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Statement of Penny J. Coleman General Counsel (Acting) National Indian Gaming Commission

Committee on Senate Indian Affairs

July 27, 2005

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 gaming 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 into trust, seeks a trust-to-trust transfer for gaming, 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 temporal relationship of the acquisition to the tribal restoration (in other words, was this land acquired a 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.

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