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SEPTEMBER 23, 2010 COMMENTS AND TESTIMONY SUBMITTED ON BEHALF OF THE SPOKANE TRIBE IN CONTEXT OF GOVERNMENT-TO-GOVERNMENTCONSULTATION
REGARDING: (1) the January 3, 2008 Memorandum regarding Guidance on Taking Off-reservation Land into Trust for Gaming Purposes; (2) whether there is a need to revise any of the provisions of 25 C.F.R. Part 292, Subpart A (Definitions) and Subpart C (Two-Part Determinations); and (3) whether the Department of the Interior's process of requiring compliance with 25 C.F.R. Part 151 (Land Into Trust Regulations) should come before or after the Two-Part Determination.

The Spokane Tribe welcomes the opportunity to consult, including the specific opportunity to address the nine questions presented in the announcement for these consultations, This written statement and attachments are submitted in addition to the remarks of Tribal Chairman Gregory J. Abrahamson and the head of the Office of Spokane Tribal Attorney, Scott Crowell, who will each testify at the September 23, 2010 Consultation session at Airway Heights, Washington which is located in the center of the Spokane Tribe's ancestral lands.

The overarching principle governing section 20 regulations must be the effectuation of Congress's intent when it passed the Indian Gaming Regulatory Act ("IGRA") in 1988. Every Court to address section 20 of the Act has noted that Congress, by including section 20, intended for Tribes to be able to game on newly acquired lands when tribes meet the criteria set forth in the section 20 exceptions. Congress set this policy, giving no role to DOI to either create or change it. Instead, DOI needs to simply effectuate the policy established by Congress.

Since the passage of IGRA, Tribes have fended off numerous attempts to rewrite Section 20 by the likes of Rep. Hoagland (1991), Rep. Torricelli (1993), Rep. Everett (1994), Rep. Solomon (1995, 1997), Rep. Browder (1996), Rep. Wolf (2001), Rep. Shays (2004), Rep. John (2004), Rep. Rodgers (2005, 2006, 2007), Rep. Dent

(2005, 2007), Rep. Pombo (2006), Rep. Wu (2006), Rep. Lundgren (2007), Sen. Chafee (1996), Sen. Bryan (1997), Sen. Vitter (2005, 2008), Sen. Voinovich (2005) Senator Slade Gordon (1998), Senator McCain (1995, 1997, 1999, and 2005), and more recently, Senator Feinstein. Notably, the law has not changed despite these failed attempts. Yet from our perspective, Senator Feinstein has utilized her platform as Chair of the Interior Appropriations to bully DOI the point that Section 20 has effectively been written out of IGRA by DOI's inaction. - Such an abuse of power overrides the basic premises of the Constitutional democracy – the Senator is not above the law – she is welcome to try to change the law – but unless and until she does, DOI is required to implement the law as it exists today.

Spokane seeks a two – part determination that its proposed development project, on land already held in trust on its behalf, at a location just down the road from the site of today's consultation, is in the best interest of the Tribe and not detrimental to the surrounding community. One would think that such a task should be simple. After all, in the morning sunlight, we are literally sitting in the shadow of the Kalispel Tribe's successful Northern Quest Casino, which is one of only five successful two-part determinations made since the passage of IGRA. The only material difference in evaluating the siting of these two casinos in the greater Spokane area is that Kalispel is not from here. These are Spokane ancestral lands – this is not a fact in dispute. Nothing Kalispel says or does will ever change the fact that they are not from here or that the Kalispel enterprise sits on Spokane ancestral lands. Yet, Spokane has undertaken the comprehensive environmental and demographic analysis required by existing regulations because we wish to comply with the regulations and guidelines in place. We have secured cooperative agreements with the City of Airway Heights and Spokane County. We have negotiated a compact that commits the Governor to consider in good faith whether to concur in the two-part determination. Ironically and sadly, the only vocal opposition to the Spokane Tribe's proposal comes from the Kalispel Tribe itself.

We have brought with us today, written testimony or comments of the Spokane Tribe addressing these very questions in (1) September, 2000, (2) March, 2002, (3) December 2006, (4) February 2007 and (5) September 2008. Rather than repeat the analysis therein, we incorporate them by reference. Every one of these comments was submitted in response to DOI official request for comments as published in the Federal Register, or in 2008, by letter request of the NIGC. Every Tribe (and non-Indian entities) had an opportunity to formally respond and submit comments – and a great number of Tribes and tribal organizations did respond. So here Spokane is, again, with a sixth set of formal comments. We ask: Do you expect our answers to be any different today than they were five times in the last decade? Do you really expect to hear some analysis or line of argumentation that you have not already heard?

It cannot be denied that, Tribes (and non-Indian entities) have had numerous opportunities to respond to specific proposals under Section 20 pursuant to DOI Guidelines that have been in place since 1994 and updated in 1997, 2001, 2005 and 2007. In that context, on November 3, 1996, the Spokane Tribe submitted comments in opposition to the Kalispel Tribe's proposal. It is an interesting read because it freezes a moment in time in which litigation between the Siletz Tribes and DOI was pending regarding the Oregon Governor's veto of a favorable two-part determination for the Siletz Tribe to operate on lands in Salem Oregon. We find the current discussion of two-part determinations curiously devoid of discussion of the issue of State's rights as preserved in 2719(b)(1)(A). The case law, long since established in the federal appellate courts, makes clear that the Governor of the State, unless contractually committed in a tribal-state compact, may veto a two-part determination for any reason, or for no reason at all. If a State wants the gaming to be on newly acquired trust lands, should DOI interpret IGRA in a manner that makes that impossible? All the hoopla over two – part determinations, when it is the one exception, among all Section 20's exceptions to gaming on newly acquired lands, that can be stopped dead in its tracks by the Governor of a state. In so many contexts, State's rights plays a prominent role in the formulation of federal Indian policy – why not here? Is there some reason to believe state governors are somehow not equipped to represent state and local interests when determining whether proposed gaming activities would be detrimental to surrounding communities within the state?

Another issue common among the waves of previous Section 20 comments over the years has been the economic impact of a casino approved pursuant to Section 20 upon existing tribal casinos. The Spokane Tribe's situation serves as quite the anecdote for that discussion. In 1996, Spokane urged DOI to reject the Kalispel's proposal because it would devastate the Spokane Tribe's on-reservation gaming facilities. The 1996 comments submitted by Spokane freeze a different moment in time – in the midst of the historic struggle of the Washington Tribes to secure the right to machine gaming. The Spokane Tribe led that fight, and for most of those years, the Spokane Tribe, the Colville Tribes and the Shoalwater Bay Tribe stood alone in that fight. The Tribes ultimately prevailed. Despite the pending litigation brought by the Spokane and Colville Tribes regarding the right to operate machine gaming, the Kalispel Tribe's application, asserted that it would be operating a small 5,000 square foot card room which could not possibly hurt the Spokane Tribe's on-reservation slot machines. The Spokane Tribe's comments, in sharp contrast, correctly forecast that the Tribes would prevail against Washington State in the courts and that Kalispel would be operating slot machines, which operation would devastate the Spokane Tribe's on-Reservation facilities. Kalispel's assumptions were wrong; fortunate for them. The Spokane Tribe's predictions are now the hard reality. We made clear that in such event, the Spokane Tribe would be compelled to seek a similar two art determination in order to effectively compete:

> "If the Airway Heights facility is allowed to go forward, the Spokane Tribe is put in an untenable situation of securing its own location in or near downtown Spokane. Given that Interior's approval of the Kalispel proposal will have caused the Spokane Tribe to be in the untenable situation, it is unthinkable that Interior would disapprove a section 2719 application by the Spokane Tribe, assuming environmental and local impact issues are adequately addressed"

Yet as we sit here today, we are aware that some seek changes in Section 20, or changes in the regulations which would deprive Spokane of the opportunity to compete head to head with Kalispel in the heart of the Spokane Tribe's exclusive ancestral lands. Kalispel will argue that Spokane's application should be denied because Kalispel will see a decline in gaming revenue. Isn't that ironic? Kalispel was put on notice in 1996 that Spokane would be seeking its opportunity to compete head to head. Kalispel underwent its huge capital investment and expansion knowing that Spokane would seek gaming on its own trust lands in Airway Heights. Fairness and common sense compels a final set of regulations that allow Spokane to proceed despite Kalispel's objections. We encourage you to read the 1996 statement. The predictions of severe economic consequences upon Spokane's on-reservation facilities developed into harsh reality that has greatly impaired the Spokane Tribe's ability to provide for its people. We submitted our concerns and Kalispel was approved anyway. The Spokane Tribe thought long and hard as to whether to file a lawsuit over that decision. We will never forget the General Council meeting where the Tribal Elders spoke strongly that the Spokanes not file such a lawsuit against another Tribe. Spokane did not file suit over the Kalispel project. Instead, we embarked on the course that leads us here today. We know the Spokane metropolitan area can sustain both casinos. Indeed, we think that together, we can grow the market as many competing tribes have experienced in other areas. Kalispel may or may not see the same revenue that it has enjoys with its current monopoly, but Kalispel was never entitled to such a monopoly and should have planned accordingly.

The current regulations provide a platform, indeed several platforms, for Kalispel to make its pitch, and provide a mechanism for DOI to approve the Spokane project after consideration of Kalispel's concerns, so lets get on with it. We already went through this immediate consultation process, and we now have 25 CFR Part 292 and its attendant guidelines – some of it we like, some of it we do not like, but all of it we adhere to. Indeed, Spokane, a Tribe with very limited resources, has relied upon Part 292 in good faith and devoted a tremendous amount of the Tribe's scarce resources to comply with the rigorous environmental and demographic data and analysis required of the regulations and guidelines now in place.

There is no basis to change the regulations and guidelines – and changing the regulations and guidelines in a manner that requires Tribes to incur additional costs is unconscionable – yet that appears to be what is at risk in these consultations. These constant delays and incremental adjustments merely drag out what should be a simple process such that the initial costs of the approval process becomes prohibitive, financing becomes scarce, and viable projects die. Notably, the projects needed for the most needy tribes are the first projects to die. Ironically, Tribes like Kalispel spend millions in gaming revenue to hire armies of lawyers and lobbyists to kill Section 20 proposals from impoverished tribes. Far from remedying this situation – a situation in which Indian gaming revenue is being used to *prevent* tribes from becoming self sufficient - this latest wave of DOI consultations merely exacerbates it.

So just STOP the misdirection, stop this consultation and cease revisiting the already-revisited regulations. DOI should simply do its job. We do not lose sight of the fact that the Department sent the Director of the Office of Gaming Management, Paula Hart, to hear our concerns. Paula Hart is amongst the most experienced within the federal umbrella in these matters and she and her Office do their job. The Bush Administration and now the Obama Administration have converted the tactic of sending a sympathetic ear to hear our concerns into an art form. It is not Ms. Hart who needs to listen, it is the army of bureaucrats above her and around her, who are not here today who need to listen. Simply put, this whole consultation process appears to be a deliberate action taken by DOI to buy yet more time to not complete its work as our federal trustee on Section 20 matters.

Our Statement today recommending that DOI simply take 25 CFR part 292 and run with it does not condone the "commutability" guidelines – quite the opposite. Carl Artman's infamous commutability standards are simply the memorandum of a political appointee – they are not part of 25 CFR 292 and certainly are not part of IGRA. Rather than falsely elevating that memorandum to a central position in these consultations, DOI should simply strike those guidelines through a new memorandum. Our fear is that these "consultations" will morph into "Proposed Regulations" noticed in the Federal Register, spawning yet another comment period, spawning yet another round of consultation, until we must start all over with the next Administration. The location of Spokane's proposed development meets Artman's commutability standards, so it does not have a dog in that fight. Unfortunately, we see the process being stalled for everyone, not just those negatively impacted by his Memorandum. But make no mistake – Spokane stands with those Tribes that want Artman's commutability memorandum rescinded. IGRA does not require such mileage restrictions and it is inappropriate and wrong for a DOI Assistant Secretary to amend IGRA by "memorandum fiat.

Spokane's responses to specific consultation questions

We now turn to answering the specific questions set forth in the notice regarding this consultation:

> **Question #1: Whether the definitions of the following terms in 25 CFR 292.2 should be amended: (1) Appropriate State and local officials; (2) Nearby Indian Tribe; (3) Significant historical connection and (4) surrounding community?**

Response:

"Appropriate State and Local Officials" is currently defined as the Governor of the State and local government officials within a 25- mile radius of the proposed gaming establishment. When publishing the regulation, DOI commented:

From the Department's prior experience implementing section 2719, the 25-mile radius allows for the adequate representation of local officials when conducting an analysis under section 2719(b)(1)(A).

73 Fed. Reg. No.98 at p. 29355 (May 29, 2008). DOI also addressed comments seeking a larger radius and a smaller radius, made clear that it included officials in other states if they fell within the radius and rejected clarification of further definition of 'Local official." 73 Fed. Reg. no.98 at p. 29355 (May 29, 2008). Spokane has nothing new to add, so NO, the definition should not be amended.

"Nearby Indian Tribe" is currently defined as "an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters." DOI Commented in the Federal Register:

> . . . if an Indian tribe qualifies as a nearby Indian tribe under the distance requirements of the definition, the detrimental effects to the tribe's on-reservation economic interests will be considered. If the tribe is outside of the definition, the effects will not be considered. The Department will consider detrimental impacts on a case- by-case basis, so it is unnecessary to include a standard. The definition of ''nearby Indian tribe'' is made consistent with the definition of ''surrounding community'' because we believe that the purpose of consulting with nearby Indian tribes is to determine whether a proposed gaming establishment will have detrimental

impacts on a nearby Indian tribe that is part of the surrounding community under section 20(b)(1)(A) of IGRA.

73 Fed. Reg. no.98 at p. 29356 (May 29, 2008). DOI's comments also addressed concerns of impacted tribes outside the 25 mile radius, addressed concerns of Tribes with historical connections to the area, and addressed the need for a larger or smaller radius. 73 Fed. Reg. no.98 at p. 29356 (May 29, 2008). The Spokane Tribe believes this definition should NOT be amended, The existing definition provides the Kalispel Tribe with its platform for demonstrating detrimental effects and enables DOI to consider such effects on a case-by-case basis. That provides Spokane with the platform in response to set forth the unique circumstances that should be taken into account regarding Kalispel's gaming operation. The Spokane Tribe is fine with the current paradigm. NO change should be made.

"Significant Historical Connection" is currently defined as "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." Spokane is somewhat confused by the inclusion of this definition in the proposed questions because it is a term used primarily for purposes of the restored lands and initial reservation exceptions to Section 20, and is not required for two-part determinations. Indeed, the DOI preamble in the Federal Register noted that commentators suggested that the two-part determinations require "evidence of an aboriginal or significant historical connection to the land, including cultural ties based upon actual inhabitance.'' This would, according to the commenter, bring the regulation into conformance with section 2719." DOI responded: "This recommendation was not adopted because it is beyond the scope of the regulations and inconsistent with IGRA." 73 Fed. Reg. no.98 at p. 29360 (May 29, 2008). Spokane agrees. Even though we note that such a requirement would have stopped the Kalispel proposal dead in its tracks, we adhere to the overarching principle that these regulations cannot be used to effectively rewrite or amend IGRA. If DOI is now suggesting that IGRA does mandate that two-parts must have such a "significant historical connection," then please inform Kalispel that their casino is illegal. If DOI is considering changing this definition, it should be explicit in informing those tribes seeking Indian Lands Determinations based on the restored lands, initial reservation and land claim settlement exceptions that their interests may be impacted by these consultations. We do note that section 292.17(i) allows the applicant to provide such information of a significant historical connection for consideration while not requiring such information. Spokane is fine with the definition because it enables Spokane to establish without dispute that the Spokane Tribe is from here and Kalispel is not. So, the definition should NOT be amended.

"Surrounding community" is currently defined as "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile

radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." DOI commented in the Federal Register, after laying out the permutations used in the guidelines and changes over the years:

> "Ultimately, our objective in the regulation is to identify a reasonable and consistent standard to define the term ''surrounding community'' and we believe that it is reasonable to define the surrounding community as the geographical area located within a 25- mile radius from the proposed gaming establishment. Based on our experience, a 25-mile radius best reflects those communities whose governmental functions, infrastructure or services may be affected by the potential impacts of a gaming establishment. The 25-mile radius provides a uniform standard that is necessary for the term ''surrounding community'' to be defined in a consistent manner. We have, however, included a rebuttable presumption to the 25-mile radius. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment".

73 Fed. Reg. no.98 at p. 29357 (May 29, 2008). That analysis remains sound and the regulation provides the flexibility for a Tribe or other entity outside of the 25 mile radius to weigh if it has compelling circumstances. Accordingly, the definition should NOT be amended.

> **Questions 2 & 3 : Whether any of the provisions of 25 CFR part 292.19 (How must an applicant describe the benefits and impacts of the proposed gaming establishment to the tribe and its members) be modified? Whether any of the provisions of 25 CFR part 292.18 (What information must the application contain regarding detrimental impacts to the surrounding community) should be modified?**

Response:

We assume that question # 2 has a typographical error and intended to reference 292.17, which reads:

> **§ 292.17 How must an application describe the benefits and impacts of the proposed gaming establishment to the tribe and its members?**
> To satisfy the requirements of § 292.16(e), an application must contain:
> (a) Projections of class II and class III gaming income statements, balance

sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe;
(b) Projected tribal employment, job training, and career development;
(c) Projected benefits to the tribe and its members from tourism;
(d) Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;
(e) Projected benefits to the relationship between the tribe and non- Indian communities;
(f) Possible adverse impacts on the tribe and its members and plans for addressing those impacts;
(g) Distance of the land from the location where the tribe maintains core governmental functions;
(h) Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred from a third party to the tribe or directly to the United States;
(i) Evidence of significant historical connections, if any, to the land; and
(j) Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of any:

(1) Consulting agreements relating to the proposed gaming establishment;
(2) Financial and loan agreements relating to the proposed gaming establishment; and
(3) Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming establishment, or the acquisition of the land where the gaming establishment will be located.

§ 292.18 What information must an application contain on detrimental impacts to the surrounding community? currently provides:

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:
(a) Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA);
(b) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(c) Anticipated impacts on the economic development, income, and employment of the surrounding community;
(d) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;
(e) Anticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment;
(f) If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land; and
(g) Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

Although these two lists are voluminous and impose a huge financial and time-consuming burden on a Tribe to assemble such analysis, Spokane understands the possible relevance of each specific item and has undertaken the tasks at hand to comply with this regulation. The two lists are also consistent with the guidelines, last modified by DOI in 2007. Spokane has undertaken these tasks even though the conclusion as to whether Spokane should be allowed to compete head to head against Kalispel, who is in the heart of Spokane's exclusive use and occupation area, pursuant to a two-part determination should not require such extensive data. Spokane is in the process of preparing a full EIS pursuant to NEPA on the proposal, even though the property is already in trust and even though an EA and/or FONSI would likely comply with NEPA. It would be unfair to Spokane and other tribes to change the rules at this juncture, so, this section should NOT be amended, and if is amended, it should "grandfather" in existing applicants who are proceeding under the current rules. Requiring that an applicant Tribe to discard its substantially complete application and supporting documents merely because the agency itself has been unable to complete action on the end-product of an already extensive and expensive process cannot be justified.

Question #4: Whether the consultation process with local and state officials and officials of nearby tribes described in 25 CFR 292.19 is adequate?

Response:

§ 292.19 How will the Regional Director conduct the consultation process? currently provides**:**

(a) The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60-day period from:

(1) Appropriate State and local officials; and
(2) Officials of nearby Indian tribes.

(b) Upon written request, the Regional Director may extend the 60-day comment period for an additional 30 days.

(c) After the close of the consultation period, the Regional Director must:
(1) Provide a copy of all comments received during the consultation process to the applicant tribe; and
(2) Allow the tribe to address or resolve any issues raised in the comments.

(d) The applicant tribe must submit written responses, if any, to the Regional Director within 60 days of receipt of the consultation comments.

(e) On written request from the applicant tribe, the Regional Director may extend the 60-day comment period in paragraph (d) of this section for an additional 30 days.

DOI decided upon this language after review of extensive comments regarding the changing timelines, the imposition of mile restrictions, etc. 73 Fed. Reg. no.98 at pp. 29370-71 (May 29, 2008). It is difficult to believe that the current consultation and comment period will generate any new analysis. The process in the current regulation is certainly workable, providing sufficient time and information and access for all who qualify as the "surrounding community" and there is no compelling reason to change. So,, this section should NOT be amended.

Question #5: Whether the information sought from consulted parties in 25 CFR 292.20 is sufficient?

Response:

§ 292.20 What information must the consultation letter include? currently reads**:**

(a) The consultation letter required by § 292.19(a) must:
(1) Describe or show the location of the proposed gaming establishment;
(2) Provide information on the proposed scope of gaming; and
(3) Include other information that may be relevant to a specific proposal, such as the size of the proposed gaming establishment, if known.

(b) The consultation letter must include a request to the recipients to submit comments, if any, on the following areas within 60 days of receiving the letter:
(1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;
(2) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of

the surrounding community;
(3) Anticipated impact on the economic development, income, and employment of the surrounding community;
(4) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;
(5) Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and
(6) Any other information that may assist the Secretary in determining whether the proposed gaming establishment would or would not be detrimental to the surrounding community.

DOI decided upon this language after review of extensive comments. 73 Fed. Reg. no.98 at pp. 29370-71 (May 29, 2008). It is difficult to believe that the current consultation and comment period will generate new analysis. The existing regulation at section 292.20(a)(3) provides the flexibility for Interior to learn of information unique to a specific proposal that compels consideration, and existing regulation section 292.20(b)(6) provides the flexibility for any consulted party to provide Interior with information unique to a specific proposal that compels consideration.. Accordingly, YES, the existing regulation is sufficient.

Question #6: Whether the evaluation criteria contained in 25 CFR 292.21 are appropriate?

Response:

§ 292.21 How will the Secretary evaluate a proposed gaming establishment? currently reads:

(a) The Secretary will consider all the information submitted under §§ 292.16– 292.19 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members and whether it would or would not be
detrimental to the surrounding community.
(b) If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its application has been disapproved, and set forth the reasons for the disapproval.
(c) If the Secretary makes a favorable Secretarial Determination, the Secretary will proceed under § 292.22.

In the current regulation, DOI considered and rejected many criteria suggested by the commentators.73 Fed. Reg. no.98 at p. 29371 (May 29, 2008). Most were rejected because they intended to impose standards not set forth in IGRA, some proposed criteria which were helpful to applicant tribes and others that were

detrimental. Spokane commends Interior's formulation of the current regulations as consistent with Spokane's over-arching concern that this process not be used to amend IGRA de facto. The current criteria allow the Secretary the flexibility to decide on a case-by-case basis after providing sufficient opportunity for the local community, including nearby Indian tribes, to weigh in. Accordingly, NO change in 292.21 is needed.

Question # 7: Whether the timeframes for a Governor's concurrence contained in 292.23(b) should be modified?

Response:

292.23(b) currently reads:

> (b) If the Governor does not affirmatively concur in the Secretarial Determination within one year of the date of the request, the Secretary may, at the request of the applicant tribe or the Governor, grant an extension of up to 180 days.

Although the Spokane Tribe would prefer one minor change and one minor clarification to section 292.23, such preferences do not warrant stopping the existing applications pending the minor changes, so, section 292.23(b) should NOT be modified.

The Spokane Tribe is frustrated that there is no time period for the Secretary to make the initial determination. The Tribe proposes that section 292.22 include a provision that the Secretary must make the determination within one year of the Tribe certifying that it has submitted all of the information required by sections 292.17 and 292.18. Further, Spokane would prefer a clarification that if the one and a half year period passes without the Governor's concurrence, that the Tribe may resubmit the request for concurrence with an update or supplement limited to that information which has changed from the initial application, rather than being required to start anew.

Question # 8: Whether the Memorandum issued by Assistant Secretary Carl Artman on January 3, 2008, regarding guidance on taking off-reservation land into trust for gaming purposes?

Response:

As indicated above, Carl Artman's infamous commutability standards are simply the content of an informal memorandum by a past political

appointee– they are not the product of rulemaking under the APA, thus not part of 25 CFR Part 292 and they certainly are not part of IGRA. DOI need do no more to rescind these standards than to simply issue a new memorandum, and not embark on a series of consultations that will further impede tribes seeking to exercise the rights recognized by Congress in 1988. Spokane meets Artman's commutability standards, so it does not have a dog in that fight, but in DOI's approach, we see the process being stalled for everyone, not just those negatively impacted by the questionable guidance Memorandum. But make no mistake – Spokane stands with those Tribes that want Artman's commutability memorandum rescinded. IGRA does not require such mileage restrictions and it is inappropriate and wrong for a DOI Assistant Secretary to amend IGRA by "memorandum fiat."

Question #9: Whether land on which an Indian tribe proposes to establish a gaming establishment should be taken into trust before or after compliance with the requirements of the two-part determination in 25 U.S.C. 2719(b)(I)(A).

Response:

It should be clear that a Tribe with lands acquired after 1988, but already in trust status, may still qualify those lands for gaming by seeking a two-part determination. The question suggests or implies a possible scenario of a regulation wherein lands now in trust, but acquired after 1988, would have lost the window of opportunity to qualify for a two-part determination. Such a regulation would run contrary to section 20 and would not survive a court challenge. The Spokane Tribe's land is currently in trust, but was acquired after 1988. Kalispel sought its two-part determination after its land in Airway Heights was already in trust, even though it had made clear unambiguous and unequivocal statements that it would never conduct gaming on its lands. In both Spokane's and Kalispel's circumstances, IGRA's structure regarding two-part determinations, however, prevents Tribes from gaming on lands already in trust without complying with the determination requirements, so no changes need to be made to existing regulations. Additionally, the question contemplates that gaming must be addressed in the initial fee-to-trust application, which again, is not required by IGRA. There may well be circumstances for the land to be taken into trust even if it is not used for gaming. It would be a tragedy to prevent a Tribe from pursuing a fee-to-trust application for a myriad of appropriate governmental purposes because it may or may not pursue gaming in the future. Again, since the protection against using the land for gaming is locked in regarding two-part determinations, no changes to the regulations are required. Conversely, any regulation should allow a two-part determination to be made before lands are taken into trust. If a Tribe seeks lands solely for gaming purposes, both the Tribe and the Governor of a State should be able to ascertain whether it will qualify for

gaming. Indeed, such front-end analysis allows the Governor of a State to have input in the process rather than being confronted with an up or down decision on the back end. IGRA does not require that the two-part determination be made before or after the land is to be taken into trust.

In contrast to the two-part determination process, for the other exceptions to Section 20, the land is eligible for gaming if it qualifies under the exception whether or not gaming was considered during the fee-to-trust process. The United States was or is involved in litigation with the Ponca Tribe over this issue, but these comments embrace the long-standing pillar of tribal governance that the government may change its decision as to use and stewardship of its lands, just as state and local governments may do so. As with the 'significant historic connection" definition discussed above, if DOI is considering adding such a provision, it should be explicit in informing those tribes seeking Indian Lands Determinations based on the restored lands, initial reservation and land claim settlement exceptions that their interests may be impacted by these consultations.

Conclusion

Thank you for the opportunity to testify today and provide our comments. The Spokane Tribe will follow the comments submitted by others at today's session and the other five sessions now scheduled in this process closely. We are concerned that the process is not clear as to whether we will have access to written comments submitted by others and requests the opportunity to respond to those comments. We reserve the right and intend to supplement these comments as we hear from and address the concerns expressed by others.

Respectfully submitted,

Gregory J. Abrahamson
Chairman
Spokane Tribe of Indians