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Questionable Federal "Guidance" on Off-Reservation Indian Gaming: Legal and Economic Issues

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In January 2008, Carl Artman, the assistant secretary for Indian affairs at the U.S. Department of the Interior, issued a memorandum titled, "Guidance on taking off-reservation land into trust for gaming purposes."[1] The guidance memo signaled a significant change in the department's position on Indian gaming on newly acquired trust lands or "off-reservation" gaming, a change that had been brewing for more than four years.

The memo also garnered the immediate attention of Congress. In February 2008, the House Committee on Natural Resources held an oversight hearing on the memo for the purpose of examining "how the new Guidance was developed, whether it was lawfully enacted, the ramifications of the new requirements on all off-reservation fee to trust applications, and whether this signifies an attempt by the Administration to change Federal policy towards Indian tribes."[2] As Committee Chair Nick Rahall (D-W.Va.) stated, "The potential change to the Federal policy towards Indian tribes is disturbing. . . . [W]e have to question if this Administration is advocating a policy to keep Indians on the reservation."[3]

Several legal and economic questions are raised by the guidance memo. This article is by no means intended to be the last word on the memo's legality, nor on the wisdom of its requirements from legal, public policy, or economic perspectives. It is, however, meant to question the memo's procedural genesis and substantive "guidance."

INDIAN GAMING ON NEWLY ACQUIRED LANDS

In 25 U.S.C. § 2719 (sometimes referred to as "Section 20," in reference to the numbering of the statutory sections in bill form), the federal Indian Gaming Regulatory Act (IGRA) sets forth a general prohibition against tribal gaming on trust lands acquired after IGRA's date of enactment: "Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. . . ."[4]

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[1] Memorandum from Carl Artman, Assistant Secretary—Indian Affairs, U.S. Department of the Interior, to Bureau of Indian Affairs Regional Directors and to the Office of Indian Gaming, Guidance on taking off-reservation land into trust for gaming purposes (Jan. 3, 2008 [herein, after "Guidance Memo"]).

[2] Oversight Hearing on Department of Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and its Ramifications Before the House Committee on Natural Resources, 110th Cong. (Feb. 27, 2008) (statement of Nick J. Rahall, II, Chair, House Committee on Natural Resources), *available at* <http://resourcescommittee.house.gov/images/Documents/20080227/08_2_27%20njr%20land%20into%20trust%20hearing%20statement.pdf>.

[3] *Id.*

[4] 25 U.S.C. § 2719(a).

Such lands are commonly referred to as "newly acquired" lands.

There are, however, a number of exceptions to IGRA's general prohibition against gaming on newly acquired lands. First, a tribe may conduct gaming on newly acquired lands that are located within the tribe's existing reservation or that are contiguous to the reservation's boundaries.[5] Second, for tribes without reservations as of Oct. 17, 1988, gaming is not prohibited on newly acquired lands if the lands are within the tribe's last recognized reservation and within the state in which the tribe currently is located.[6] Third, gaming is allowed on newly acquired lands when the lands are placed in trust as part of a settlement of a land claim, the initial reservation of a federally recognized tribe, or the restoration of lands for a tribe whose federal recognition is restored.[7] Finally, an exception is made when gaming on newly acquired lands is "in the best interest of the tribe and its members, and would not be detrimental to the surrounding community."[8]

The latter exception is often commonly referred to as the "two-part determination" or "best interests" exception. Under this exception, the secretary of the interior must first consult with the tribe, the state, local officials, and officials of nearby tribes, and then determine that gaming on the newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community. The state's governor must concur with the secretary's determination, essentially granting the governor veto power over tribal gaming under this exception. The consultation and governor's concurrence requirements create potential political obstacles to the likelihood that a tribe may conduct gaming on newly acquired lands under the best interests exception, as demonstrated by the fact that only three tribes currently operate gaming on newly acquired lands under this exception: the Keweenaw Bay Indian Community of the Lake Superior Bands of Chippewa Indians in the Choclay Township outside of Marquette, Mich.; the Forest County Potawatomi in Milwaukee, Wis.; and the Kalispell Tribe in Airway Heights, Wash.

Though the term "off-reservation gaming" often is used to refer to gaming under any of the § 2719 exceptions, the Interior Department generally uses the term "off-reservation" to refer to land that is neither within or contiguous to existing reservation boundaries. Further, the best interests exception is the sole exception that does not require some historical tie or legal claim to the land in question.

THE LAND-INTO-TRUST PROCESS

Section 2719 does not authorize the interior secretary to take land into trust; instead, it creates a separate requirement a tribe must meet independent of the land-into-trust process before the tribe may conduct gaming on land taken into trust. In addition to meeting the requirements of § 2719, the tribe also must satisfy the requirements of the land-into-trust process. (And, of course, if a tribe wants to conduct gaming on any land acquired after 1988, it must satisfy IGRA's other conditions, including that the land satisfies the "Indian land" requirement,[9] that the tribe's gaming ordinance is approved by the chair of the National Indian Gaming Commission,[10] and, for Class III or casino-style gaming, that a duly negotiated and approved tribal-state compact is in place.[11])

The interior secretary's power to take land into trust for the benefit of a tribe stems from Congress's grant of authority in the Indian Reorganization Act of 1934 (IRA).[12] Generally speaking, the secretary may exercise discretion whether to grant or deny an application to take land into trust

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[5] *Id.* § 2719(a)(1). Seven tribal casinos currently operate under this exception.

[6] *Id.* § 2719(a)(2)(B). A special exception applies to tribes without reservations that have acquired trust lands in Oklahoma. Gaming is allowed on newly acquired lands in Oklahoma if the lands are within the tribe's former reservation or if the lands are contiguous to the tribe's current trust or restricted lands. *Id.* § 2719(a)(2)(A).

[7] *Id.* § 2719(b)(1)(B). These, too, are controversial exceptions, despite the fact that relatively few tribal casinos operate under them: currently, four casinos operate on settlement lands (all stemming from the Seneca Tribe of New York's land claim), three on initial reservations, and 13 on restored reservations. IGRA also includes specific exceptions, which reference particular lands, for the St. Croix Chippewa Indians in Wisconsin and the Miccosukee Tribe of Indians in Florida. *Id.* § 2719(b)(2).

[8] *Id.* § 2719(b)(1)(A).

[9] 25 U.S.C. § 2710(b)(1) & (d)(1). For nonreservation trust lands, this requires that the tribe exercise governmental authority over the land. *Id.* § 2703(4).

[10] *Id.* § 2710(b)(1)(B), (d)(1)(A).

[11] *Id.* § 2710(d)(1)(C).

[12] 25 U.S.C. §§ 460 *et seq.*

for a tribe. (Some acquisitions by the secretary are nondiscretionary, such as those mandated by a federal statute or court decision directing the secretary to place land into trust.) The secretary has promulgated regulations governing both on-reservation and off-reservation land acquisitions, which require consideration of the impact on local and state governments, as well as opportunity for public comment. The primary purposes for which the secretary might approve a trust application are the facilitation of tribal government services, economic development, and housing. Gaming falls within economic development.

Under its regulations, the secretary will consider a number of factors in exercising discretion whether to take land into trust, including the tribe's need for additional land, the impact of removing the land from state and local tax rolls, any jurisdictional problems, and potential conflicts of land use.[13] For off-reservation acquisitions (meaning land that is not within or contiguous to a reservation), the secretary considers the same factors, along with "the location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation."[14] Further, "as the distance between the tribe's reservation and the land to be acquired increases, the secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition [and] shall give greater weight to the concerns raised" related to jurisdiction, potential conflicting land uses, and removing the land from state and local tax rolls.[15]

Though Bureau of Indian Affairs (BIA) regional directors may approve land-into-trust applications for nongaming purposes, all gaming-related applications must go through the Interior Department's Office of Indian Gaming Management (OIGM) and

[13] 25 C.F.R. § 151.10. That section provides:

> On-reservation acquisitions. Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:
> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
> (b) The need of the individual Indian or the tribe for additional land;
> (c) The purposes for which the land will be used;
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
> (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. . . .

[14] *Id*. § 151.11(b).

[15] *Id.* § 151.11. That section provides:

> Off-reservation acquisitions. The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:
> (a) The criteria listed in §151.10 (a) through (c) and (e) through (h);
> (b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.
> (c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.
> (d) Contact with state and local governments pursuant to §151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

be approved by the assistant secretary for Indian Affairs.[16] The tribe's application first goes to the BIA regional director, who will review it for compliance with the requirements of 25 C.F.R. pt. 151 and request from OIGM a determination whether the land in question will qualify for one or more of § 2719's exceptions. The regional director also will consult with state and local officials in accordance with 25 C.F.R. pt. 151. The public has an opportunity to comment during the process required by the National Environmental Policy Act, which includes a review of the potential socioeconomic impacts of taking the land into trust for gaming. The regional director submits her recommendation on the tribe's application to the OIGM, which in turn provides a final recommendation to the assistant secretary for Indian Affairs. Typically, then, the review of a tribe's application to take land into trust for gaming purposes occurs simultaneously with review of the applicability of one of § 2719's exceptions.

Prior to the issuance of the guidance memo, applications falling under the best interests exception had followed a slightly different process. Review of whether the tribe met the requirements of the exception occurred prior to the decision of whether to take the land into trust. The regional director made factual findings regarding whether gaming on the land was "in the best interest of the tribe and its members, and would not be detrimental to the surrounding community."[17] The regional director's factual findings then were forwarded to the OIGM for further review. Ultimately, if the secretary agreed with a positive recommendation, he asked the state's governor to concur. Without the governor's concurrence, gaming could not be conducted on the land under the best interests exception, and the tribe's application to take the land into trust for the purpose of gaming was denied without further review.

PRIOR FEDERAL POLICY ON "FAR-FLUNG LANDS"

As noted above, gaming-related land-into-trust applications falling under IGRA's best interests exception involve off-reservation lands. Unlike other off-reservation exceptions under § 2719, the best interests exception does not require any historical ties or legal claim to the land in question. Not surprisingly, such applications often are politically controversial and involve a much greater level of state and local involvement, including the governor's power to effectively "veto" a tribe's attempt to conduct gaming on newly acquired lands under the best interests exception.

Despite state and local input and gubernatorial "veto" over off-reservation gaming under the best interests exception, former Interior Secretary Gale Norton raised questions about applications involving so-called "far-flung lands," or lands distant from a tribe's existing reservation. In 2004, Interior Department officials authored an Indian gaming paper in response to Norton's concerns.[18]

The Indian gaming paper concluded that through both IGRA and the IRA, Congress contemplated that the secretary could take into trust off-reservation land, and thus implicitly authorized the secretary to do so. Neither statute contains any limitation based on the land's distance from the tribe's existing or historical reservation. As explained in the paper, "By its clear language, the IRA envisions off-reservation acquisitions that are free from state and local taxation and nowhere in the law does Congress purport to limit the exercise of that authority to lands within a fixed distance from an existing reservation."[19] Further, "it is certain that if Congress had intended to limit Indian gaming on lands within established reservation boundaries or even within a specific distance from a reservation, it would have done so expressly within IGRA. It did not."[20]

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[16] The OIGM has produced a "Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 [§ 2719] Determinations" for gaming-related land acquisitions based on the requirements of 25 U.S.C. § 2719, 25 C.F.R. pt. 151, and federal environmental laws [hereinafter *Checklist*]. The checklist details the submission process for an acquisition request, including explanations of the supporting documentation required for each of the exceptions.

[17] 25 U.S.C. § 2719(b)(1)(A).

[18] U.S. Department of the Interior, *Indian Gaming Paper* (Feb. 20, 2004) [hereinafter *Indian Gaming Paper*]. The paper was authored by Michael Rossetti, Counselor to the Secretary, Aurene Martin, Principal Deputy Assistant Secretary for Indian Affairs, Christopher Chaney, Associate Solicitor for the Division of Indian Affairs, and Edith Blackwell, Deputy Associate Solicitor for the Division of Indian Affairs. Originally, the paper was not publicly released. In the wake of the Interior Department's January 2008 guidance memo, it is now widely available. *See, e.g.*, *Kempthorne Brought Major Shift on Off-Reservation Gaming*, INDIANZ.COM, Jan. 30, 2008, <http://www.indianz.com/News/2008/006888.asp>.

[19] *Indian Gaming Paper*, at 8.

[20] *Id.* at 6.

Under the IRA, the secretary has broad discretion to take land into trust for the benefit of a tribe. The secretary's land-into-trust regulations provide a basis for considering the relative distance of an off-reservation land acquisition, as they require the secretary to take into account the distance between the land and the tribe's reservation. And, as previously noted, as that distance increases, so does the secretary's scrutiny of tribal benefits and the weight given state concerns.[21]

At the same time, IGRA's best interests exception expressly limits the secretary's discretion to two determinations: whether gaming on the newly acquired land would be "in the best interest of the tribe and its members, and would not be detrimental to the surrounding community."[22] Though the secretary has not promulgated formal regulations detailing relevant factors for either determination, the Interior Department as a matter of practice has considered a number of factors, detailed in the OIGM's "Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 [§ 2719] Determinations."[23] With regard to whether gaming on the land is in the best interests of the tribe and its members, relevant considerations include the economic benefit to the tribe and its members, including the impact on tribal employment, job training, and career development, as well as benefits related to tourism, increased tribal income, and the relationship between the tribe and the surrounding community. Also relevant are any possible adverse impacts on the tribe, and the tribe's plans for dealing with those effects. With regard to whether gaming on the land would be detrimental to the surrounding community, relevant considerations include impacts on the environment, social structure, infrastructure, services, housing, community character, land-use patterns, income, employment, and economic development, and, of course, the costs of these impacts. Other factors include sources of revenue to offset costs and proposed programs for problem and pathological gamblers.[24]

Subsequent to the issuance of the Indian gaming paper, Interior Department officials testified before Congress regarding the apparent legal irrelevance to the best interests exception of the distance between the land in question and the tribe's reservation. In 2004, then-Principal Deputy Assistant Secretary for Indian Affairs Aurene Martin acknowledged that the best interests exception "does not contain any express limitation on the distance between the proposed gaming establishment and the tribe's reservation," and that the secretary's authority under the best interests exception is limited to determining the best interests of the tribe and its members and the potential detriment to the surrounding community.[25] In 2005, then-Acting Deputy Assistant Secretary for Indian Affairs George Skibine echoed Martin's testimony before the U.S. Senate Committee on Indian Affairs. Skibine also noted, however, the "growing concerns about land venue shopping by tribes," and assured the Indian Affairs Committee that "[w]e are evaluating closely the expansion of . . . applications for sites ever more distant from" reservations.[26]

NEW FEDERAL "GUIDANCE" ON TAKING OFF-RESERVATION LAND INTO TRUST FOR GAMING PURPOSES

In January 2008, the Interior Department unveiled its new guidance for the evaluation of off-reservation land acquisitions for gaming purposes. Notably, the department "has taken the position that although IGRA was intended to promote economic development of tribes by facilitating Indian gaming operations, it was not intended to encourage the establishment of Indian gaming facilities far from existing reservations."[27] Thus, the guidance memo rejected the department's prior stance reflected in the Indian gaming paper, that Congress "clearly did not" limit Indian gaming based on distance from a tribe's reservation. Additionally, all off-reservation gaming applications, including those under the best interests exception, must go through the land-into-trust administrative process first, before department officials give any consideration to whether the land falls within one of the § 2719 exceptions under IGRA.[28]

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[21] *See* 25 C.F.R. § 151.11.
[22] 25 U.S.C. § 2719(b)(1)(A).
[23] *Checklist*, supra note 16.
[24] *See id.*; *see also* Heidi McNeil Staudenmaier, *Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles*, 4 Nev. L.J. 301 (2004).
[25] Aurene M. Martin, Statement Before the U.S. House of Representatives Committee on Resources (July 13, 2004).
[26] George T. Skibine, Statement Before the U.S. Senate Committee on Indian Affairs Concerning Taking Land into Trust (May 18, 2005).
[27] *Guidance Memo*, at 2.
[28] *See Kempthorne Brought Major Shift on Off-Reservation Gaming*, Indianz.Com, Jan. 30, 2008, <http://wwwindianz.com/News/2008/006888.asp> (reporting on Artman's public statements regarding shift in procedure).

At the threshold level, the guidance memo tracks the regulations governing land-into-trust applications for off-reservation acquisitions, which require that "as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition [and] shall give greater weight to the concerns raised" by state and local governments regarding the "potential impacts on regulatory jurisdiction, real property taxes and special assessments."[29] In addition, while the guidance memo expects that "greater scrutiny" and "greater weight" will be given to all off-reservation land in trust applications, it provides standards for considering those applications that exceed a daily commutable distance from the reservation.

Greater scrutiny of anticipated benefits

In terms of greater scrutiny of anticipated benefits of the acquisition, the guidance memo creates a threshold of "commutable distance from the reservation," meaning "the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation." The memo also sets forth the "general principle" that "the farther the [gaming facility] is from the reservation, the greater the potential for significant negative economic consequences on reservation life."[30]

For acquisitions that are more than a commutable distance from the reservation, the guidance memo provides a policy rationale for its underlying general principle. The memo warns:

> If the gaming facility is not within a commutable distance of the reservation, tribal members who are residents of the reservation will either: a) not be able to take advantage of the job opportunities if they desire to remain on the reservation; or b) be forced to move away from the reservation to take advantage of the job opportunity. In either case, the negative impacts on reservation life could be considerable. In the first case, the operation of the gaming facility would not directly improve the employment rate of tribal members living on the reservation. . . . In the second case, the existence of the off-reservation facility would require or encourage reservation residents to leave the reservation for an extended period to take advantage of the job opportunities created by the tribal gaming facility. The departure of a significant number of reservation residents and their families could have serious and far-reaching implications for the remaining tribal community and its continuity as a community.[31]

Further, if a proposed land acquisition exceeds the commutable distance from the reservation, the memo requires department officials to consider a number of factors in determining the benefits to the tribe, including the reservation unemployment rate, on-reservation benefits and job opportunities, and the potential relocation of reservation residents and resulting impact on quality of reservation life and tribal identity. The memo goes on to flatly state that "no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distance gaming facility."[32]

The department's issuance of the guidance memo was accompanied by 22 denials of pending tribal applications (many filed as a preventative measure in response to congressional efforts to amend IGRA's requirements for off-reservation gaming on newly acquired lands). Ten were rejected on the basis of being beyond a commutable distance; these ranged in distance from 115 to 1,500 miles from the tribe's existing reservation.[33] One of the 10 rejected applications that was particularly striking was that of the St. Regis Mohawks in New York. In that case, the tribe had garnered the support of then-Gov. George Pataki and executed a tribal-state gaming compact. (The tribe also had maintained the support of former Gov. Eliot Spitzer.) Despite the seeming certainty of gubernatorial concurrence, as required by the best interests exception, the tribe's application was rejected under the "commutable distance"

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[29] 25 C.F.R. § 151.11.
[30] *Guidance Memo* at 3.
[31] *Id.* at 4.
[32] *Id.*
[33] *See* Sam Cohen, *Interior's New Commutable Distance Test for Off-Reservation Gaming*, INDIAN GAMING MAGAZINE, Feb. 2008, at 24–27.

test. An additional application by the United Keetowah Band in Oklahoma, with a distance of 70 miles from the tribe's reservation, was deemed within a reasonable commute, but was rejected based on state and local opposition.

Greater weight to state and local concerns

With regard to the greater weight that must be given to state and local concerns, the guidance memo focuses on two sets of state and local issues: jurisdictional and land use concerns, and the removal of land from the tax rolls. According to the memo, greater weight is given to state and local concerns on these issues because

> the farther from the reservation . . . the more the transfer of Indian jurisdiction to that parcel of land is likely to disrupt established governmental patterns [and] . . . the more difficult it will be for the tribal government to efficiently project and exercise its governmental and regulatory powers.[34]

In addition, the guidance memo sets forth specific requirements with respect to jurisdictional and land use issues. For jurisdictional issues, the land acquisition application should include copies of intergovernmental agreements between the tribe and state and/or local governments, or "an explanation as to why no such agreements exist."[35] The memo states that "[f]ailure to achieve such agreements should weigh heavily against the approval of the application."[36] For land use issues, the application must include a "comprehensive analysis" of compatibility with current state and local zoning and land use requirements, the uses of adjacent land, and whether such uses would be negatively impacted by traffic, noise, and development of the proposed gaming facility. Failure to include such an analysis indicates that the application "should be denied."[37]

LEGAL ISSUES

While the "greater scrutiny" of anticipated benefits and "greater weight" to state and local concerns are required by current federal regulations for any off-reservation land acquisition, the guidance memo essentially creates more specific requirements for off-reservation land acquisitions that are for the purpose of gaming. The memo's commutable distance test and its seeming requirements for both intergovernmental agreements and comprehensive compatibility analysis presumably make it more difficult for tribes to seek gaming-related land acquisitions off the reservation.

The memo's requirements raise a number of legal questions, some of which are explored in detail below.

"Guidance" or legislative rule?

There is a significant question as to whether the requirements set forth in the guidance memo are such that they should have been promulgated in accordance with the notice and comment procedures of the federal Administrative Procedure Act (APA).[38] If the requirements are mere guidance, then the issuance of the memo may be legally appropriate. However, if the requirements are in fact legislative rules that amend the prior regulations, then they must be enacted in accordance with the APA's notice and comment provisions. Mere guidance is just that—it guides, rather than controls, the agency's decision. A legislative rule, on the other hand, prescribes the agency's decision, and therefore has a more significant substantive dimension.

The guidance memo states that "[a]ll pending [and future] applications . . . should be initially reviewed in accordance with this guidance" and "[i]f the initial review reveals that the application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied."[39] On its face, then, the memo appears to allow room for agency judgment by stating that applications "should" be denied, rather than "shall" be denied, for failure to comply with the memo's requirements. Further, the guidance memo arguably merely clarifies the existing regulatory requirements for "greater scrutiny" and "greater weight" by giving substance to the otherwise vague direction of the regulation.

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[34] *Guidance Memo*, at 5.
[35] *Id.*
[36] *Id.*
[37] *Id*. at 5–6.
[38] 5 U.S.C. § 553(b).
[39] *Guidance Memo*, at 2–3.

In determining whether the requirements are mere guidance or legislative rules, a court will take into account whether the memo is binding on agency decisions or "genuinely leaves the agency and its decisionmakers free to exercise discretion."[40] A guidance memorandum may be binding on its face or if it is applied by the agency in a way that indicates that it is binding. In *General Electric Co. v. EPA*,[41] the U.S. Court of Appeals for the D.C. Circuit examined a guidance document issued by the Environmental Protection Agency (EPA). The document directed that applications that used a particular method of risk assessment would be accepted, while those that failed to use the preferred method would be required to submit detailed justification. The court held that "[o]n its face the Guidance Document imposes binding obligations upon applicants to submit applications that conform to the Document and upon the Agency not to question an applicant's use of the [preferred method]. This is sufficient to render it a legislative rule."[42] Further, wrote the court, the EPA's application of the guidance document "does nothing to demonstrate that the Document has any lesser effect in practice."[43] Because it concluded that the guidance document was a legislative rule, the court went on to examine whether the issuance of the document complied with the APA's notice and comment requirements.[44]

As law professor Alex Tallchief Skibine testified during the recent oversight hearing conducted by the U.S. House Committee on Natural Resources, this issue of administrative law is a "close call" with respect to the guidance memo:

> On the one hand, the existing rule already [required] that the more [distant] lands are from the reservation, the more scrutiny will be given the tribe's claim of anticipated benefits and the greater the weight will be given to the concerns of state and local governments. On the other hand, the existing rule never mentioned commuting distance or the importance of existing intergovernmental agreements. However, these two factors are only suppose[d] to raise a presumption that can be rebutted. Yet, the fact that the first 11 tribal applications after the Guidance [memo] was issued were all denied may indicate that in reality, these two factors raise much more than mere presumptions and may, in fact, be binding on the agency.[45]

Arbitrary and capricious "guidance"?

There is also a serious question as to whether agency decisions made in accordance with the guidance memo would be arbitrary and capricious and thus subject to judicial reversal. Under basic principles of separation of powers embodied in administrative law, courts accord considerable deference to agency decisions pursuant to enabling legislation and agencies' discretionary interpretation of relevant statutes. The *Chevron*[46] doctrine requires courts to follow two steps in reviewing final agency decisions. The first step is to ask whether Congress has spoken to the precise question at issue; if so, then the agency (and the court) must give effect to the unambiguous intent of Congress. If the statute is silent or ambiguous, then courts must employ *Chevron*'s second step and ask whether the agency's decision on the issue is a reasonable construction of the statute. Agency regulations and actions should be given deference by the courts "unless they are arbitrary, capricious, or manifestly contrary to" the enabling statute, and "considerable weight" is given to an agency's reconciliation of conflicting policies or exercise of particular expertise.[47]

There are a number of arguments that arise concerning the possible arbitrary and capricious nature of the guidance memo's requirements. Here, some potential flaws in the memo's substantive guidance in the context of the applicable legal standard of review are highlighted. Many of these also are highly questionable from an economic perspective, which may provide further basis for a legal challenge

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[40] Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).
[41] 290 F.3d 377 (D.C. Cir. 2002). *Cf., e.g.,* Center for Auto Safety, Inc. v. Nat'l Highway Traffic Safety Admin., 342 F. Supp.2d 1 (D.D.C. 2004) (holding that the NHTSA's policy letter was not a legislative rule because it allowed discretion by agency decisionmakers and the agency did not treat the letter as binding).
[42] 290 F.3d at 385.
[43] *Id.*
[44] *Id.* at 384–85.
[45] Oversight Hearing on Department of Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and its Ramifications Before the House Committee on Natural Resources, Feb. 27, 2008 (Statement of Professor Alex Skibine, University of Utah College of Law).
[46] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[47] *Id.* at 843–44.

under the arbitrary and capricious standard. The memo's potential flaws include:

- The emphasis on commuting distance as a potentially determinative factor. As the Indian gaming paper noted, both IGRA and the IRA reflect Congress's implicit authorization of the secretary's power to take off-reservation land into trust, and neither statute contains any limitation based on the land's distance from the tribe's existing or historical reservation.
- The primary focus on job creation in a manner that may minimize other anticipated benefits of Indian gaming. Though job creation may be an important benefit of tribal gaming, IGRA's policy goals involve the more generalized benefits of tribal economic development, tribal self-sufficiency, and strong tribal governments.
- The seeming presumption that employment off the reservation may have greater negative consequences than unemployment *on* the reservation. Nothing in IGRA or its legislative history appears to support such a presumption.
- The implicit second-guessing of tribal government judgment on the benefits and detriments of off-reservation gaming to the tribe and its members, which may be inconsistent with IGRA's goals of tribal self-sufficiency and strong tribal governments.
- The assertion that the farther an off-reservation casino is from the reservation, "the greater the potential for significant negative economic consequences on reservation life."[48] Here, too, nothing in IGRA or its legislative history appears to support such an assertion. Instead, it appears that off-reservation gaming serves IGRA's goals in ways similar to on-reservation gaming, including creating funding for on-reservation jobs and providing other employment opportunities for tribal members, the majority of whom live off-reservation.[49]

Undermining congressional intent?

The guidance memo also may run counter to Congress's purpose in allowing off-reservation gaming under IGRA. Although IGRA's legislative history does not provide much insight into Congress's intent in enacting § 2719(b)(1)(A), one likely possibility is that Congress was cognizant of the fact that not all tribes had lands in areas amenable to profitable gaming enterprises. Tribes with reservations near metropolitan areas obviously would see more financial success than tribes in more remote locales. Congress may have intended that tribes in rural areas could acquire land for the purpose of taking fuller advantage of Indian gaming (i.e., tapping into a larger customer base) with, of course, strict state controls.[50] If the commutable distance requirement disadvantages the very tribes that Congress may have intended to benefit from off-reservation gaming, it may undermine Congress's policy goals for Indian gaming.

Additionally, as the Indian gaming paper stated, "[I]t is certain that if Congress had intended to limit Indian gaming on lands within established reservation boundaries or even within a specific distance from a reservation, it would have done so expressly within IGRA. It did not."[51] The memo inverts the process for land falling under the best interests exception: the 25 C.F.R. pt. 151 determination, including the new commutable distance test, is conducted first, and may result in a denial of a land-into-trust application, even where IGRA's requirements for the best interests exception are met (as happened in the case of the St. Regis Mohawks' application). This, too, may run counter to Congress's intent.

These same arguments speak to the weight that a court may give to the memo itself. Under the U.S. Supreme Court's decision in *Skidmore v. Swift & Co.*,[52] the weight to be afforded nonbinding agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

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[48] *Guidance Memo*, at 3.

[49] These potential flaws led one commentator to call the memo's assertion "flat wrong." Oversight Hearing on Department of Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and its Ramifications Before the House Committee on Natural Resources, Feb. 27, 2008 (Statement of Professor Kevin Washburn, University of Minnesota Law School).

[50] *See* Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396, 465–69 (2006).

[51] *Indian Gaming Paper*, at 6, 8.

[52] 323 U.S. 134 (1944).

On the other hand, the *Chevron* standard is deferential to agency expertise. As the Supreme Court directed, where

> Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[53]

Per the *Chevron* analysis, an agency decision need not be the best decision, or perhaps even a good decision, so long as it is based on a permissible reading of the enabling statute.

ECONOMIC ISSUES

From an economic perspective, the guidance memo also raises a number of serious concerns, a few of which are discussed below:

- The memo focuses on identifying potential negative impacts of off-reservation gaming on Indian tribes, rather than scrutinizing the anticipated benefits of off-reservation gaming to tribes;
- The memo inappropriately minimizes and ignores many anticipated benefits of off-reservation gaming to tribes;
- The memo incorrectly concludes that the absence of a positive impact is the same as a negative impact;
- The commutable distance standard set forth in the memo is ill-defined;
- The memo treats the commuting distance of tribal members as if it were a determinative factor in whether to approve off-reservation land acquisitions for gaming purposes; and
- The memo ignores the benefits of off-reservation gaming to tribal members not living on a reservation.

Excessive focus on potential negative impacts

In discussing how the interior secretary should give greater scrutiny to a tribe's justification of anticipated benefits, the guidance memo focuses on identifying potential negative impacts of off-reservation gaming on Indian tribes, rather than scrutinizing anticipated benefits. Upfront, the memo unequivocally states that "[t]he reason for [the greater scrutiny] requirement is that, as a general principle, the farther the economic enterprise—in this case, a gaming facility—is from the reservation, the greater the potential for significant negative consequences on reservation life."[54] Here, the memo not only fails to link the "significant negative consequences" to any anticipated benefits, it also fails to provide any foundation for or concrete evidence of this "general principle."

The memo shortly thereafter reiterates its contention that "the location of the gaming facility can have significant negative effects on reservation life that potentially worsen as the distance increases."[55] In this case, the memo attempts to link the "significant negative effects" to the anticipated benefit of employment for tribal members. The memo posits that:

> If the gaming facility is not within a commutable distance of the reservation, tribal members who are residents of the reservations will either: a) not be able to take advantage of the job opportunities if they desire to remain on the reservation; or b) be forced to move away from the reservation to take advantage of the job opportunity. In either case, the negative impacts on reservation life could be considerable.[56]

However, these alleged links between job creation (or lack thereof) and negative effects on reservation life are highly questionable. In fact, as discussed in detail below, the memo misconstrues the absence of job creation as causing negative impacts. As also discussed below, there is clearly a positive job creation impact regardless. Off-reservation gaming typically creates a significant number of non-gaming jobs on the reservation.

Minimizing and ignoring potential positive impacts

In addition to spending an inordinate amount of time exploring potential negative impacts of off-

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[53] *Chevron,* 467 U.S. 837.
[54] *Guidance Memo*, at 3.
[55] *Id.* at 3–4.
[56] *Id.* at 4.

reservation gaming on tribes, the guidance memo also minimizes, and in some cases entirely ignores, potential positive impacts of off-reservation gaming on tribes. In fact, the memo identifies only two benefits of an off-reservation gaming facility: the income stream from the gaming facility and employment.[57] It glosses over all other anticipated benefits by throwing them all within the "income stream from the gaming facility." This is a very narrow view of the potential benefits of off-reservation gaming. The intent of Congress through IGRA was "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."[58] Toward these ends, IGRA also set forth that tribes may only use gaming profit to:

1. Fund tribal government operations or programs;
2. Provide for the general welfare of their members;
3. Promote tribal economic development;
4. Donate to charitable organizations; and
5. Help fund operations of local government agencies.[59]

In accordance with these requirements, tribes have historically used gaming profits to:

- Support a variety of social and economic programs and services, such as health care, housing development, educational programs, elderly care, vocational training, environmental services, loans, and scholarships;
- Fund the development of other tribal enterprises;
- Help charitable causes; and
- Assist state and local governments via revenue sharing.

Although the guidance memo identifies the two aforementioned economic benefits, it focuses primarily on employment as the anticipated benefit of off-reservation gaming. Employment for tribal members, however, is not the only anticipated benefit of off-reservation gaming. In fact, it is often not even the primary anticipated benefit, whether on or off the reservation. Although the percentage of Indian gaming employees who are tribal members has been noted as being up to 80 percent in some areas of the United States with high unemployment, the nationwide percentage is only 25 percent.[60]

On the other hand, the income stream from the gaming facility (i.e., gaming profit) is often an important anticipated benefit to tribes. As noted above, gaming profit has provided many tribes the funds to support tribal government programs, services, and infrastructure that otherwise might not exist. The guidance memo does at least acknowledge that gaming profit "can have a positive effect on reservation life."[61] However, it only does so in passing and fails to consider how the gaming facility income stream provides for nongaming employment and/or possibly offsets any alleged negative effects on reservation life. Gaming, whether on or off the reservation, typically creates nongaming jobs on the reservation, such as within tribal governments or other tribal enterprises supported by gaming profits. This occurs because gaming profit is brought back to the reservation where the tribal government is located. Furthermore, if per capita payments are made to tribal members as a result of the off-reservation gaming, then off-reservation gaming is generating income just like direct employment at an off-reservation gaming facility. Per capita payments provide income to tribal members while allowing them to remain on the reservation.[62]

The absence of a positive impact is not the same as a negative impact

In its discussion of the significant negative effects that result from off-reservation employment for tribe members, the memo misconstrues the absence of a positive impact as being a negative impact. Specifically, the memo suggests that "[i]f the gaming facility is not within a commutable distance of the reservation, tribal members who are residents of the reservation will . . . not be able to take advantage of the job opportunities if they desire to remain on

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[57] *Id.* at 3.
[58] 25 U.S.C. § 2702(1).
[59] *Id.* § 2710.
[60] National Indian Gaming Association, *Indian Gaming Facts*, <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml>.
[61] *Guidance Memo*, at 3.
[62] It should be noted that only about 34 percent of tribes distribute per capita payments to their tribal members. ALAN MEISTER, INDIAN GAMING INDUSTRY REPORT (2007–2008 ed.). Computed based upon data from the National Indian Gaming Association, *Indian Gaming Facts*, <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml>.

the reservation."[63] And thus, "the operation of the [off-reservation] gaming facility would not directly improve the employment rate of tribal members living on the reservation."[64] This, however, is not a negative impact, just the absence of a positive impact and only with regard to employment. If new jobs are not available to tribal members, then the tribal employment rate neither increases nor decreases.

Also, as previously noted, if off-reservation gaming creates nongaming jobs on the reservation, such as within tribal governments or other tribal enterprises, then there is in fact a positive on-reservation job impact even though the gaming is off-reservation.

Ill-defined commutable distance standard

The guidance memo creates a commutable distance standard for tribal members. Commutable distance is vaguely defined as "the distance a reservation resident could reasonably commute on a regular basis."[65] A "reasonable" commuting distance is not defined, and no specific distance is provided. While it is possible that a reasonable distance could differ depending on the specific facts of each application, there is no discussion of potential factors that would be considered. Given that an application for an off-reservation acquisition for gaming purposes can be costly and time consuming, particularly for the tribe but also for the Department of the Interior as well as state and local governments, it would be valuable to know what the maximum allowable commuting distance is going to be set at or at least how the commuting distance will be specifically evaluated. In the absence of further information on commutable distance, some tribes may initially expend significant time, effort, and money pursuing off-reservation acquisitions that the department would never approve because they are too far from the tribes' reservations.

Although the guidance memo does not define the maximum allowable commuting distance, some information may be gleaned from the applications that were denied immediately after the memo was issued. As noted above, 11 applications were immediately rejected, and 10 of those were rejected on the basis of not being located within a reasonable commuting distance from the reservations. The shortest commuting distance among these 10 rejected applications was 115 miles for the Los Coyotes Band of Cahuilla and Cupeño Indians, which was pursuing an off-reservation casino in Barstow, Calif.[66] Interestingly enough, the one other application that was outright rejected, but not on the basis of commuting distance, was 70 miles from the reservation of the United Keetowah Band of Cherokee Indians.[67] In combination, these two aforementioned applications seem to imply that the cutoff point for a reasonable commuting distance might be somewhere between 70 and 115 miles.

Further insight into the maximum allowable commuting distance may be gleaned from the department's testimony before the House Committee on Natural Resources in February 2008. Assistant Secretary of Indian Affairs Carl Artman testified that the "BIA is used to dealing with requests for land 20, 30, or 50 miles away from a tribe's reservation . . . [t]he BIA is not accustomed to assessing applications for land 100, 200, or 1,500 miles away from a tribe's reservation."[68] Furthermore, when questioned by House Committee members regarding the maximum allowable commuting distance, Artman answered that "[the department is] taking land into trust that is off reservation," but that "most of those are 40 miles or below."[69] Thus, a reasonable commuting distance might actually be much less than the distances for the rejected applications.

To confuse matters further, there were some applications that were not denied by the department, but which were located more than the 115 miles from the tribes' reservations:

- Menominee Indian Tribe of Wisconsin—190 miles;
- Miami Tribe of Oklahoma—609 miles; and

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[63] *Guidance Memo*, at 4.
[64] *Id.*
[65] *Id.* at 3.
[66] Letter from Carl J. Artman, Assistant Secretary—Indian Affairs, U.S. Department of the Interior, to Hon. Catherine Saubel, Chairwoman, Los Coyotes Band of Cahuilla and Cupeño Indians, Jan. 4, 2008.
[67] Letter from Carl J. Artman, Assistant Secretary—Indian Affairs, U.S. Department of the Interior, to Hon. George Wickliffe, Chief, United Keetowah Band of Cherokee Indians, Jan. 4, 2008.
[68] Oversight Hearing on Department of Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and its Ramifications Before the House Committee on Natural Resources, 110th Cong. (Feb. 27, 2008) (testimony of Carl J. Artman, Assistant Secretary—Indian Affairs, U.S. Department of the Interior).
[69] *Id.*

• Wyandotte Tribe of Oklahoma—150 miles.[70]

Commuting distance as a determinative factor

The guidance memo is unclear regarding whether commuting distance is a determinative factor when evaluating off-reservation land acquisitions for the purposes of gaming. Based upon the denied applications, though, this would seem to be case. From an economic perspective, commuting distance does not warrant such an important role, if one at all. Commuting distance is of little consequence when most tribal members would not be working at the off-reservation gaming facility and considering the greater importance of gaming profit rather than employment as the primary anticipated benefit for the majority of tribes.

Furthermore, the commutable distance requirement is likely to affect tribes in a disproportionate manner. In many cases, tribes seek off-reservation gaming in more urban areas. Thus, the commuting distance rule would disadvantage rural tribes, which would be farther from urban areas, while advantaging tribes with land near urban areas.

Ignoring the benefits of off-reservation gaming to nonreservation tribal members

In examining the benefits of off-reservation gaming, the guidance memo focuses exclusively on tribal members living on reservations. Thus, it entirely ignores tribal members who do not live on a reservation. This is a significant oversight because the most recent U.S. Census data found that the majority of tribal members in the United States (66 percent) do not live on reservations.[71] Furthermore, nonreservation tribal members could enjoy the benefit of job opportunities at off-reservation casinos without incurring the alleged negative impacts anticipated by the memo. After all, they are already living off of the reservation.

As one tribal leader commented, "The Secretary implies that tribal members would be better off poor and unemployed and living on the reservation rather than living off the reservation near the casino with a job."[72]

CONCLUSIONS: THE MEMO'S CONSEQUENCES

Since its release, the guidance memo has generated much controversy. It has raised important legal, public policy, and economic questions, some of which may end up being resolved in the courts. In the meantime, the memo has already had a substantive impact on a number of tribes whose off-reservation land-into-trust applications for gaming purposes have been denied.

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[70] Bureau of Indian Affairs, U.S. Department of the Interior, "Pending Gaming Applications," Mar. 2008. The Bad River Band of Lake Superior Indians of Wisconsin and the St. Croix Chippewa Indians of Wisconsin also had applications for land that is more than 115 miles from their reservations (339 miles and 332 miles, respectively). As part of a lawsuit, the department had agreed to hold off on any decision regarding the two tribes' joint off-reservation casino project.

[71] U.S. Census Bureau, *We the People: American Indians and Alaska Natives in the United States*, Census 2000 Special Report, Feb. 2006, at 14.

[72] *BIA Starts New Year with Off-Reservation Gaming Policy*, INDIANZ.COM, Jan. 7, 2008, <http://www.indianz.com/News/2008/006500.asp> (quoting Francine Kupsch, spokesperson for the Los Coyotes Band of Cahuilla and Cupeño Indians).