional provision applicable to foreign nations (Art.II, sec. 2, clause 2). However, the treaty relationship had been twisted to create a whole new concept of treaty between nations. In this case the lesser nation becomes "incorporated" into the larger nation as a consequence of entering a treaty with it, even though there are no legal foundations for this incorporation in international law. In United States v. Wheeler, 435 U.S. 313 (1978), this incorporation was interpreted to be a **divestiture of sovereignty implied:**

"involving the relations between an Indian tribe and non-members of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68; Johnson v. McIntosh, 6 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. Worcester v. Georgia, 6 Pet. 515, 559: Cherokee Nation v. Georgia, 5 Pet., at 17-18: Fletcher v. Peck, 6 Cranch 87, 147 (Johnson, J., concurring). And as we have recently held, they cannot try nonmembers in tribal courts. Oliphant v. Suquamish Indian Tribe [435 U.S. 191 (1978)]. at 326

The Court has build up numerous citations to support itself. The conclusions have often contained inventions of the court- justifying the damage to Indian governance. The use of court-made law is indicative of the failure of the court to exercise judicial restraint. Instead, it has created a foundation based on its imagination. Court inventions such as "Plenary Power over Indians," and the "Conquest" of Indian Nations, and their subsequent "incorporation," "implicit divestiture" and the "wardship" doctrines are explicit examples.

The irony is the ability of the Court to turn its words around such that they mean another thing entirely, as in the case of Worcester where the reverse of the findings are held out as if the original court has actually made that decision. As Milner S. Ball has stated, on page 38, as pertains to the original Marshall decision:

"According to Marshall, Indian nations were still separate political communities that retained their original rights and were national powers with which the United States would continue to make treaties (Worcester v. Georgia, 31 U-S. at 559). Marshall believed it possible for non-Indians to be incorporated into tribes but impossible to incorporate Indians into European-derived bodies politic."

IRRESPECTIVE OF CONGRESSIONAL AND PRESIDENTIAL POLICY, THE COURTS HAVE FABRICATED A NEW POLITICAL ATMOSPHERE FOR INDIAN NATIONS

The Wheeler court would take the very words of Marshall and reverse their intent to hold that the tribes that are *incorporated-* an invention of Justice Rehnquist in 1978. The question next turns to whether tribes were incorporated, as stated in Wheeler. Somehow the United States has been empowered by the Courts to exercise broad powers that have no constitutional foundation. Milner S. Ball, page 21-22, identified three means by which tribes may have lost their power, as follows:

"loss of power by treaty is straightforward and verifiable. There are many grave doubts about the validity of some treaties with Indian nations both because of the manner in which Indians were forced or misled into signing them and because of the failure of the United States to keep the promises made in those treaties. But as an explanation for the Indian loss of power, the proposition is unexceptionable. ***A nation may voluntarily surrender its power through a treaty.*** *Of course, the fact that the United States would enter treaties with Indian tribes is itself a way of acknowledging tribal sovereignty and power. In this way, treaties will always be an affirmation of the tribes' political integrity at the same time that they maybe be a vehicle by which tribes surrender certain powers. Which powers have been lost by a given tribe, and when, will then be a simple matter of reference to treaty.*

Statutes are the second possible explanations for loss of tribal power listed *by Wheeler. Statutes, however, account for no more legitimate diminishment of tribal power than do the treaties upon which they are dependent.* ***A tribe could not legitimately suffer loss by statute unless the statute implemented a treaty provision****. The inherent sovereignty of another nation cannot be reduced non-consensually by means of United States legislation. One sovereign may not establish for itself jurisdiction over another by enacting statutes that purport to govern the foreign sovereign.*

Third basis listed by Wheeler is ***"implicit divestiture which it attributes to Indian tribes' "incorporation within the territory of the United States."*** *Incorporation may be what transpired between the "one time" when tribes governed their own affairs and the "today" when the federal government has that power. It certainly has drastic effects, and increases in favor with the Court. So the attempt must be made to discover what incorporation is, why it legitimizes divestiture of sovereignty by implication, and how, as well as when, it occurred."*

In my opinion, a fourth process of divesting the tribes of their inherent governmental powers, and expediting their incorporation, has been the changing of the individual's tribal Indian status into that of an U.S. Citizenship (under the 1924 Indian Citizenship Act). Basically a foreign nation has taken the "citizens" of the tribes and incorporated them as their own citizens, and then using their power to educate the "new citizens" as to their status and that allegiance they own to "their government."

But the Indian Citizenship Act is contrary to the intent of Article I, section 2, clause 3, and the lst and 2nd Sections of the Fourteenth Amendment, as defined by the 39th and 40th U.S. Congresses. Since then, many tribal members have been publicly indoctrinated to find and hold a closer alliance with the United States then with their own tribes. And, billions of dollars in assessed federal taxes have been extracted from Indian Country as result of this citizen status; based primarily on the Internal Revenue Services successful strategy of singling the individual "citizen Indian" out and prosecuting them for tax evasion through the federal tax courts. This tactic has been very similar to the wolves steering the weak calf away from the herd in order to take it down for the feast.

FROM THE LAWS OF NATIONS TO CONQUERED BY WORDS AND INCORPORATION

Treaty-making has commonly been acknowledged as a legally binding relationship between the United States and Indian Tribes. The "supreme law of the land" and the "law of nations" doctrines and their respective canons of construction should always be referenced in addressing the legal duties and responsibilities tied to the relationship by all parties. However, today we see the Court is willing to give the treaties less meaning then intended in negotiations. Once the United States secured the lands sought by the treaty from the Indians, then the rights of the Indians became a minor matter after that. At one time, in United States v. Winans, 198 U.S. 371 (1905), the Court held that the treaties reserved those rights not given to the United States. This reservation of powers just as easily implied a reservation of self-determination and self-governance and not incorporation as found in Wheeler.

But, the Court has not been hesitant to reach back and change legal and factual history as it deems fit, such as it did in "Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1954). Here, the Court added a new fiction, that of the "Conquest of Tribes." The fact is that the tribes, if they were conquered, were conquered only by the words of the Court, at a time that America was attempting to terminate Indian tribalism under federal policy (House Con. Res. 108, 67 Stat. B132 (1953). Milner Ball (id at 46) found that "conquest" first derived from the writings of Felix Cohen (Cohen I, 1942, and as rewritten into Cohen II, 1958), which the Court has held to be "the Indian law of the nation." The most praised version of "Cohen" by the Court is the rewrite during the termination era.

Prior to the evolution of conquest and incorporation, there developed the "plenary power" of the Congress over Indian Affairs. It has been argued that the "Commerce Clause" (Art. I, sec. 8, cl. 3) was the foundational basis for the United States "absolute power" over Indian Affairs. This clause provides, "... *Congress shall have the power to regulate commerce with Foreign Nations, amongst the several States, and with the Indian Tribes."* In Gibbons v. Ogden, 19 U.S. (6 Wheat.) 1 (1824), the Court found that the national governments power over commerce is plenary and absolute. But how does this compare to the status of its application to the Indian tribes.

Milner S. Ball, stated it thus, "*Marshall's Worcester reading of Congress's power to regulate commerce with the Indian tribes is the same as his Gibbons reading of Congress's power to regulate commerce amongst the states and with foreign nations. The power belongs wholly to Congress. In relation to its object, the power is unlimited. However, it cannot be extended beyond the specified relationship. It has no force with respect to affairs internal to the foreign nation, state, or tribe. This reading of the Indian commerce clause is consistent with Marshall's general view of the relation of the federal government to the separate, distinct Indian nations.*"

In United States v. Kagama, 118 U.S. 375 (1886), the Court said it "*would be a very strained construction*" to make the Commerce Clause support the plenary power over Indians. Even the broadest reading of the clause would fail to substantiate such a power. If it were true with Indians then it would be more likely be true of the states foremost and then the foreign nations addressed by this clause. The weakness of this position would find new fictional strength in Merrion v.Jicarilla Apache Tribe, 435 U.S. 130, 155 (1980). Justice Thurgood Marshall wrote: "*when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, **or by virtue of its superior position over tribes***." In this latter instance, the tribes are classified under the "wardship status," and covered by the "plenary power" doctrine, both resulting from their having entered treaty relationships with the United States or commercial relationships governed by the federal government under authority of the Commerce Clause. By the Indians having subjected themselves to this relationship the United States was inherently, it had been stated by the Courts, operating from a superior position. This legal positioning fails in the Laws of Nations.

INCORPORATING PLENARY POWER, SUPERIOR POSITION, AND OTHER FICTIONS INTO INDIAN AFFAIRS

The Court has had the opportunity to rule on Congress passing legislation that violated specific provisions of treaties with the tribes; but, most often, has done nothing to invalidate such enactments. To do so would be within the federal question jurisdiction conferred by the constitution. The Supreme Court could consistently rule a "supreme law of the land" decision on U.S. obligations under the Indian treaties per the canons of construction. This would presume an intent on the part of the United States to place canons of construction of written constitutions first and foremost, and then the treaties, along with acts of Congress that do not circumvent the constitution or treaty duty. This would mean that treaties are actually one of the three types of supreme law of the nation under the constitution that is protected consistently. This would be in compliance with international law and the canons of construction of written constitutions.

But, Indian nations have unilaterally become an "Interior" matter of the United States and thereby deprived of the umbrella of the (international) laws of nations. As noted above, the most blatant example of willful violation of treaties, as supported by the Courts, was passage of the Dawes Act- the General Allotment laws (Act of February 8, 1887, 24 Stat. 388, as amended), which deprived the tribes of 90,000,000 acres of

treaty-protected lands and natural resources. Rather then overrule the legislation as contrary to the protection treaties have under the "supremacy clause," the Court chose to give credence to the entire act. The Court's past inventions of legal fictions governing Indian cases have allowed these types of decisions to stand as law. The other way out has been for the court to rule that Indian Affairs subject matter is a political question best left to the Congress.

In another arena, much like the incorporation of tribes into the national system, is the dangers of cases such as Williams v. Lee, 358 U.S. 217 (1959). This case operated with the apparent assumption that the federal government has complete jurisdiction and control over the tribes and that through "conquest and treaties" the tribes have been "induced to give up complete independence" (Id. at 357). Here, the Court talks about a two-tier analysis of "preemption" and "infringement." Unlike Worcester, the Court finds that Indian country is not necessarily extraterritorial to the state, not unless specifically excluded by Congress. This is a complete reversal of the constitutional relationship which held tribes to be outside the jurisdiction of the United States, especially the individual states. Now it is assumed that the tribes are a part of the U.S. body politic if not specifically excluded by legislative enactment. But, prior legislation did not address the Indians since they were extraterritorial to the states; now, if the legislation does not include language to protect the rights of the tribes then it is being read to mean the Congress meant to apply that law to the tribes. In reality, the only thing that made the law applicable to the Indians was the court decision to apply it.

The termination policy of the U.S. Congress seems to be extremely well-fed as a predatory concept of the U.S Supreme Court. It has been a constant basis for the Court's elimination of tribal powers, self-governance, and jurisdiction. In Montana v. United States, 450 U.S. 544 (1981), the Court does not search for reasons to find and justify state presence inside the Crow Reservation; instead, it gave the disputed riverbed to the state, awarding Indian land to it. In Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 155, the Court simply imposed a new fiction of the requirement of " a series of federal checkpoints before a tribal tax can take effect." Here, the Court sets the stage for the tribes to lose their inherent power to control taxation within their boundaries. This has been accomplished in cases such as Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), in McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973), in Moe v. Salish & Kootenai Tribes, then Washington v. Confederated Tribes of the Colvilles Indian Reservation, 447 U.S. 134 (1980). The general conclusion is that state taxation will be allowed to preempt tribal taxation and authority unless forbidden by the Congress by specific words in legislation.

The Court's decisions have completely reversed the findings of the 1830's Marshall Court. The tribes, as per treaty-relationship and the constitution, were "extraterritorial" to the states. Now the states are inside Indian Country unless forbidden by a specific act of Congress. Of course there would not be any such enactments since Congress did not govern Indian Country. In the Marshall Court decision there was no need to clarify what was clearly intended by the Constitution- states had no jurisdiction over Indian Affairs or

power to enter treaties or agreements with Indians. Today, however, states are inside Indian Country- as if they always had a claim to Indian lands, resources, and a right to exercise power over tribal governance. This is a fiction created by the Courts.

The argument for the validity of tribal immunity from state taxation had failed in the Supreme Court. Tribes have become involuntary agents collecting state taxes. The Court was not concerned that such tribal taxes support essential tribal governmental functions. Colville and Moe would translate to mean that unless there was "value generated" on the reservation there could be no exemption from the imposition of the state authority. If this concept was brought to its logical conclusion under the "commerce clause" then each state of the Union could absolutely impact interstate commerce to the nullification of the national economy. Under this logic, unless the goods had value added inside the boundaries of any state then that state's ability to tax the sale transaction was nullified. Any economically viable goods passing from one state to another would be subject to the second state taxing the first, and forcing the first to collect the taxes of the second, because the first did not have value added status to the product. This would collapse state economies and taxation foundations, as it has done in Indian Country. It would definitely impact interstate commerce.

Justice O'Connor, in Rice v. Rehner, 463 U.S. 713 (1983) would go a step further and hold that since there was no tradition of self-government over the subject matter then the tribe's sovereignty carries no weight. There is no preemption of state authority (Id. at 731). Once again, a new fiction, a new invention, that tribes have no history of governmental functions in which a part of the collective wealth (whether dollars or goods) is collected (taxed) for the good of the whole. This falls in line with the reasoning that Indian tribes do not have the capacity to evolve in areas of self-government that would be a normal evolution for non-Indian counter-parts. It rings of "once a savage always a savage" and therefore it would not be normal for Indians to have this type of self-governance function. This is very much in line with racist, ethnocentric views of Indians- the poor ignorant savages that need to be spoon-fed by the Great White Father in Washington. This is another version of the "Conquest of Tribes" found in Tee-hit-ton. This is an extension of Rehnquist's "incorporation"- i.e., for some forms of governmental duty, responsibility or function then the tribes will never qualify and all persons will have to turn to the nearest state (non-Indian, white) government for protection and coverage, not the "unqualified" Indian governments.

In the area of criminal jurisdiction, the Indian tribes found protection, as it should be, in Ex Parte Crow Dog, 109 U.S. 556 (1883)- which failed to find federal jurisdiction over Indians committing murder against another Indian. This case lead to the passage of the Major Crimes Act (18 U.S.C. 548), which was upheld in Kagama based on alleged tribal weaknesses and helplessness, 118 U.S. at 383-84. Just as the Congress fictionally assumed its jurisdictional authority to apply the Major Crimes Act to Indian country, it

did likewise in its delegation of jurisdiction to some states under Public Law 280 [67 Stat. 588 (1953)] during the termination era. Such congressional enactments do not confirm jurisdiction already owned by the tribes but destroyed areas of tribal law that was once within the exclusive jurisdiction of the tribal governments.

While P.L. 280 did not deal with questions of taxation, and even though the State of Washington never adhered to the congressional requirements pertinent to its assumption of jurisdiction over tribes in the state, the Court, in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), would not place limitations on the expansion of the state's taxing authority/jurisdiction into Indian country. In fact, the Court used its imagination to include an expansion of state taxing authority into Indian country by P.L. 280. This means that the Court, can by precedent, read and add anything it wants to congressional acts, as a means to justify its newly imposed limitations upon tribal self-government. The court has, once again, resorted to creating court-made law, a power constitutionally reserved to the other branches of government.

In comment on "Colville" Milner Ball says, "*if Indians on the reservation are not formally members of the reservation tribe, sales to them are taxable. This innovation was without precedent. White approved it on the ground that- his only explanation- federal statutes "cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the tribe. Washington had no such power. No state had such power. If there is a clear thread running through the fabric of Indian law, it is that states may not tax Indian commerce with Indians within Indian country. It is doubtful that Congress has power to levy such a tax. It is more doubtful that, if it has such power, Congress could delegate it to a state. It is certain that Congress had not authorized Washington to impose the tax." Id at 106.*

What has this left the tribes in hopes of building a future for their people based on self-determination and self-government in the area of economic development? We would hope the federal government would help resolve this conflict; but, today, we find the federal government taxing all incomes made within Indian Country under the "income tax" enactments. The Commerce Clause was once intended to regulate the commerce and trade activities of the U.S. citizens. Now it is a vehicle to reach right into Indian Country and claim taxing jurisdiction for the national government as well as the states. Federal and state taxation takes funds away before tribal governments can use the same to support essential government functions. The Court has created an unwritten taxation law that forces tribes to be revenue poor and less effective as governments. It is not economically feasible to enter Indian Country and develop commerce due to the multitude of different governments assessing taxes, before the tribes assess their own.

THE DECISION OF "DURO" EXEMPLIFIES THE EXTENT TO WHICH THE U.S. COURT WAS WILLING TO IGNORE THE DAMAGES TO TRIBAL GOVERNANCE CREATED BY ITS FICTIONS UNTIL CHECKED BY LEGISLATIVE REVERSAL

Moe, Colville, and Rice each lead to the conclusion found in a controversy over Indian tribal jurisdiction. In Duro v. Reina, 110 S. Or. 2053, 109 L.Ed. 2d 693 (1990), the Court removed tribal jurisdiction over non-member Indians. Most every tribe in America culturally forbids in-breeding into the same genetic lines; thus, membership marry into other tribes. But, there have always been tribal controls on heirship by marriage. And, marriage did not guarantee membership into a new tribe... any social, political, etc., concerns would naturally be based on the marriage relationship and not a right secured by marriage into the tribe. The Duro case would have destroyed tribal jurisdiction over non-member tribal Indians. This was, basically, a legal attack upon the cultural and common laws of Indian country, and its inherent jurisdiction over non-member Indians.

Duro was additionally in line with the Courts decision in Oliphant v. Suquamish Indian Tribe, 433 U.S. 191 (1978), in which Justice Rehnquist not only invented incorporation" of Indian tribes and its implied divestment of tribal authority; but, removed tribal criminal jurisdiction over non-Indians. Since then, the Court has not used its power to provide protection to the Indian communities now plagued by non-Indians resident on the reservations but protected from tribal laws. These non-Indians violate tribal, state, and federal laws for lack of readily available enforcement. Indian country has become the domain of the lawless non-Indian. If Duro was left standing then non-member Indians would have been free from tribal enforcement as well. The lost of tribal governmental taxation and enforcement powers have been consistent with the Court's "divesture rulings." This has been a program of tribal governmental termination by the Courts and not due to direct action of the Congress. While termination of tribes as a federal policy is dead in the Congress and Presidency, it is kept alive by the Supreme Court in its "conquest," "incorporation," and "divesture" rulings.

Unlike the "Oliphant" problem, the Congress has reacted and corrected the court's Duro error. The Presidency has failed to act as a responsible "Chief Executive" and use its powers to provide protection and fill the enforcement void created by the "Oliphant" Court. The federal government has not provided increased funding for federal enforcement on reservations for crimes committed by non-Indians. The federal government has assumed that the states would do this. But, the state expansion of police power inside Indian reservations is contrary to the "extraterritorial" ruling of the 1830's by the Marshall court. Some tribes may have to literally hold non-Indian criminals in root houses until they can deliver the criminal elements up to the proper authorities (federal agencies), as provided in many treaties. Lummi actually did this in 1916. The Lummis held several non-Indians for trespassing on a federal reserve, per the treaty language, until the U.S. Marshall could arrive. The state and county were powerless to take any action to the contrary.

The Indian nations have become (quasi-) sovereignties tied to treaties that have become the legacy of America's lack of honor amongst nations. Tribes understand that they have inherent rights to self-governance. These rights were not given up at treaty negotiations. They do not see themselves as weak and helpless but more the victims of deceptive government and bureaucracies. They believe themselves to have retained the power to determine membership, administer justice and enforce laws, to tax, to regulate domestic affairs, to zone & regulate property use, to manage their commerce and economics, and the whole conglomerate of self-governance powers. Tribes recognize they are the ones that shall perform the "essential government functions" needed to serve the tribal populations.

The Court has assumed the same role of "protector status" of the poor non-Indians that find themselves subjected to tribal authority while inside Indian country. This is the plight of tribes today. There is minimal protection in the federal judiciary of inherent tribal governmental rights and powers. Today, the tribes should consider the Supreme Court as a predatory enemy force of the federal government, more so then the other two branches of the national system. The Court treats the Indian tribes and nations not only as "wards" but as undesirable orphans. It appears intent on driving the tribes into impoverishment until incorporation into states is an acceptable means of survival. The Court is more destructive than protective of tribal self-government. The Court is "incorporating" tribes into the general politic, making tribal governments extensions of local (See: Brendale) or state (See: Duro, Oliphant, Colville, Moe, etc.) governments.

The use of the "incorporation" and "divestiture of sovereignty" to justify expanding state powers has caused great harm to the ability of Indian nations to be self-governing. These court inventions have no constitutional or legislative foundation. The judiciary is still operating under the late terminationist policies while the Presidency and Congress moved closer to the constitutionally provided government-to-government relationship. The tribes have a clear message for the Court- it should be held accountable to protect the U.S. Constitution in accordance with canons of construction of written constitutions. Thus far, the Court has expressed two hundred years of willingness to invalidate the constitution to justify and further the public and political demands for more Indian lands and natural resources, to turn jurisdiction over to the state governments.

The original reading of Worcester upheld the rights of tribes to be exempt from predatory state laws and jurisdiction. This right is based on the intent of treaties and constitutional provisions. In the State of Washington, as impacts the Lummi, this is even most true since the state has failed to amend its own constitution and remove the applicable disclaimers of jurisdiction over Indian rights, resources, and reservations. If the Supreme Court will not require the state to adhere to the constitutional requirements then it is up to the U.S. Congress to clarify the obligations since it is a subject arising under Article IV powers used by the Congress to admit the new state. The Court was given the chance to correct the State of Washington, in the cigarette and alcohol cases,

but refused to order compliance and failed to overrule claims of state taxation jurisdiction over the tribal activities. Unless these series of decisions are corrected then we must assume that tribes really are "calves fattened for the feast" and the state is ready to eat at the table prepared by the Supreme Court.

The tribes need assurances that their rights will be explicitly protected from erosion. The language has to be very clear in order for the judiciary to get the message that the United States is not terminating tribes or attempting to force their assimilation. The reversal of Duro by the U.S. Congress was indicative that this was true. The 1988 Congressional reversal of the tax court decision in Earl v. Commissioner was another example of the Congress correcting the wayward court. The recent enactments on tribal self-government, as pertains to the Bureau of Indian Affairs (Title IV of the Tribal Self-Governance Act of 1994, P.L. 106-260) and the Indian Health Services (Titles V & VI of P.L. 106-260), are additional indicators that "termination" of tribal governments is a thing of the past. But, there are a lot of unresolved problems created by the judicial fictions left on the books. The Congress has not restored tribal jurisdiction over non-Indians inside reservation boundaries. Based on the treaty, the federal government should exercise the task of patrolling these persons' activities, not the state. Nor has the Congress stopped states from applying their taxes inside Indian Country. The Congress could easily say that the U.S. Constitution forbids such action of the states, but it has not done so.

"EXCLUDING INDIANS NOT TAXED"- A SPECIFIC CHALLENGE TO THE U.S. CONSTITUTION

One of the most blatant examples of violations of the U.S. Constitution deals with the joint effort of the Congress and the Court to absorb and incorporate tribal membership into the general citizenship of the national government and the individual states. The resultant taxes collected for the federal government due to this status makes it financially worthwhile to ignore the constitutional mandates on the status of individual Indians and Indian tribes. If the United States was to abide by the constitution then it would lose billions in federal tax dollars from Indian country, and possibly face a duty to repay the illegal taxes collected.

Because of the 1924 Indian Citizenship Act, the Department of Treasury- Internal Revenue Service has been challenging the status of individual American Indians. The IRS cites Indians for failure to pay federal income taxes. Individual tribal people are forced to attempt to specifically show language inside respective federal enactments or treaties that argues a "tax exemption" was provided for or intended. Only then can Indian income from treaty protected resources be exempt from payment of federal income taxes, argues the IRS. The Tax Code is silent on Indians because they have been separate from the U.S. Citizenship until recently. It is only in the last five decades that the tax code has been applied to Indian incomes due to their standing generically as U.S. citizens rather than tribal Indians.

Tax codes and federal enactments that were not applicable to Indian Country did not have reference to Indian Country. The legislation and laws were drafted as applicable to the citizens of the United States. Indians were, generally, excluded from being counted as members of that political population due to the language of the constitution. Now, with the passage of Indian Citizenship Act (1924), it is being argued that the Indians have to point to language that provided an exemption from its applicability. The language was not inserted inside the legislation before imposition of this citizenship and it will not by some miracle have the language in it now.

Opinions of the Department of Interior (1983 and 1985) had been issued in support of treaty law as supreme to the tax code. The Department of Justice (1985) - on behalf of the Internal Revenue Service- had cited numerous cases where Indians failed to show treaty language that could provide the necessary exemption. With these types of cases as precedence, the IRS has been able to convince the tax court of the applicability of the code provision to individual Indian incomes. The IRS has been applying federal income tax laws to the incomes of American Indians that were previously exempt. All to often, this income was usually derived from the harvest of resources reserved by treaty specifically for the tribal Indians (aka: "excluding Indians not taxed"). Historically the resources and harvests have been the jurisdictional subject matter of tribal governance exclusively. In lieu of taxes the resources were shared throughout the community.

The American Indians were once referred to as the "Indians not taxed". This principle concept reflected the separateness between the United States and the Indian tribes. Neither the states or federal government viewed the Indians as their citizens or within their taxing power, originally. It was the intention of 367 ratified treaties with the Indians to keep them separate from the people of the states and territories separate. This is reflected in the very wording of the Constitution...which provides the words, "excluding Indians not taxes". The question here is what is right, the 1924 Indian Citizenship Act or the Constitution and the ratified treaties?

Indian Tribes have been drawn into legal confrontations with the Internal Revenue Service- which targets tribal members as separate from the tribal umbrella of treaty rights and Indian law. This issue is not a new conflict to the United States. "Excluding Indians not taxed" was the definition developed by the Founding Fathers of the Constitution, and retained through the Reconstruction Debates that ended with the ratification of the Fourteenth and Fifteenth Amendments. The 39th and 40th Congresses were very specific about retention of the language dealing with Indian tribes and their constitutional separateness from the United States and the individual states.

Because of the 1924 Indian Citizenship Act, courtroom battles have been waged directly against individual Indians and indirectly against Indian Country. The Internal Revenue Service argues that because Indians were congressionally made citizens by act of Congress, Indians are subject to all the tax laws of general application to other citizens. The Tax Code was developed in the 1930's, a long time after the Constitution or any ratification of any treaty relationship with the tribes. The Indian Citizenship Act

was not intended to be an amendment to either the Constitution or the treaties. However, the Tax Code talks about citizens and taxation. The IRS has concluded that if Indians are citizens then a tax liability is present.

The leading tax case cited by the federal tax attorneys is that of Squire v. Capoeman, 351 U.S. 1 (1956), in which the Supreme Court considered whether capital gains from the sale of standing timber on lands allotted to non-competent Quinualt Indians was subject to the federal income tax. The court began its analysis in Squire with the principle that: "Indians are citizens and ...in ordinary affairs in life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." This leading case was used to argue against treaty resource income exemptions of the Pacific Northwest Indian Tribes.

In Earl v. Commissioner, 78 T.C. 1014 (1982) it was argued that "treaty Indians" were "citizens" and all citizens pay taxes; therefore, Indians will have to pay federal income taxes on treaty derived income. Fortunately, the 100th U.S. Congress, in 1988, overrode the conclusion of the Tax Court. The Congress admitted that income derived from the exercise of treaty fishing rights is not taxable under the tax code. The new law required the IRS to pay back all taxes collected within a statute of limitations period dated from enactment of Public Law 100-647.

Treaty Tribes that opposed the attempts to tax Indian fishing rights considered opinions of the Department of Justice (1985) supporting the Internal Revenue Service to be seriously flawed in legal logic. There was a greater issue at stake here. The legal foundation to the Internal Revenue Service's cases in the "tax court" was the "citizenship" of American Indians. The 1924 Indian Citizenship Act was claimed to have made all Indians citizens. But the original wording of the U.S. Constitution- and in its present form- still defines tribal Indians as "Indians not taxed." An act of Congress is not a proper means to amend the constitution. There is the question as whether or not "excluding Indians not taxed" is still valid constitutionally. The Internal Revenue Service has continued to assert that American Indians are citizens of the United States and "subject to the jurisdiction thereof."

We have to look to the U.S. Constitution for the current wording that is definitive of the relationship the American Indian has to the national constitutional government- the Congress, the Presidency, the Judiciary, and the people. For this reason we researched the historical records to find the intent of the constitution, as of 1787, in the 1860's, and in 1924 versus the present picture drawn by the Internal Revenue Service.

David Hutchinson, in "THE FOUNDATIONS OF THE CONSTITUTION" (p.35), points out the history of the Rule of Apportionment. On March 6, 1783, the Committee of Revenue made a report to Congress. One part of the report proposed to abolish article eight of the Articles of Confederation which made land the basis of taxation. It proposed to substitute an article providing that the common treasury be supplied by the several states in proportion to the number of inhabitants of every age, sex, and condition,

"except Indians not paying taxes" in each state, which number shall be triennially taken, and transmitted to the United States in Congress assembled in such mode as they shall direct, and appoint, provided always that in such enumeration no persons shall be included, who are bound to servitude for life, according to the laws of the state of which they belong, other than such as may be between the ages of ___years. It is obvious that we have here the first outline of the clause in the constitution. On April 18th, the revenue plan was passed by the Congress amended."

Article I, Section 2, Clause 3 of the Constitution provides that: "*Representation and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole number of free Persons, excluding those bound to Service for a Term of Years, and* ***excluding Indian not taxed****, three-fifths of all other Persons...*"

This provision has been in the constitution ever since, supported by amendments added after the civil war, in the 1860's. The Congress had the opportunity to eliminate all reference to any race or people during the debates over the amendment to be added to the constitution. This amendment was a matter of grave importance and not taken lightly. The resolution of the amendment final wording was a concern of every state that was a part of the Union. Their representatives participated with the full intent of not being shoved aside and not heard. Indians were addressed and language retained to assure a clear definition of their status politically in America.

The expression, excluding Indians not taxed, is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. It appears therein as follows: "*Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state,* ***excluding Indians not taxed***"... To understand the intent of not changing the language and relationship after the Civil War, as pertains to Indians, we have to understand what was the intended relationship in the first place. In the debates of the 1787 Constitutional Convention, there is little said about the relationship the Indians bore to the United States. On the other hand, the problems of apportionment of representatives and direct taxes were cause of great debate and extensive writings. In view of this, it is only reasonable to assume that the delegates to the convention were so clearly cognizant of the meaning of the phrase "Indians not taxed" as to render any consideration of it unnecessary.

Indians, members of sovereign and separate communities or tribes were outside of the community of people of the United States even though they might be located within the geographical boundaries of a state. Their status was well described by Chancellar Kent when in 1823 he said:"*Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes. They are not our subjects, born within the purviews of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities...*"

Again, in 1776, Congress tendered protection and friendship to the Indians, and resolved, that no Indians should be employed as soldiers in the armies of the United States, before the tribe, to which they belonged, should, in a national council, have consented thereunto, nor then, without the express approbation of Congress. What acts of government more clearly and strongly designate these Indians as totally detached from our body politic, and as separate and independent communities." (Goodell v. Jackson, 20 Johns. 693, 711)

"To describe these Indians who were not a part of the community of people of the United States the phrase "Indians not taxed" was chosen. The reasons for the choice of the particular phrase was easily surmised. It reflected, first, the prevalent notion that taxation and representation should go hand in hand. It reflected, secondly, the fact that in a less complex system of government taxation is the principle criterion of government authority. No more significant attribute of the condition of the Indian living in his separate and independent community should have been chosen. Being outside the control of either State or Federal Government, he was an "Indian not taxed", and since he did not bear the financial burden of the government, he was not entitled to representation therein." (United States v. Kagama, 118 U.S. 375, 378).

In the case of Elk v. Wilkins, John Elk, an Indian that had claimed to have permanently severed his ties with his tribe, taken up residence among the whites, had claimed that he was denied his right to vote on the ground that he was not a citizen. The Supreme Court considered the question as to whether or not he was covered by the first clause of the first section of the Fourteenth Amendment of the United States Constitution, by which it is provided, *"all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."* The Supreme Court held that: "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the Unites States, of ambassadors or other public ministers of foreign nations.

This view is confirmed by the second section of the Fourteenth Amendment, which provides "*excluding Indians not taxed.*" Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count of citizens that make up the body politic, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens. (112 U.S. Reports, 98-99, 102, 109).

The conditions of these Indians as a people separate from the community of people of the United States had not changed by the time of the adoption of the Fourteenth Amendment. Their exemption from the application of States laws had been affirmed by the Supreme Court on more than one occasion since Worcester v. Georgia, 6 Pet. 515.

The same Congress which approved the Fourteenth Amendment and which submitted it to the States for adoption, enacted the Civil Rights Bill of 1866 (14 Stat. 27). It provided that "all persons born in the United States and not subject to any foreign power, *excluding Indians not taxed*, are hereby declared to be citizens of the United States."

The Solicitor for the Department of Interior in Opinion of November 7, 1940, stated: "In the bill as originally reported from the Judiciary Committee there were not words excluding "Indians not taxed" from the citizenship proposed to be granted. Attention being called to this point, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations with government of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States. Mr. Trumbull, who reported the bill, modified it by inserting the words, "excluding Indians not taxed."

What was intended by that modification appears from the following language used by Trumbull in debate. *"...Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with who we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be subjects of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States, when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, "excluding Indians not taxed", and not subject to any foreign Power, shall be deemed citizens of the United States." (Cong. Globe, 1st Sess., 30t9th Cong.,* p.527).

The understanding of the Congress, as to the meaning of the phrase, as it appears in the Constitution, was expressed by Mr. Trumbull: "It is a constitutional term used by the men who made the Constitution itself to designate... a class of persons who were not a part of our population. (Ibid., p.572)

It is not surprising to find the following statement in a report of the Judiciary Committee to the Senate of the United States on the 14th of December, 1870, in obedience to an instruction to inquire as to the effect of the Fourteenth Amendment upon the treaties which the United States had with various Indian tribes of the country: "During the war slavery had been abolished, and the former slaves had become citizens

of the United States; consequently, in determining the basis of representation in the Fourteenth Amendment, the clause `three-fifths of all other persons' is wholly omitted; but the clause `excluding Indians not taxed' is retained."

The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave, which had been effected during the war, while it recognized no change in the status of the tribal Indians. They were excluded by the original constitution, and in the same terms are excluded by the amendment from the constituent body- the people.

The exclusion of the tribal Indians from the constituent body, the People of the United States, was reflected too in their exclusion from the operation of both state and federal tax laws. As at the time of the adoption of the Constitution these Indians were not subject to taxation, so too were they not subject to taxation at the time of the adoption of the Fourteenth Amendment. This attribute of their status remained the same and it was retained as descriptive of a status that likewise had remained the same (up and until the 1924 Indian Citizenship Act).

During the Reconstruction Debates over the 14th Amendment, the Senate (39th Cong. 1st Sess. (May 29-30, 1866)) had addressed House Joint Resolution 127. This was the resolution that introduced the proposed language to be included in the First and Second Sections of said amendment. Members of the Senate debated whether or not the provisions of the 14th Amendment should be extended to the "Indians not taxed" or "wild Indians" or "Indians remaining in tribal relations." The debate was upon issue as to whether or not the language "excluding Indians not taxed" should be in both sections of the amendment. However, what was not disputed was the fact that the "Indians" were not to be made "citizens of the United States of America."

In the first section, it was provided, the Indians were excluded by the wording of "subject to the jurisdiction thereof." Mr. Trumbull, Chairman of the Committee of the Judiciary, stated this point in the debates, as follows: ...*"The provision is, that "all persons born in the United States, and subject to the jurisdiction." Now, does the Senator from Wisconsin pretend to say that the Navajoe Indians are subject to the complete jurisdiction of the United States? What do we mean by subject to the jurisdiction of the United States? Not owing allegience to anybody else. That is what it means. Can you sue a Navajoe Indian in Court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them..." (39th Cong. 1st Sess. (May 29-30, 1866))*

Mr.Howard, Senator from Michigan, stated that: "...*Certainly, Gentlemen cannot content that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction. That question has only since been adjudicated, so far as the usage of the Government is concerned. The Government of the United States have always regarded and treated the Indian tribes within our limits as*

Foreign Powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned, for in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with Foreign nations and among the States, but also with the Indian Tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes, the same character in which they have been recognized ever since the discovery of the continent and its occupation by civilized men; in the same light the Indians were viewed and treated by Great Britain from the earliest commencement of the settlement of the continent. (39th Cong. 1st Sess. (May 29-30).

Mr. Williams pointed out in the debate his observations, as follows:
"I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States. But I am satisfied that, giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. The first and second sections of this proposed amendment are to be taken together, are to be construed together. and the meaning of the word "citizens" as employed in both sections, is to be determined from the manner in which that word is used in both of those sections. (39th Cong. 1st Sess. (May 29-30).

Now, can any reasonable man conclude that the word "citizens" there applies to Indians not taxed, or include Indians not taxed when they are expressly excluded from the basis of representation and cannot even be taken into the enumeration of persons upon whom representation is to be based? I think it is pretty clear, when you put the first and second sections together, that Indians not taxed are excluded from the term "citizens;" because it cannot be supposed for one moment that the term "citizens", as employed in these two sections, is intended to apply to Indians who are not even counted under any circumstances as a part of the basis of representation. I therefore think that the amendment of the Senator from Wisconsin is clearly unnecessary. I do not believe that Indians not taxed are included, and I understand that to be descriptive of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States." (39th Cong. 1st Sess. (May 29-30)).

The Internal Revenue Service argues that the 1924 Act authorizes taxing jurisdiction over the incomes of tribal Indians that live on-reservation and are subjects of the United States. If this is true then this status is imposed without constitutional authority. In most cases of legislation applied to Indians, the act must be specific and clear and not ambiguously worded. But, in accordance to the IRS this is not so. This was reinforced by the 1940 Department of Interior Opinion. The government bureaucrats willfully take ambiguous laws, and perhaps unconstitutional laws, and apply them to Indian Country.

Doctrines of federal Indian law have been nullified by tax court doctrines. The IRS takes the offense that Indian persons are individuals and not tribal when it comes to application of the tax code. It continues to argue that since they are in court as individuals then their status as tribal Indians with treaty rights protections do not apply. The tax court shifts the burden from the IRS to the defendant individual Indian to show there was intent to make

him exempt from the tax code. In regular Indian case law the plaintiff is required to prove application of the law to Indian country was congressionally intended. Only in the Tax Courts is this is not the rule. The tax court and the IRS continue to apply ambiguous taxing authority to Indian Country. This will not change until such time the tribal governments are able to unite and force judicial review of the constitutionality of the Indian Citizenship Act by the U.S. Supreme Court or Congress assembled.

We must understand the reasons for the passage of the 1924 Indian Citizenship Act. First, let us look at the wording of the enactment, as follows: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.*" (Approved June 2, 1924).

Where in this enactment does it say that the Internal Revenue Code shall be specifically applied to the land, resources, and incomes of Indian people...NOWHERE! The language clearly means the act was not to disrupt the protections reserved by or secured to the Indian people. And, yet, the IRS alleges the whole tax code of the United States was intended to be applied to all of Indian Country. We recognize this as just one more (tax court) judicial fiction and not the intention of the law, as passed. In fact, on the very day that the "citizenship" was granted to the Indian people, the U.S. Congress was addressing the "Revenue Act of 1924"; and, if the real reason was to apply the tax laws to Indian Country, then said Act would have been the logical location to enact such legislative authorization for the Internal Revenue Service.

There are other historical arguments that hold Indians were not to be taxed. As early as 1798 the Federal Government had imposed a direct tax upon real estate and slaves. Act of July 14, 1798, (1 Stat. 597). "In the summer of 1813 a direct tax was again assessed on real estate and slaves and Congress laid duties on carriages, a duty on refined sugar, a license tax upon distillers of spirituous liquors, stamp duties, an auction tax, and license tax upon retailers of wines and spirituous liquors." (Dewey Financial History of the United States, page 139). By 1862 so many internal revenue taxes were being laid by the Federal Government that one writer concisely described the revenue measure of the year as follows: "Wherever you find an article, a product, a trade, a profession, or a source of income, tax it." (Well Practical Economics, New York, 1885). In 1861, the first Federal income tax was authorized to be levied "upon the annual income of every person residing in the United States, derived from any source whatever." Act of August 5, 1861 (12 Stat. 292, 309). The tax was abolished in 1872" (Dewey Financial History of the United States, page 305). These tax laws did not apply to the tribal Indians.

The special significance is that in no instance were any of these numerous taxes applied to Indians living in their separate tribal communities, even though, as in the case of the income tax, it was by its provisions intended to apply to every person residing in the United States. The reason for the non-application of such a tax to Indians was the same

as the reason for the non-application of all laws of general application to Indians. *They were considered a people separate from the community of people of the United States; and thus, it was not to be inferred, in the absence of clear and unambiguous language to the contrary, that Congress intended to subject them to a law which by its terms applied to every person residing in the United States. Elk v. Wilkins, 112 U.S. 94.*

In fact, the reason the Indian Citizenship Act was enacted had nothing to do with taxation of Indians. The intent was to secure First Amendment Rights of the U.S. Constitution for American Indians. (THE HOPI, by Harry James, 1974). This was because the Commissioner of Indian Affairs, Charles Burke, had drafted, implemented, and enforced the "Indian Religious Crime Code" (DOI Circular #1665) up until 1924. This code had the specific aim of eliminating American Indian Religions. When the Commissioner had Indian traditionalists and ceremonialists imprisoned, this received attention from Indian support groups in California. The foremost was the Indian Welfare League; others were the National Association to Help the Indian, and the Indian Defense Association of Northern California.

It was the brainstorm of a member of the Indian Welfare League that "American Indians" should be made "citizens". This person was Ida May Adams, a Los Angeles lawyer. She believed Indian people would be given the First Amendment Religious Freedom guarantees, if they were citizens. The Act was not intended to affect any other part of the Indian's life or property holdings and rights. The American Indian Religious Freedom Act was passed in 1978, 54 years after the Citizenship Act specifically because of Indian citizenship failed to provide religious freedom (unless the Indians converted to white religions).

We do not believe the 1924 Indian Citizenship Act expanded the powers of the IRS. The IRS should not be inside Indian Country and taxing the incomes of tribal Indians. The U.S. government should not continue to violate their own constitution. The federal courts should not continue to ignore such violations---under the disguise that it is a political question between the Indian tribes and the politicians. The real question is, "What is the process for the U.S. Congress to extend taxation and representation powers over Indian Country?" We argue that it is specifically provided for within the Fifth Article of the Constitution- the amendment process.

The U.S. Constitution was amended twenty-four times, and five other amendments were proposed, but never ratified, by the required three-fourths of the states. The Fourteenth Amendment was specifically added to address the freed Negro slaves, the Chinese, the Gypsies, the Hindus and other foreign immigrants. To prove that it was not intended to be applied to the American Indians, on a state level, the wording "excluding Indians not taxed" was retained in the second section of the amendment. To make sure it was not applied on a national level the words "subject to the jurisdiction thereof" was inserted into the first section. Another example of purposeful amendment of Article I was the amendment providing for the suffrage of American Women , as ratified in 1920. It is significant to point out that the amendment process is applicable to

Congress assembled and its dealings with American Indians. They can continue to argue that their actions are justified as "political questions", in reality, and sooner or later, they will have to account for having weakened the constitutional value of their mandated duties and powers.

If the U.S. Congress determines there is a part of the 1787 Constitution that needs to be amended, in order that it may or may not legislate in the respective area of governance, then Article V addresses that power: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution,...". There is no excuse for the Congress failing to amendment Article I and the Fourteenth Amendment to overcome the constitutional hurtles inserted to prevent the federal government or the individual state governments from making tribal Indians their citizens.

It is the Congress and Presidency that will have to respond to the questions of taxing powers raised by the IRS. In the area of tax law, the tax courts would be prime targets of Felix Cohens' Miner's Canary analogy. The extensive amounts of federal taxes coming out of Indian country are unconstitutional; but, because the plunder is so profitable the courts refuse to police the Congress, the Congress refuses to police itself, and the Presidency uses the money to help balance the budget. If Congress assembled fails to correct this error, then they are only further perpetuating the neglect of the mandates of the constitution. America's form of constitutional democracy is precariously fragile. If the President, as Chief Executive, cannot or will not issue an Executive Order to the IRS directing their withdrawal from inside the borders of Indian Country, then it will be the job of Congress assembled to do so. Congress can issue legislation to stop the application of the tax code to Indian Country by the IRS. To legally apply the tax code to the tribal Indians then the respective parts of the Constitution will have to be amended.

The IRS is implementing its own agenda that includes taxing all treaty rights that guarantee to the American Indian people their control and enjoyment of land resources reserved by treaties for future generations. Career officials and career staff counsels are developing their own policy on Indian Country. Such agendas are contrary to the past Indian Policies of Presidents Reagan, Bush, and Clinton. These Presidential Policies called for respect of the constitutionally mandated government-to-government relationships with the tribes. The IRS program is contrary to the Administration Policies on Indian self-governance as well. However, the reason IRS career personalities are able to implement their own agendas was typified by President Harry S. Truman, in 1948, as follows: "*The difficulty with many career officials in the government is that they regard themselves as the men who really make policy and run the government. They look upon elected officials as just temporary occupants. Every president in our history has been faced with this problem: how to prevent career men from circumventing presidential policy. Too often career men seek to impose their own views instead of carrying out the established policy of the Administration. Sometimes they achieve this by influencing the key men appointed by the President to put his policies into operation...*"

We have witnessed the IRS career officials exercising this very type of influence over Presidential appointments in the Offices of the Secretary to the Department of Justice, Secretary to the Department of Treasury, the Attorney General, and other important and relevant offices. In the case of taxing Indian rights and resources the Cabinet had endorsed the IRS agenda- until the tribes were able to secure a congressional reversal in the passage of the Tax Amendments of 1988 (which became Section 7873 of the Internal Revenue Code per Indian Fishing Rights). In the mid-1980s, the Solicitors Opinions of the Departments of Justice and Treasury held that to apply the tax code to Indians was the "sounder view of the law".

Even though all recent Presidents have declared policies to honor the treaties made with the Indian tribes and promote Indian self-governance, and even though the U.S. Constitution still declares treaties the supreme law of the land, and defines tribal Indians as "excluding Indians not taxed", the IRS has continued to convince government officials and the tax court that their definition of Indian rights is valid. One check on such ambiguous use of the taxing power should have been the U.S. Supreme Court.

Oliver Ellsworth said in the Connecticut Convention, January 7, 1788: *"If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure the impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so." (David Hutchinson, THE FOUNDATION OF THE CONSTITUTION, p.272)."*

A careful study shows that the Founding Fathers understood the Federal judiciary was to declare both state and United States laws void. All these men held firmly to the idea that the Constitution required the Federal courts to declare state and national laws void, if they contravened the Constitution of the United States. These were the men who framed the Constitution, and they all expected the Federal courts to exercise judicial control over legislation." (Ibid.,p.272)

President Franklin D. Roosevelt remarked upon this subject in his radio address on March 9, 1937, as follows: *"I want---as all Americans want--- an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written---that will refuse to amend the Constitution by the arbitrary exercise of judicial power---amendment by judicial sayso."*

Now, we hold that for any of the Federal courts, entrusted by and empowered by the authority of the United States, that refuse to read the Constitution as written, and that refuses to acknowledge that the U.S. Constitution has never been amended as to the "excluding Indians not taxed" language, is doing just what President Roosevelt feared and disliked, "amendment by judicial say so."

Since passage of the "Indian Citizenship Act", the IRS has been prosecuting individual American Indians in tax courts as if the Act itself was a proper amendment to the Constitution, Article V notwithstanding. Since 1924, this citizenship question has surfaced time and time again in the Tax courts, with rulings always holding that since Indians are citizens, they must pay the federal income taxes. It is a duty of the court to read the Constitution as it is presently written, wherein we find the words "excluding Indians not taxed".

Because of the logic behind the canons of construction of constitutions, and due to the clarity of his commentary, we once again quote Justice Cooley, on the Constitution: "*A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have changed as perhaps to make a different rule in the case seem desirable. A principle share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty. (Cooley's Constitutional Limitations, 68-69 (6th ed. 1890))*

It is now that we should begin to understand what was reflected upon by Harvard Law Professor Milner Ball in 1987, as follows: "Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercise unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted by a fundamental contradiction between our political rhetoric and our political realities."

The establishment of a constitutional relationship between the Indians, the United States, and the restraints upon the individual States, was not intended to be political rhetoric. The fact is that the public passion for Indian natural resources and lands have motivated an ever-expanding popular denial of the truth behind the conditions of Indian country. Old time politics and judicial fictions still protect invested interests of non-Indians in Indian country. The IRS is also a vested interest in Indian country. The individual IRS agent gets promoted for accessing taxes against Indians. Now, the courts allow most all non-Indian governments to apply their taxing authority inside Indian Country as well. Consequently, Indian country is too impoverished to defend itself in the court, the Congress, and the White House.

Let us take into consideration the acknowledgement of the 1988 Tax Code Amendments on the tax-exempt status of Indian Fishing Rights protected by treaty. This language has

become Section 7873 of the Internal Revenue Code. What makes the harvest of Indian fishing resources that are secured by treaty language any different from the harvest of other natural resources protected by treaty language? Nothing! Whether the natural resource is timber, agricultural crops, coal, oil, gas, uranium, water, or soil it does not matter. These are all natural resources set aside for Indians by treaty agreement with the United States. All treaty-protected natural resources were intended to be for the benefit of the Indians and their tribes. If fish are exempt under the Internal Revenue Code then these other natural resources and the incomes derived from harvesting, processing, and marketing them should be exempt as well.

Tribal Indians are "excluding Indians not taxed." They are tribal Indians because they are enrolled as tribal members. They are dependent upon tribal governments to deliver essential governmental services to them. They are dependent upon the tribal governments to protect their treaty rights and natural resources. They live on the reservations as tribal Indians in unique traditional cultures and communities that set them apart from the rest of the United States. They still have treaty relationships with the United States. All the attempts to exterminate them, terminate them, assimilate them, and enculturate them as "citizens" of the nation or state have failed. They are still tribal Indians and have their own separate sovereignty and inherent rights to self-determination and self-governance. These rights can only be preserved exercising their exclusive rights to manage their own commerce, their own affairs, and to create economies based on their treaty protected natural resources- without interference by state and federal governments or their attempts to tax the same. Federal and state taxation of the incomes of the individual tribal Indian and/or the tribal enterprises causes unstable tribal economies.

If the constitutionally intended relationship between the Indians and the United States were adhered to then the futures of the Indian Tribes would have a better chance of survival. However, it has become politically, legally, economically, and publicly convenient to ignore the constitution. The constitution has a price, based on the Indian experience. Does the public want to continue to sell? If so, then where does this leave the future of their own children?

SUPERVISOR MIKE MCGOWAN
CHAIRMAN, INDIAN GAMING WORKING GROUP
CALIFORNIA STATE ASSOCIATION OF COUNTIES

TESTIMONY
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARING ON LANDS ELIGIBLE FOR GAMING
PURSUANT TO
THE INDIAN GAMING REGULATORY ACT
JULY 27, 2005

On behalf of the California State Association of Counties (CSAC) I would like to thank Chairman McCain, Vice-Chairman Dorgan, and the other distinguished members of the Committee on Indian Affairs, for giving us the opportunity to submit testimony as part of this oversight hearing to consider issues related to taking land into trust for gaming purposes under the Indian Gaming Regulatory Act (IGRA). I am Mike McGowan, a member of the Yolo County Board of Supervisors, and Chairman of the CSAC Indian Gaming Working Group.

CSAC is the single, unified voice speaking on behalf of all 58 California counties. The issue raised in this hearing has direct and unique bearing on counties, more so than any other jurisdiction of local government.

There are two key reasons this issue is of heightened importance for California counties. First, counties are legally responsible to provide a broad scope of vital services for all members of their communities. Second, throughout the State of California and the nation, tribal gaming has rapidly expanded, creating a myriad of economic, social, environmental, health, safety, and other impacts. The facts clearly show that the mitigation and costs of such impacts increasingly fall upon county government and that California is at the epicenter of dramatic increases in Indian gaming as well as a target for future gaming proposals.

For the past three years, CSAC has devoted considerable staff time and financial resources to the impacts on county services resulting from Indian gaming. We believe that California counties and CSAC have developed an expertise in this area that may be of benefit to this Committee as it considers amendments to IGRA and looks at ways to address problems created by the phenomenon now known as "reservation-shopping," the practice of some tribes and their business partners attempting to acquire land not historically tied to these tribes but which has considerable economic potential as an Indian casino.

INTRODUCTION

At the outset, the California State Association of Counties (CSAC) reaffirms its absolute respect for the authority granted to federally recognized tribes. CSAC also reaffirms its support for the right of Indian tribes to self-governance and its recognition of the need for tribes to preserve their tribal heritage and to pursue economic self-reliance. CSAC further recognizes the injustices tribes have faced and the unique history of many California tribes in facing termination of their sovereign status and loss of tribal lands.

However, it is now apparent that the delicate balance between federal, state and tribal rights that was struck to further tribal economic development in IGRA's enactment has now been upset. Tribal gaming has grown from a $100 million venture when IGRA was enacted to over $19 billion today and tribes and their development partners are now looking far from traditional tribal lands to open casinos in the most lucrative markets. In addition, existing laws fail to address the off-reservation impacts of tribal land development, particularly in those instances when local land use and health and safety regulations are not being fully observed by tribes in their commercial endeavors. This is of growing concern as gaming enterprises are attracting millions of non-Indian visitors to these newly sovereign lands.

A. The Role of County Government

Every Californian, including all tribal members, depends upon county government for a broad range of critical services, from public safety and transportation, to waste management and disaster relief. Counties are the largest political subdivision of the state having corporate authority and are vested by the Legislature with the powers necessary to provide for the health and welfare of the people within their borders. Counties are responsible for a countywide justice system, social welfare, health and other services totaling nearly 700 programs, including the following:

* sheriff
* elections & voter services
* jails
* public health
* roads & bridges
* flood control
* fire protection
* welfare
* indigent health
* family support
* probation
* child & adult protective services
* substance abuse rehabilitation

Most of these services are provided to residents both outside and inside city limits. Unlike the exercise of land use control, such programs as public health, welfare, and jail services are provided (and often mandated) regardless of whether a recipient resides within a city or in the unincorporated area of the county. These vital public services are delivered to California residents through their 58 counties. It is no exaggeration to say that county government is essential to the quality of life for over 35 million Californians. No other form of local government so directly impacts the daily lives of all citizens. In addition, because county government has very little authority to independently raise taxes and increase revenues, the ability to adequately mitigate reservation commercial endeavors is critical, or all county services can be put at risk. California counties' ability to provide these mandated critical services has been significantly impacted by the expansion of Indian gaming.

B. Impacts on County Government

There is not yet a definitive study on the impacts of gaming on local communities. However, in those counties that are faced with large gaming projects, it is clear that the impacts on traffic, water/wastewater, the criminal justice system and social services are significant. For non-Indian casinos it is estimated that for every dollar a community collects from gambling-related taxes, it must spend three dollars to cover new expenses, including police, infrastructure, social welfare, and counseling services.[1] As local communities cannot tax Indian operations, or the related hotel and other services that would ordinarily be a source of local government income, the negative impact of such facilities can even be greater. This is one reason that CSAC sought amendments to California Tribal-State Compacts to ensure that the off-reservation environmental and social impacts of gaming were fully mitigated and that gaming tribes paid their fair share for county services.

In 2003 CSAC took a "snapshot" of local impacts by examining information provided by eight of the then twenty-six counties (the only counties that had conducted an analysis of local government fiscal impacts) where Indian gaming facilities operated.[2] The total fiscal impact to those eight counties was approximately $200 million, including roughly $182 million in one-time costs and $17 million in annual costs. If these figures were extrapolated to the rest of the state, the local government fiscal costs could well exceed $600 million in one-time and on-going costs for road improvements, health services, law enforcement, emergency services, infrastructure modifications, and social services.

Even when a gaming facility is within a City's jurisdictional limits, the impacts on County government and services may be profound. The California experience particularly has made clear that large casino facilities have impacts beyond the immediate jurisdiction in which they operate. Attracting many thousands of car trips per day, larger facilities cause traffic impacts throughout a local or even regional transportation system. Similarly, traffic accidents, crime and other problems sometimes associated with gaming are not isolated to a casino site but may increase in surrounding communities.

As often the key political entity and service provider in the area, with a larger geographic perspective and land use responsibility, county involvement is critical to insure that the needs of the community are met and that any legitimate tribal gaming proposal is ultimately successful and accepted. Local approval is necessary to help insure a collaborative approach with tribes in gaming proposals and to support the long-range success of the policies underlying the IGRA.

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1 *Cabazon*, The Indian Gaming Regulatory Act, and the Socioeconomic Consequences of American Indian Governmental Gaming - *A Ten Year Review* by Jonathon Taylor and Joseph Kalt of the Harvard Project on American Indian Economic Development (2005) at p. 9 (citing Sen. Frank Padavan, Rolling the Dice: Why Casino Gambling is a Bad Bet for New York State at ii (1994).

2 CSAC Fact Sheet on Indian Gaming in California (11/5/03) (attached as Attachment C.)

C. Reservation Shopping

Compounding this problem of community gaming impacts is the "reservation shopping" phenomenon. CSAC opposes "reservation shopping" as counter to the purposes of IGRA. "Reservation shopping" is an affront to those tribes who have worked responsibly with counties and local governments on a government-to-government basis in compliance with the spirit and intent of the IGRA as a means of achieving economic self-reliance and preserving their tribal heritage.

CSAC sincerely appreciates the efforts of Chairman McCain and the other Members of the Committee for investigating problems with the current legal framework for determining the eligibility of Indian lands for gaming. This written testimony is in support of your efforts to craft amendments to IGRA that preserve its original goals of supporting tribal economic development while minimizing the impacts of "reservation shopping" on local communities. CSAC offers its assistance to Chairman McCain and the Indian Affairs Committee in any manner that may be helpful as you tackle this complex issue.

BACKGROUND

A. The Advent of Indian Gaming

Even before the enactment of IGRA in 1988, California counties were experiencing impacts in rural areas from Indian gaming establishments. These early establishments were places where Indian bingo was the primary commercial enterprise in support of tribal economic self-reliance. The impacts on local communities were not significant in large part because the facilities where Indian bingo was played were modest in size and did not attract large numbers of patrons. Following enactment of IGRA, the impacts to counties from Indian gaming establishments increased with the advent of larger gaming facilities. Even so, the impacts to local communities from these larger gaming facilities were generally manageable except in certain instances.

Over the last five years, the rapid expansion of Indian gaming in California has had profound impacts beyond the boundaries of tribal lands. Since 1999 and the signing of Compacts with approximately 69 tribes and the passage of Propositions 5 and 1A (legalizing Indian gaming in California), the vast majority of California's counties either have a casino, a tribe petitioning for federal recognition, or are the target or focus of a proposed casino plan. As the Committee is aware, many pending casino proposals relate to projects on land far from a tribe's ancestral territory.

A 2004 CSAC survey reveals that 53 active gaming operations exist in 26 of California's 58 counties. Another 33 gaming operations are being proposed. As a result, 35 counties out of 58 in California have active or proposed gaming. The 35 counties impacted by Indian gaming are home to 82 tribes, only 20 of which have local agreements for mitigation of the off-reservation impacts on services that counties are required to provide. As gaming has grown nationally from a $5.5 billion enterprise in 1995 to $19.4 billion in 2004, the highest percentage of growth has occurred in the California region, which now alone accounts for approximately $5.8 billion in Indian gaming revenues.

B. Development of CSAC 2003 Policy

In 1999, California Governor Gray Davis and approximately 65 tribes entered into Tribal-State Compacts, which permitted each of these tribes to engage in Class III gaming on their trust lands. The economic, social, environmental, health, safety, traffic, criminal justice, and other impacts from these casino-style gaming facilities on local communities were significant, especially because these gaming facilities were located in rural areas. The 1999 Compacts did not give counties an effective role in mitigating off-reservation impacts resulting from Indian casinos. Consequently, mitigation of these impacts could not be achieved without a tribe's willingness to work with the local governments on such mitigation. Some tribes and counties were able to reach mutually beneficial agreements that helped to mitigate these impacts. Many other counties were less successful in obtaining the cooperation of tribes operating casino-style gaming facilities in their unincorporated areas.

The off-reservation impacts of current and proposed facilities led CSAC, for the first time, to adopt a policy on Indian gaming. In the fall of 2002, at its annual meeting, CSAC held a workshop to explore how to begin to address these significant impacts. As a result of this workshop, CSAC established an Indian Gaming Working Group to gather relevant information, be a resource to counties, and make policy recommendations to the CSAC Board of Directors on Indian gaming issues.

CSAC's approach to addressing the off-reservation impacts of Indian gaming is simple: to work on a government-to-government basis with gaming tribes in a respectful, positive and constructive manner to mitigate off-reservation impacts from casinos, while preserving tribal governments' right to self-governance and to pursue economic self-reliance.

With this approach as a guide, CSAC developed a policy comprised of seven principles regarding State-Tribe Compact negotiations for Indian gaming, which was adopted by the CSAC Board of Directors on February 6, 2003. The purpose of this Policy is to promote tribal self-reliance while at the same time promoting fairness and equity, and protecting the health, safety, environment, and general welfare of all residents of the State of California and the United States. A copy of this Policy is attached to this written testimony as Attachment A.

C. Implementation of CSAC's 2003 Policy

Following adoption by CSAC of its 2003 Policy, the Indian Gaming Working Group members met on three occasions with a three-member team appointed by Governor Davis to renegotiate existing Compacts and to negotiate with tribes who were seeking a compact for the first time. As a result of these meetings, three new State-Tribe Compacts were approved for new gaming tribes. These new Compacts differed from the 1999 Compacts in that the 2003 Compacts gave a meaningful voice to the affected counties and other local governments to assist them in seeking tribal cooperation to address the off-reservation environmental impacts of the Indian casinos that would be built pursuant to those Compacts. From this experience it has become clear that a critical component of a trust land acquisition policy is ensuring a mechanism for county government and tribes to address the potential off-reservation impacts of any proposed project.

Illustrations of Successful Local Government/Tribal Cooperation

For an Indian casino project to be truly successful and accepted local government participation in the decision making process is essential. Many tribes have expressed their concern for such participation equating it with relinquishment of sovereignty and a land acquisition veto. This is simply untrue. There are many examples of California counties working cooperatively with tribes on a government-to-government basis on all issues of common concern including gaming-related issues. These discussions and resulting agreements have preserved tribal sovereignty and assisted tribes in moving forward to achieve their economic goals.

In Santa Barbara County an agreement was reached with the Chumash Tribe over a trust land acquisition adjacent to its gaming facility. In addition, after the Chumash completed a significant expansion of its casino, it realized the need to address ingress and egress, and flood control issues. Consequently, Santa Barbara County and the Tribe negotiated an enforceable agreement addressing these issues in the context of a road widening and maintenance agreement. Presently, there is no authority that requires the County of Santa Barbara or its local tribe to reach agreements. However, both continue to address the impacts caused by the tribe's acquisition of trust land and development on a case-by-case basis, reaching intergovernmental agreements where possible.

San Diego County has a history of tribes working with the San Diego County Sheriff to ensure adequate law enforcement services in areas where casinos are operating. In addition, San Diego County has entered into agreements with four tribes to address the road impacts created by casino projects. Further, a comprehensive agreement was reached with the Santa Ysabel Tribe pursuant to the 2003 Compact with the State of California.

In Northern California, Humboldt County and tribal governments have agreed similarly on law enforcement-related issues. Humboldt County also has reached agreements with tribes on a court facility/sub station, a library, road improvements, and on a cooperative approach to seeking federal assistance to increase water levels in area rivers.

In central California, Madera, Placer, and Yolo Counties have reached more comprehensive agreements with the tribes operating casinos in their communities. These comprehensive agreements provide differing approaches to the mitigation of off-reservation impacts of Indian casinos, but each is effective in addressing unique community concerns.

The agreements in each of the above counties were achieved only through positive and constructive discussions between tribal and county leaders. It was through these discussions that each government gained a better appreciation of the needs and concerns of the other government. Not only did these discussions result in enforceable agreements for addressing specific impacts, but enhanced respect and a renewed partnership also emerged, to the betterment of both governments, and tribal and local community members.

Illustrations of Continued Problems Addressing Casino Impacts

On the other hand, there are examples of Indian casinos and supporting facilities where a tribal government did not comply with the requirements of IGRA or the 1999 Compacts. In Mendocino County, a tribe built and operated a Class III gaming casino for years without the requisite compact between it and the California Governor. In Sonoma County, a tribe decimated a beautiful hilltop to build and operate a tent casino in a high-risk wild fire area that the local Fire Marshal determined lacked the necessary ingress and egress for fire safety.

In other California counties, tribes circumvented or ignored requirements of IGRA or the 1999 Compacts prior to construction of buildings directly related to Indian gaming. In San Diego County, neighboring water wells have run dry, apparently due to a tribe's construction and use of its water well to irrigate a newly constructed golf course adjoining its casino, and several other tribal casino projects have never provided mitigation for the significant traffic impacts caused by those projects.

In 2004, the focus of CSAC on seeking mechanisms for working with gaming tribes to address off-reservation impacts continued. Governor Schwarzenegger and several tribes negotiated amendments to the 1999 Compacts which lifted limits on the number of slot machines, required tribes to make payments to the State, and incorporated most of the provisions of CSAC's 2003 Policy. Of utmost importance to counties was the requirement in each of these newly amended Compacts that each tribe be required to negotiate with the appropriate county government to develop local agreements for the mitigation of the impacts of casino projects, and that these agreements are judicially enforceable. Where a tribe and county can not reach a mutually beneficial binding agreement, "baseball style" arbitration will be employed to determine the most appropriate method for mitigating the impacts.

D. The Advent of "Reservation Shopping" in California

The problems with the 1999 Compacts remain largely unresolved, as most existing Compacts were not renegotiated. These Compacts allow tribes to develop two casinos and do not restrict casino development to areas within a tribe's current trust land or historical ancestral territory. For example, in the Fall of 2002 a Lake County band of Indians was encouraged by East Coast developers to pursue taking into a trust land in Yolo County for use as a site of an Indian casino. The chosen site was across the Sacramento River from downtown Sacramento and was conveniently located near a freeway exit. The actual promoters of this effort were not Native Americans and had no intention of involving tribal members in the operation and management of the casino. In fact, one promoter purportedly bragged that no Indian would ever be seen on the premises.

In rural Amador County, starting in 2002 and continuing to the present, a tribe being urged on by another out-of-State promoter is seeking to have land near the small town of Plymouth taken into trust for a casino. The tribe has no historical ties to the Plymouth community. The effort by this tribe and its non-Native American promoter has created a divisive atmosphere in the local community. That new casino is not the only one being proposed in the County; a second, very controversial new casino is being promoted by a New York developer for a three-member tribe

in a farming and ranching valley not served with any water or sewer services, and with access only by narrow County roads. The development of these casinos would have severe environmental and social consequences for this rural county, which already has one major Indian casino.

In the past two years in Contra Costa County, there have been varying efforts by three tribes to engage in Indian gaming in this highly urbanized Bay Area county. The possibility of significant economic rewards from operating urban casinos has eclipsed any meaningful exploration of whether these tribes have any historical connection to the area in which they seek to establish gaming facilities.

The newest California twist to "reservation shopping" also shows how the current law now serves to pit tribe against tribe. Counties are now experiencing tribes with established casinos trying to "leap-frog" over other tribal gaming operations to get closer to a population center. For example, the Hopland Band of Pomo Indians, a Mendocino County based gaming tribe located north of Sonoma County, is trying to move south along the Highway 101 corridor towards San Francisco, passing a Sonoma County tribe's operations that apparently is reducing its profits. The location the Mendocino tribe chose for its new casino is within the historic rancheria boundary of another Sonoma County tribe – the Cloverdale Band of Pomo Indians – that opposes the gaming proposal. The Mendocino tribe has applied to the BIA and NIGC to transfer the land (held in trust by a member of to the Cloverdale Tribe) and to have it designated as "restored" so that it is eligible for gaming. The Mendocino's tribe's trust transfer application, which is opposed by other Sonoma County tribes, is pending before the BIA and NIGC.

E. Definition of Indian Lands

A significant, uninvestigated California issue has also arisen with respect to the definition of Indian lands for gaming. Section 2703(4) of IGRA defines "Indian lands" as lands within a reservation or lands held in trust by the United States for the benefit of a tribe (or individual). Several rancherias are owned in fee simple by the United States, some of which conduct gaming activities. In response to a congressional inquiry, on June 4, 2002, the California Attorney General provided a legal opinion that gaming could not legally be conducted on these non-trust properties. A copy of the Attorney General's opinion is provided as Attachment E. While the letter was subsequently withdrawn by the Attorney General its conclusions have never been repudiated. There remains a serious question whether these lands, some of which have operating casinos, are in fact legally eligible for gaming under IGRA without applying IGRA's "two-part test." In one instance, the Secretary has appeared to try to address this problem by assuming the rancherias are reservations. This view was rejected by the Attorney General's analysis and is currently the subject of a legal challenge in the United States District Court for the District of Columbia (*Amador County, California v. Norton*, Civ. Action No. 1:05CV00658), based, in part, on the California Reservation Act of 1864 which specifically limited the number of reservations that could be established in California. The NIGC's and BIA's essentially unsupported position with respect to the rancherias has led to significant expansion of gaming in California.

FUTURE RISKS

In California the "reservation shopping" problem has been driven, in large part, by the "restoration" exception contained in Section 20(b)(1)(B)(iii) of IGRA. This exception allows tribes that are restored to federal recognition to avoid the two-part test under IGRA, which helps insure that a gaming establishment, on lands taken into trust after 1988, would not be detrimental to the local community. The result of this policy has been to encourage developers to shop for or attempt to "create" tribes that may be eligible for recognition to eventually obtain "restored" land or for tribes that were terminated (both landless and not) to seek to have land taken into trust, often far from their traditional geographic base.

In recent testimony before this Committee, George Skibine, Acting Deputy Assistant Secretary for Indian Affairs in the Department of the Interior, testified that by far the most frequently used exception under IGRA that serves to avoid the two-part test is the restoration exception. Since 1988, the Secretary approved 26 gaming trust acquisitions that were determined to meet one of the five Section 20 gaming exceptions for land acquired after IGRA's enactment. Of these exceptions 12 were under the Section 20(b)(1)(B)(iii) exception for "restored land to a restored tribe". Of these twelve one quarter were in California. He further testified that of the eleven pending gaming applications before the BIA claiming an exception under section 20(b)(1)(B), nine were in California – all of which were claiming that they were not subject to the two-part test pursuant to the restored land exception.

The experience in California, driven in part by the restoration of illegally terminated rancherias, is that the restored land exception to prohibiting gaming on lands acquired after 1988 is being misused. This is illustrated in the Hopland tribe's attempt to have land found eligible for gaming under the restored land provision despite the fact the tribe already has land in trust upon which it operates a casino and the land sought is within another tribe's historic jurisdiction. Similarly, Alameda and Contra Costa counties have been faced with numerous proposals to have land "restored" from remote tribes for gaming purposes.

These efforts are examples of tribes and their investors attempting to evade the two-part test under IGRA that provides for consultation between local communities (and local tribes) and the Secretary to determine whether gaming on newly acquired trust lands is detrimental to the surrounding community, and the concurrence by the governor in that determination. CSAC therefore supports continuation of the two-part test for the acquisition of new lands and increased local government participation in the decision of whether land should be taken into trust for gaming purposes.

PRINCIPLES FOR IGRA REFORM

To address these emerging gaming issues, the CSAC Board of Directors adopted a Revised Policy Regarding Development on Tribal Lands on November 18, 2004 (attached as Attachment B). It is CSAC's position that these policies should inform any revisions to IGRA. As a preliminary principle, the Revised Policy reaffirms that:

* CSAC supports cooperative and respectful government-to-government relations that recognize the interdependent role of tribes, counties and other local governments to be responsive to the needs and concerns of all members of their respective communities.

With respect to the issues specifically now before the Committee the following policies apply:

* CSAC supports federal legislation to provide that lands are not to be placed in trust and removed from the land use jurisdiction of local governments without the consent of the State and affected County.

* CSAC opposes the practice commonly referred to as "reservation shopping" where a tribe seeks to place lands in trust outside its aboriginal territory over the objection of the affected County.

* Nothing in federal law should interfere with provision of public health, safety, welfare or environmental services by local governments, particularly counties. (June 2004 NACo Policy sponsored in part by CSAC).

Several of these policies are embodied, at least in part, through IGRA's two-part test when meaningful input is afforded local governments. When the test is evaded, either through the restored land exception, or legislative fiat (in cases of congressionally mandated land acquisitions), the potential for "reservation-shopping" abuse is heightened as is the potential for an Indian gaming "backlash" either from other tribes or local communities. To avoid the negative impacts and abuses of reservation shopping county government must play a significant role in the decision making process to insure that a proposed facility is not significantly detrimental to a community and that impacts of any new gaming establishment are appropriately mitigated.

CSAC also believes that part of the determination process must include a tribe's geographic and historical ties to a particular area of the State. This approach recognizes that when a tribe has geographic and historical ties to a community, a preferential effect to those ties is warranted. Without those geographic and historical ties, a tribe is comparable to any other developer seeking an economic opportunity on lands already subject to land use controls.

CONCLUSION

CSAC presents this written testimony to assist the Chairman and Committee Members in their efforts to amend IGRA to address the increasing practice of "reservation shopping." In California, there is an urgent need for counties to have a greater voice in matters that create impacts that the County will ultimately be called upon by its constituents to address. This voice is critical if California counties are to protect the health and safety of their citizens. Otherwise, counties find themselves in a position where their ability to effectively address reservation shopping and the off-reservation impacts from Indian gaming is very limited.

In California, through the most recent State-Tribe Compacts, counties and other local governments have been provided an appropriate opportunity to work with gaming tribes to address these off-reservation impacts. The result has been improved government-to-government relationships between tribes and county governments. Contrary to the fears expressed by some tribal leaders, local governments have not acted to usurp tribal sovereignty or automatically oppose all gaming proposals. In fact, local government involvement in the gaming and trust acquisition process has led to improved relationships as each government gains a better understanding of the responsibilities and needs of the other. A joint approach to gaming projects has also led to more successful enterprises as both tribes and local governments work jointly to create a safe beneficial community environment for a gaming enterprise. Enactment of amendments that strengthen IGRA by limiting its exceptions and allowing a greater role for local government would further the original goals of IGRA while helping to minimize abuses that have created a backlash against Indian gaming and the opportunities it affords.

-end-

ATTACHMENT A:
CSAC Policy Document Regarding Compact Negotiations for Indian Gaming

Adopted by the CSAC Board of Directors
February 6, 2003

In the spirit of developing and continuing government-to-government relationships between federal, tribal, state, and local governments, CSAC specifically requests that the State request negotiations with tribal governments pursuant to section 10.8.3, subsection (b) of the Tribal-State Compact, and that it pursue all other available options for improving existing and future Compact language.

CSAC recognizes that Indian Gaming in California is governed by a unique structure that combines federal, state, and tribal law. While the impacts of Indian gaming fall primarily on local communities and governments, Indian policy is largely directed and controlled at the federal level by Congress. The Indian Gaming Regulatory Act of 1988 is the federal statute that governs Indian gaming. The Act requires compacts between states and tribes to govern the conduct and scope of casino-style gambling by tribes. Those compacts may allocate jurisdiction between tribes and the state. The Governor of the State of California entered into the first Compacts with California tribes desiring or already conducting casino-style gambling in September 1999. Since that time tribal gaming has rapidly expanded and created a myriad of significant economic, social, environmental, health, safety, and other impacts.

CSAC believes the current Compact fails to adequately address these impacts and/or to provide meaningful and enforceable mechanisms to prevent or mitigate impacts. The overriding purpose of the principles presented below is to harmonize existing policies that promote tribal self-reliance with policies that promote fairness and equity and that protect the health, safety, environment, and general welfare of all residents of the State of California and the United States. Towards that end, CSAC urges the State to consider the following principles when it renegotiates the Tribal-State Compact:

1. A Tribal Government constructing or expanding a casino or other related businesses that impact off-reservation[3] land will seek review and approval of the local jurisdiction to construct off-reservation improvements consistent with state law and local ordinances including the California Environmental Quality Act with the tribal government acting as the lead agency and with judicial review in the California courts.

2. A Tribal Government operating a casino or other related businesses will mitigate all off-reservation impacts caused by that business. In order to ensure consistent

[3] As used here the term "reservation" means Indian Country generally as defined under federal law, and includes all tribal land held in trust by the federal government. 18 U.S.C. § 1151.

regulation, public participation, and maximum environmental protection, Tribes will promulgate and publish environmental protection laws that are at least as stringent as those of the surrounding local community and comply with the California Environmental Quality Act with the tribal government acting as the lead agency and with judicial review in the California courts.

3. A Tribal Government operating a casino or other related businesses will be subject to the authority of a local jurisdiction over health and safety issues including, but not limited to, water service, sewer service, fire inspection and protection, rescue/ambulance service, food inspection, and law enforcement, and reach written agreement on such points.

4. A Tribal Government operating a casino or other related businesses will pay to the local jurisdiction the Tribe's fair share of appropriate costs for local government services. These services include, but are not limited to, water, sewer, fire inspection and protection, rescue/ambulance, food inspection, health and social services, law enforcement, roads, transit, flood control, and other public infrastructure. Means of reimbursement for these services include, but are not limited to, payments equivalent to property tax, sales tax, transient occupancy tax, benefit assessments, appropriate fees for services, development fees, and other similar types of costs typically paid by non-Indian businesses.

5. The Indian Gaming Special Distribution Fund, created by section 5 of the Tribal-State Compact will not be the exclusive source of mitigation, but will ensure that counties are guaranteed funds to mitigate off-reservation impacts caused by tribal gaming.

6. To fully implement the principles announced in this document and other existing principles in the Tribal-State compact, Tribes will meet and reach a judicially enforceable agreement with local jurisdictions on these issues before a new compact or an extended compact becomes effective.

7. The Governor should establish and follow appropriate criteria to guide the discretion of the Governor and the Legislature when considering whether to consent to tribal gaming on lands acquired in trust after October 17, 1988 and governed by the Indian Gaming Regulatory Act. 25 U.S.C § 2719. The Governor should also establish and follow appropriate criteria/guidelines to guide his participation in future compact negotiations.

ATTACHMENT B:
CSAC Revised Policy Document Regarding Development on Tribal Lands

Adopted by CSAC Board of Directors
November 18, 2004

Background

On February 6, 2003, CSAC adopted a policy, which urged the State of California to renegotiate the 1999 Tribal-State Compacts, which govern casino-style gambling for approximately 65 tribes. CSAC expressed concern that the rapid expansion of Indian gaming since 1999 created a number of impacts beyond the boundaries of tribal lands, and that the 1999 compacts failed to adequately address these impacts. The adopted CSAC policy specifically recommended that the compacts be amended to require environmental review and mitigation of the impacts of casino projects, clear guidelines for county jurisdiction over health and safety issues, payment by tribes of their fair share of the cost of local government services, and the reaching of enforceable agreements between tribes and counties on these matters.

In late February, 2003, Governor Davis invoked the environmental issues re-opener clause of the 1999 compacts and appointed a three member team, led by former California Supreme Court Justice Cruz Reynoso, to renegotiate existing compacts and to negotiate with tribes who were seeking a compact for the first time. CSAC representatives had several meetings with the Governor's negotiating team and were pleased to support the ratification by the Legislature in 2003 of two new compacts that contained most of the provisions recommended by CSAC. During the last days of his administration, however, Governor Davis terminated the renegotiation process for amendments to the 1999 compacts.

Soon after taking office, Governor Schwarzenegger appointed former Court of Appeal Justice Daniel Kolkey to be his negotiator with tribes and to seek amendments to the 1999 compacts that would address issues of concern to the State, tribes, and local governments. Even though tribes with existing compacts were under no obligation to renegotiate, several tribes reached agreement with the Governor on amendments to the 1999 compacts. These agreements lift limits on the number of slot machines, require tribes to make substantial payments to the State, and incorporate most of the provisions sought by CSAC. Significantly, these new compacts require each tribe to negotiate with the appropriate county government on the impacts of casino projects, and impose binding "baseball style" arbitration on the tribe and county if they cannot agree on the terms of a mutually beneficial binding agreement. Again, CSAC was pleased to support ratification of these compacts by the Legislature.

The problems with the 1999 compacts remain largely unresolved, however, since most existing compacts have not been renegotiated. These compacts allow tribes to develop two

casinos, expand existing casinos within certain limits, and do not restrict casino development to areas within a tribe's current trust land or legally recognized aboriginal territory. In addition, issues are beginning to emerge with non-gaming tribal development projects. In some counties, land developers are seeking partnerships with tribes in order to avoid local land use controls and to build projects, which would not otherwise be allowed under the local land use regulations. Some tribes are seeking to acquire land outside their current trust land or their legally recognized aboriginal territory and to have that land placed into federal trust and beyond the reach of a county's land use jurisdiction.

CSAC believes that existing law fails to address the off-reservation impacts of tribal land development, particularly in those instances when local land use and health and safety regulations are not being fully observed by tribes in their commercial endeavors. The purpose of the following Policy provisions is to supplement CSAC's February 2003 adopted policy through an emphasis for counties and tribal governments to each carry out their governmental responsibilities in a manner that respects the governmental responsibilities of the other.

Policy

1. CSAC supports cooperative and respectful government-to-government relations that recognize the interdependent role of tribes, counties and other local governments to be responsive to the needs and concerns of all members of their respective communities.

2. CSAC recognizes and respects the tribal right of self-governance to provide for the welfare of its tribal members and to preserve traditional tribal culture and heritage. In similar fashion, CSAC recognizes and respects the counties' legal responsibility to provide for the health, safety, environment, infrastructure, and general welfare of all members of their communities.

3. CSAC also supports Governor Schwarzenegger's efforts to continue to negotiate amendments to the 1999 Tribal-State Compacts to add provisions that address issues of concern to the State, tribes, and local governments. CSAC reaffirms its support for the local government protections in those Compact amendments that have been agreed to by the State and tribes in 2004.

4. CSAC reiterates its support of the need for enforceable agreements between tribes and local governments concerning the mitigation of off-reservation impacts of development on tribal land[4]. CSAC opposes any federal or state limitation on the ability of tribes, counties and other local governments to reach mutually acceptable and enforceable agreements.

5. CSAC supports legislation and regulations that preserve—and not impair—the abilities of counties to effectively meet their governmental responsibilities, including the provision

[4] As used here the term "tribal land" means trust land, reservation land, rancheria land, and Indian Country as defined under federal law.

of public safety, health, environmental, infrastructure, and general welfare services throughout their communities.

6. CSAC supports federal legislation to provide that lands are not to be placed into trust and removed from the land use jurisdiction of local governments without the consent of the State and the affected county.

7. CSAC opposes the practice commonly referred to as "reservation shopping" where a tribe seeks to place land into trust outside its aboriginal territory over the objection of the affected county.

8. CSAC does not oppose the use by a tribe of non-tribal land for development provided the tribe fully complies with state and local government laws and regulations applicable to all other development, including full compliance with environmental laws, health and safety laws, and mitigation of all impacts of that development on the affected county.

ATTACHMENT C:
CSAC Fact Sheet on Indian Gaming in California (11/5/03)

Indian Gaming In California...
A Growing Number

172	Tribes in California with current Compacts, Request for Compacts, or Petitioning for Federal Recognition, or unknown status
108	Tribes in California that have Federal Recognition
62	Tribal-State Compacts in California
52	Compacted Tribes that have active gaming facilities
10	Compacted Tribes that are non-gaming
44	Counties with Indian Tribes in gaming, non-gaming, petitioning for federal recognition, or proposed gaming
25	Counties with active gaming in their communities
33	Counties with active and proposed gaming
53	Total number of fully operational casinos in California
23	Total number of proposed casinos

Jena Band of Choctaw Indians

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TESTIMONY OF

THE HONORABLE CHRISTINE NORRIS, CHIEF
THE JENA BAND OF CHOCTAW INDIANS

BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
JULY 27, 2005

OVERSIGHT HEARING ON
IGRA SECTION 20 EXCEPTIONS AND OFF-RESERVATION GAMING

OPENING STATEMENT

Mr. Chairman and members of the Committee, thank you for providing me with the opportunity to testify this morning on behalf of the Jena Band of Choctaw Indians. Our story is that of a poor tribe playing by the rules and trying to do the right thing while politicians and various established gaming interests have distorted our motives and sought to influence public opinion through the use of shell interest groups and now-discredited lobbyists. Our story is one of established gaming tribes and non-Indian gaming interests spending millions of dollars to protect their monopolies, doing everything in their power to prevent us from opening a Jena Band facility in order to protect their profits. Our story is one that highlights all that is right and everything that is wrong with Indian gaming, the fee-to-trust process, and the Section 20 exceptions.

I am here today to tell you about our experience as a newly recognized landless tribe trying to acquire a land base for our people. The Jena Band was acknowledged through Interior's Federal Acknowledgement Process ten years ago. For eight of those ten years we were entirely landless. Still today, none of our lands have been proclaimed by the Department of the Interior to be our initial reservation, so that *ten years after recognition we still do not have land on which we can develop a gaming facility.* As a result, we have no access to the economic development engine enjoyed by the other three federally recognized tribes in our own state, and no access to the economic development we so desperately need to provide employment opportunities and crucial health, educational and governmental and social services for our members.

Our efforts to obtain land on which to develop a gaming facility have been characterized by some, including elected public officials from our own state, as "forum shopping" or "reservation shopping" -- terms that radiate from the Abramoff scandal. Unable to change the true facts and history of our case, our opponents have used these terms to discredit our legitimate efforts to establish a gaming facility. Mr. Chairman, members of the committee, we are one of the tribes most directly victimized by Mr. Jack Abramoff. Earlier this year, the Washington Post reported:

> Jack Abramoff, one of Washington's most prominent Republican lobbyists, tapped into the gambling riches of a rival tribe to orchestrate a far-reaching campaign against the Jena Band of Choctaws -- calling on senior U.S. senators and congressmen, the deputy secretary of the interior and evangelical leaders James Dobson and Ralph Reed.

Susan Schmidt, *Casino Bid Prompted High-Stakes Lobbying*, Washington Post, March 13, 2005 (*See* Attachment 1).

It is our hope that any actions taken by this Committee to amend Section 20 of the Indian Gaming Regulatory Act (IGRA) will take into account the very real and very desperate needs of tribes like ours -- tribes that have survived the extremely rigorous Federal Acknowledgement Process only to find themselves continuing after federal recognition to be landless, poor, and denied access to the economic development opportunity allowed to almost every other tribe in the country.

NEWLY RECOGNIZED TRIBES AND TRUST LAND ACQUISITION

Tribes need their own lands on which to build housing, health clinics, schools and facilities from which various governmental services can be operated. Tribes need land on which to conduct economic activities so that tribal governments can generate the revenue they need to build and run those clinics, schools and governmental facilities. Tribes need land on which to build tribal businesses that provide employment and training opportunities to tribal members. Finally, tribes need land deemed to have "reservation" status in order for tribes to be able to participate in a wide range of federal programs which are tied to services provided "on or near a reservation."[1]

Unfortunately, there is no mechanism in the Federal Acknowledgment Process that provides land or a reservation for tribes newly recognized under that process. As a result, a newly recognized FAP tribe, like the Jena Band, must find the financial means to obtain land on its own, and it must find the financial means to fund the process of applying to have that land taken into trust through the Department of the Interior's fee-to-trust process. Ironically, because the newly recognized FAP tribe has no reservation, its fee-to-trust application, by definition, is reviewed by Interior under the most onerous portions of Interior's fee-to-trust regulations, those governing "off-reservation" acquisitions. This increases the costs of the application process and significantly increases the amount of weight given to any concerns expressed by the local community about the tribe's fee-to-trust application.

[1] Examples include federal programs and services which are tied to being "on or near a reservation" are listed in the document provided at Attachment 2.

Further, except in the very rare cases in which the newly recognized FAP tribe benefited from a state-held reservation prior to recognition, in almost all circumstances the FAP tribe is confronted with the *daunting* task of having to try to carve out a reservation land base from within a local non-Indian political subdivision. As you can imagine, cities and counties in which newly recognized FAP tribes live rarely embrace the idea of losing the jurisdiction and the property tax revenue that results when land is acquired in trust for the newly recognized tribe.

Adding to the inherent difficulties of the FAP tribe's relationship with local governments is the almost ubiquitous dynamic in which FAP tribes find that either they live in a community which has no gaming because that community is morally opposed to such activity, or they live in a community that has embraced gaming as evidenced by the existence of other Indian or non-Indian gaming facilities. In either case, the FAP tribe finds itself in a no-win situation. The morally opposed community will fight the acquisition for substantive reasons. In the community in which gaming has been accepted, well-heeled gaming interests will spare no expense to kill potential competition.

In addition, because newly recognized FAP tribes are poor tribes *desperate* to generate revenue, FAP tribes understandably focus their first land acquisition efforts on lands which would be suitable for development of a gaming facility. Under Interior's current approach, this means that the newly recognized FAP tribe must also ask the Secretary to proclaim new land taken into trust for it as the tribe's reservation (pursuant to the authority granted the Secretary in Section 7 of the Indian Reorganization Act) so that the lands will be deemed the tribe's "*initial reservation*" pursuant to Section 20(b)(1)(B)(ii). Hence the tribe must also submit an application for a reservation proclamation. That application is submitted to an office in the Bureau of Indian Affairs which is entirely separate from the office that reviews our fee-to-trust application. Most painful, in the case of the Jena Band the Bureau took the position that first the land had to be taken into trust, and only then would the Department consider the Jena Band's initial reservation request. Hence the reason why, even though the Jena Band now has trust land, and even though we had asked that that land be proclaimed to be our reservation concurrent with taking it into trust, we still have no reservation proclamation and are still unable to develop a gaming facility on trust land within our service area.

Finally, the newly recognized FAP tribe must submit to and pay for the Department's compliance with the National Environmental Policy Act. We note that the Department of the Interior recently amended its Section 20 guidance to make clear that in many situations where land acquisition involves gaming, it will automatically require the preparation of an Environmental Impact Study (rather than an Environmental Assessment) despite the fact that, to the best of our knowledge, every Environmental Assessment prepared in connection with gaming fee-to-trust acquisitions has ultimately been upheld by the federal courts.[2] An Environmental Impact Statement routinely costs hundreds of thousands, sometimes more than a million, dollars to prepare.

Respected members of the Committee, as you can see, the process to establish a land base for a tribe recognized through the administrative process is hardly any faster or less costly than the process to achieve federal recognition. Ten years after achieving federal recognition the Jena Band

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[2] "*See City of Roseville v Norton*, 219, F.Supp.2d 130 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003); *El Dorado County v Norton*, CV. S-02-1818 GEB DAD (E.D. Cal. Jan. 10, 2005); *TOMAC v Norton*, No. 01-0398 (D.D.C. Mar. 24, 2005)."

still does not have a reservation proclamation that would allow the Tribe to game under the exception. This is a long, hard road to achieving parity with other tribes who were lucky enough to be recognized in 1988.

THE JENA BAND'S HISTORY

From 1786 through 1830, the Choctaw Nation ceded approximately 23.4 million acres of land to the United States. These cessions, resulting in the infamous Trail of Tears, inflicted an immeasurable human toll on Choctaw people. During this time period, most Choctaw were removed to Oklahoma. Small groups, however, refused to be removed to Oklahoma and so remained in Mississippi and Louisiana.[3] Our ancestors eventually settled near the small town of Jena, Louisiana.

The Senate Committee on Indian Affairs summarized our history in its 1993 Report concerning proposed legislation that would have conferred federal recognition on us. This Committee found:

> The Jena Band of Choctaw Indians lives in and around Jena, Louisiana, just to the northeast of the center of the State. The Band has about 150 members, about 60 percent of whom are from half to full blood Choctaw. Although they were not statutorily terminated as other tribes which have been recently restored, the Jena have a history of being treated as an Indian entity by the Federal Government.
>
> Identified as a group of full bloods, the Jena Band of Choctaw Indians were authorized to take allotments in Oklahoma under the General Allotment or Dawes Act. Around the turn of the century the Jena Band of Choctaw Indians was requested to appear and give testimony before the Dawes Commission in Muskogee, Oklahoma. Having to work their way to Oklahoma to offset expenses, the Band walked to Oklahoma over the course of nine months only to find that they were allowed to apply for, but not yet receive, such allotments. They then walked back to Louisiana over the course of several more months. Upon returning home to Louisiana, they were notified that they were identified as full-blood Choctaw entitled to land and services from the United States. The notification stated that the Band could return to Oklahoma within four and a half months to finally accept allotments. Tired, penniless, and mistrusting, and facing an impossible time-frame, the Jena found themselves not up to a second walk to Oklahoma to claim their allotments, but remained in Louisiana where they still reside.

[3] Historical documentation, much of which was published well before the passage of IGRA, confirms that historical Choctaw presence throughout what is modern-day Louisiana. The Tribe provided this information to members of the Louisiana congressional delegation a few years ago and would be happy to provide the information to the Committee as well.

> In 1938, the Assistant Commissioner of the Bureau of Indian Affairs authorized the relocation of the Band to reservation lands in Mississippi where the Jena would once again be eligible for services. The Jena Band of Choctaw Indians indicated its willingness to relocate, but the United States did not follow through with the relocation. Once again the Jena missed their opportunity to enjoy Federal benefits because of their status as an Indian tribe.
>
> The group has been the beneficiary of Federal funds for Indians through various programs. The BIA funded an all-Indian contract school in the community of Jena, Louisiana, between 1934 and 1938. The school was closed in anticipation of the tribe's promised relocation to Mississippi in 1938, which never occurred.
>
> * * *
>
> From the evidence previously submitted to this Committee at a hearing on March 28, 1990, in the 101st Congress and extensive documentary evidence subsequently furnished this Committee relating to services provided to the Jena Choctaws by the Bureau of Indian Affairs in the years following enactment of the Indian Reorganization Act of 1934, and the offer by the Bureau to purchase tribal lands for the Jena Choctaws in the State of Mississippi, the Committee has concluded that recognition had previously been extended to the Jena Band of Choctaw by the Department of the Interior.
>
> Accordingly, the Committee strongly supports prompt confirmation of the government-to-government relationship of the Jena Band of Choctaw Indians of Louisiana and the United States. In the view of the Committee, acknowledgment of the trust responsibility of the United States and restoration of the Federal relationship has been delayed far too long and further delay would be unconscionable.

S. Rep. No. 103-116, at 1-3 (1993). Although Congress did not enact legislation that would have conferred federal recognition, two years later the Department of the Interior administratively confirmed our federal status through the Federal Acknowledgment Process.

THE JENA BAND'S EFFORTS TO ESTABLISH A RESERVATION, AND THE SURREAL ORDEAL THAT HAS FOLLOWED

Shortly after recognition, the Jena Band worked to identify lands within our three-parish service area to serve as a reservation from which we could provide governmental, health and human

services to our people. We also decided to pursue the development of a gaming facility to generate revenues to provide these services, just as so many other tribes have done. We first looked within the three-parishes (Louisiana's version of counties) which BIA had designated as our service area. However, those three-parishes are located in a very conservative, very religious part of our state. All three of these parishes, through a statewide referendum in 1996, flatly opposed video poker gaming, Indian or non-Indian. (*See* Attachment 3.) For this reason, the Governor insisted, and we agreed, that we should make every effort to find a gaming site outside of our three-parish service area in a community desirous of hosting such a facility.

And this, good Senators, is how our ordeal began.

1. Governor Foster Insisted That We Locate Our Gaming Facility Outside Of Our Service Area.

From our earliest discussions with former governor, M.J. "Mike" Foster, he flatly refused to negotiate a tribal-state gaming compact for any facility located within our three-parish service area. He further threatened that he would actively oppose our efforts to acquire trust lands for non-gaming purposes within our service area if we sought to locate a gaming facility there. Governor Foster took this position despite the fact that all three of the other federally recognized tribes in Louisiana operate gaming facilities pursuant to such compacts, and despite the fact that the state has licensed or legislatively approved sixteen non-Indian casinos and three racinos throughout the state.

In addition to the significant pressure exerted by Governor Foster, we were cognizant and respectful of the views of our neighbors in our three-parish service area. We well understood that they preferred that we not develop a gaming facility within their boundaries. As a result, we worked very hard to find a community outside our service area that actually *wanted* to host a gaming facility. It was for these reasons, and these reasons alone, that we embarked on a several-year effort to identify an alternative site for our gaming facility which satisfied three criteria, those being that the site had to be located: 1) not too distant from our service area; 2) within a parish that expressly supported gaming in general and our project in particular; and 3) within an area with which we could demonstrate a historical Choctaw connection.[4]

In Logansport, Louisiana we found such a site. Logansport is located in DeSoto Parish, approximately 64 miles from our service area. The Logansport area unfortunately suffers from one of the highest unemployment rates, and from some of the lowest family income averages in the State. Attempting to spur economic development, Mayor Dennis Freeman and the DeSoto Parish Police Jury (the elected governing body of DeSoto Parish) actively pursued a relationship with the Jena Band. These officials went on record, in writing, time and time again supporting the placement of the Jena Choctaw gaming facility in their community. In a letter to President Bush and Secretary Norton, Mayor Freeman expressed the Town of Logansport's wholehearted support for the Band's proposed gaming facility, and explained that the people of Logansport "are desperate for economic

[4] I respectfully refer you to the two maps provided at Attachment 4 to my testimony. These maps are borrowed from a book written by several Indian history experts published before enactment of the Indian Gaming Regulatory Act. Fred B. Kniffen, Hiram F. Gregory & George A. Stokes, *The Historic Tribes of Louisiana* (1987). These maps demonstrate the Choctaw connection to our service area and Logansport, Louisiana -- the location near our service area that we ultimately selected for our gaming facility. We have also provided thousands of pages of documentation to the Department of the Interior documenting our historical connection to the Logansport area of the State.

development, desperate for investment dollars and desperate for jobs." March 12, 2003 letter from Mayor Dennis Freeman to President Bush and Secretary Norton.

We applied to the Department of the Interior asking that the Logansport land be taken into trust. At the same time we also applied for trust status for several non-gaming parcels located in our service area. (These parcels included lands for our tribal cemetery, government buildings, housing, and general economic development.) We concurrently asked the Department to proclaim the Logansport parcel and our service area lands to be our reservation. As part of our request, we carefully explained our problem with the Governor, our efforts to work with the local communities in our service area and at Logansport, and our historical connection to the Logansport area. However, the Department declined to take Logansport into trust as part of our initial reservation. As I mentioned earlier, the service area parcels were taken into trust but we have not yet received a reservation proclamation for them.

We then submitted thousands of pages of information documenting the historical Choctaw connection to the land near Logansport, and documenting our legal case for a determination that we are a "restored" tribe and that the Logansport parcel constituted "restored lands" within the meaning of Section 20(b)(1)(B)(ii) of the Indian Gaming Regulatory Act. Given this Committee's pronouncement in its 1993 Committee Report about the Jena Band's restored tribal status,[5] this request seemed more than reasonable. Nevertheless, the Department declined to act on our request to acquire the Logansport land in trust based on a restored lands determination.

2. Interior Suggests That We Seek a Two-Part Determination Under Section 20(b)(1)(A).

Finally, the Department suggested it would be willing to review our Logansport request under the Two-Part Determination criteria embodied in Section 20(b)(1)(A). Once again, we changed gears and agreed to have the Department review our application under significantly more onerous standards. The Two-Part Determination provision requires Interior to make a factual determination that acquiring trust title to the property for gaming is first, "in the best interest of the tribe," and second, "not detrimental to the surrounding community." The burden of collection and submission of the factual documentation necessary to support such a determination falls on the Tribe. It is enormously time consuming and expensive. As you can imagine, the burden of such temporal and financial costs weighs very heavily on landless tribes.

While our "Two-Part Determination" application was pending before Interior, Governor Foster repeatedly expressed his support to the Jena Band and to the Department for our Logansport application. Based in no small part on the Governor's support, in December 2003, Interior issued a positive Two-Part Determination. Interior sent its determination to Governor Foster and requested his concurrence. To our great dismay, disappointment, and surprise, Governor Foster left office a few weeks later without acting on Interior's request.

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[5] As mentioned earlier in this testimony, the Senate Indian Affairs Committee found that "In the view of the Committee, acknowledgment of the trust responsibility of the United States and restoration of the Tribal relationship has been delayed for too long and further delay would be unconscionable." S. Rep. No. 103-116, at 3 (1993).

3. Governor Blanco Vows To Oppose Any Casino For the Jena Band.

Shortly after Governor Kathleen Blanco took office, I asked to meet with her to discuss the Jena Band's Logansport application, and I requested that she negotiate a gaming compact with the tribe. For many, many months we received no response whatsoever. It was not until a full nine months later that Governor Blanco agreed to meet with the Tribe. When we did meet, we discussed the background of the Logansport application, the state's role in how we eventually selected the Logansport site, and the Tribe's willingness, within reason, to meet the demands of the State even if that meant entering into a compact on less favorable terms than what the State has agreed to with other gaming tribes in Louisiana. Six months after our initial meeting, and fifteen months after our initial request, Governor Blanco callously responded to our good faith efforts by stating:

> [I] want to make it clear that I simply cannot support the establishment of another gambling casino. And to this end I have asked Attorney General Charles C. Foti, Jr. to research all legal avenues available to the state to oppose a casino. I must be up-front with you and tell you that this means I feel the duty to do all that I can to oppose the establishment of any new casino.

Letter from Governor Blanco to Chief Norris, April 12, 2005. (A copy of this letter is attached at Attachment 5.) Needless to say, Governor Blanco did not concur in Interior's Two-Part Determination.

Today, my Tribe is left with no alternative but to try to develop a gaming facility within our three-parish service area. We do this with heavy heart. We looked forward to working with a community desirous of our presence -- a community with which we had worked closely for several years to develop a win-win partnership for all of our people, Indian and non-Indian. Instead, we are forced to try to develop a facility within our service area, in a community that opposes gaming there. Further, we have been forced to file suit against the Governor for her failure to negotiate a compact in good faith as required by IGRA.

SENATOR VITTER'S OPPOSITION TO THE JENA BAND

Over the last few years, Senator Vitter has been a vocal opponent of our efforts to establish a gaming facility. News articles report that Senator Vitter "opposes the Jena Band's plans to open gaming operations anywhere in the state[.]" Ana Radelat, *Vitter Bill Would Thwart Jena Band's Attempts at Casino*, Shreveport Times, June 17, 2005. Among other things, Senator Vitter, when he was still a Congressman in the last Congress, caused a rider to be added to the Report of Interior's Appropriations bill that was designed to prevent the Jena Band from acquiring the Logansport parcel in trust. The effects have been reported by the Washington Post:

> "Working with Abramoff legal team, [Vitter] said, his staff drafted language that he placed in an Appropriations conference report that urged the Interior Department to prevent the Jenas from establishing a casino on lands outside their historic tribal area."

Susan Schmidt, *Casino Bid Prompted High-Stakes Lobbying: Probe Scrutinizes Efforts Against Tribe*, Washington Post, March 13, 2005. *See* Attachment 1.

In March of this year, Senator Vitter threatened the Governor, warning her not to sign *any* compact with the Jena Band, whether for Logansport or service area lands:

> "If you sign a compact with the Jena Band, I will join with others in vigorously opposing it at the U.S. Department of the Interior, which either must approve or reject it."

Senator Vitter further urged Governor Blanco *not* to negotiate with the Tribe in good faith pursuant to IGRA. Senator Vitter counseled the Governor:

> "Fourth, and finally, there is absolutely nothing in federal or other law which requires you to sign a compact with the Jena Band. This has been made crystal clear by the United States Supreme Court in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)."

Letter from Senator David Vitter to Governor Kathleen Babineaux Blanco, March 21, 2005 (*see* Attachment 6).

Finally, in June of this year Senator Vitter introduced legislation designed to ensure that we, and other tribes similarly situated, will never have the opportunity to engage in one of the few economic endeavors that has worked in Indian country. S. 1260, innocuously titled the "Common Sense Indian Gambling Reform Act," appears to be designed generally to discourage land acquisition for newly recognized tribes in general, and to squash the Jena Band in particular.

1. Senator Vitter's Proposal Protects Established Indian and Non-Indian Casino Interests At The Expense Of Administratively Acknowledged Tribes.

The purpose of IGRA's "initial reservation" exception is to ensure that tribes recognized through the Federal Acknowledgment Process are put on a level playing field with tribes that already had federal recognition when IGRA was passed in 1988. Senator Vitter's bill eliminates the initial reservation exception entirely, and in its place requires landless, newly recognized FAP tribes to satisfy a version of the Two-Part Determination exception that is even more onerous than the current Two-Part Determination exception. Section 2 of S. 1260 provides, in relevant part, that gaming may occur on lands acquired in trust after 1988 only if:

> the Secretary, after consultation with the Indian tribe and officials of all State, local, and tribal governments that have jurisdiction over land located within 60 miles of such Indian lands, determines that a gaming establishment on that land –
>
> (i) would be in the best interest of the Indian tribe and its members; and
>
> (ii) taking into consideration the results of a study of the economic impact of the gaming establishment, **would not have a negative economic impact, or *any* other negative effect, on *any* unit of government, business, community, or Indian tribe located within 60 miles of the land.**

(Emphasis added.) Senator Vitter's modified Two-Part Determination exception effectively requires a showing that the proposed gaming facility would have no negative effects at all on existing tribal casinos and non-Indian casinos that provide revenue to State and local governments. Senator Vitter's proposal inserts what clearly is intended to be an insurmountable hurdle into what is already a daunting process.[6]

2. Senator Vitter's Proposal Misuses Environmental Protection Laws.

In addition to requiring FAP tribes to submit to a significantly more difficult Two-Part Determination process, Senator Vitter would draw a bright line rule *always* requiring preparation of an Environmental Impact Statement. Section 5 of Senator Vitter's bill provides:

> Before an Indian tribe uses any Indian lands for purposes of class II or class III gaming, the Indian tribe shall—
>
> i. submit to the Secretary an Environmental Impact Statement that the Secretary determines to be in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) relating to that use; and
>
> ii. obtain the consent of the Secretary with respect to the change in use of the Indian lands.

NEPA requires that Environmental Impact Statements be prepared only for major federal actions that are determined to have a significant impact on the environment. Senator Vitter's proposal would require a costly Environmental Impact Statement (EIS) regardless of whether the impact is expected to be significant or not. Such a requirement is contrary to NEPA's basic approach of preparing an Environmental Assessment to determine whether preparation of an EIS is necessary and appropriate. And since the federal courts consistently have affirmed Interior's use of Environmental Assessments to evaluate the impacts of land acquired in trust for gaming purposes,[7] we suspect that Senator Vitter's concern is less with the environment and more with erecting yet another hurdle for the Jena Band's efforts to locate its facility within its own service area.

We note that the Bureau of Indian Affairs currently requires tribes to foot the bill for the costs of any environmental analysis, whether it be an Environmental Assessment or an EIS. We understand that it is not uncommon for the preparation of an EIS to take years to complete and to cost more than one million dollars to prepare. Further, the federal government is required to

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[6] Senator Vitter's proposal includes further requirements that ensure that no newly recognized landless tribe will be able to game. For example, the bill limits land eligible for a Two-Part Determination to those lands within the state where the tribe is primarily located, and to which the tribe has a primary geographic, social and historic nexus, which is restrictively defined, or within the last recognized reservation of the tribe (within the current state).

[7] *See City of Roseville v. Norton*, 219, F.Supp.2d 130 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003); *El Dorado County v. Norton*, CV. S-02-1818 GEB DAD (E.D. Cal. Jan. 10, 2005); *TOMA C v. Norton*, No. 01-0398 (D.D.C. Mar. 24, 2005).

prepare the EIS or oversee the contractors that do so, resulting in the expenditure of significant federal resources as well.

More than anything else, what this provision in Senator Vitter's bill does is create yet another barrier to the Jena Band's efforts to develop a gaming facility. Because the Jena Band has turned its attention to developing gaming on trust land it now owns within its service area, and because an Environmental Assessment is being prepared as part of the reservation proclamation process for that parcel of trust land at an additional cost of over a quarter of a million dollars, Senator Vitter apparently figures he can slow or halt the Jena Band's plans to develop the site by now requiring that a much more time-consuming, much more expensive EIS be required before the Tribe can "change" the use of its existing trust land to gaming.

3. Senator Vitter's Proposed Legislation Attempts to Dictate What Authority Governors Have Under State Law.

Finally, Senator Vitter's proposed legislation attempts to rewrite state law for Louisiana and all other States by mandating that tribal-state gaming compacts be approved by both the Governor and the State Legislature. Senator Vitter accomplishes this by almost sleight-of-hand, by changing the definition of "State" for purposes of the compacting section of IGRA:

> (10) DEFINITION OF STATE- In this subsection, the term 'State' means the Governor of the State and the legislative body of the State.

S. 1260, Section 3. Of course, currently under IGRA every State determines under its own laws whether its Governor is vested with authority to enter into compacts under IGRA or whether state legislative approval is necessary. Every existing tribal-state compact in Louisiana was executed by the Governor without approval of the state legislature. If the state of Louisiana wishes to impose a legislative approval requirement it may take steps to do so, but that requirement should not be dictated by Washington. Rather than allowing the Jena Band to be treated equally with Louisiana's other three tribes, Senator Vitter's proposal changes the rules in the middle of the game in an attempt to erect yet another barrier to the Jena Band's efforts to develop a gaming facility. Senator Vitter is so eager to oppose the Jena Band that he is willing to sacrifice states' rights in order to do it. Surely Congress will reject his efforts to legislate at the federal level what authority Governors possess under State law.

CONCERNS ABOUT SENATOR VITTER'S OPPOSITION

Because we are Senator Vitter's constituents, his virulent opposition to our efforts is painful. More painful, however, is the knowledge that Senator Vitter made no effort to fight the State's issuance of a license for Louisiana's sixteenth non-Indian casino; similarly, he made no effort to oppose a Louisiana state house bill that would have allowed a non-Indian vendor to place slot machines at the New Orleans airport. Most disturbing, it appears that his opposition to our tribal casino may be tied to a relationship with Jack Abramoff. The press[8] has reported the following:

- Abramoff hosted a fundraiser for Senator Vitter "just two months before Vitter

[8] Copies of the news reports quoted herein are attached at Attachment 7.

inserted a provision in an Interior spending bill helping one of Abramoff's tribal clients." John Bresnahan, *Abramoff Hosted '03 Fundraiser for Vitter*, Roll Call, March 16, 2005.

- "The Coushattas, one of Abramoff's most lucrative clients, feared the Jena Choctaws' site would harm their own casino, and the tribe funneled tens of millions of dollars to Abramoff ... to help stop it.... The Coushattas provided financial backing to a Louisiana organization called the Committee Against Gambling Expansion [CAGE].... In 2002, after the Jena Choctaws had first announced their casino plans, CAGE did a mailing on behalf of Vitter, a longtime gambling opponent. Vitter later used CAGE's name in his own phone bank operation." *Id.*

- "On Feb. 19, 2002, a day after receiving the [$2,000] campaign contribution from the Coushattas [which was later returned], Vitter wrote to Interior Secretary Gale Norton outlining his opposition to the [Jena Band gaming] proposal. Vitter would write seven letters to Norton on this issue in the next year." John Bresnahan, *Members Flee Fallout From Abramoff*, Roll Call, March 1, 2005.

- "On Feb. 26, 2002, Vitter met with representatives from the Coushatta tribe; they told him of their own concerns about the Jena Choctaws' proposal." *Id.*

- Vitter's communications director "said his boss had tried to get language into the 2003 Interior funding bill to block the Jena Choctaws' casino but failed to do so. The proposal that Vitter sent the following year to Rep. Charles Taylor (R-N.C.), chairman of the House Appropriations subcommittee on the Interior, actually went further than what Congress finally approved. Vitter's proposal, dated April 3, 2003, would have formally blocked any funds included in the Interior bill from being used in any way that would allow any Indian tribe to take land into trust for a casino. In his letter to Taylor, Vitter pointed out that Rep. Jim McCrery (R.-La.), in whose district the new Jena Choctaw casino would be built, backed his request." *Id.*

The press quotes speak for themselves.

AMENDMENTS TO THE INITIAL RESERVATION EXCEPTION THAT SHOULD BE MADE

It is our hope that the United States will help -- not hinder -- newly recognized landless FAP tribes. We have been neglected, unfunded, misused -- even abused -- for too long. Not only should Congress refuse to subject landless FAP tribes to *even more* onerous requirements than those that are already in place, but we respectfully suggest that Congress should consider a few small amendments to the initial reservation exception to make it more fair and efficient.

Our first request is that Congress impose hard deadlines on the Department of the Interior for taking land into trust for landless tribes. No tribe in the United States is more needy, more worthy of the Department's focus and prioritization than a landless tribe which has survived decades in the Federal Acknowledgement Process. The length of the current fee-to-trust process, which can take many many years to complete, unduly burdens the very tribes that can least afford the delay. We believe, it would make most sense if the Department would automatically designate a newly

recognized tribe's service area concurrently with providing federal recognition through FAP (currently tribes must apply for their service area designation as yet a separate process governed by its own set of regulations), and then be required to take some portion of land into trust for the newly recognized tribe in the tribe's service area within a time certain. Congressional direction requiring early designation of service area and strict time deadlines for initial land acquisition would also go a long way to dampening the amount of political intrigue that is fostered by letting fee-to-trust and reservation proclamation decisions linger for extended periods.

Our second, related request is that Congress amend the Section 20(b)(1)(B)(ii) initial reservation exception to clarify that the first parcel or parcels taken into trust by the Secretary shall be automatically deemed the newly recognized FAP tribe's initial reservation. This would spare tribes like ours the expense and frustration of being made to jump through yet another hoop – another hoop which serves no purpose other than to further delay the day when we are put on a level playing field with other tribes.

CONCLUSION

Perhaps we were naive, but when we first considered Indian gaming as a vehicle for economic development, we had no concept of the degree to which our efforts would become the focus of virulent, outrageously funded attacks from non-Indian casino operations owned by out-of-state interests and from other tribes. The opposition of well-heeled, well-established gaming concerns can make it incredibly difficult for newly-recognized tribes to participate in the economic benefits which have been made available to almost every other tribe in the United States. I submit that the political dynamics of FAP tribes' fee-to-trust request are characterized by a struggle between the haves and the have-nots.

It is my hope that the story of the long and difficult road upon which my Tribe has been made to travel will inform the current public policy debate on "reservation shopping." It is my hope that Congress will reject the efforts of established gaming interests, Indian and non-Indian alike, to insist on amendments to Section 20 that serve no purpose but to protect the profits of existing casino operators. It is my hope that instead, Congress will lend a hand to those who most desperately need it.

The Jena Band of Choctaw has played by every rule. We have worked tirelessly to accommodate every interest. We are exhausted, still poor, and still without a reservation. Good Senators its unclear to us of after these many years what "playing by the rules has done for us."

I once again thank you for the opportunity to tell the Jena Band of Choctaw Indians' story today. I would be most happy to answer any questions you may have.

Abramoff Hosted '03 Fundraiser for Vitter

March 16, 2005
By John Bresnahan,
Roll Call Staff

Former GOP lobbyist Jack Abramoff hosted a September 2003 fundraiser for now-Sen. David Vitter (R-La.) just two months before Vitter inserted a provision in an Interior spending bill helping one of Abramoff's tribal clients.

Vitter has stated repeatedly that he only met Abramoff once and had no idea that Abramoff's client, the Coushatta Indians of Louisiana, were funding an anti-gambling group with which Vitter had repeated dealings.

But Abramoff hosted a Sept. 9, 2003, fundraiser for Vitter at the restaurant Signatures in Washington, D.C., a popular GOP eatery that Abramoff has a financial stake in.

Abramoff did not make an appearance at the event, although his name was on an invitation for the fundraiser as the host, and the invitation specifically noted that it was to benefit Vitter. Also attending the cocktail reception and dinner as a "special guest" was House Chief Deputy Majority Whip Eric Cantor (R-Va.). It's unclear how much money was raised at the event.

The Abramoff fundraiser for Vitter was first reported by the Web site RawStory.com.

Roll Call reported two weeks ago that Vitter had inserted language in the fiscal 2004 Interior appropriations bill — completed late in 2003 — requesting that the Bureau of Indian Affairs and the National Indian Gaming Commission deny an application from the Jena Choctaw Tribe of Louisiana for land for a gambling casino. BIA comes under the authority of the Interior Department.

The Coushattas, one of Abramoff's most lucrative clients, feared the Jena Choctaws' site would harm their own casino, and the tribe funneled tens of millions of dollars to Abramoff and Republican public relations expert Michael Scanlon to help stop it.

The Coushattas provided financial backing to a Louisiana organization called the Committee Against Gambling Expansion. In 2002, after the Jena Choctaws had first announced their casino plans, CAGE did a mailing on behalf of Vitter, a longtime gambling opponent. Vitter later used CAGE's name in his own phone bank operation.

Vitter has said repeatedly that he had no idea of the source of funding for CAGE. The Louisiana Republican said he thought that CAGE was a Christian group opposed to gambling on ideological grounds. Ralph Reed, the former executive director of the Christian Coalition and a longtime friend of Abramoff's, spoke out in Louisiana on behalf of CAGE's activities and raised money for the group.

In addition to stating that Vitter only met Abramoff once, the Louisiana Republican and his aides have repeatedly noted that he received no campaign contributions from the former lobbyist.

Vitter, in a statement released by his office Monday night, said Abramoff did not attend the

September 2003 fundraiser. The event was attended by fewer than 10 people, and it was part of an effort by Abramoff to raise money for Vitter from the Jewish community. Cantor is the only Jewish Republican in the House.

"I've rechecked all of my campaign finance records and have confirmed again that I've never accepted any contributions from Jack Abramoff, the Greenberg Traurig firm, or gambling entities," Vitter said in the statement. Abramoff worked at Greenberg Traurig until March 2004, when it was publicly reported that he and Scanlon raked in more than $45 million from a half-dozen Indian tribes over three years. That figure has since risen to more than $80 million as additional information was uncovered. Federal and Congressional investigators are now looking into the pair's business activities.

In his statement, Vitter dismissed any suggestion that he had a close relationship with Abramoff, or had acted at Abramoff's request when he sought to block the Jena Choctaws' casino plans. "I never met with Jack Abramoff on any Indian gambling issue. Never," Vitter said. "Furthermore, to my knowledge, I have only met him once briefly in passing, and to this day I couldn't pick him out of a crowd."

Vitter's campaign to block the Jena Choctaw's casino extended from early 2002 into late 2003, and consisted of numerous letters to Interior Secretary Gale Norton in opposition to the tribe's proposal, as well as repeated public statements on the casino proposal. Vitter also tried to insert language in the fiscal 2003 Interior spending bill but was rebuffed.

"Serving on the House Appropriations committee, I thought a good vehicle to accomplish this would be to insert language into an appropriations bill," said Vitter, who was elected to the Senate last November after years in the House. "My original initiative in FY 03 was unsuccessful. I made another attempt in the FY04 Interior Conference report, and was successful."

Vitter acknowledged working with lawyers at Greenberg Traurig in late 2003 to help draft his legislative language for the Interior bill, although his aides adamantly insisted that he did not know that Abramoff or the Coushattas had any connection to CAGE. Abramoff and Greenberg Traurig were paid $5.7 million to lobby for the Coushattas between 2001 and 2003, according to lobbying disclosure reports.

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Members Flee Fallout From Abramoff

March 1, 2005
By John Bresnahan,
Roll Call Staff

The list of lawmakers caught up in the scandal surrounding former GOP lobbyist Jack Abramoff continues to grow, as two Republican Senators — David Vitter (La.) and Conrad Burns (Mont.) — said they were duped by the once high-flying influence peddler.

Vitter inserted a provision in the fiscal 2004 Interior spending bill that aided one of Abramoff's American Indian clients, the Coushatta tribe of Louisiana, but insists he did not do so at the behest of Abramoff.

The Coushattas own a casino that rakes in hundreds of millions of dollars annually and were attempting to prevent a rival tribe from opening its own casino in Louisiana. Vitter's provision warned the Interior Department not to approve the new casino request, made by the Jena Choctaw tribe.

During his run for the Senate last year, Vitter acknowledged his close ties to an anti-gambling group in Louisiana called the Committee Against Gambling Expansion, which was funded by the Coushattas and other tribes. But Vitter has said repeatedly that he had no idea of the source of funding for CAGE, although he worked hand-in-hand with the group on several occasions. Vitter has also stated that he never met Abramoff or received campaign contributions from him.

Burns and his former chief of staff, Will Brooke, say they too were taken in by Abramoff, whom they turned to for fundraising help in 2001. Burns' re-election committee and two PACs tied to the Montana Republican received $134,000 in campaign donations from Abramoff, Indian tribes that he lobbied for and his business associates during the 2001-02 election cycle, more than one-fifth of what the veteran lawmaker raised in that entire period.

Burns has asserted that he never did anything to assist Abramoff or his clients. As chairman of the Senate Appropriations subcommittee on the Interior, Burns played a pivotal role in drafting the 2004 Interior funding, which contains two other provisions benefiting Abramoff's Indian clients in addition to the Jena Choctaw language inserted by Vitter.

The Montana Republican now describes his relationship with Abramoff as "distant," although one of Abramoff's former colleagues at the firm Greenberg Traurig LLP went to work for Burns as his state director in late 2001 before returning to Greenberg Traurig just over a year later.

Burns' former top aide, Brooke, also later went to work for Abramoff at Greenberg Traurig, only weeks after the 2004 Interior spending bill was adopted by Congress. Brooke said he quickly became disillusioned with Abramoff's tactics, and almost left the firm before his contract had expired. Brooke formally ended his ties with Greenberg Traurig at the end of 2004.

The interactions between Abramoff and these GOP lawmakers illustrate some of the ways the former lobbyist was able to build relationships with influential Members of Congress. Using hundreds of thousands of dollars in campaign donations, liberal loans of luxury suites at some of

Washington's top sporting venues, and jobs for well-connected former Congressional staffers, Abramoff built an impressive network of contacts on Capitol Hill and within the Bush administration. Those contacts allowed Abramoff to charge some of the highest fees of any K Street lobbyist, and during the late 1990s and beyond he took in tens of millions of dollars in payments from grateful clients.

All that fell apart last year after reports emerged that Abramoff and Republican grass-roots specialist Michael Scanlon were paid more than $82 million by a half-dozen Indian tribes between 2001 and 2003. After several of the tribes elected new leaders, they began to complain that the payments to Abramoff and Scanlon were excessive, and some tribes have even sued the two men, seeking the return of their money.

The complaints from the Indian tribes also brought scrutiny from federal and Congressional investigators, who continue to pore over the business dealings of the two men.

Abramoff was forced out of Greenberg Traurig one year ago this week and has since been hauled before the Senate Indian Affairs Committee to answer questions about his business activities, something he declined to do. Lawmakers once close to Abramoff, including House Majority Leader Tom DeLay (R-Texas) and House Administration Chairman Bob Ney (R-Ohio), now want nothing to do with him. A federal grand jury has issued dozens of subpoenas to potential witnesses in the case, and official Washington continues to speculate over what will happen next.

The legislative language inserted by Vitter in the Interior bill declared that Congress did not want the Bureau of Indian Affairs, an agency of the Interior Department, or the National Indian Gaming Commission to grant a request by the Jena Choctaw tribe for additional land to open up a new casino. Vitter, a longtime gambling opponent, was vehemently opposed to the Jena Choctaws' efforts.

Abramoff was at that time lobbying on behalf of the Coushattas, who had their own casino in southwestern Louisiana and feared the Jena Choctaws' proposed casino, closer to the Texas-Louisiana border, would draw away gamblers coming in from the Lone Star State. Abramoff was paid $5.7 million by the Coushattas in the period from 2001 to 2003 for lobbying work, according to federal lobbying records, and the tribe shelled out tens of millions of dollars more to Scanlon, who then rerouted some of those funds back to Abramoff as "referral fees."

The Committee Against Gambling Expansion also opposed the Jena Choctaws' plan. That organization, set up in 2001 by the former executive director of the Louisiana Republican Party, received funding from the Coushattas as well.

Ralph Reed, the former Christian Coalition executive director and current candidate for lieutenant governor in Georgia, also raised money for and spoke out on behalf of CAGE. Reed ultimately received more than $4 million from Abramoff and Scanlon for his work on anti-gambling initiatives in Louisiana, Texas and Alabama. These campaigns helped Abramoff's tribal clients by freezing competitors out of those gambling markets. Reed, who had known Abramoff since their days as College Republicans, has stated that he was not aware that these funds came from Abramoff's tribal clients.

While Vitter and his aides have adamantly denied that he had any knowledge that CAGE was receiving financial backing from the Coushattas, Vitter's opposition to the Jena Choctaws' casino was enormously helpful to Abramoff and the Coushattas.

Vitter "came up with this himself. He was worried about Indian gaming," said Mac Abrams, Vitter's communications director, of the measure inserted by his boss into the 2004 Interior spending bill. Vitter himself told the New Orleans Times-Picayune in mid-October, when the issue of CAGE's ties

to Abramoff and the Coushattas was first raised by Democrats, that he had no idea the Coushattas were funding the group. Louisiana records show CAGE was incorporated in Baton Rouge in 2001 by Rhett Davis, a former state GOP official with strong ties to Christian groups, according to the Times-Picuyane.

"I had the impression that it was a strong anti-gambling organization and run by Louisiana folks with the Christian community," Vitter told the newspaper in a story published Oct. 15. "If it is true that it was funded by gambling interests, I would have thought twice about [using] them."

Abrams also said that Vitter "has never met with Jack Abramoff. Never." Vitter did not receive any campaign contributions from Abramoff and while the Coushattas gave $2,000 to Vitter in on Feb. 18, 2002, the donation was later returned.

Vitter's opposition to the Jena Choctaw casino was well known throughout the state and began to make headlines as soon as former Louisiana Gov. Mike Foster (R) inked a secret deal with the tribe in early 2002. On Feb. 19, 2002, a day after receiving the campaign contribution from the Coushattas, Vitter wrote to Interior Secretary Gale Norton outlining his opposition to the proposal. Vitter would write seven letters to Norton on this issue in the next year.

On Feb. 26, 2002, Vitter met with representatives from the Coushatta tribe; they told him of their own concerns about the Jena Choctaws' proposal.

CAGE offered political cover to Vitter on two separate occasions. The group sent out a mailer in 2002 praising Vitter for opposing the Jena Choctaw casino. CAGE later allowed Vitter to use its name during a phone-bank campaign that Vitter set up when he briefly considered a gubernatorial campaign in 2003. Vitter eventually decided against entering that race.

Abrams said his boss had tried to get language into the 2003 Interior funding bill to block the Jena Choctaws' casino but failed to do so.

The proposal that Vitter sent the following year to Rep. Charles Taylor (R-N.C.), chairman of the House Appropriations subcommittee on the Interior, actually went further than what Congress finally approved.

Vitter's proposal, dated April 3, 2003, would have formally blocked any funds included in the Interior bill from being used in any way that would allow any Indian tribe to take land into trust for a casino. In his letter to Taylor, Vitter pointed out that Rep. Jim McCrery (R-La.), in whose district the new Jena Choctaw casino would be built, backed his request.

Taylor did not include Vitter's language in the original House version of the Interior bill, and the proposal was never vetted by any House committee.

But as the House and Senate wrangled over the final version of the 2004 Interior bill, Rep. Sherwood Boehlert (R-N.Y.) was able to convince negotiators to include language cautioning another tribe about building a casino in New York. Vitter then went back to Taylor and renewed his request for language on the Jena Choctaws, and the North Carolina Republican agreed to insert it, according to Abrams.

The approved provision was nonbinding on the Bush administration, although BIA and top officials at the Interior Department would have no doubt that senior lawmakers on the powerful Appropriations committees did not want them to approve the Jena Choctaws' plan.

"The managers [of the Interior bill] are concerned about the growing number of tribes, both landless and with an existing reservation, that are attempting to claim reservation rights that

would allow them to engage in gaming operations in States where they have no reservation or trust land status," stated the conference report accompanying the 2004 Interior bill. "The Jena Band of Choctaw in Louisiana is attempting to take land into trust for gaming purposes in an area of Louisiana that is outside their traditional service area."

The report added: "The managers expect the Department of the Interior and the National Indian Gaming Commission to implement fully the existing rules and regulations governing these types of gaming operations."

The Jena Choctaws never received approval from the Interior Department for new land to open a casino.

That measure was not the only victory for Abramoff's clients in the Interior bill that year, however.

Sens. John Kerry (D-Mass.) and Edward Kennedy (D-Mass.) successfully pushed for language urging BIA to complete its review of the recognition request of the Mashpee Wampanoag tribe. That tribe had retained Abramoff's firm, Greenberg Traurig, just as the Interior funding bill was being drafted, although the firm did not file a lobbying disclosure report with Congress until after the bill had already passed.

Sen. Byron Dorgan (D-N.D.) played an important role in getting the Mashpee Wampanoag language in the bill. Michael D. Smith, a former top aide to Sen. Tom Harkin (D-Iowa), himself a member of the Appropriations Committee, worked at Greenberg Traurig and was lobbying Senate Democrats hard on the Interior bill, according to Democratic insiders. Smith has since left Greenberg Traurig.

Michigan Sens. Carl Levin (D) and Debbie Stabenow (D) also succeeded in placing $3 million in the bill for a school operated by the Saginaw Chippewa tribe, another Abramoff client.

While Burns and his staff have insisted that they played no role in helping Abramoff include any item in the Interior bill, the former GOP lobbyist had showered Burns with campaign donations during the previous election cycle. Burns is the chairman of the Senate Appropriations subcommittee on the Interior.

In addition to the $134,000 Burns' political entities took in from Abramoff and his clients in 2001-02, in the 2003-04 cycle Burns' PAC and campaign received another $16,500 from the same sources.

The donations were almost exclusively from Indian tribes. Abramoff was officially registered to lobby for three of the tribes: the Mississippi Band of Choctaws, the Saginaw Chippewas and the Louisiana Coushattas.

The Mississippi Choctaws donated $30,000 to Burns' soft-money PAC in the first half of 2001, the Coushattas kicked in $25,000 in early 2002, and the Saginaw Chippewas gave $20,000, according to federal campaign records.

Another tribe that gave to Burns' soft-money fund, the Tigua Indians of El Paso, Texas, were secretly getting help from Abramoff. The Tiguas paid Scanlon $4.2 million beginning in early 2002 as part of a stealthy campaign designed to generate Congressional support for reopening the Tiguas' Texas casino, which had been shut down by state authorities in February of that year. Scanlon then paid Abramoff as much as $2 million in "referral fees," according to testimony given in November 2004 to the Senate Indian Affairs Committee. At no time did Abramoff ever register to lobby for the Tiguas or make known his behind-the-scenes efforts on the tribe's behalf.

The Tiguas donated $20,000 to the Big Sky Non-Federal PAC in the first quarter of 2002.

A fifth tribe that Abramoff lobbied for, the Agua Caliente Tribe of Palm Springs, Calif., gave $5,000 to the Friends of the Big Sky Federal PAC, Burns' hard-money PAC, in October 2002. The Coushattas and Mississippi Choctaws each gave $5,000 to Burns' hard-money PAC as well.

Abramoff himself donated $5,000 in hard money to that same Burns PAC, as did several of his business associates. Adam Kidan, a partner with Abramoff in a failed Florida-based gambling cruise ship company, gave $5,000. Eloy Inos of Saipan, which is part of the U.S. Commonwealth of the Northern Marianas Islands, gave $5,000. Abramoff had done lobbying work for Willie Tan, owner of Tan Holdings, Inos' employer. Greenberg Traurig's own PAC kicked in another $2,000.

Staff members also moved between the employ of Abramoff and Burns.

In late 2001, Burns hired Shawn Vasell, a lobbyist with Abramoff at Greenberg Traurig, to serve as his state director in Montana. In January 2003, Vasell left Burns' office and went back to work for Greenberg Traurig, where he is still employed as the director of its governmental affairs shop.

Right after the 2004 Interior bill was complete, Abramoff hired Brooke, then Burns' top aide. At the time, Abramoff told Roll Call that Brooke's decision to join Greenberg Traurig was "a big hire for us."

Burns recently described his relationship with Abramoff as "distant." He said the two men weren't that close, and suggested that he had kept the lobbyist "at arm's length" throughout their dealings.

Abramoff "was kind of like a snapping turtle — when he hooked on, he stayed on," Burns recalled.

During the interview, Burns said that his former aide, Brooke, left Greenberg Traurig after only one year, and added that Brooke thought there was "something fishy — something not quite right" about the way Abramoff conducted his activities at the firm. Brooke signed up several Montana-based clients for Greenberg Traurig before departing at the end of 2004. He is now of counsel for Ryan, Phillips, Utrecht & McKinnon, and also has a law practice in Montana.

Burns also said the campaign contributions coming from Abramoff's clients were based on his longstanding support for increased federal funding for Indian schools, not legislative favors. Burns pointed out that he "had seven [American Indian] reservations in my state." But none of the tribes Abramoff lobbied for was located in Montana.

In a recent interview, Brooke said that going to work for Abramoff at Greenberg Traurig was a big mistake. Brooke also vehemently denied that there was any quid pro quo between Abramoff and Burns.

"I went over there in January '04, and three weeks later, all this [expletive] hits the fan, stuff coming down about" Abramoff, said Brooke. "I was surprised and taken aback like everybody, because in my meetings with Jack, I said, 'I want to be with a law firm with a good reputation.' And he said, 'Me too. They dot the i's and cross the t's and everything is on the up-and-up here.'"

Brooke said he almost resigned from Greenberg Traurig when the furor surrounding Abramoff began, but decided to finish his 12-month contract with the firm. "I had a hard decision to make whether to stay there or not, and quite frankly, I [stayed] because I thought there would be the opportunity to rebuild the government affairs practice," said Brooke.

Brooke added that he had no role in inserting any legislative items benefiting Abramoff or his clients in any appropriations bill.

"None of those matters came to me as [Burns'] chief of staff," said Brooke. "To the extent that they were being worked on in the Appropriations Committee, I expected that they had gone through the proper channels."

Brooke acknowledged that Abramoff, whose contacts among conservatives allowed him to tap into vast financial networks on behalf of GOP lawmakers, was an attractive target for him and Burns as they sought to raise money for the Montana Republican's leadership PACs several years ago. The Washington Post has reported that Abramoff helped steer more than $3 million to GOP candidates and incumbents.

Burns also was not the only Senator on the Interior panels to benefit from Abramoff's fundraising abilities

For instance, Sen. Sam Brownback (R-Kan.) received $44,000 in campaign contributions from Abramoff and his clients in 2001-02. All but $2,000 of that was in soft money. Sen. Thad Cochran (R-Miss.), now chairman of the full Appropriations Committee, received $33,500 in hard-money contributions. Cochran put $16.3 million into a 2002 funding for a tribal jail for the Mississippi Choctaws. Dorgan, who Burns' office said was responsible for the inclusion of one of the measures benefiting Abramoff clients in the 2004 Interior bill, got $15,000 in soft money through his leadership PAC during the same period.

Brooke, Burns' ex-aide, said he received numerous requests from Abramoff associates during his time at Burns' office, and turned many of them down flat because they "didn't pass the smell test."

One of those requests was for up to $6 million to build a hospital in Israel, money that would have been funneled through the Pentagon. Abramoff, an Orthodox Jew, was known as a major pro-Israel booster.

"These things had to stand on their own merit through the screening process, though the committee process," said Brooke. "There was no quid pro quo — hell no."

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TESTIMONY
OF
GEORGE T SKIBINE
ACTING DEPUTY ASSISTANT SECRETARY – INDIAN AFFAIRS
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.

**APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA (OCTOBER 17, 1988)
ON AND/OR CONTIGUOUS TO THE
BOUNDARIES OF THE RESERVATION**

1	**White Earth Chippewa** 25 U.S.C. 2719 (a)(1)	Mahnomen, Mahnomen County, Minnesota	61.73	08/14/95
2	**Skokomish Indian Tribe** 25 U.S.C. 2719 (a)(1)	Skokomish Reservation, Mason County, Washington	3.0	12/08/03
3	**Suquamish Indian Tribe** 25 U.S.C. 2719 (a)(1)	Suquamish, Kitsap County, Washington	13.47	04/21/04
4	**Picayune Rancheria of Chukchansi Indians** 25 U.S.C. 2719 (a)(1)	Coursegold, Madera County, California	48.53	06/30/04
5	**Tunica-Biloxi Tribe** 25 U.S.C. 2719 (a)(1) (Contiguous to Reservation)	Avoyelles Parish, Louisiana	21.05	11/15/93
6	**Coushatta Tribe** **25 U.S.C. 2719 (a)(1)** (Contiguous to Reservation)	Allen Parish, Louisiana	531.00	09/30/94
7	**Saginaw Chippewa** 25 U.S.C. 2719 (a)(1) (Partially on and contiguous to reservation)	Mt. Pleasant, Isabella County, Michigan	480.32	04/14/97

APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA (OCTOBER 17, 1988)
SETTLEMENT OF A LAND CLAIM

1	**Seneca Nation** 25 U.S.C. 1774	Niagara Falls, Niagara County, New York	12.8	11/29/02
2	****Seneca Nation** **25 U.S.C. 1774**	Niagara Falls, Niagara County, New York	8.5	12/08/03
3	****Seneca Nation** **25 U.S.C. 1774**	Niagara Falls, Niagara County, New York	.40	07/21/04
4	****Seneca Nation** **25 U.S.C. 1774**	Niagara Falls, Niagara County, New York	2.15	11/5/04

** Gaming Related

APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA (OCTOBER 17, 1988)
INITIAL RESERVATION OF AN INDIAN TRIBE ACKNOWLEDGED BY THE SECRETARY UNDER THE FEDERAL ACKNOWLEDGMENT PROCESS

1	**Mohegan Tribe** **25 U.S.C. 2719 (b)(1)(B)(ii)**	New London, Montville County, Connecticut	240.00	09/28/95
2	**Nottawaseppi Huron Band of Potawatomi** **25 U.S.C. 2719 (b)(1)(B)(ii)**	Battle Creek, Calhoun County, Michigan	78.26	07/31/02
3	**Match-E-Be-Nash-She-Wish Band (Gun Lake Tribe) of Pottawatomi Indians** **25 U.S.C. 2719 (b)(1)(B)(ii)**	Wayland Township Allegan County Michigan	147.48	04/18/05

APPROVED GAMING ACQUISITIONS
SINCE ENACTMENT OF IGRA OCTOBER 17, 1988
RESTORATION OF LANDS FOR AN INDIAN TRIBE
RESTORED TO FEDERAL RECOGNITION

1	**Grand Ronde Community** 25 U.S.C. 2719 (b)(1)(B)(iii)	Grand Ronde, Polk County, Oregon	5.55	03/05/90
2	**Siletz Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii)	Lincoln City, Lincoln County, Oregon	10.99	12/05/94
3	**Coquille Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii)	Coos Bay, Coos County, Oregon	20.0	02/01/95
4	**Klamath Tribes** 25 U.S.C. 2719 (b)(1)(B)(iii)	Chiloquin, Klamath County, Oregon	42.31	05/14/97
5	**Little River Band of Ottawa** 25 U.S.C. 2719 (b)(1)(B)(iii)	Manistee, Manistee County, Michigan	152.80	09/24/98
6	**Little Traverse Bay Bands** 25 U.S.C. 2719 (b)(1)(B)(iii)	Petoskey, Emmett County, Michigan	5.0	08/27/99
7	**Paskenta Band of Nomlaki Indians** 25 U.S.C. 2719 (b)(1)(B)(iii)	Corning, Tehema County, California	1898.16	11/30/00
8	**Lytton Band of Pomo Indians** 25 U.S.C. 2719 (b)(1)(B)(iii)	San Pablo, Contra Costa County, California	9.3	01/18/01
9	**Pokagon Band of Potawatomi** 25 U.S.C. 2719 (b)(1)(B)(iii)	New Buffalo, Berrien County, Michigan	675	01/19/01
10	**United Auburn Indian Community** 25 U.S.C. 2719 (b)(1)(B)(iii)	Placer County, California	49.21	02/05/02
11	**Ponca Tribe** 25 U.S.C. 2719 (b)(1)(B)(iii)	Crofton, Knox County, Nebraska	3	12/20/02
12	**Little Traverse Bay Bands** 25 U.S.C. 2719 (b)(1)(B)(iii)	Petoskey, Emmett County, Michigan	96.00	07/18/03

PENDING GAMING APPLICATIONS UNDER SECTION 20 (b)(1)(B)

	Tribe	Location	Section 20 Exception
1	Snoqualmie Tribe of Washington	56 Acres Snoqualmie, King County, Washington	Initial Reservation 2719(b)(1)(B)(ii)
2	Cowlitz Indian Tribe of Washington	151.87 Acres Clark County, Washington	Initial Reservation 2719(b)(1)(B)(ii)
3	Greenville Rancheria of Maidu Indians of California	334.69 Acres, Red Bluff, Tehama County, California	Restored Tribe 2719(b)(1)(B)(iii)
4	Mechoopda Indian Tribe of Chico Rancheria of California	650 Acres Chico, Sutter County, California	Restored Tribe 2719(b)(1)(B)(iii)
5	Enterprise Rancheria of Maidu Indians of California	40 Acres Olivehurst, Yuba County, California	Restored Tribe 2719(b)(1)(B)(iii)
6	Elk Valley Rancheria of California	203 Acres Del Norte County, California	Restored Tribe 2719(b)(1)(B)(iii)
7	Ione Band of California	224 Acres Plymouth, Amador County, California	Restored Tribe 2719(b)(1)(B)(iii)
8	Graton Rancheria of California	360 Acres Rohnert Park, Sonoma County, California	Restored Tribe 2719(b)(1)(B)(iii)
9	Scotts Valley Band of California	29.87 Acres Richmond Contra Costa County California	Restored Tribe 2719(b)(1)(B)(iii)
10	North Fork Rancheria of California	305 Acres Madera, Madera County, California	Restored Tribe 2719(b)(1)(B)(iii)
11	Guidiville Band of Pomo Indians of CA	375 Acres Richmond, Mendicino County, California	Restored Tribe 2719(b)(1)(B)(iii)

TESTIMONY OF U.S. SEN. DAVID VITTER

BEFORE THE COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

JULY 27, 2005

OVERSIGHT HEARING ON IGRA SECTION 20 EXCEPTIONS

AND OFF-RESERVATION GAMING

Mr. Chairman, Mr. Vice Chairman, I am pleased to be here today to express my concerns about the proliferation of off-reservation Indian casino gambling. This is an issue that directly affects my home state of Louisiana as well as numerous other states. It is an issue of national significance. I want to thank you for inviting me to testify.

In 1988, when Congress passed the Indian Gaming Regulatory Act, gambling on Indian reservations was a small industry. At that time, virtually no one foresaw the future growth in "class III" casino-style gambling, or that Indian gambling would become an $18 billion per year industry, with 400 casinos in 30 states across around the nation.

Amendments to reform the law are needed, in particular, to discourage the recent trend known as "forum shopping," or "reservation shopping," by Indian tribes. That is the troubling practice, on the part of a growing number of tribes, of selecting lands to which the tribes have little or no connection, for the sole purpose of building casinos at the most economically advantageous location.

As widely reported in the press, various tribes are now attempting to claim rights that would allow them to engage in gambling operations in states where they have no

reservation or trust land status. Tribes making such claims include landless tribes as well as tribes with an existing reservation. Affected states include California, Illinois, Ohio, Colorado, Oregon, New York, and Louisiana, among others:

* **California**. By one account, as many as 40 tribes are pursuing off-reservation gambling proposals in California alone. The state is already home to approximately 55 Indian casinos. I commend the members of this Committee for recently approving, by a bipartisan 10-3 vote, a measure authored by our colleague, Senator Dianne Feinstein, which would make it more difficult for one California tribe to proceed with an off-reservation casino.

* **Ohio.** Although Ohio has no federally recognized Indian tribes, the Eastern Shawnee Tribe of Oklahoma is trying to open casinos in multiple Ohio locations. The tribe is pushing its casino proposals with help from non-Indian investors, against the wishes of many Ohio folks. The tribe has sued the state to seek reparations for tribal lands in Ohio that were taken 170 years ago.

* **New York**. Another example of possible "forum shopping" by tribes is New York State, where several out-of-state tribes and additional in-state tribes have attempted to negotiate for casinos in the Catskills area to settle land claims.

* **Louisiana.** And of course, my home state of Louisiana, may provide another example of "forum-shopping." The Jena Band of Choctaw, which is here today to testify before this Committee, attempted to take land into trust for gambling purposes in an area of my state, Louisiana, that is outside of its traditional service area.

I think that the history of the Jena Band is instructive; and it is one example with which I am familiar. The Jena Band has been rejected in its pursuit of land for a casino in

two counties in Mississippi, has made a number of applications for land across Louisiana, and I understand it has considered land in Texas as well. I am concerned about this attempt at "forum shopping" for the purpose of building a casino, which seems to be the sole interest of this tribe.

The Jena Band received Federal recognition in 1995. After receiving recognition, the tribe courted the Rapides Parish Police Jury (the county government) in July 1996 with promises to pay them up to 6% of the net profits made off of a proposed casino. However, then Louisiana Governor Mike Foster opposed their attempts and refused to negotiate a compact. The Jena Band actually filed a federal lawsuit in an attempt to force the Governor to negotiate with them but the judge threw out the lawsuit in December 1996.

The tribe then reached out to Mississippi, and actually was rejected by two counties in 2001: Greene and Tishomingo. Mississippi's Governor stated he would refuse another Indian casino in Mississippi. So the Jena looked back to Louisiana. In October 2001, on hearing that the Jena might be looking to their parish, the Sabine Parish Police Jury passed a resolution declaring their opposition to a casino.

The Jena and former Governor Foster then quietly negotiated a compact, centered on Vinton, Louisiana, and sent it to the Bureau of Indian Affairs for approval in January 2002. There was a real outcry against having a proposed casino there, including written opposition from Louisiana Congressman Jim McCrery, U.S. Senator Mary Landrieu as well as over 30 other members of the U.S. Congress, including myself. The BIA rejected the compact on March 7, 2002.

The Jena Band, which has more recently turned its attention to Grant Parish, Louisiana, has argued that it has the ability to force a state into agreeing to a gambling compact, circumventing the state process designed by federal law and instead working directly with the U.S. Department of the Interior. The current Governor of Louisiana opposes the expansion of casino gambling in our state. Even the suggestion that the federal government would ever force states to accept casinos they oppose is troubling.

In June, I joined our colleague, Senator George Voinovich, who is here today as well, and other members of the United States Senate in offering a floor amendment to ensure that governors of affected states will have input when decisions are being made to take land into trust on behalf of Indian tribes for a gambling purpose. This amendment was endorsed by the National Governors' Association, but we did not call for a vote on the Voinovich amendment, due to jurisdictional concerns expressed by certain members of this Committee.

The amendment actually complements a bill I introduced in June. I want to spend a few minutes describing my bill, which is entitled the "Common Sense Indian Gambling Reform Act of 2005" (S. 1260). It is a companion to a nearly identical measure (H.R. 2353) sponsored by Congressman Mike Rogers (R-Michigan) in the U.S. House of Representatives. That House companion measure has 10 cosponsors (including another member of the Louisiana congressional delegation, Congressman Charles Boustany).

Our legislation does not specifically target any particular tribe. Rather, it proposes seven reasonable reforms to current federal law relating to Indian gambling:

* ***Economic Impact Study Requirement.*** First, the bill that we introduced would require that an economic impact study be conducted of the area within a 60-mile radius of a proposed new Indian casino. The rationale for requiring such a study would be to ensure that we fully understand, before developing a proposed casino, how it would actually hurt or help the surrounding community.

* ***More Local Input.*** Second, the bill that we introduced would eliminate several existing exceptions to the existing ban on Indian casino gambling under IGRA. Striking these exceptions would ensure that state and local input is garnered and honored before development of a casino can proceed.

The bill require federal officials to consult with officials of all potentially affected state or local government or Indian tribes (not just "appropriate" officials, as under current law) before making what is known as a "two-part determination" with respect to a proposed Indian casino, under the Indian Gaming Regulatory Act. In addition, the bill we introduced requires the state legislature as well as the governor of the state to concur in this two-part determination.

* ***Enhanced Role For State Legislatures.*** Third, the bill we introduced would enhance the input of state lawmakers in decisions to develop a casino, by clarifying that both a state's legislature and the governor must approve any new Tribal-State compact for Class III gambling. This part of the bill amends current law, which requires that, before opening a casino, a tribe must enter into a Tribal-State compact governing the conduct of gaming activities.

* ***Off-Reservation Casinos Rendered Virtually Impossible.*** Third, our bill effectively precludes Indian tribes from proposing new casinos on lands to which the tribes have little or no connection. It does so by imposing these conditions: first, an Indian casino must be on a single, contiguous parcel of Indian lands; and second, the casino must be within the state in which the tribe is primarily located, and on land to which the tribe has its primary "geographical, social, and historical" nexus.

* ***Additional Background Checks.*** Fifth, the bill we introduced clarifies that any financial top ten interest involved in opening an Indian casino operation will be subject to a background check. The National Indian Gaming Commission (NIGC) would approve all top ten financial arrangements, and would perform the background checks. Experts have testified to the need for greater scrutiny of such financial interests.

* ***Requirement That Tribes Declare Intent To Gamble.*** Sixth, the bill we introduced also would require a tribe to declare its intent to gamble in its initial application to have lands taken into trust by the United States on behalf of the tribe. Absent such a declaration, the tribe could not later engage in casino gambling on those lands.

* ***Requirement Of Environmental Impact Study.*** Seventh, and finally, the bill we introduced would change current law by requiring that an Indian tribe must submit a new

environmental impact statement to the Secretary of the Interior if the tribe changes the use of its land from a non-gambling, or general, purpose to a gambling purpose.

There is a widespread and growing concern in Congress about the issue of off-reservation casino gambling. I thank Senators Feinstein and Voinovich for joining me in this effort. I look forward to working with Chairman and Ranking Member of the Indian Affairs Committee to enact sensible reforms. Thank you.

UNITED STATES SENATOR GEORGE V. VOINOVICH
OVERSIGHT HEARING ON IGRA EXCEPTIONS AND OFF-RESERVATION GAMING
SENATE COMMITTEE ON INDIAN AFFAIRS
JULY 27, 2005

Mr. Chairman, I thank you for holding this hearing today. As you know, I am increasingly concerned about the subject of today's hearing – the move to take gambling off-reservation by Indian tribes across the country.

As you know, this explosive growth of Indian gambling is becoming a problem in my home state of Ohio and a number of other states nationwide.

Currently, there are over 400 tribal casinos in 30 states. The tribes who run these casinos have seen a substantial financial benefit to their tribes. Last year, the annual revenue of Indian casinos had grown to almost $19.5 billion – with the continued expansion of Indian casinos, that annual revenue will continue to grow.

To build on this financial success of tribal casinos, some Native American tribes are aggressively seeking to take gambling off reservations and into local communities all across the country – from states like California to New York, Oregon to Florida, and my home state of Ohio.

In this practice, commonly referred to as "reservation shopping," tribes are looking to acquire new, non-contiguous land to open casinos near large communities or next to major roads with easy access.

A loophole in the law that regulates Indian gaming, the Indian Gaming Regulatory Act, allows the Department of Interior to take land into trust for a tribal casino, even at great distances from their home reservation.

While some casinos on tribal reservations have been very successful, many reservations are located in rural areas at great distances from population centers. These tribes are looking at lands hundreds of miles from their reservations and near population centers like Cleveland, Chicago, Miami and the Bay Area of California.

In early 2003, a tribe secretly began courting communities in Ohio with the lure of financial gain from casinos. Since then, agreements have been reached between the tribe and four separate mayors in the state to site casinos in their communities under the pledge that a casino complex would bring new jobs and increase the tax base. All of this has been done without any land claims filed or before any determination has been made that a land claim will be successful. The Eastern Shawnee, and the developers behind their casino plans, are so confident they can pull off their land claim, they are garnering political support for casinos in my state.

Last month, the Eastern Shawnee Tribe of Oklahoma filed a land claim in federal court for the rights to 146 square miles of land and hunting rights to 4 million acres of land throughout the state. To put this in perspective, 146 square miles is almost the size of Cleveland (77 square miles) and Cincinnati (78 square miles) combined. This claim is against the State of Ohio, 36 counties in the state, a number of cities and private landowners.

As indicated in this article from *The Columbus Dispatch*, the Eastern Shawnee's lawyer has stated that the tribe will drop the land claim in exchange for the right to put casinos in these communities throughout the state. Mr. Chairman, I ask unanimous consent that this article be made a part of the record.

The Eastern Shawnee, and the groups financing their efforts in Ohio, are clearly blackmailing the State and they are not even being subtle about it. The reality here is that they were looking at location and then looking at the legality of bringing in a casino.

By filing this claim, the Eastern Shawnee tribe is exploiting loopholes in existing federal law. The Indian Claims Commission Act of 1946, which was created expressly to resolve land claims against the federal government, required that any claims be filed within five years of enactment. Because the tribe is now precluded from suing the federal government, they are suing the state.

The Eastern Shawnee was successful in pursuing a claim against the federal government in the Indian Claims Commission. In the 1970s, the Commission concluded that the claims against the government were valid and Congress appropriated funds to pay these claims.

Mr. Chairman, I respectfully request that, as you develop legislation in your committee, you consider that tribes are now using land claims against state and local governments as well as private landowners as leverage for casinos. The real goal behind this land claim is to site casinos, not to seek financial restitution. As you consider this, also consider the need to strengthen IGRA to specifically prohibit tribes from moving across state lines, hundreds of miles from their reservation. Clear language such as this would prevent frivolous lawsuits like the one pending in Ohio.

Another loophole that the Eastern Shawnee is taking advantage of is the ambiguity in how the provision in the Indian Gaming Regulatory Act (IGRA) which determines which gambling activities are permitted.

As you know, IGRA defines casino-style gambling as Class III which includes:

- slot machines,
- black jack,
- craps,
- roulette,
- some lotteries and
- pari-mutuel racing.

This class of gambling activity on Indian lands can only be, and I quote, "located in a State that permits such gaming for any purpose by any person, organization or entity."

It is unclear whether this means that the statutory language should be read and applied in a class-wide or categorical sense or whether it should be read and applied on an activity-by-activity basis.

District and circuit federal courts have both considered this question. In 1991, a District Court in Wisconsin ruled that if a state permits one type of class III gaming, then all other types of class III gaming can be conducted in that state under the IGRA.

On the other hand, in 1993 and 1994, the Eighth and Ninth Circuit Courts of Appeals construed the language of the IGRA to mean that class III gaming in a particular state is limited under the federal law to the specific activities that are permitted under that state's laws.

Earlier this month, the 10th Circuit revealed that these uncertainties continue by finding in favor of the Northern Arapaho tribe who wants to build a casino in Wyoming. Gambling is illegal in the State of Wyoming, except for social and charitable gambling. In this instance, the tribe contended that it is entitled to offer full, casino-style gambling on its reservation because the state allows casino-style activities for social or nonprofit purposes.

In Ohio, gambling for commercial purposes is prohibited by the State Constitution. However, pari-mutuel racing and lottery are both permitted as well as charitable gambling on a very limited and controlled basis.

The Eastern Shawnee and the developers they have partnered with recognize this ambiguity in existing federal law. In order to address this loophole, I will be introducing legislation today that clarifies congressional intent that the provision in IGRA permitting class III gambling only applies on an activity by activity basis and not the full gamut of casino gambling.

Mr. Chairman, I respectfully request that you hold a hearing on the questions that are raised by the ambiguity in the law and that you consider my bill as you develop legislation to address the unintended consequences of the Indian Gaming Regulatory Act.

The Eastern Shawnee already operates a casino on the reservation at the border of Oklahoma and Missouri. Chief Enyart testified before the House Resources Committee earlier this year that their economic potential is limited by the rural character of where the casino and reservation are located.

This tribe has been courted by investors with the attraction that they can find dollar signs out of state - dollar signs that they will make at the detriment of my constituents. Ohio is

a much larger and more populated state. In fact, the population of Ohio is more than three times the size of the population of Oklahoma.

The Eastern Shawnee and the financial backers of their proposals are promising local communities in Ohio that casinos and gambling will address the economic problems Ohio is facing right now.

Mr. Chairman, that is another issue that I encourage you to consider as your committee continues to investigate this issue – who is actually funding the efforts to bring Indian casinos off-reservation and across state lines. In Ohio, it is well recognized that the Eastern Shawnee efforts are being paid for by a number of unnamed private investors.

With private investors such as these, Indian gaming and its consequences have gone far beyond what was originally intended by Congress when IGRA was passed. This has become a gigantic shell game, instead of righting earlier wrongs against tribes. We are no longer looking at giving tribes the self-sufficiency needed for economic gain, but rather lining the pockets of investors with large sums of money.

Mr. Chairman, this issue is ultimately a public policy question. I oppose gambling in all forms, whether commercial or Indian. To me, this is ultimately a question of states' rights – one that our founding fathers addressed in the 10th amendment. I believe that states should have the authority over whether or not to allow for gambling within their borders. However, in Ohio we are facing blackmail by Indian tribes and the financial backers who are funding these efforts.

Some of my colleagues may ask why I am opposed to the prospect of gambling in Ohio. The answer is simple. This issue is really about families. Back when I was a state representative and just beginning my career in government, I was asked how I would confront the problems of Ohio if I had a magic wand.

My answer then was the same as it is now: I would use it to reconstitute and protect the family, which is the foundation of this country and the reason why most of us get up in the morning, go to work and hurry to get home at the end of the day.

Proponents of casino gambling never mention the taxes that will be taken *off* the table by casino gambling. Casinos are most destructive to those citizens least able to cope with financial loss. National statistics underscore that every tax dollar that comes from casino gambling results in $3 in social welfare costs. These are lousy odds when compared to the cost of tax dollars from other things the people would do with their money.

That doesn't address the devastating social costs of gambling. Gambling leads to spikes in violent crime, embezzlement and fraud. Bankruptcy rates in casino counties around the U.S. are 18-35 percent higher than in casino-free counties. Divorce and suicide rates are higher for addicted gamblers than non-gamblers.

Mr. Chairman, as you continue your oversight of the Indian Gambling Regulatory Act, I encourage you to look closely at the issues I've raised today. Thank you for the opportunity to testify before your committee.

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The Columbus Dispatch
Ohio's Greatest Online Newspaper

Tribe sues Ohio in effort to import casino gambling

Eastern Shawnee have no case, Petro says

Tuesday, June 28, 2005

Alan Johnson
THE COLUMBUS DISPATCH

The Eastern Shawnee tribe of Oklahoma made an official claim for 93,440 acres in northwest Ohio yesterday in a bid to return — and bring casino gambling — to their "aboriginal home."

JEFF HINCKLEY | DISPATCH
Charles D. Enyart, chief of the Eastern Shawnee of Oklahoma, and Betty Watson, chairwoman of the tribe's casino-developing business, listen as their attorney discusses their lawsuit.

The lawsuit filed in U.S. District Court in Toledo also seeks hunting, fishing and gathering rights, but not ownership, for another 11,315 square miles of land in 36 counties in central and southeastern Ohio, including the city of Columbus and the southern half of Franklin County.

Charles D. Enyart, chief of the 2,300-member tribe, said during a press conference at the Riffe Center that the tribe has legitimate historic land claims dating back to the Treaty of Greenville, signed on Aug. 3, 1795.

"We were forced out. We were removed. We didn't go voluntarily," he said.

Enyart said he would prefer negotiating with the state to settle the land claims, but Attorney General Jim Petro ignored all communications and refused to have a settlement meeting with tribal leaders.

"Such discourteous treatment harkens to an earlier era in this nation's history which we had believed to have long since yielded to a more enlightened course of dealings between tribal and state government," Enyart said in a letter sent to Petro and Gov. Bob Taft.

While the claims are massive, Mason D. Morisset, a Seattle attorney representing the tribe, made it clear that the intent is to bargain with state and local officials to secure smaller chunks of land to locate casinos — perhaps several of them.

"No one wants to throw anyone out to move in," Morisset said.

"The tribe is perfectly willing to go ahead," he said, "but from a public-policy standpoint, it's much better to go with the folks that want this as an economic-development tool."

Areas that appear casinofriendly include the village of Botkins in Shelby County, the city of Lorain west of Cleveland, and the village of Lordstown in Trumbull County.

Lordstown Mayor Michael A. Chaffee, who attended the press conference, said the Shawnee tribe has an option to purchase 128 acres in Lordstown as the site for a $200 million to $300 million casino that would bring up to 3,000 jobs.

"It would be a gigantic plus for us," Chaffee said. "You'd be a fool not to be excited by something like

that."

Chaffee said he's sensitive to criticism of casino gambling, but he noted that many Mahoning Valley residents now drive 45 minutes to the Mountaineer track and casino in Chester, W.Va. He said on a recent Friday night, he counted 190 of 250 cars with Ohio license plates.

Morisset said the lawsuit could take two years to resolve in the courts.

It seeks damages from the state for revenue collected on the property since it assumed control in 1831. The figure, Morisset said, "could be astronomical."

"The claims are extremely serious for the people of Ohio," he said. "This sullies everyone's title to their land."

In a statement, Petro vowed to "continue to vigorously defend the state and laws crafted by the state which do not allow for Class III casino gambling.

"Since we do not believe that the Eastern Shawnee are entitled to any land in Ohio, whether state owned or not, we do not see any point to meeting with them. If this lawsuit is an effort to further expand gambling in the state, I will do everything I can to stop it."

Petro, a Republican candidate for governor next year, has indicated his strong political opposition to casino gambling.

ajohnson@dispatch.com

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"Freedom is not something to be secured...in any one moment of time...We must struggle to preserve it every day, since freedom is never more than one generation from extinction..."
President Ronald Reagan

Chairman Emeritus:
Alan Montgomery, Washington
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Dan Johnson, Idaho

Former Congressman Jack Metcalf, Washington

Marianne Pender, Wisconsin

Marilyn Sherry, Washington

Rich Porter, Illinois

Cynthia Rasmussen, Washington

August 29, 2005

The Honorable Senator John McCain, Chairman
U.S. Senate Indian Affairs Committee
Washington, DC 20510

Re: Request to testify before your Committee on subject of "Reservation Shopping"

Dear Chairman McCain and Indian Affairs Committee Members,

I am writing to you on behalf of One Nation United, a nonpartisan, nonprofit umbrella group representing over 300,000 concerned citizens, community groups, homeowner associations, local governments, national trade groups, businesses large and small, law enforcement, and elected officials in thirty-seven states across America. Our 501(c)4 organization represents many thousands of property owners, families, and companies in energy, agriculture, retailing, and manufacturing who are adversely impacted by current federal Indian policy. We have enrolled tribal members among our membership, as well as fee land owners both on and off reservation. Our goal is equality of opportunity, an equal voice in government, and equality under the law for all U.S. citizens, Indian and non-Indian alike. We actively defend private property rights, the consent of the governed, and a level Free Enterprise playing field for all Americans.

We greatly appreciate the opportunity to submit testimony to your Committee on the subject of "Reservation Shopping" and are so very thankful that you are giving long overdue attention to the need for reform of federal Indian policy. We understand that you plan to hold MORE hearings on this subject in DC and across the country. We hope you'll consider holding one in Southern California, where these problems are acute.

We honor and respect tribal sovereignty and treaty rights, but believe State Sovereignty deserves equal honor and respect by the tribes. Likewise, we fully support the economic advancement of tribal governments, but hold the firm conviction that tribal financial success should not come at the expense of non-tribal citizens, businesses, and local governments. We need to seek balance by making changes to federal Indian policy that will lead to more fairness and equity.

The fundamental question that needs to be answered is this:

Should states and local citizens have a meaningful voice in decisions that shape the future of our communities? Or should Indian tribes be able to buy land, move it off the tax rolls, and build large casinos and other development projects that are completely contrary to local land use and environmental rules? This question lies at the root of major controversies erupting now in states across the country, from Washington to New York as well as from Oklahoma to Wisconsin, in hundreds of communities, large and sometimes very small.

Thank you for recognizing these problems by holding hearings on this topic!

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FROM :ONENATION FAX NO. :8055230524 Aug. 30 2005 06:31PM P1

Advisory Committee:

Chair:

Marla R. Peek,
Director of Regulatory Affairs, Oklahoma Farm Bureau, Oklahoma City, Oklahoma

Committee Co-Chairs:

Chip Worthington,
Founder, "Stop The Casino 101", Rohnert Park, California

Rheba Hewitt,
President, "Alliance for Community Rights" San Bernardino, California

Advisory Committee Members:

Scott Seaborne,
Vice-President, Shawano County Concerned Property Taxpayers Association, Gresham, WI

Honorable Wally J. Leimgruber,
Imperial County Supervisor-District 5, El Centro, CA

Honorable Nicholas H. Mullane II,
First Selectman, Town of North Stonington, CT

Jon Farbee,
President, North Idaho Citizens Alliance, Harrison, ID

Hon. Paul Johnson,
Mayor Pro Tem, Town of Cochiti Lake, NM

Dick Platfoot,
Citizens Against Casino Gambling, Wapakoneta, OH

Nancy Smelcer,
Menominee County Taxpayers Association, Keshena, WI

Tom and Patty Mitchell,
Founders, Tulalip Community Association, Marysville, WA

More and more people are coming to see that the unchecked power of casino tribes is increasingly leading to flagrant and outrageous abuses. No one wants secret deal making, rather than an open, public process for siting major development projects, especially casino-financed development where Indian tribes are allowed to ignore virtually all state and local environmental rules, water codes, signage, health, and public safety requirements. Tribes have the right to manage their own affairs and govern their own members -- but not to impose their rules on their non-tribal neighbors.

That is why we believe a big part of the solution would be to give local citizens, communities, and elected officials more say in this process. Congress should act in the best interests of ALL American citizens, Indian and non-Indian alike, in drafting legislation on issues that have such wide-ranging implications on the state and local level. This is especially true for tribal casinos, which are designed to attract non-tribal patrons. This means the harmful effects are inevitably felt far beyond the boundaries of Indian Country.

Citizens are concerned over seeing casino tribes flaunt laws enacted to protect everyone -- every customer, every worker, and every tribal member. The damage being inflicted, especially on small town America, is very real. Neighboring communities caught in the explosion of Indian casino expansion are facing similar problems in dozens of states. Local taxpayers, who are bearing most of the burdens, have drawn a line in the sand saying, "Enough is enough."

Therefore, we strongly object to "Off Reservation Economic Opportunity Zones" as proposed on the House side by Chairman Pombo in his draft legislation. Carving lands out of sovereign states without their express consent is **unconstitutional and illegal**. Congress does not have the authority to overturn state sovereign authority over the lands located within its territorial borders, except (as recently pointed out by California Governor Arnold Schwarzenegger) to the extent such jurisdiction is "expressly reserved by, or ceded to, the federal government or preempted by operation of federal law."

After all, by enacting the Indian Gaming Regulatory Act (IGRA) in 1988, **Congress intended to provide states with a meaningful role in determining which gambling activities would be conducted, if at all, when and where** under the terms of tribal-state gaming compacts. We believe that, as subdivisions of state government, local governments should also have a voice in the siting of casinos and all other major tribal development projects.

Many major national news reports have been published, starting with TIME Magazine and more recently in the Wall Street Journal, describing how tribal government actions are often causing soil erosion, water shortages, snarled traffic, increased crime, bankrupt neighboring businesses, and dramatically reduced property values in communities that host Indian gambling meccas.
The draft legislation should, therefore, be modified to allow community approval by ALL impacted communities within a 200 mile radius of the proposed casino, just as it requires approval by each Indian tribe located within 200 miles. To do otherwise is to insure that the citizens, businesses, and communities suffering the biggest negative impacts will have **no** voice at all in how their future is shaped.

The health, safety, and welfare of all U.S. citizens should be taken into account!

The health, safety, and welfare

Your Committee needs to take a hard look at writing a new "Final Rule" regarding acquisition of title to land in trust for Indian tribes, since many of the problems being experienced are the result of this flawed process. Any process by which tribes acquire land for the purpose of building a tax-exempt gaming facility should be within the bounds of state and federal law and should also be fair, balanced, and fully respectful of the interests of state, tribal, AND local governments.

Indian-owned businesses typically do not pay property taxes or most of the other fees, taxes, and regulatory burdens borne by non-tribal business. But tribes and their patrons nonetheless use all of the same public services - - and local taxpayers bear the biggest cost of providing those services. **Gambling, in particular, has well-documented social and economic consequences to local citizens.** Our local communities are deeply affected in the important areas of water use, sovereignty, environment, jurisdiction, transportation, infrastructure, and quality of life.

The advantages tribes now have through tax-free pricing is creating major inequities in the marketplace, undermining economic development, and eroding the tax base of many local, county, and state governments. The result is a growing number of small business competitors are closing their doors permanently, while more and more states are seeing huge budget deficits.

Our organization represents the owners of convenience stores, gas stations, restaurants, and grocery stores nationwide who cannot compete against tribal businesses that refuse to collect or remit state and local sales taxes on purchases made by non-tribal customers. This is happening despite the fact that the U.S. Supreme Court has ruled on four separate occasions that tribal retailers are **lawfully bound to collect and remit all taxes owed on retail purchases by their non-Indian customers. (Local officials can't enforce the law due to sovereign immunity.)**

Since Congress created this boondoggle, Congress now needs to step forward to help solve these problems. President Bush sent an unmistakable message to the grassroots when his Secretary of Interior vetoed a Clinton-promulgated "Final Rule" on fee-to-trust in 2001 that would have made it easier for tribes to open large casinos without community input or much needed mitigation.

We urgently call on Congress to quickly enact comprehensive reforms to the "fee-to-trust" process, preferably by enacting a nationwide moratorium on any new conversions while public hearings are held nationwide. We pray that your Committee will schedule hearings soon on the need to fix the fee-to-trust process, the Indian Gaming Regulatory Act, as well as the tribal recognition process. Indian tribes should respect state sovereignty and state and local laws, just as all U.S. citizens must honor tribal sovereignty and treaty rights. It's a two way street; not the one-way street some tribal leaders and BIA bureaucrats demand it to be.

We remain committed to helping to resolve the conflicts arising out of the implementation of IGRA. But we simply cannot allow the total disruption of our communities' land use plans, our businesses' viability, and reduced value of our properties by tribal governments in which we have no voice or vote. We must defend our local communities from the consequences of unchecked tribal government power that is growing in an uncontrolled fashion. Tribes need to be held to a reasonable standard of behavior, financial transparency, and accountability to their neighbors, their customers, their employees, and their tax-paying competitors. How would tribes react if we could build huge developments in the middle of their reservations without meaningful tribal input? That wouldn't be fair or right, just as the status quo isn't fair to non-Indians today!

Here are some additional suggestions we have for improving this draft legislation:

(1) Amend IGRA to include a requirement that whenever land is taken into trust (whether contiguous or noncontiguous) that the tribal proposal must include full and complete disclosure of any and all planned gambling activities. Tribes are increasingly engaging in what we call "Bait & Switch" whereby they tell everyone that they have NO plans to engage in any gaming activities on the subject property and then, as soon as trust status is

approved, promptly build a casino. (We can provide numerous examples when we are, hopefully, allowed to have a One Nation United representative testify at an upcoming hearing).

(2) Another amendment to IGRA we hope you will consider was suggested by the National Association of Attorneys General in 2003: "A fee-to-trust application should NOT be approved if approval would result in "significant" (instead of "severe") negative harm to the local government or to the environment." Determining the answer to this question involves careful examination of the facts.Therefore, NAAG and the National Governors' Assn. also suggest the need for a "Neutral, Third Party Hearing Officer" or "Impartial Decisionmaker." Please consider adding language directing the Secretary of Interior to appoint a neutral hearing examiner to help resolve disputed issues between tribes, states, and local communities. Superintendents of the Department of Interior, Bureau of Indian Affairs Regional Directors, and other employees of the Assistant Secretary for Indian Affairs are, by law, advocates for the tribes and this makes it impossible for them to render decisions that are perceived to be objective or fair. A neutral hearing examiner could set up hearings to allow both the applicant tribe and representatives of local communities to present evidence and resolve contested facts. Only appointment of a neutral hearing officer will allow state and local interests to be fully and fairly considered, especially the ability of our governments to fulfill their public responsibilities on a reduced tax base. This appointment would help to restore public confidence in the process.
(http://www.nga.org/portal/site/nga/menuitem.665439ab78c074e78a278110501010a0/?searchterm=Land+into+trust&Find=Find) *See NGA Policy Position on "The Role of States, the Federal Government, and Indian Tribal Governments with Respect to Indian Gaming and Taxation Issues." Read NGA letter dated April 9, 2001 outlining NGA's objections to the Department of Interior's final regulations governing procedures for taking land into trust, NGA letter dated June 14, 2001 commenting on final land into trust regulations issued by the BIA, and NGA letter dated June 27, 2005 on trust land acquisition process. Letters signed by NGA Executive Director, Ray Scheppach.*

(3) Amend IGRA to require the state governor's approval **before** BIA moves land (contiguous or noncontiguous) into trust for a tribe when the purpose is gambling-related, such as for parking lots, casino overflow, casino resort construction, and/or any other activity not strictly related to casino construction. This is needed because such acquisitions are clearly being used for expansion of tribal gambling. Add language requiring that ALL local governments be notified in writing by the BIA within 30 days of application by any tribe to move land into trust for any "gambling-related" purpose, as explained above.

Furthermore, consider adding language stating that ANY "off-reservation" land removed from a state government's jurisdiction, zoning, taxing, and environmental controls should at a minimum be of "compelling" necessity to specific tribal needs. If the proposed tribal land acquisition, whether on or off-reservation, cannot be resolved through a cooperative agreement between the parties, the Secretary should be directed by amendment language to deny the application for trust acquisition whenever a neutral hearing examiner finds "significant" harm to the environment OR to a state or local community. Some proposed tribal casino sites are simply inappropriate locations. An appropriate location should be found.

(4) As suggested by the "Western States Sheriffs' Association in resolutions passed in 2003 and 2004, please consider amending IGRA to further define the role of Indian tribes (as beneficiaries of tax-exempt profits from a government-sponsored gambling monopoly business) to require compliance with city, county, and state building, health and safety, criminal, water, sanitation, and environmental codes, as well as adding language requiring casino tribes to fully mitigate the loss of property, hotel, and sales tax revenues to surrounding non-Indian communities. (See attached copies of WSSA resolutions from 2003 and 2004 at:
http://www.uspact.org/SheriffAssoc.pdf)

(5) Amend IGRA to fix the "Good Faith" standard included in IGRA, which currently requires a good faith negotiation standard **only** for state governments. A "Good Faith" showing should instead be required for **both** tribal governments and states. As the National Governors' Association has repeatedly pointed out, the inability to

agree on a gaming compact should **not** be treated as an indication of bad faith, especially when a state is simply adhering to its own constitution and state laws on subject of gambling.

(6) Add language amending IGRA stating that tribes not be allowed to demand that a state enter a compact for gambling activities which are clearly inconsistent with state policy, constitution, or law. Furthermore, language should be added stating the U.S. Secretary of Interior's ability to approve Class III gambling for any tribe is strictly limited to what is allowed under that state's laws, regulations, and ordinances, not simply what is allowed under the state's criminal codes.

(7) Consider amending IGRA to address the problem of regulatory oversight. Establishment by Congress of minimum regulatory standards should **not** preempt stricter state laws governing gambling at Indian casinos. This is important to protect the interests of ALL - - casino patrons, tribal members, state governments, tribal governments, and casino employees, as well as the public-at-large. Add language stating that the states cannot be prevented from negotiating more stingent regulatory standards with tribes in their tribal-state compacts. Again, this is to **give equal honor and respect to state sovereignty**.

(8) Another amendment that should be considered is to address questions of enforcement. We believe language should be added directing the Department of Justice to use its existing enforcement authority under the terms of IGRA to shut down Class III tribal gambling casinos operating in violation of, or in absence of, tribal-state compacts. Due to tribal sovereign immunity from suit, the states cannot take aggressive action against tribes conducting gaming outside of Indian trust lands nor can states go after tribes engaging in uncompacted Class III gambling. Language granting states authority to seek injunctive relief in federal courts against such illegal gambling activities should also be seriously considered.

(9) As suggested by the National Governors' Assn. in 2003, we hope you will also consider adding language that would **require the Secretary of Interior to provide states and affected local governments with copies of tribal submissions and evidence on these issues, just as tribes are now able to review state and local submissions**. We need amendment language ensuring that states and local jurisdictions have the right to provide data to the Secretary challenging assertions made in tribal proposals for fee-to-trust. Such a requirement would do much to reduce conflicts between tribes and their neighbors and give tribal governments more incentive to cooperatively address adverse impacts, jurisdictional disputes, and infrastructure needs. This would be in best long-term interests of everyone concerned, especially the tribes because research shows that more than 50% of their patrons typically reside within a 50-mile radius of the casino. Having good relations with these neighboring communities would mean bigger profits for all tribal businesses in the long run. Again, we simply need more balance and the standards should be the SAME for all parties.

(10) Finally, to address the growing problem of tribal businesses flaunting the law and ignoring U.S. Supreme Court rulings requiring collection and remission of sales/excise taxes on purchases made by non-Indian customers, we urge you to consider adding amendment language stating (as suggested by the National Governors' Assn.) that:
"When duly imposed and legitimately assessed taxes are not collected by retail establishments on trust lands and remitted to the appropriate taxing jurisdiction, the land on which the retail establishment is located should be removed from trust status. A cause of action should be available in federal court to enforce this provision." Such language would go a long way toward reducing state and local budget deficits now being faced across the nation.

We sincerely hope that the Committee will pledge to work **not only** with tribal leaders around America in seeking solutions to these growing problems, but that Chairman McCain will urge his staff to also reach out to non-tribal citizens, elected officials, and community group leaders who likewise need increased economic opportunities, protection to the health and welfare of our children and senior citizens (some of whom are becoming gambling addicts and risking the loss of their lifetime savings), and defense of State Sovereignty and our private property rights on the local level.

[illegible] (See copy of Bandow's article, attached).

It is the abuses of IGRA and the fee-to-trust process that we are addressing in this communication to you. Some, certainly not all, tribal leaders are overreaching and taking advantage of the many loopholes contained in IGRA and, in the process, causing needless conflicts with their neighbors. We must reform federal Indian policy for the benefit of Indians and non-Indians alike, since we all live together and share common infrastructure and public safety needs.

As reported in TIME Magazine by two Pulitzer Prize-winning investigative reporters, not very many tribal members are actually seeing any economic benefit from the hundreds of millions of dollars flowing into tribal government coffers from tax-free casino profits. Some tribal leaders, their families, and greedy non-Indian developers are raking in the big bucks, while most rank-and-file enrolled members still are living in abject poverty. This needs fixing, too!

developers are raking in the big bucks, while most rank-and-file enrolled members still are living in abject poverty. This needs fixing, too!

Thank you for taking the time to read our letter to you and allowing us to share our heartfelt concerns. We stand ready to testify in person at any upcoming hearings and can offer you assistance in providing names and contact information for electeds on the state and local level who would likewise be anxious to testify, along with law enforcement leaders and national trade group officials from the National Association of Convenience Stores (NACS), Petroleum Marketers Association of America (PMAA), National Sheriffs Association, National Grocers Association, Conference of Western Attorneys General (CWAG), Food Marketing Institute, Oklahoma Farm Bureau, and Western Sheriffs' Association, all of whom we work closely with on these reform efforts.

All of these groups, along with One Nation United, would like to share with your Committee our members' concerns over "Reservation Shopping" and how removing land from state and local tax rolls for purposes of tribal gambling expansion has wide-ranging impacts on local businesses, public safety, and other significant economic impacts to their localities. Many community group leaders involved with local tribal casino proposals would also appreciate the opportunity to tell you their stories and explain their valid concerns.

Please feel free to call me if you have any questions or need additional information. We hope to hear from you soon about a date and location for a field hearing in Southern California. Thank you again for looking into these issues!

Gratefully Yours,

Barbara M. Lindsay, National Director and Spokesperson
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ENCLOSURES: Western States Sheriffs' Assn. resolutions, The Washington Times article by Doug Bandow, "Reservation Shopping" in Oregon by People Against a Casino Town (PACT), letters by Governor Jodi Rell of Connecticut and Rep. Frank Wolf of Virginia, article from The Daily News written by Eric Leach of Los Angeles

Stand Up For California!

"Citizens making a difference"
standupca.org

P.O. Box 355
Penryn, CA 95663

September 16, 2005

The Honorable John McCain
Chair, Committee on Indian Affairs
US Senate
836 Hart Senate Office Building
Washington, DC 20510

The Honorable Byron Dorgan
Ranking Minority Member, Committee on Indian Affairs
US Senate
836 Hart Senate Office Building
Washington, DC 20510

Dear Chairman McCain and Senator Dorgan.

On July 27, 2005, the Committee on Indian Affairs held an Oversight Hearing on *Lands Eligible for Gaming Pursuant to the Indian Gaming Regulatory Act.*

The first witness on Panel II was Mr. Walter Gray, Tribal Administrator, Guidiville Band of Pomo Indians, Talmage, California. He provided the Committee with a 21-page statement. Beginning at the top of page 5, the Statement sets forth a "SUMMARY CALIFORNIA TIMELINE."

Stand Up For California! is a statewide organization with a focus on gambling issues affecting California, including tribal gaming, card clubs and the state lottery. We have been involved in the ongoing debate of issues raised by tribal gaming and its impacts for nearly a decade. Since 1996, we have assisted individuals, community groups, elected officials, and members of law enforcement, local public entities and the State of California as respects to gaming impacts. We are recognized and act as a resource of information to local, state and federal policy makers.

Stand Up For California reviewed the aforementioned statement presented by Mr. Gray to the Committee, and in particular the Summary California Timeline. We believe this statement contains outright errors in certain instances and numerous omissions in others. Collectively, these errors and omissions amount to an incomplete and distorted history as presented to the Committee. We have prepared the attached statement which details and itemizes the identified errors and omissions.

Stand Up For California! requests that the Committee both undertake a review of Mr. Gray's statement to either validate the claims asserted or confirm the distortions/omissions and then, as appropriate, correct the Record. In the alternative, the Committee may prefer to request that the

Bureau of Indian Affairs staff undertake a complete review of the Timeline presented to the Committee, or to ask the Interior Department's Inspector General (IG) or the Library of Congress' Congressional Research Service (CRS) to do the same.

We respectfully request that our letter and the attachment be considered a Statement for the Record of the Oversight Hearing and that these documents be included in the July 27 Committee Hearing Record following the statement submitted by Mr. Gray. If there are additional questions regarding the review of the timeline please do not hesitate to contact me.

Sincerely,

Cheryl A. Schmit – Director
PH: 916-663-3207
schmit@quiknet.com

CC: Honorable Arnold Schwarzenegger, Governor - State of California
Honorable Peter Siggins, Secretary of Legal Affairs
Honorable Dan Kolkey, Attorney - Tribal State Compact Negotiator
Honorable Bill Lockyer, Attorney General - State of California

Attachments: Timeline and exhibits:

Exhibit No. 1. Guidiville Stipulated Judgment
Exhibit No. 2 Asst. Secretary Indian Affairs Ada Deer and Indian Commissioner Bruce letter regarding the Ione Band "reaffirmation"
Exhibit No. 3 Internal Memorandum of BIA from Lee Fleming to Kevin Gover questioning legality of "reaffirming tribes"
Exhibit No. 4 Memo from Kevin Gover Directing Pacific Regional Office To correct errors regarding federal "recognition/reaffirmation".
Exhibit No. 5 *Father of a Nation*, by Ron Russell 3-1-2005, San Francisco Weekly

Summary of Omissions and Errors in Chairman Gray's California Timeline

1849: California enters Statehood.

1850: (Clarification) The failure of the United States Senate to ratify the 18 treaties with the Indians of California has long been a contentious issue with many of the California tribes including tribes not yet federally recognized. However, the issues may be overstated for the reason that unratified treaties have no legal force or even any modern significance because the legal description of lands ceded by treaties -- or proposed to be ceded in the case of unratified treaties -- is irrelevant as a matter of law. Moreover, the California tribes have no claims to their aboriginal lands because they failed to certify their ownership pursuant to the California Land Review Act of 1851.[1]

1851: (Omission) California Land Review Act established a Commission to review the deeds of California settlers which also included Indian land claims. The Commission was needed as many prominent Californians of the day were traveling to Mexico to have their Mexican deeds back-dated and lands expanded prior to the signing of the Guadalupe Hidalgo Treaty of 1848.

1864: (Omission) The 1864 Act, also know as the "Four Reservations Act," applies uniquely to California Indian lands and Indian tribes. The Act specifically stated that no more than four Indian reservations could be established within the State of California. This statutory limitation of four reservations within California was confirmed by the United States Supreme Court in the case of *Mattz v. Arnett, 412 U. S. 481, 489 (1973)*. Thus, there could be no further or future reservations within California in the absence of specific Congressional authorization.

While there have been some private bills establishing reservations for some California tribes, the only significant exception was the Mission Indians Relief Act of January 12, 1891, 26 Stat. 712, which provided for the establishment of a number of reservations for Mission Indian residing in Southern California. The identity of Mission Indians is well known and well documented as they were the Indians historically residing adjacent to or near the Catholic missions throughout Southern California.[2]

Current Congressional authorizations of new reservations have been as recent as 1994, when Congress recognized the Paskenta and the United Auburn Indian Community reservations, the Federate Miwoks of the Graton Rancheria in 2000 and the establishment of a reservation for the Lyttons in the San Francisco area in 2000. These *ad hoc* Congressional authorizations have not been without contraversary.

1906 through 1914: (Omission) The Congressional Appropriation Acts of 1906 (34 Stat. 383), 1908 (35 Stat. 70-76) and 1914 (38 Stat. 58 – 59) provided money to purchase land for residential and agricultural use for homeless Indians of no specific tribal affiliation. Often these were small family groups and/or unrelated, racially mixed families that were administratively grouped together and offered an agreed upon track of land that the United States held title in fee simple (i.e., the property was not held in trust, the deed does not use trust language and there were no restrictions on alienation). These lands were termed "Rancherias" because of the 1864

Four Reservations Act prohibited the creation of additional Reservations by the Executive Branch.

1909: (Omission) A 50 acre tract of land was purchased for $2000 for the establishment of the Guidiville Rancheria.[3]

1912: (Omission) By Executive Order further lands were added, enlarging the tract by 34.12 acres at a cost of $2,100.[4]

1923: (Omission) In 1923, the Reno Indian Agency ("Agency") had jurisdiction over Indian reservations, colonies, villages and scattered bands of homeless Indians in Nevada and Northern California not under the superintendence of any other jurisdiction. The Agency and its entire personnel gave considerable time surveying and compiling data on populations, locations and needs of the various Indian Reservations, colonies, Rancherias, villages and scattered bands of homeless California Indians as documented in the Agency's annual report of 1923.[5]

The 1923 Agency records indicate approximately 38 Indians; comprised 12 families with 12 minors. A tract of 74 acres has been purchased for the Guidiville band with funds appropriated under the acts of June 21, 1906 (31 Stat., 325-333), and April 30, 1908 (35 Stat., 70-76) **"to purchase for the use of the Indians in the State of California."** This tract of land was established on the traditional homeland of this group of Indians.

> (**Note:** There is a difference of 10 acres between the Reno Indian Agency Report, the Department of the Interior and Congressional records regarding the total acreage.)

1928: (Omission) Congress permitted the Indians of California to sue the U.S. for compensation promised but denied under the unratified treaties which Indians had negotiated.

1934: (Clarification) Wheeler-Howard Act, June 18, 1934 (Indian Reorganization Act)

Rancherias were not contemplated as reservations for the purposes of the 1934 Act. The Department of the Interior has allowed the homeless Indians of California residing on Rancheria lands to organize and take land under section 5 of this Act.

In a letter from the Attorney General of California, dated July 29, 1997:

> The Attorney General objects to these notices of application to have property taken into trust due to the lack of authority of the Secretary of the Interior to take property into trust for the benefit of Indians. Title 25 United States Code, Section 465, pursuant to which the Secretary appears to act, is an unconstitutional delegation of legislative power. Absent Congressional action to circumscribe the apparently unlimited authority of the Secretary now set out in section 465, the Secretary cannot legally take property into trust for any Indians or Indian tribes."

The Indian Reorganization Act was enacted to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a

credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes. Section 19 of the IRA act was misapplied to Rancheria lands and homeless Indians of California. (See footnotes 15 and 16.)

Sec. 19 of the IRA: **(Clarification)** The term **"Indian"** as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all person who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any **"reservation"**, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term **"tribe"** wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on **one reservation**. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years

1944: **(Clarification)** Indian Land Claims are settled. Court of Claims allowed relief (98 Ct. C.583, 592-592) citing Stat. 602(1928). The claims of the Mission Indians, the Indians of California and the Pit River people were consolidated and accepted 47 cents per acre for the land they had lost in the unratified treaties.[6]

1953: **(Clarification)** Congress passed Public Law 280. Public Law 280 requires law enforcement protection by local officials (i.e. County Sheriff, County District Attorney, etc.) on California's Indian lands, including all Reservations and Rancherias. Tribal governments and members were conferred the protections of the California Criminal (Penal) Codes and limited civil codes for such matters as marriage, divorce and adoption. However, civil regulatory laws do not apply to Reservations (Rancherias depending on land status). Public Law 280 is respectful of the inherent sovereignty of the tribal governments and their authority to govern Indian members. Many of California's 109 tribal governments have memorandums of understanding (MOU's) with County Sheriffs, local Police and District Attorney Offices. These MOU's are intergovernmental agreements which define the authorities and responsibilities of each agency one to another.[7]

1955: **(Omission)** October 20, 1955 the residents of the Guidiville Rancheria passed a resolution requesting that the United States Government transfer fee title from the United States directly to the individual members of their respective tracts and that the mountain and grazing land be patented to the group. The Guidiville Rancheria governing body further requested that a survey be made so that each assignee will receive a legal description of his property, that any lien against the land be cancelled, and that a 'legal entity'[8] be established to accept and maintain the land that will be leased to non-tribal individuals.[9]

Approximately 32 people were living on the Rancheria, although the group did not have an approved membership roll in 1955. The group had an informal tribal organization with elected officers. They were not formally organized. Several of the residents had vineyards and make part of their livelihood through this agriculture. Only 38 acres are used by Indians for home sites and 213 acres are leased to a non-Indian.[10]

1992: (Omission) Wednesday February 12, 1992, Notice of Reinstatement to former status for the Guidiville Band of Pomo Indians was issued by the BIA in the Federal Register: "The Scotts Valley Band of Pomo Indians and Lytton Indian Community of California. Effective September 1991. Federal Register/Vol 57.29"

Omitting this reinstatement to former status in 1991 raises several additional material facts that must be included in the timeline:

1. The land that the Guidiville Band is now attempting to have restored is not located within, nor contiguous to, the boundaries of a "Reservation" of a tribe in existence on October 17, 1988. On October 17, 1988, the Guidiville Band was not a federally recognized tribe, did not have a land base, and did not reside on land set aside under federal protections against other jurisdictions and did not assert governmental powers over any land.

2. The Guidiville Band never had a "Reservation." The Rancheria was purchased for "the use and occupancy of homeless Indians" located in Mendocino County in the small town of Talmage. (1999 Tribal Information and Directory, BIA) (Review timeline: 1909, 1912 and 1923)

3. The Guidiville Band is making a claim for "restored lands" in the City of Richmond, California – more than 100 miles south of Talmage - for a casino/hotel/restaurant/shopping mall complex although it is not part of and not consistent with, the land settlement terms and conditions in the Stipulation.

4. According to BIA records, the Guidiville Band has never been acknowledged by the Secretary pursuant to the federal acknowledgment regulations.

The stipulated judgment is not a restoration act. The Stipulated Judgment was not an official act permitting restoration of a Reservation from the ashes of a Rancheria. The Stipulated Judgment documents that the Guidiville Band was not terminated and the Tribe's Rancheria assets were not distributed pursuant to the Rancheria Act.

Specifically, the Stipulation provides that the Federal government agrees to accept into trust status any land" *within the boundaries of the former Guidiville Rancheria*" that:

1. Is currently in Indian ownership, and
2. Was deeded or passed as a direct consequence to termination to certain entities or individuals.

The Stipulated Judgment does, in fact, permit the Federal government to take land into trust "outside the boundaries" of the former Guidiville Rancheria ***only if*** the land at issue is currently held in fee or through allotment by (1) any distributee receiving such land under a Rancheria distribution plan; or (2) the distributee's dependent or Indian heir, or successor in interest
Exhibit No. 1.

Stipulated Judgment, at pp. 5-7. In sum, the Stipulated Judgment merely re-established the Band's governmental relationship with the Federal government as a federally recognized tribe.

1992: (Clarification) The Tribe cites PL 102-416 (October 14, 1992), as amended by PL 104-109 (February 12, 1996) which appropriated funding for the creation of the Advisory Council on California Indian Policy. The council was made up of representatives from federally recognized, terminated and unacknowledged California tribes. The Advisory Council was directed to submit recommendations to Congress regarding remedial measures to address the special status problems of California's terminated unacknowledged tribes and the needs of California Indians relating to economic self sufficiency, health and education.[11]

However it should be noted, there is no companion report suggesting the needs or impacts on the State of California, State agencies, Local Governments, law enforcement or communities of citizens to balance the suggested recommendations of the Advisory Council. Moreover for it to appear in a timeline that is supporting the restoration of lands more than 100 miles from the existing Rancheria specifically for a gaming acquisition appears to significantly broaden and misconstrue the reports purposes.[12]

1994: (Omission) Many California tribal groups qualify for gaming due to the enactment of Senator John McCain's 1994 legislation, the List Act (Technical Corrections Act of 1994, Section 5, Pub. L. 103-263, 108 Stat. 707 (May 31, 1994), which he said and believed was not controversial. The unintended consequence of the List Act in California relates to Rancheria lands that were held in a variety of status which included: fee-simple in the name of the United States, fee patent, fractional interest lands or in trust in the name of individual Indians.

The List Act created many unintended consequences in California. In essence the Act was used as class action "reaffirmation." This has created numerous instances of tribal governments entering into enrollment disputes over Indian lands, gaming money and power.

In *Cherokee Nation of Oklahoma vs. Gale Norton* (2004) ("Cherokee Nation"), the 10th Circuit rejected the 1996 determination regarding the Delaware's. The Court held that Indian tribes may be recognized only 1 of 3 ways: (1) by an Act of Congress, (2) through the Part 83 acknowledgment process or (3) by a decision of a federal court. The court stated:

> Agencies ... must follow their own rules and regulations. The DOI used a procedure heretofore unknown to the law – 'retract and declare' – to purportedly re-recognize the Delaware's. In so doing, the DOI's actions were arbitrary and capricious. The agency simple elected not to follow the Part 83 procedures for recognizing an Indian tribe and, furthermore, did not even properly waive application of those procedures. See 25 C.F.R. § 1.2. We accordingly hold unlawful and set aside the DOI's 1996 final decision. 5 U.S.C. § 706(2)(A). Any action taken on the agency's 1996 final decision is void. 'Further comment on this case is unnecessary.' [Citing a 1994 Supreme Court decision]

Moreover, a plain reading of the Technical Corrections Act of 1994, Section 5, Pub. L. 103-263, 108 Stat. 707 (May 31, 1994) demonstrates that the BIA may not misconstrue the amendment to avoid application of the required criteria for acknowledgment to be met.[13]

The action by the Pacific Regional Office federally recognizing/reaffirming land-based groups conflicts with the above ruling and raises reasonable and legitimate questions regarding the authority of the Pacific Regional Office to perform reaffirmation. Or correct the list by moving land base groups to the federally recognized list. This action appears to have ushered in the proliferation of landless tribes seeking gaming in urban and metropolitan areas of California. Guidiville, Scotts Valley, Ione and Lower Lake Koi Nation are good examples. Exhibit No. 4. Interestingly, former Assistant Secretary Kevin Gover who directed the Pacific Regional Office to perform this action, despite the internal memorandum to the contrary which questioning the ethics and legal authority for such action (Exhibit No. 3), is a spokesperson or consultant for some of these groups and financially benefiting from this action. Exhibit No. 5.

Errors and Clarification in the timeline:

IONE

1992 (Omission) Interior Board of Indian Appeals appeal by the Ione Band declines their request for federal recognition citing the federal acknowledgement regulations as the relevant and necessary process.[14]

1994 (Omission) Ada Deer in a letter dated May 22, 1994 to Chairman Nicholas Villa states, "Upon review of the matter, I am now reaffirming the "portion" of the Commissioners Bruce's letter which reads:

> "The Secretary also recognizes that obtaining a tribal community land base for the Ione Band is a part of his policy of Indian self-determination and cultural identification. Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. As the Commissioner of Indian Affairs, I therefore, hereby agree to accept by relinquishment of title or gift the following described parcel of land to be held in trust for the Ione Band of the Miwok Indians." (See Exhibit No. 2: Ada Deer and Indian Commissioner Bruce letters)

This action conflicts with the above August 1992 IBIA ruling and is without a citation to authority or precedence for such action. This action is further complicated by the Department of Interior's failure to follow its own rules. **43 U.S.C. section 150 prohibits the Secretary from withdrawing any public land by Secretarial or Executive Order** for use as an Indian reservation. In other words, not even a Secretarial proclamation can legally grant Rancherias the status of a Reservation. The Rancheria was not officially purchased by the BIA even in 1923 as the quote from the Reno Indian Agency Report indicates.

> "As the Office is aware, we have been considering the purchase of a tract for the Indians at Ione for the past several years, the property being a forty acre tract, which has been tied up by legal procedures. See File 13222-22, the proposed price is $4000.00."

- **1998** The Ione Band again appeals to the IBIA to establish criteria for tribal membership using the 1915 Ione Census. The Ione Band land issue remains unresolved despite the action of Ada Deer.

- **2005** Presently, title to the Ione Rancheria is in fee-simple in the name of the United States.(43 U.S.C. section 150) Unless the land is held in trust, it does not meet the legal threshold for gaming under IGRA 2703 (4). The Ione Band is presently seeking an off-reservation casino in the small community of Plymouth. The Ione Band asserts the need for restored lands. (i.e. an exception to IGRA pursuant to 2719 (b)(1)(B)(iii). There remains an on-going FBI investigation of Pacific Regional Interim Supervisor who acted on behalf of the Ione Band which stems from family ties to the Band.

PASKENTA AND UNITED AUBURN

1994: (Correction/Clarification) [The Timeline incorrectly cites 1993] P. L. 103-434 (108 Stat. 4526) Act of October 31, 1994, S1146. This Act of Congress recognized the tribal government and restored land to the Paskenta Tribe and the United Auburn Indian Community. The BIA took land into trust for these two Tribes in their historic and aboriginal areas. Tribal elders are still living in the same location as they were prior to the 1958 Rancheria Termination Act. These tribes have negotiated comprehensive intergovernmental agreements with nearby local governments and United Auburn has re-negotiated with California Governor Schwarzenegger for a new compact addressing necessary payments to the state and essential social justice issues protecting the non-Indian community today and into the future.

FEDERATED MIWOKS OF THE GRATON RANCHERIA

2000: (Clarification) Restoration of tribal government and mandatory land acquisition of the Federated Miwoks of the Graton Rancheria by Congressional Act authored by Senator Barbara Boxer. The agreement between the Tribe and its gaming investor, Station Casinos, was brokered by Attorney Doug Boxer, Senators Boxer's son. The Tribe recently withdrew (August 2005) from the EIS process and optioned a new location for the casino that is consistent with the community's general development plan.

LOWER LAKE POMO OF THE KOI NATION

2000: (Clarification) "Reaffirmation" of the Lower Lake Pomo of the Koi Nation does not appear to have occurred pursuant to the Administrative Procedure Act ("APA"), 25 U.S.C. §§ 701-706. In a memo dated December 27, 2000 from R. Lee Fleming-Chief, Branch of Acknowledgement and Research to Kevin Gover - Asst. Deputy Secretary of Indian Affairs, Chief Fleming expresses his great concern over rumors of reaffirmation.

> "We are troubled by the possibility that the Department is about to take this action of "reaffirmation" rather than resolving the status of these groups through 25 CFR Part 83 regulations. We also are concern that those actions may be taken without a thorough and factual review."

> "...the Department's credibility as an unbiased agency tasked with acknowledging tribes will be damaged by an arbitrary acknowledgement of [the Lower Lake Pomo of the Koi Nation]."

He further states:

> There presumably has been no opportunity for third parties to comment on any of these proposed "reaffirmations", which likely would constitute a violation of the Administrative Procedures Act (APA).

See Exhibit No. 3. Despite legal and ethical obstacles, two days later, Mr. Gover "reaffirmed" the Lower Lake Pomo of the Koi Nation as a federally recognized tribe.

LYTTON BAND OF POMO INDIANS

2000: (Clarification) The Congressional Technical Correction of 2000, granting the San Pablo card-club to the Lytton Band of Pomo Indians was backdated to1988 in order to qualify as an exception to IGRA. Senator Feinstein of California authored a bill, S113, (and Senator McCain has passed it from the Committee of Indian Affairs) to require the Lytton to adhere to the a two-part-determination.

MEWEKMA OF SAN FRANCISCO

2005: (Omission) Mewekma of San Francisco filed a lawsuit against the Secretary of the Interior seeking administrative action for "reaffirmation" of federal recognition, citing the process used for the Lower Lake Koi and Ione Band, to justify immediate reaffirmation of federal recognition. The arguments appear to be the same which the IBIA declined to employ in the Ione case in 1992 citing to the federal acknowledgement regulations as the relevant and necessary process.

Once more, Rancherias were established as land bases for homeless California Indians. Congressional Senate and House Reports on the purchases (see timeline 1906 through 1914) and sale of Rancheria lands clearly identify these lands as "tracks of land owned in fee by the United States for the use of homeless California Indians" not reservations for federally recognized Tribes.[15 16]

It should further be noted that California's Indian population is the lowest in the nation with the highest number of tribes, 109. This includes reservations that cross state lines. This population represents fewer than 40,000 enrolled tribal members few of whom actually live on reservations or Rancherias.

In conclusion, Stand Up For California expresses serious concerns that the revised histories and selective application of BIA procedures if allowed to continue exacerbates growing problems and significant questions of legitimacy with regards to restored land determinations and to the 65 petitioning tribes seeking federal recognition in the State of California.

[1] http://www.tachi-yokut.com/Intro.html
[2] 50th Congress, 1st Session Senate Report No. 74 to accompany bill S 2.
[3] Senate Report 1874, June 22, 1958 pages 23-24
[4] Senate Report 1874, June 22, 1958 pages 23-24. The Finance-Bookkeeping 129236-1912 REB is a voucher for $2000.00 to purchase the 34.12 acres of land, and this is followed by a Memorandum of June 17, 1914 giving justification to the purchase.
[5] Annual Report 1923 Reno Indian Agency, RG 75 Reno Indian Annual Narrative Statistical Reports 1912-1924, Box 6; Folder "[Annual Narrative Report 1923 Reno Ind. Ag.]" page 1-31. - page 13

[6] In 1972, 120 years after the Indians signed the 18 lost treaties, 60,000 California Indians received $633 each as compensation for land covered by the treaties. Some Indians refused the payment, and some failed to cash the check, but others who had waited for generations and had spent much time and money trying to resolve the issue accepted the payment. The land claims case was finally over.] -- This was excerpted from **http://www.cr.nps.gov/history/online_books/5views/5views1.htm**

[7] Intergovernmental Agreement between United Auburn Indian Community and Placer County District Attorney
[8] California Rancheria tribes used California State Corporation laws to establish Homeowner Associations to manage Rancheria lands held in common. The Homeowner Association in many instances was the only form of government. Guidiville Village Association allowed federal funds for management and enhancement of common Rancheria lands and infrastructure. Guidiville Village Association managed the well site in assessor's parcel 182-27-10 and Regina Water Co., Inc. (tank) on parcels 182-27-12 and 182-27-13.
Distribution of the Assets of the Guidiville Rancheria, According to the Provisions of the PL 85-671 enacted by the 85th Congress approved August 18, 1958
[9] Senate Report 1874, June 22, 1958 pages 23-24
[10] Senate Report 1874, June 22, 1958 pages 23-24
[11] The Advisory Council on California Indian Policy (Executive Summary Sept. 1997)
[12] *Amador County, California vs. Gale A. Norton*, et al., Civil Action No. 1:05CV00658 (RWR) 2005 "The ACCIP Report is nothing more than an advocacy document prepared by California Indian Tribes seeking policy changes in the way the federal government deals with them."
[13] Before the BIA published its Proposed Findings on United Houma Nation's (UHN) petition, Congress enacted the Technical Corrections Act of 1994 amending section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987 (June 18, 1934). UHN construes these amendments to preclude the BIA from making any regulatory distinctions between historic and non-historic tribes, thus rendering void the criteria that trouble its petition in 25 CFR part 83 7(e). However, the BIA interprets the amendments to have no effect upon the acknowledgment process. (Also see: *United Houma Nation vs. Bruce Babbitt* (October 28, 1996).
[14] Ione Band of Miwok Indians v. Sacramento Area Director Bureau of Indian Affairs Docket No. IBIA 92-189-A Department of the Interior August 4, 1992)
[15] **84th Congress 2nd Session, Senate Report No. 1645 to accommodate H. R. 585** "The Rancheria is one of several tracts acquired for Indian use and occupancy with funds appropriated by Congress during the years 1910- 14. The Bureau of Indian Affairs, in administering the tracts, has generally made small parcels available to needy individual Indians through assignments.
[16] **88th Congress 2d Session House of Representatives Report No. 1569 to accommodate H. R. 11562** "Such Rancherias were purchased in the name of the United States for the benefit of landless California Indians. They differed in this respect from reservations set aside from the public domain for the benefit of Indians, but there is no practical difference today between California Rancherias and reservations in the way they are managed by the BIA."

Exhibits No. 1 through No. 5 follow

Exhibit No. 1.

Guidiville Stipulated Judgment

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NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SCOTTS VALLEY BAND OF POMO INDIANS OF THE SUGAR BOWL RANCHERIA, et al. Plaintiffs, v. United States of America, et al., Defendants.	NO. C-86-3660 WWS STIPULATION FOR ENTRY OF JUDGMENT

(Scotts Valley/Bridgeville)

FORM OBD-183
MAR. 83

Plaintiff Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria and plaintiff Guidiville Band of Pomo Indians of the Guidiville Rancheria and federal defendants, by and through their respective counsel, enter into the following stipulation for the purpose of reaching a compromise and final settlement of the claims alleged by said plaintiffs against the federal defendants in the Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages, filed herein on August 25, 1987. The settling parties understand that this stipulation shall provide the basis for entry of a judgment by the court which will serve to implement, in an orderly and timely fashion, the substantive and procedural matters agreed to herein. Accordingly, the parties stipulate and agree as follows:

1. Federal defendants agree that the Scotts Valley and Guidiville Rancherias were not terminated, and the rancheria assets were not distributed, in accordance with the provisions of the Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390 ("the Rancheria Act"). Federal defendants further agree that the Indian status of the persons named as distributees in the distribution plans of the Scotts Valley and Guidiville Rancherias was not terminated in accordance with the Rancheria Act. The status of distributees who have been parties to a

prior judicial determination as to the Federal government's compliance with the Rancheria Act shall, however, be consistent with such prior judicial determination.

2. Federal defendants agree that, except as otherwise provided in this stipulation and prior judicial determinations, the distributees and dependent members of the Scotts Valley and Guidiville Rancherias and their lineal descendants, will have the individual and collective status and rights, including the rights to organize for their common welfare and to govern their affairs, which they had prior to termination. Federal defendants further agree to deal with these Indians on the same basis on which they deal with other Indians of a similar status.

3. Federal defendants agree that within 30 days of the Court's approval of the entry of judgment pursuant to this stipulation the Assistant Secretary will transmit to the Federal Register for publication a proclamation stating:

a. that the Scotts Valley and Guidiville Rancherias were not lawfully terminated and their assets were not distributed in accordance with the provisions of the Rancheria Act, Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390;

b. that the distributees of the Scotts Valley and Guidiville Rancherias are eligible for all rights and benefits extended to Indians under the Constitution and laws of the United States; and

c. that the Scotts Valley and Guidiville Rancherias and their members shall be eligible for all rights and benefits extended to other federally recognized Indian tribes, including Indian tribes defined and organized under the provisions of the Indian Reorganization Act, 25 U.S.C. § 461 et seq., and their members; provided, the rights and benefits, if any, extended to those members who have been parties to a prior final judgment determining their rights under the Rancheria Act shall be consistent with such prior judgment.

4. Effective as of the date of entry of this stipulation by the Court, both the Scotts Valley and Guidiville Bands shall, consistent with Federal law, have the right to determine their own membership and otherwise to govern their internal and external affairs as tribal entities consistent with their status prior to termination. When and if either of the groups reorganize pursuant to federal statute, the federal defendants agree to add them to the list of federally recognized tribal entities then being used and will include

them on any list of tribal entities published in the Federal Register. Because the Scotts Valley Band rejected the Indian Reorganization Act, 25 U.S.C. § 461 et seq., it is not eligible to reorganize pursuant to that statute. However, the Federal government had dealings with the Scotts Valley Band as a distinct Indian entity prior to its purported termination and the purpose of this stipulation is to reestablish the status quo prior to termination. Based on these unique considerations, the federal defendants do not object to the Scotts Valley Band reorganizing to exercise powers consistent with its status prior to termination. Further, the federal defendants agree to add Scotts Valley to the list of federally recognized tribal entities then being used and will include them on any list of tribal entities published in the Federal Register. The name of the tribal entity entered on the list(s) shall be the name chosen by the reorganized rancheria in its governing document. The Federal defendants further agree to advise the Commissioner of the Internal Revenue Service promptly that the rancherias have reorganized to exercise governmental functions and have been added to the list of tribal entities.

5. Lands Within Former Boundaries and Currently In Indian Ownership

Federal defendants agree to accept in trust status any land within the boundaries of the former Scotts Valley and Guidiville Rancherias that:

(a) is currently in Indian ownership and

(b) was deeded or passed as a direct consequence of termination to:

(1) the Sugar Bowl Association, the Guideville Village Association or any other Indian community organizations formed for the purpose of accepting distribution of rancheria assets, or

(2) any distributee who received land under a rancheria distribution plan, or

(3) any dependent or Indian heir, or successor in interest to such distributee, provided any successor in interest is an Indian from the rancheria. (As used herein, "Indian of the rancheria" shall include distributees and their dependent members, and their Indian spouses and lineal descendants.)

Federal defendants further agree to discharge any tax liens against the property and to discharge those specific liens, deeds of trust, or mortgages listed in Exhibit A, attached hereto, which were incurred by the Indian owner after the purported termination for the purpose of improving the habitability of the subject property; provided that the

Federal defendants shall not be required to accept in trust any land for a distributee who has been a party to a prior judicial decree settling claims by owners or occupants of the land arising out of the purported termination, nor shall the Federal defendants be required to discharge any liens on such lands.

6. Lands Outside the Boundaries of the Former Rancherias and Currently Owned by Certain Indians

Since persons listed in the plans for distribution of assets of the Scotts Valley and Guidiville Rancherias may have acquired interests in trust lands outside those rancherias and which interests may no longer be held in trust because of the purported termination of the Indian status of the listed persons, Federal defendants agree to accept in trust any fee interests in trust or former trust allotments issued to such persons, if such interests are currently held in the name of the distributee, or of his/her dependent or Indian heir, or successor in interest, provided the successor is an Indian of the rancheria or reservation where the allotment is located; provided further that the Federal defendant shall not be obligated to accept in trust any land held in the name of a distributee who has been a party to a prior judicial decree finally determining the claims of such distributee under the Rancheria Act.

7. Process for Restoring Trust Status

Federal defendants agree that restoration of lands to trust status under the provisions of Paragraphs 5 and 6 above shall be accomplished as follows:

(a) Notice - Publication: Federal defendants shall publish a copy of the judgment in a newspaper of general circulation within the Counties in which Scotts Valley and Guidiville Rancherias are located. Additionally, a copy of this judgment shall be mailed to:

(1) each individual Indian person listed in the Termination Proclamations for the Scotts Valley and Guidiville Rancherias, and

(2) such other persons, based on all available information in the possession of the Federal defendants and any other information supplied by plaintiffs Scotts Valley and Guidiville Bands, who may be related to or descended from any such individual, for whom the Bureau of Indian Affairs has a current or last known address;

(b) Election to Convey:

(1) General Rule: Each Indian or Indian organization of either the Scotts Valley or Guidiville Rancherias who has retained any

interest in or to the lands or assets of any of said rancherias (however acquired), shall be entitled to elect to convey his, her, or its interest to the United States, to be held in trust for the benefit of such Indian member(s) of either the Scotts Valley or Guidiville Bands (as defined under the constitution or bylaws thereof), or for the benefit of the Indians of either the Scotts Valley or Guidiville Bands or an entity which may be formed to govern any of the said rancherias, as may be specified in the instrument of conveyance.

(2) Direct Result of Termination: Each Indian of either the Scotts Valley or Guidiville Bands who has retained any interest in or to allotted lands, fee patent to which was issued upon or, in the judgment of the Secretary, as a direct result of the purported termination of either the Scotts Valley or Guidiville Rancherias, may make a similar election, except that any such individual may specify the person for whom the land is to be held in trust by the United States without regard to membership in or affiliation with either the Scotts Valley or Guidiville Bands, so long as the person so named is related by blood or, at the time of

this decree, is the individual's spouse and is otherwise eligible to have land held in trust as an Indian by the United States for his or her benefit;

(c) Form of Conveyance Instrument: Conditions and Restrictions: Before accepting any instrument of conveyance which has the effect of restoring trust status to and within either the Scotts Valley or Guidiville Rancherias, the Secretary of the Interior shall be entitled to approve or reject said instrument as to form; however, the existence of such liens as are identified in Paragraph 5 above, shall not constitute a basis for declining to accept any such conveyance. Conveyance of title to the United States made pursuant to this stipulation and the judgment entered thereon may, at the election of the grantor, provide that the United States will hold title in trust for an Indian, Indians, or tribal entity of either the Scotts Valley or Guidiville Rancherias, and be subject to such conditions or restrictions as set forth in the instrument of conveyance; provided such conditions and restrictions are acceptable to the United States; and, provided further, that the United States shall not unreasonably withhold its acceptance;

(d) Recording Conveyance: Upon acceptance of any instrument or instruments conveying to the United States title to lands within or without either the Scotts Valley or Guidiville Rancherias pursuant to this stipulation and the judgment entered thereon, the Secretary of the Interior or his designee shall promptly record said instruments with the County Recorder of the County in which said lands are located.

8. Future Land Acquisitions Within Former Boundaries by Certain Indians

Federal defendants agree to accept in trust any land within the former boundaries of the Scotts Valley and Guidiville Rancherias which is subsequently acquired by any distributee, their dependent or lineal descendant, or by either the Scotts Valley or Guidiville Bands; provided that the Federal defendant shall not be obligated to accept in trust any land held in the name of a distributee who has been a party to a prior judicial decree finally determining the claims of such distributee under the Rancheria Act.

9. Nothing in this stipulation shall be construed to require the Secretary to accept in trust any land which has on it hazardous substances or contaminants. Before the Secretary accepts any land in trust pursuant to this stipulation, a hazardous substance determination shall be made in accordance

with 602 DM 2 and the instructions for implementing that chapter of the Department Manual described in 54 BIAM Bulletin 1, dated March 9, 1990, and any duly adopted revisions of the manual or instructions. Copies of 602 DM 2 and 54 BIAM Bulletin 1 are attached as Exhibits B and C, respectively.

10. Should lands be acquired in the future on behalf of the Guidiville Band, if organized under the IRA, the Secretary shall within 180 days consider and respond to a request to issue a proclamation in accordance with 25 U.S.C. § 467 that such newly acquired lands constitute an Indian reservation.

11. The Federal defendants will, following the execution of this stipulation by their counsel, prepare comprehensive needs assessments for the Scotts Valley and Guidiville Bands, including the projected needs of the bands for Federal programs and services through Fiscal Year 1994.

The Federal defendants will provide workshops prior to March 1992 to be conducted by a technical team comprised of representatives from the Bureau of Indian Affairs, the Indian Health Service, the Department of Housing and Urban Development, and such other consultants as may be necessary, for the purpose of providing needed technical assistance to the Scotts Valley and Guidiville Bands. The scheduling and content of the workshops will be developed by the Federal defendants in consultation with representatives from the

Scotts Valley and Guidiville Bands and will be designed to provide, at a minimum, specific information regarding Federal programs available to Indian tribes, including the tribal contracting requirements of Public Law 93-638, and an overview of those Indian programs available to meet the developmental needs of individual Indians, such as health care, education and vocational training. The Federal defendants shall cover the costs of attendance at the workshops of at least one representative each from the Scotts Valley and Guidiville Bands.

12. The plaintiff Scotts Valley and Guidiville Bands will provide the federal defendants with the names, current or last known residential address of each potential class member to whom it has given notice of this proposed settlement and the names and ages of all minors who are dependents of potential class members. Plaintiff Scotts Valley and Guidiville Bands will give written notice of the terms of the settlement to all members of the plaintiff class, as such class is defined in Paragraph 10 of the Second Amended Class Action Complaint, filed herein on August 25, 1987. The costs of giving such notice shall be borne solely by the Federal defendants. The form of notice, the deadline for responding to the notice, and other procedures for class members to opt in or out of the settlement, shall be set forth in a separate stipulation to be filed with the Court.

13. The plaintiff Scotts Valley and Guidiville Bands, in consideration of the above agreements by the federal defendants, will (a) release and forever discharge federal defendants from and against any and all liability, including attorneys' fees and costs, arising out of this litigation and settlement, provided, this release and discharge shall not apply to claims relating to hazardous substances or contaminants which may be identified in any survey conducted in order to make the determination required by paragraph 9 of this agreement; and (b) will dismiss with prejudice all money damages claims alleged herein against the federal defendants, including any individual and tribal claims.

14. It is agreed that plaintiff Scotts Valley and Guidiville Bands will not seek, and federal defendants will not agree, to reestablish the former boundaries of the Scotts Valley and Guidiville Rancherias, and that no action taken in connection with this settlement shall be construed as reestablishing the former rancheria boundaries. As to those lands within the former rancherias that remain in Indian ownership, the authority of the respective tribal governing body shall extend to such lands only if the individual Indian landowner(s) shall consent to the tribe's authority.

15. It is understood that none of the terms of this agreement shall deprive a federal official of his authority to revise, amend or promulgate regulations, nor shall this agreement be construed to commit a federal official to expend funds not appropriated by Congress. Furthermore, the sole remedy of the plaintiff Scotts Valley and Guidiville Bands for the failure of the Federal defendants to comply with its terms shall be to initiate such proceedings in this action as may be available, or file a new action in the United States district court, to enforce the provisions of this stipulation and the judgment entered theron.

Dated: March 15, 1991

CALIFORNIA INDIAN LEGAL SERVICES

Stephen V. Quesenberry

STEPHEN V. QUESENBERRY
CALIFORNIA INDIAN LEGAL SERVICES
Attorneys for Plaintiffs

Dated: March 19, 1991

Glen R. Goodsell

GLEN R. GOODSELL, Attorney
United States Department of Justice
Environment & Natural Resources
Division

FORM OBD-183
MAR 81

EXHIBIT A

Scotts Valley Rancheria:

(1) Assessor's Parcel No. 005-040-05 (Boggs, Theresa Pearl - deceased)

(a) Delinquent taxes, including penalties, for 1983-1990 totalling $1,880,60.

(b) Estimated taxes for 1990-1991 in the amount of $127.00.

(2) Assessor's Parcel No. 005-040-06 (Elliott, Bennett)

(a) North Lakeport Water District assessment of $4,108.30, payable over a 25 year period at an annual assessment in the amount of $285.00.

(b) Current taxes are minimal because of homeowner's exemption. Taxes, combined with Fire District assessment of $22.50, totalled $23.20 in 1989-1990.

Guidiville Rancheria:

(1) Assessor's Parcel No. 182-270-03 (Cooper, Nora - deceased)

(a) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $90.00.

(2) Assessor's Parcel No. 182-270-09 (Elliott, Jesse - deceased)

(a) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $230.00.

(3) Assessor's Parcel No. 182-270-19 (Young, Irene)

(a) Deed of trust in the amount of $12,323.00, dated 08-24-84, to secure indebtedness incurred for housing rehabilitation.

(b) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $350.00.

(4) Assessor's Parcel No 182-270-20 (Whiterock, Paul)

(a) No tax delinquencies; estimated taxes for 1990-1991 in the amount of $320.00.

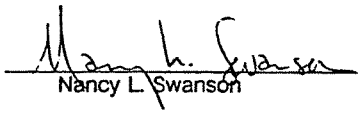
Exhibit A

Mark D. Peters, Esq.
Senneff, Bernheim, Kelly & Kimelman
50 Old Court House Square
Santa Rosa, CA 95402

Claudia Wilken
U.S. Magistrate
United States District Court
450 Golden Gate Avenue
19th Floor, Room 19426
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 22, 1991, at Oakland, California.



Nancy L. Swanson

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Vol. 57, No. 29 / Wednesday, February 1992 / Notices

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Reinstatement to Former Status for the Guidiville Band of Pomo Indians, the Scotts Valley Band of Pomo Indians and Lytton Indian Community of CA

AGENCY: Bureau of Indian Affairs.

ACTION: Notice.

SUMMARY: This notice advises the public that the Federal government has settled litigation reinstating the status and rights of three California Indian rancherias with which the Federal government had terminated its relationship. Effective September 8, 1991, the Indians of the Guidiville Band of Pomo Indians, the Scotts Valley Band of Pomo Indians and Lytton Indian Community of California, were reinstated to the status they had before termination. Each of the groups and their members are eligible for all rights and benefits extended to other federally recognized Indian tribes and their members.

DATES: Effective September 8, 1991.

ADDRESSES: All three groups are under the operational jurisdiction of the Superintendent, Central California Agency, Bureau of Indian Affairs, 1824 Tributa Road, suite J, Sacramento, CA 95815-4308, telephone (916) 978-4337; and the Director, Sacramento Area Office, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, CA 95825-1884, telephone (916) 978-4691.

FOR FURTHER INFORMATION CONTACT: Harold M. Brafford, Superintendent, Central California Agency, or Ronald Jaeger, Director, Sacramento Area Office, at the addresses listed above; or William Wirtz, Esq., Office of the Regional Solicitor, Pacific Southwest Region, 2800 Cottage Way, room E-2753, Sacramento, CA 95825-1890, telephone (916) 978-4824; or Scott Keep, Assistant Solicitor, Branch of Tribal Government & Alaska, Division of Indian Affairs, Office of the Solicitor, Mail Stop 6556, U.S. Department of the Interior, 1849 C Street, NW., Washington, DC 20240, telephone (202) 208-5134.

SUPPLEMENTARY INFORMATION: Pursuant to the authority in the Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, Public Law 88-419, 78 Stat. 390 ("the Rancheria Act"), the Federal government terminated its relationship with many California Indian rancherias, including those for the Indians of the Guidiville Band of Pomo Indians, the Scotts Valley Band of Pomo Indians and Lytton Indian Community of California, and distributed the assets of the rancherias pursuant to plans adopted by the Indians. The Indians of these three rancherias and the Mechoopda Indians of the Chico Rancheria, brought suit against the United States alleging that the termination was unlawfully done because the United States had not taken all actions required by the Rancheria Act prior to the purported termination. They sought reinstatement of the status they had individually and collectively enjoyed prior to the termination and certain other relief. A settlement of the litigation was negotiated which recognizes that the distributes of the rancheria assets are eligible for all rights and benefits extended to Indians under Federal law and that the tribes or communities of the rancherias and their members.

Indians of the Sugar Bowl Rancheria, et al. v. *United States*, No. C-86-3660 WWS, N. D. California.

Dated: February 6, 1992.

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 92-3357 Filed 2-11-92; 8:45 am]

BILLING CODE 4310-02-M

SCOTTS VALLEY BAND OF POMO INDIANS
OF SUGAR BOWL RANCHERIA
P.O. Box 701
Lakeport, CA 95453
(707) 263-3062

Exhibit No. 2.

Asst. Secretary BIA Ada Deer and Indian Commissioner Bruce Letter Regarding the Ione Band "Reaffirmation"

#2

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

TAKE PRIDE IN AMERICA

MAR 22 1994

The Honorable Nicholas Villa, Jr.
Chief, Ione Band of Miwok
P.O. Box 1152
Ione, California 95640

Dear Mr. Villa,

I am writing regarding our meeting on October 28, 1993 and subsequent discussions with Congressman Doolittle. In that meeting I agreed to clarify the United States' political relationship of the Ione Band of Miwok, as well as Mr. Louis Bruce's 1972 letter regarding the tribe's political status and its historic land base.

Upon review of the matter, I am now reaffirming the portion of Commissioner Bruce's letter which reads:

> The Secretary also recognizes that obtaining a tribal community land base for the Ione Band is a part of his policy of Indian self-determination and cultural identification. *** Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. *** As the Commissioner of Indian Affairs, I therefore, hereby agree to accept by relinquishment of title or gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians. (See Bruce letter attached)

As Assistant Secretary of Indian Affairs I hereby agree to accept the parcel of land designated in the Bruce letter to be held in trust as territory of the Tribe. As I stated during the October meeting, the Tribe will henceforth be included on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," last published in the Federal Register on October 21, 1993.

I am hereby directing the Bureau of Indian Affairs and specifically the Sacramento Area Office to deal with the tribe accordingly. The Bureau will maintain contact with the tribe to address the relevant details. I extend my personal congratulations and look forward to working with you and your people.

Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:

1 0 1972

Mr. Nicholas Villa and the
IONE BAND OF INDIANS
c/o Mrs. Bernice Villa
Route 1, Box 191
Ione, California 95640

Dear Mr. Villa:

In January of this year the Bureau of Indian Affairs received a letter from Robert J. Donovan, the Director of the California Rural Indian Land Project. That letter requested that the United States agree to accept title to a certain forty acre tract of land near Ione, California and to hold that land in trust for the Ione Band of Indians.

Since then the Bureau of Indian Affairs has learned that the Ione Band has filed suit in Amador County Superior Court to quiet and perfect title in their names. It has been informed that the Indians continue to desire that the land ultimately be taken by the United States and held in trust status.

The Secretary of the Interior recognizes his authority under 25 U.S.C. 465 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;"

The Secretary also recognizes that, there having been no vote pursuant to 25 U.S.C. 476 by the Ione Indians, the provisions of 465 apply to them. The Secretary also recognizes that obtaining a tribal or community land base for the Ione Band is a part of his policy of Indian self-determination and cultural identification.

EXHIBIT E

Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. As stated earlier, they did not reject the Indian Reorganization Act and thus are eligible for the purchase of land under this act. The Sacramento Area Office of the Bureau of Indian Affairs should determine that the land is merchantable and free of encumbrance. I am directing the Sacramento Area Office to assist in the preparation of a document containing a membership roll and governing papers which conform with the Indian Reorganization.

As the Commissioner of Indian Affairs, I therefore, hereby agree to accept by relinquishment of title as gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians:

> Beginning at the point of intersection of the center line of the County Road to Jackson, with the Westerly line of the fifty-two acre tract of land owned by Anthony Hesch, Armando Dellaringa, Rocco Dellaringa, and Albert Dellaringa, as recorded in Book 130 Official Records, Amador County, California page 98; thence following the center line of said County Road, North sixty-five degrees, fifty minutes West (N. 65° 50'W.) One thousand seven hundred twenty five (1725) feet to a point; thence at right angles, North twenty-four degrees, ten minutes East (N. 24° 10'E) One thousand seventy two (1072) feet to a point: thence at right angles, South sixty-five degrees, fifty minutes East (S. 65° 50'E) One thousand five hundred thirty one (1531) feet to the West boundary of the said property of Anthony Hesch, Armando Dellaringa, Rocco Dellaringa and Albert Dellaringa; thence following said boundary line, South fourteen degrees, eight minutes West (S. 14° 08'W) One thousand eighty-seven (1087) feet to the point of beginning.

Sincerely,

Commissioner

Exhibit No. 3.

December 27, 2000 Memorandum from Lee Fleming to Kevin Gover re illegality of "Reaffirming Tribes"

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 27 2000

Memorandum

To: Deputy Commissioner of Indian Affairs

Through: Acting Director, Office of Tribal Services

From: Chief, Branch of Acknowledgment and Research

Subject: "Reaffirmations"

The Branch of Acknowledgment and Research (BAR) and the Office of Tribal Services are greatly concerned with the rumored "reaffirmation" of several groups as federally recognized tribes. We are troubled by the possibility that the Department is about to take the action of "reaffirmation" rather than resolving the status of these groups through 25 CFR Part 83 regulations. We also are concerned that this action may be taken without a thorough factual and legal review. We have heard that the groups affected are:

1) Burt Lake in Michigan, Petition #101, next in line for a proposed finding
2) Lower Lake in California, not on list of petitioners
3) Shoonaq' in Alaska, not on list of petitioners
4) King Salmon in Alaska, not on list of petitioners

Unless the Assistant Secretary - Indian Affairs (AS-IA) has clear authority to act outside the acknowledgment regulations, and has conducted a competent, neutral study of the facts in these cases, the Department's credibility as an unbiased agency tasked with acknowledging tribes will be damaged by an administrative acknowledgment of these select groups.

To our knowledge, there has never been a formal opinion from the Department's Solicitor as to whether the Department's authority to acknowledge tribes can be exercised by the AS-IA outside of the regulations, or whether the establishment of the regulations precludes acknowledgment by simple administrative action. There presumably has been no opportunity for third parties to comment on any of these proposed "reaffirmations," which likely would constitute a violation of the Administrative Procedures Act (APA).

A thorough review of the claims of these groups is necessary because court precedents and past Department decisions, which pre-date the acknowledgment regulations, have established the principle that ancestry from a once-recognized tribe does not by itself give the Department authority to recognize a group of descendants as a sovereign entity, absent the group's continuing existence as a distinct political community.

Exemption 5: Internal Deliberative Process - ____ pages withheld.

LOWER LAKE RANCHERIA

[illegible]

5) Big Valley Band of Pomo Indians of the Big Valley Rancheria,
6) Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria,
7) Hopland Band of Pomo Indians of the Hopland Rancheria,
8) Middletown Rancheria of Pomo Indians of California,
9) Robinson Rancheria of Pomo Indians of California, and
10) Upper Lake Band of Pomo Indians of Upper Lake Rancheria of California.

The Office of Tribal Services received copies of several [illegible] different rancherias, tribes and copies of proposalsive data for each current member of [illegible]. Approx. 20 percent reduction in the number of [illegible] between the Nov. [illegible] and the December 1983 submissions.

We suggest that:

- The Lower Lake [illegible]

Exhibit No. 4.

Memo from Kevin Gover on Correcting Departmental Errors regarding Recognition

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 29

Memorandum

To: Regional Director, Alaska Region
Regional Director, Pacific Region

Through: Deputy Commissioner of Indian Affairs M. Sharon Blackwell

From: Assistant Secretary - Indian Affairs Kevin Gover

Subject: Reaffirmation of Federal Recognition of Indian Tribes

I have received information from you that the King Salmon Tribe, the Shoonaq' Tribe of Kodiak, and the Lower Lake Rancheria have been officially overlooked for many years by the Bureau of Indian Affairs ("Bureau" or "BIA") even though their government-to-government relationship with the United States was never terminated. I have been requested to review these cases and take action, if warranted.

At one time, each of these groups was recognized by the Bureau. However, for reasons not clearly understood, they were simply ignored as the BIA went through fundamental organization and philosophical changes following landmark legislation such as the 1934 Indian Reorganization Act and other federal policy shifts. It is an unfortunate part of the Bureau's legacy that I spoke of during our reconciliation event several months ago, and I am pleased today, and on behalf of the Department of the Interior and the BIA, to correct this egregious oversight.

The Indian tribes mentioned above should not be required to go through the Federal acknowledgment process outlined in the Federal Register at 25 CFR. Part 83 ("acknowledgment regulation") because their government-to-government relationship continued. The acknowledgment regulation does not apply to Indian tribes whose government-to-government relationship was never severed. Rather, the acknowledgment regulation provides a process for tribes to seek recognition when the tribe has yet to establish such a government-to-government relationship, when a previously existing government-to-government relationship has lapsed, or when the government-to-government relationship was terminated through an administrative process. Here, the Tribes were never administratively terminated nor were their relations with the United States broken. Instead, an administrative error by the Bureau of Indian Affairs occurred in the initial failure to place the tribes on the Federal Register list of entities recognized and eligible to receive services from the United States Bureau of Indian Affairs. The administrative oversight, having now been identified, must be corrected and the Tribes' rightful existence must now be reaffirmed.

With respect to the King Salmon Tribe, the Alaska Regional Director advises me that the King Salmon Tribe has provided documentation that supports its position that it has existed and maintained a continuous Indian community from historic times. In addition, these documents support my finding of a long-standing governmental relationship with the United States. In 1994, the Department re-established governmental relationships with 224 Alaska Native governments under similar circumstances. Documents supporting the King Salmon Tribe's request were forwarded by the Bristol Bay Native Association. The original village site of Old Savonoski was destroyed when a volcano, Mount Katmai, erupted and buried it. Members traveled downstream on the Naknek River from the original site and settled in King Salmon, New Savonoski, Naknek and South Naknek. Although scattered, the people of King Salmon did not abandon their traditional tribal identity. Ethnographic records confirm that the people of King Salmon today are descendants of the indigenous people from the King Salmon area.

The BIA's West Cental Alaska Field Office and the Alaska Regional Office support the Tribe's request that their status be reaffirmed and authorized to conduct a Secretarial election under provisions of the Indian Reorganization Act, 25 U.S.Code Section 476. The Acting Director, Office of Tribal Services, also recommends that Federal recognition of the King Salmon Tribe be reaffirmed.

With respect to the Shoonaq' Tribe of Kodiak, the Alaska Regional Director advises me that the Shoonaq' Tribe has provided documentation that supports its position that it has maintained a continuous political organization since European contact. In addition, these documents support my finding of a long-standing relationship with the United States. As with King Salmon, the Department's 1994 re-establishment of governmental relationships with 224 Alaska Native governments was under similar circumstances.

Members of the Shoonaq' Tribe are descendants of a consortium of Koniagmiut from Kodiak Island (known to the Russians as St. Paul or St. Paul's Harbor) who settled in the locale of the contemporary city of Kodiak. The Council of the Shoonaq' Tribe of Kodiak governs the historical Native community in and around the contemporary community of Kodiak, Alaska. No other tribe claims this territory or membership. The Tribe has entered into numerous federal contracts through which it provides the same federally funded services and benefits to its members as are provided by other federally recognized tribes in Alaska. Congress acknowledged Kodiak as a historic Native village possessing claims to aboriginal title in the Alaska Native Claims Settlement Act (ANCSA). Consequently, Kodiak was declared eligible and received land and other benefits under ANCSA.

In 1987, the Kodiak Tribal Council, upon learning that they were not included in the Federal Register listing of federally recognized Indian tribes, requested that the Secretary of the Interior correct the list. By letter dated August 12, 1987, they submitted arguments that they had been federally recognized prior to 1931 and they should have been included in the Secretary's published list. In an August 25, 1987, letter the Anchorage Agency Superintendent, after reviewing the matter, concurred with the Tribe's request and recommended that the Shoonaq'

Tribe be reaffirmed and added to the Federal Register listing. Today, the West Central Alaska Field Office and the Alaska Regional Office, as well as the Acting Director, Office of Tribal Services, recommend that the Shoonaq' Tribe of Kodiak be included on the list of federally recognized Indian tribes.

With respect to the Lower Lake Rancheria, the documentation shows that it should be treated differently than other California tribes that were terminated during the termination era. The California Indian tribes considered terminated during this era were those subject to the terms of Pub. L. 85-671, 72 Stat. 619, as amended by Pub. L. 88-419, 78 Stat. 390, commonly referred to as the Rancheria Act. The Rancheria Act specifically provided, in §10b, that when assets were accepted, the affected tribe was terminated. In contrast, the Lower Lake Rancheria lost its land pursuant to the Lower Lake Act, Pub. L. 84-443, 70 Stat. 58, as amended by Pub. L. 84-751, 70 Stat. 595, which sold its land for the purpose of establishing a local airport. This Act predated the Rancheria Act and did not contain a provision to cause the loss of an Indian's legal status as an Indian as a result of his (or her) acceptance of any of the assets of the Lower Lake Rancheria. Thus, the Lower Lake Act did not terminate the Lower Lake Rancheria.

The Lower Lake Rancheria's tribal status has been continuously maintained by the tribal members. The Lower Lake Rancheria successfully obtained funding from the Administration of Native Americans, U. S. Department of Health and Human Services, to strengthen their tribal government structure. Both the BIA's Agency Superintendent, Central California Agency, and the Regional Director, Pacific Region, as well as the Acting Director, Office of Tribal Services, recommend administrative reaffirmation of the status of the Lower Lake Rancheria.

Therefore, by action today, I am reaffirming formal recognition of the following Indian tribes:

King Salmon Tribe in Alaska;

Shoonaq' Tribe of Kodiak in Alaska; and

Lower Lake Rancheria in California

The Federal recognition of the Tribes and the trust relationship between the United States and the Indian Tribes are hereby reaffirmed, subject to further discussion and negotiation between the tribes and the BIA with respect to respective tribal membership lists, if necessary. All laws and rules of law of the United States of general application to Indians, Indian tribes, or Indian reservations which are not inconsistent with the 1934 Indian Reorganization Act, the Rancheria Act, or the 1971 Alaska Native Claims Settlement Act, as amended, shall apply to the respective Alaskan tribes and Lower Lake Rancheria, and their respective members. Each of the Tribes listed above is recognized as an independent tribal governmental entity, separate from any other nation, band, village, rancheria or Indian tribe.

By this memorandum, I am directing that the Bureau of Indian Affairs, specifically the Alaska Region, and Pacific Region officials deal with the respective tribes accordingly. Further, I direct that the Office of Tribal Services include the Tribes mentioned above in the "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," a

list published in the **Federal Register** most recently on March 13, 2000 (Vol. 65, No. 49), pp. 13298-13303, pursuant to Section 104 of the Act of November 2, 1994, Pub. L. 103-454, 108 Stat. 4791, 4792.

The Bureau of Indian Affairs will maintain contact with the respective tribes to address the relevant details in maintaining a government-to-government relationship in accordance with Executive Orders 13084 and 13175 as well as the Executive Memorandum of April 29, 1994, on Government-To-Government Relations with Native American Tribal Governments.

Please contact the Director, Office of Tribal Services, at (202) 208-3463, if you have any questions regarding this matter.

cc: Office of the Special Trustee
Office of American Indian Trust
Director, Office of Indian Education Programs
Director, Office of Trust Responsibility

Exhibit No. 5

Father of a Nation
By Ron Russell
3-1-2005
San Francisco Weekly

schmit

From: schmit [schmit@quiknet.com]
Sent: Wednesday, March 02, 2005 2:45 PM
To: 'schmit'
Subject: Father of a Nation
Importance: High

So is this tribe shopping or what?

Father of a Nation

As head of the U.S. Bureau of Indian Affairs, Kevin Gover single-handedly gave the Koi Nation land rights. Now, he's stepped through the revolving door to hawk the tribe's plans for a Bay Area casino.

BY RON RUSSELL 3-1-05
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On Dec. 29, 2000 -- his last day as director of the U.S. Bureau of Indian Affairs -- Kevin Gover signed paperwork legitimizing a band of 53 people, most of them children, as the sovereign Koi Nation. He took the action even though members of his own staff warned him in a memo, made available to SF Weekly, that the designation was unwarranted and that he might be violating federal law in granting the Koi tribal status.

The proposed casino site is near the center of this photo.

Now, owing to a quirk of federal gaming law, this landless band of Pomo Indians stands ready to reap untold riches. The tribe does not need the consent of California's governor to open a Las Vegas-style slot palace near Oakland International Airport. Once the federal government declares a 35-acre parking lot where the casino would be built as its "reservation," the Koi Nation will be a casino developer's dream come true.

Florida real estate mogul Alan Ginsburg is that lucky developer.

Ginsburg, who is also backing the landless Scott's Valley Band of Pomo in its attempt to build a Vegas-style casino up the road in Richmond, has spared no expense in assembling an array of lawyers, ethnographers, public relations consultants, and lobbyists to help the Koi attain their multimillion-dollar casino. Chief among those on the Ginsburg team pitching for the tribe is -- you guessed it -- Kevin Gover.

Although BIA officials have often passed through the revolving door to work for Indian interests, Gover's financial connection to the tribe whose federal recognition he engineered has raised eyebrows among even some of Indian Country's more jaded critics. "You build a trough and then you go feed in it. What else can you say about that?" says Tom Grey, executive director of the National Coalition Against Legalized Gambling. "In my mind, he went out [of office] like a thief in the night."

As the oldest of three children born to a white mother and a Pawnee father in Oklahoma, Gover,

now 50, arrived at BIA with both an impressive personal story and no shortage of critics.

The son of civil rights workers, he had caught the eye of an aristocratic VISTA volunteer who arranged for him to go away to a New England prep school on scholarship at age 15. He went on to obtain an undergraduate degree at Princeton and to attend law school at the University of New Mexico. After working at a prestigious Washington, D.C., law firm, he returned to Albuquerque and opened his own practice, which grew to become one of the nation's largest Indian law firms.

When President Bill Clinton nominated him to head BIA in 1996, it was Gover's second time around. He had been offered the job in 1992 and had turned it down. (A recovering alcoholic, Gover has said that he hadn't quit drinking at the time.) After he accepted the post in 1996, anti-gaming forces raised a ruckus, accusing him of being a mouthpiece for casino gambling. It hadn't helped that he had rather infamously gone to a White House coffee a few months before his appointment and forked over $50,000 to the Democratic National Committee on behalf of a New Mexico casino operated by one of his tribal clients.

By virtue of his being a former BIA director, Gover, who now teaches Indian law at Arizona State University, is a marquee name among Indian gaming consultants. Records show that within a year of leaving the bureau, he went to work for casino deal-maker Gary Fears, a controversial figure who has been involved with the Seminole in Florida and at least two California tribes, the Timbisha Shoshone and the Guidiville Band of Pomo. (The latter tribe, which is now partnered with Harrah's, the Nevada gaming giant, and another developer, wants to open an East Bay casino at Richmond's Point Molate, just four miles from the San Pablo card club the Lytton Band of Pomo seeks to convert into a Las Vegas-style gambling mecca.)

Gover has also provided services to the Scott's Valley Band of Pomo, the other tribe Ginsburg is sponsoring in the Bay Area, which wants to plop a casino into unincorporated North Richmond.

In an interview with the *Weekly* in October, Gover downplayed his connection with the Koi Nation, aka Lower Lake Rancheria, while avoiding discussing the details of his decision to award recognition to the tribe. "I had virtually nothing to do with [Ginsburg's] relationship with Lower Lake," Gover said. "I had, I believe, one meeting with Lower Lake." (He did not return calls seeking comment for this article.) Yet, when the tribe appeared before a special session of the Oakland City Council in January in an effort to win a resolution favorable to the casino, Gover was clearly the headliner. "We've developed quite a fantastic team," Tribal Chair Daniel Beltran told the elected officials before introducing the ex-BIA director as "a leading expert in Indian law and regulatory issues."

With only Mayor Jerry Brown and one of Oakland's eight council members on record as favoring the casino, Gover's pitch didn't appear to be well-received. He may not have helped his cause by taking a jab at casino opponents, suggesting that "to the extent that the issue has been prejudged, that probably diminishes [their] credibility" with the federal Department of the Interior, which will have the final say in the matter. The remark triggered a somewhat tense exchange between Councilwoman Jean Quan, who opposes the casino, and Gover about his role with the tribe.

Quan: "You are the former director of the Bureau of Indian Affairs?"

Gover: "I am."

Quan: "And were you not the person who made this tribe eligible for land rights?"

Gover: "I am the person that restored the Koi Nation to its rightful federal recognition, yes."

Quan: "Are you now an employee of either the Koi Nation or its investors?"

Gover: "I am a consultant to its investors, yes."

Quan: "You're asking us to have faith in the credibility of the process, but clearly as an insider it seems that you have a disproportional impact on it. So you have to understand that we're somewhat skeptical."

Although the tribe would prefer to have Oakland's cooperation, in the end, the city will have little, if any, say about the casino. That's because of the Koi's special status as a so-called "restored" tribe, whose *rancheria*, or small reservation, was disbanded during the Eisenhower administration as part of a policy of assimilation. While federal law generally prevents tribes from setting up casinos on land they didn't already own in 1988 (the year the Indian Gaming Regulatory Act was enacted), restored tribes, such as those of the Pomo, which had no land when the law was passed, are exempt. (Unlike many other *rancheria* tribes, however, as a technical matter Lower Lake/ Koi Nation was never officially terminated by the federal government, even though it had ceased to be included on the government's list of federally recognized tribes after its land was sold; thus, Gover's action to *reaffirm* recognition.)

Indeed, should the Koi Nation persuade the U.S. Department of the Interior to let it acquire land near Oakland's airport as a "reservation," under the law the tribe would not need the consent of California's governor to open a casino. All of which makes what Gover did for the Koi enormously valuable. "It's almost like a free ticket," says Tom Gede, who teaches Indian law at the University of the Pacific's McGeorge School of Law in Sacramento. "It may have been unseemly, and it may be incongruous, but once they got federal recognition, there's not much anyone can do about it."

The circumstances leading to Gover's reaffirming the Koi Nation as a federally recognized tribe remain shrouded in secrecy. A letter from Gover congratulating the tribe for attaining its new status alludes to a meeting that members of his staff conducted with the tribe in October 1999. But BIA officials have failed to provide documents related to that meeting (or any other communication Gover may have had with the tribe before recognition was granted), despite the *Weekly*'s requesting the records for more than three months.

No one disputes that the tribe owes its sovereignty to the singular -- and highly unusual -- administrative act executed by the former BIA director on his last day in office. That's when Gover announced his decision to reaffirm the tribe in a four-paragraph letter to its chairman, Daniel Beltran. The letter offered no legal rationale. It proclaimed that "henceforth" the tribe would be included on the list of Indian entities recognized by and eligible to receive the services of the Bureau of Indian Affairs. In making the decision, Gover wrote that he had been "advised" by two of his subordinates, the bureau's Pacific regional director and the superintendent of the Central California office, both in Sacramento.

Dale Risling, the former superintendent who is now a deputy regional director of the Pacific regional office, says that Gover initiated the review of the Koi's status. He says he does not recall the details of his own involvement. "That's been a few years ago, and I would have to go back and look at files that aren't readily available," he says. Ron Jaeger, who was Pacific regional director at the time and has since left the agency, did not respond to interview requests for this article.

What the letter didn't mention was that Gover's own staff of experts within the bureau's Branch of Acknowledgment and Research (now known as the Office of Federal Acknowledgment) was unalterably opposed to bestowing federal recognition on the Koi Nation.

Having heard rumors that Gover was about to recognize the Koi and two tiny Alaskan Indian groups, Lee Fleming, the head of the bureau's acknowledgment office, fired off a memo imploring

his outgoing boss to hold off -- just two days before the Gover edict. The memo, a copy of which was obtained by the *Weekly*, laid out the case for why the Koi Nation did not qualify for reaffirmation. Among other things, it cited problems with the list of tribal members that the group had submitted.

BIA staffers had become suspicious after the tribe, apparently aiming to clean up the list, reduced its enrollment by half in the year leading up to Gover's action. Fleming, a widely respected expert in Indian genealogy, concluded that the tribe had failed to adequately establish hereditary links to the handful of Native Americans purported to have been members of Lower Lake Rancheria before the *rancheria* was disbanded a half-century ago.

Fleming wrote that his office and the Office of Tribal Services were concerned that the reaffirmation was about to occur "without a thorough factual and legal review." Questioning Gover's legal authority to take action on his own, Fleming complained that there had been no chance for third parties to comment on the matter, which he opined was likely a violation of federal law. The memo concluded that to proceed with reaffirming the Koi and other tribes would damage the bureau's "credibility as an unbiased agency tasked with acknowledging tribes."

Recalling several "uncomfortable" verbal exchanges with his former boss during Gover's last two days on the job, Fleming says, "His response was that he had the authority to do it, and he was going to do it."

Even now, little is known about the "sovereign nation" whose leaders want to build a casino that, they say, will provide 2,200 jobs and pump more than a billion dollars into the Bay Area economy. And that's precisely the way the tribe appears to prefer it.

The Koi, whose "office" is a mail drop at a UPS Store near Oakland's Lake Merritt, receive no money from the Bureau of Indian Affairs. The tribe's finances are almost totally dependent on Ginsburg, the band's publicity-averse investor. His claim to fame before getting involved with several Indian tribes trying to enter the casino market was as one of the nation's largest developers of low-income housing. The man with whom Ginsburg ostensibly is doing business in Oakland, Daniel Beltran, is a former pickup-and-delivery courier. Beltran's brother, Dino, the tribal treasurer, used to manage a restaurant. For the past year they've been employed by East Bay Gaming, an entity Ginsburg set up to promote the casino.

Making the rounds with the Beltran brothers before civic and business groups and as they meet with elected officials is Ginsburg operative Rodney G. (Rod) Wilson, a Los Angeles-area public relations consultant. Wilson's business Web site lists him as the president and CEO of Pacific Research & Strategies, a Long Beach consulting business in which he is a partner with a professor of government at Claremont McKenna College, although the state Department of Corporations shows the firm as suspended.

Holding the title of "community relations director" for the Koi Nation, Wilson functions as the tribe's handler. He escorts the Beltrans to public events; presides over a multimedia presentation about the casino before community groups; oversees press releases and op-ed pieces distributed under Daniel Beltran's name ("Casino's Ills Overstated, Benefits Ignored"); and steps in to rescue the tribal chair and his brother from sometimes hostile questions.

He's part of a team assigned to the Koi that, besides Gover, includes Harlan Goodson, a lawyer with the influential national firm of Holland & Knight and the former head of the California Division of Gambling Control; James McClurken, a University of Michigan ethnologist; Edward Castillo, a Native American studies professor at Sonoma State University; and a phalanx of local lobbyists and

other operatives. Among them is Kathy Neal, the well-connected ex-wife of former Oakland Mayor Elihu Harris and a former Oakland Port commissioner.

Wilson carefully guards the tribe's exposure to the press. Last October, after Daniel Beltran agreed to a rare interview with the *Weekly*, Wilson showed up with the tribal leader and his brother at the restaurant where the interview was to take place and scuttled it. While Daniel and Dino Beltran sat impassively, Wilson inquired about why the newspaper wanted to write about the tribe. He then said he would "think about" the request, "and I'll get back to you." He never did. The Beltrans, Wilson, and the third member of the tribal council, Carole Tapia, all failed to respond to numerous phone calls seeking comment for this article.

Wilson also serves as chief explicator of the glitzy seven-story hotel, resort, and spa -- to be called Crystal Bay Resort -- whose 2,000 slot machines would be complemented by a 1,000-seat concert hall and up to five restaurants. It would be built on the marshy shores of San Leandro Bay, next to Martin Luther King Regional Shoreline, long a protected area for waterfowl. "For those who don't like to gamble, they can go and have a nice meal, go to the spa and get a nice massage, or just stay in the four-star hotel," he told a mostly hostile crowd of Alameda and San Leandro residents at a recent community meeting. "We believe we're creating a destination resort."

Anyone expecting to learn about the tribe creating that resort had to be disappointed.

"Can somebody from the Koi Nation explain how a person is qualified to be a member of the Koi tribe?" asked one man, during a question-and-answer session in which several people tried unsuccessfully to get the Beltrans to talk about the tribe. After huddling with the brothers, it was Wilson who spoke. "The question is regarding the membership of the tribe [sic] has been asked in a variety of ways," he said. "The simple answer is that the federal government recognized the tribe in the early 1900s. All the members today come from the original roll recognized by the federal government; [they are the] direct lineage of those first recognized as the Koi Nation."

Not content to let it go, a woman pressed Daniel Beltran to "give us some information about Koi Nation." His answer didn't take long. "We're one tribe. The members reside in Sonoma and Alameda counties. There are 53 [members]." He suggested that "if there are basic questions about the history of the tribe, you can see on [our] Web site."

But while it discusses the history of the Pomo people in general from thousands of years ago, the tribe's Web site (**www.koination.com**) says precious little about the Koi in modern times. Its leaders' "biographies" are similarly skimpy. Daniel Beltran is touted as having been "a student of the Koi Nation's history and culture" since his youth and as being "dedicated to reaching out to the greater community." But there are few other facts about him. Dino Beltran is described as "a seasoned professional" who has "held senior management positions in the hospitality and retail industries," with no mention as to where or for whom. About all that's to be learned about Carole Tapia is that she is "a mother and grandmother" who "brings many decades of experience and wisdom" to the tribal council.

In praising the team put together to work with the tribe before a civic group in December, Wilson singled out Castillo, the Sonoma State professor, as "an expert on Pomo history" who has written more than 30 books on the subject. But that appears to be misleading. Contacted by the *Weekly*, Castillo chuckled when told about the remark, saying that he has "written maybe 30 articles" -- not books -- as an academic, and that none of them was about the Koi. His one book about the Pomo in general (which did not deal with the Koi) turns out to have been a children's book of 48 pages.

The professor did, however, compile a history of the Koi Nation, at its behest, he said. But he declined to talk about it, citing a "confidentiality agreement" with the tribe. "There's so much controversy over the tribe's seeking land [for the casino]. What they don't want is a bunch of

hostile reporting."

The tribe's reticence is perhaps understandable, considering the controversial manner in which Gover enabled it to attain recognition. In reaffirming the Koi by fiat, Gover ignored a benchmark criterion that BIA has long considered essential before officially recognizing entities claiming to be tribes: that is, whether such groups can show "continuous existence from historical times to the present."

"What that means," says Fleming, BIA's acknowledgment chief, "is that there has to be evidence that an entity has maintained tribal relations between members; that not only were there tribal leaders, but that those leaders exercised political authority and that the members followed the direction of the leaders' governance continuously through time."

Asked whether Lower Lake Rancheria/ Koi Nation meets that test in his view, he replies, "I think my memo speaks for itself." Others are more direct. "I don't call [the Koi Nation] a tribe, and I do not believe that Kevin Gover had legal authority to do what he did," says William Wirtz, 67, the retired former deputy solicitor in BIA's Pacific regional office for nearly two decades.

The Koi trace their origins as a recognized tribe to 1916, the year the federal government bought 140 acres known as Purvis Flats near the present-day town of Clearlake in Lake County -- about 130 miles north of San Francisco -- and designated it as the Lower Lake Rancheria. But the land wasn't good for much. Even a BIA official referred to it as "a rock pile." According to records on file at the National Archives regional center in San Bruno, despite being purchased decades earlier for "the benefit of the landless Indians residing in the immediate vicinity," it remained uninhabited until a handful of Indians took up residence there in the 1940s.

Those records show that Harry Johnson and his wife, Isabella, who occupied a shack on 41 acres of the property, were considered to be the only two Indians living there in 1953 when Lake County expressed interest in acquiring the land for an airport. A special Act of Congress in 1956 enabled the county to obtain 99 acres for the airport. At the same time, the 41 acres occupied by the Johnsons became their private property after they agreed to accept it as a "gift" from the government. As far as the federal government was concerned, Lower Lake Rancheria ceased to exist.

If there is evidence to show that the tribe maintained continuous governance either before or after the land was lost, the Koi Nation's leaders have not yet seen fit to make it public. Indeed, assuming an earlier tribal government existed, there is evidence to suggest that it wasn't revived until 1994. That's when Dino Beltran, presenting himself as the tribe's chairman, appeared before Lake County officials after they announced plans to close the airport, asserting the tribe's rights to the land. Beltran told the Board of Supervisors that a benefactor whom he declined to name was willing to front the tribe enough money to make an offer. (The property ended up being sold to the town of Clearlake.)

But according to a 1994 memo prepared for the tribe by a legal firm acting on its behalf, a copy of which was obtained by the *Weekly*, there was apparently no Koi tribal government in place until the Beltrans helped organize one after the airport sale talk began. "It is our understanding that the Koi people had not formed an active government functioning as the 'Lower Lake Rancheria Interim Council' until this year," says the memo, prepared at California Indian Legal Services, which advocates for Native American rights. "The impetus for the formation of the government appears to have been the realization that the Tribe may have rights to the land that is currently Pearce Field Airport."

Although she doesn't have much to say one way or the other about Gover, Rosemary Cambra wonders what a tribe that claims Lake County as its aboriginal birthplace is doing trying to establish a "reservation" in Oakland. "I don't object to them wanting to put up a casino," says the leader of the Muwekma Ohlone, a tribe whose ancestral lands include San Francisco and the East Bay, and which has been fighting for federal recognition for years. "It's just the wrong place for them to be doing business."

Apparently, a lot of other people feel the same way. Besides Oakland's City Council, the Alameda County Board of Supervisors and the city councils of Berkeley, Alameda, and San Leandro are all on record as opponents of the casino. As such, their resolutions have been forwarded to the Bureau of Indian Affairs, which has begun the first in a string of bureaucratic processes that could take several years before the interior secretary ultimately decides the fate of the property.

Meanwhile, the tribe's handlers appear to be positioning the Koi to fight as the home team.

During presentations before community groups, Wilson, the tribe's minder, has for some months shown a slide that purports to be a map of traditional Pomo homelands covering a wide swath of Northern California. On such occasions, he has explained the tribe's connection to Oakland and the East Bay as their being part of Pomo "trade routes" for the sale of such items as clamshell beads and obsidian.

But when benefactor in chief Gover appeared before Oakland's City Council in January, he made a bold new assertion that critics, including San Jose State University ethnologist Alan Leventhal, were quick to dismiss as "astonishing" and "just plain wrong."

Suggesting that Lake County was merely the area to which the Koi were "assigned by federal policy during an unfortunate time in American history," Gover concluded, "So part of our evidence in this case is to examine just what were their original lands. We maintain that those lands were in the East Bay."

He spoke with the conviction of someone with dollar signs in his eyes.

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