STATEMENT
OF
AURENE M. MARTIN
ACTING ASSISTANT SECRETARY – INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON THE
INDIAN GAMING REGULATORY ACT

JULY 9, 2003

Good morning, Mr. Chairman and members of the Committee. My name is Aurene Martin, Acting Assistant Secretary – Indian Affairs. I am pleased to be here today to discuss the role of the Department of the Interior in reviewing revenue-sharing provisions included in Class III tribal-state gaming compacts submitted to the Department for approval under Section 11(d) of the Indian Gaming Regulatory Act of 1988 (IGRA). I will also discuss the role of the Department in implementing Section 20 of IGRA dealing with acquiring trust land for gaming purposes. Accompanying me today is Mr. George Skibine, Director of the Bureau of Indian Affair's Office of Indian Gaming Management.

IGRA provides that Class III gaming activities are lawful on Indian lands only if they are, among other things, conducted in conformance with a tribal-state compact entered into by an Indian tribe and a state and approved by the Secretary. The Secretary may only disapprove a compact if the compact violates (1) any provision of IGRA; (2) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or (3) the trust obligations of the United States to Indians. Under this statutory scheme, the Secretary must approve or disapprove a compact within 44 days of its submission, or the compact is considered to have been approved, but only to the extent the compact is consistent with the provisions of IGRA. A compact takes effect when the Secretary publishes notice of its approval in the Federal Register.

Since IGRA was passed in 1988, nearly 15 years ago, the Department of the Interior has approved approximately 250 Class III gaming compacts between states and Indian tribes in 24 states. These compacts have enabled many Indian tribes to establish Class III gaming establishments. These establishments have helped reduce tribes reliance on Federal dollars and enabled them to implement a variety of tribal initiatives in furtherance of Congress' intent in IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." The Department supports lawful and regulated tribal gaming under IGRA because it has proved to be an effective tool for tribal economic development and self-sufficiency.

Section 11(d)(4) of IGRA specifically provides that the compacting provision of IGRA shall not be interpreted as conferring upon a state or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe, and that no state may refuse to enter into compact

negotiations based upon the lack of authority in such state or its political subdivisions to impose such a tax, fee, charge, or other assessment.

Section 11 of IGRA allows Indian tribes to initiate a lawsuit in Federal district court against a state arising from the failure of that state to enter into compact negotiations or to conduct such negotiations in good faith. In 1996, the U.S. Supreme Court ruled in *Seminole Tribe v. State of Florida*, that a state may assert an Eleventh Amendment immunity defense to avoid a lawsuit brought by a tribe under IGRA alleging that the state did not negotiate in good faith.

In response to the *Seminole* decision, the Department published a rule that became effective in 1999, to enable Indian tribes to obtain Secretarial "procedures" for Class III gaming when a tribe has been unable to negotiate a compact with the state, and the state has raised an Eleventh Amendment immunity defense to a lawsuit initiated by the tribe in Federal court. Applications for Secretarial procedures are currently pending for Indian tribes in Florida and Nebraska, but a legal challenge to the Secretary's authority to promulgate this rule has been filed by the states of Florida and Alabama.

Another consequence of the Supreme Court's 1996 decision is that more states have sought to include revenue-sharing provisions in Class III gaming compacts, resulting in a discernable increase in such provisions in the past seven years. In general, the Department has attempted to apply the law to limit the circumstances under which Indian tribes can make direct payments to a state for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has only approved revenue-sharing payments that call for tribal payments when the state has agreed to provide valuable economic benefit of what the Department has termed "substantial exclusivity" for Indian gaming in exchange for the payment. As a consequence, if the Department affirmatively approves a proposed compact, it has an obligation to ensure that the benefit received by the state under the proposed compact is appropriate in light of the benefit conferred on the tribe. Accordingly, if a payment exceeds the benefit received by the tribe, it would violate IGRA because it would amount to an unlawful tax, fee, charge, or assessment. While there has been substantial disagreement over what constitutes a tax, fee, charge or assessment within this context, we believe that if the payments are made in exchange for the grant of a valuable economic benefit that the governor has discretion to provide, these payments do not fall within the category of prohibited taxes, fees, charges, or other assessments.

Since 1988, the Department has approved, or deemed approved revenue-sharing provisions between Indian tribes and the following States: Connecticut, New Mexico, Wisconsin, California, New York, and Arizona. In addition, four Michigan Indian tribes are making revenue-sharing payments to the State of Michigan under compacts that became effective by operation of law. Other Michigan tribes have made revenue-sharing payments to the State of Michigan under a court-approved consent decree, but these tribes stopped making the payments when Michigan authorized non-Indian casinos in Detroit.

I will now turn to a discussion of the issues presented by the implementation of section 20 of IGRA. 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). 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 section 20 also applies before the Tribe can engage in gaming on the trust parcel. Section 20 requires that if lands are acquired in trust after October 17, 1988 (the date IGRA took effect), they may not be used for gaming unless one of several statutory exceptions apply. One exception is lands acquired in trust within or contiguous to the boundaries of the tribe's reservation as it existed on October 17, 1988. However, there are additional exceptions for off-reservation trust lands. For instance, there is an exception for lands located within a tribe's last recognized reservation, if the tribe had no reservation on October 17, 1988. There is also an exception for trust lands of Oklahoma tribes. In addition, there are exceptions for lands taken into trust as part of either (1) the settlement of a land claim; (2) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or (3) the restoration of lands for an Indian tribe that is restored to Federal recognition by an act of Congress or by a judicial decree. Since 1988, the Secretary has approved approximately 20 applications that have qualified under the exceptions to section 20.

Finally, an Indian tribe may also conduct gaming activities on after-acquired trust land if it meets the requirements of section 20(b)(1)(A) of IGRA. Under section 20(b)(1)(A), 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 not detrimental to the surrounding community but only if the Governor of the state in which the gaming activities are to occur concurs in the Secretary's determination. Since 1988, state governors have concurred in only three positive determinations for off-reservation gaming on trust lands: the Forest County Potawatomi gaming establishment in Milwaukee, Wisconsin; the Kalispel Tribe gaming establishment in Airway Heights, Washington; and the Keweenaw Bay Indian Community gaming establishment near Marquette, Michigan.

Since taking office, Secretary Norton has raised the question whether the law provides her with sufficient discretion to approve off-reservation Indian gaming acquisitions that are great distances from their reservations, so-called "far-flung lands." This is further framed by what appears to be the latest trend of states that are interested in the potential of revenue sharing with tribes encouraging tribes to focus on selecting gaming location on new lands based solely on market potential rather than exercising governmental jurisdiction on existing Indian lands. It is within the context of this emerging trend, that the Secretary has asked those of us who work on Indian gaming issues to review federal law with this concern in mind. While we have not yet concluded our work, we have spent substantial effort examining the overall statutory scheme that Congress has formulated in the area of Indian self-determination and economic development. This includes a careful examination of what Congress intended when it enacted Section 20 (b)(1)(A). Thus far, our preliminary review suggests that Congress sought to establish a unique balance of interests. The statute plainly delineates the discretion of the Secretary, limiting her focus to two statutory prongs. Also, by requiring that the Governor of the affected state concur in the Secretary's determination, the statute acknowledges that in a difference of opinion between a sovereign tribe and an affected state, the state

prevails.

Further, at least on its face, section 20(b)(1)(A) does not contain any express limitation on the distance between the proposed gaming establishment and the tribe's reservation, nor is the presence of state boundaries between the proposed gaming establishment and the tribe's reservation a factor. Currently, there are eight section 20(b)(1)(A) applications pending with the Bureau of Indian Affairs for sites in New York, Wisconsin, Michigan, Louisiana, and California. Many more are rumored, including potential applications from tribes located in one state to establish gaming facilities in another state. However, we need to keep in mind there have been only three section 20(b)(1)(A) off-reservation approvals in the last 15 years. We are conducting our review of the law with this in mind. Yet, our review must also acknowledge that the role of the Secretary under section 20(b)(1)(A) is limited to making *objective* findings of fact regarding the best interests of the tribe and its members, and any detriment to the surrounding community. Therefore, while the trust acquisition regulations provides broad discretion, section 20(b)(1)(A) does not authorize the Secretary to consider other criteria in making her determination, thus limiting her decision-making discretion to that degree. We look forward to concluding our review for the Secretary and to sharing those results with you as appropriate.

This concludes my remarks. I will be happy to answer any questions the Committee may have. Thank you.