TESTIMONY OF
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U.S. DEPARTMENT OF THE INTERIOR
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Good morning Mr. Chairman, Madam Vice Chairwoman, and Members of the Committee. It is a pleasure to be here today to present the Department's statement on the land into trust applications, environmental impact statements (EIS), probates, appraisals and lease approvals processes and the number of each that are pending. My testimony includes an overview of each item and the procedures that we follow as set forth in statute and regulation in order to process them.

PROBATE

I am pleased to announce that we have cut our inventory in half over the last two years. Moreover, 98% of our backlogged cases are ready for adjudication and distribution of assets. We plan to clear the backlog by the end of 2008. In fact, by 2009, we plan to handle the probate cases with BIA staff and eliminate the need for outside contractors.

The BIA took a critical look at the historically high caseload of probate cases in late 2005. An average Indian probate case took an excessive amount of time to prepare, adjudicate and distribute. Building on the reorganization and standardization of the probate program, the Bureau has reduced the probate caseload by one half over the last two years. Combining the efforts of staff dedicated to probate with a new comprehensive tracking system (ProTrac), the Department has improved case management and coordination of probate activities across three separate offices: the Bureau of Indian Affairs, The Office of Hearings and Appeals, and the Office of the Special Trustee for American Indians.

There are four phases for the completion of a probate case under BIA's new system. Using ProTrac, BIA monitors the performance of each case at each phase all the way through distribution of assets to the heirs. These phases are: (1) Pre-Case Preparation; (2) Case Preparation; (3) Adjudication; and (4) the Closing Process.

In 2005, we created a report regarding the probate backlog and, as of today, the BIA has completed 98 percent of the estates in the Case Preparation Phase and 86 percent of the estates have been distributed. The 2005 report included all estates where the decedent's date of death was prior to 2000 or whose date of death was unknown and the estate was part of the managed inventory as of September 30, 2005. As of September 21, 2007, the

ProTrac system contains 53,802 cases, of which 17,208 cases are currently active. In FY07, the Bureau exceeded its annual probate goal by 31 percent.

TRUST LAND ACQUISITIONS FOR NON-GAMING PURPOSES

The basis for the administrative decision to place land into trust for the benefit of an Indian tribe is established either by a specific statute applying to an Indian tribe, or by Section 5 of the Indian Reorganization Act of 1934 (IRA), which authorizes the Secretary to acquire land in trust for Indians "within or without existing reservations." Under these authorities, the Secretary applies his discretion after consideration of the criteria for trust acquisitions in our" 151" regulations (25 CFR Part 151), unless the acquisition is legislatively mandated. Mandatory land acquisitions may be due to a land claim settlement with a specific Indian tribe.

There are two primary types of trust land acquisitions under this category which are processed for Indian landowners by the Bureau of Indian Affairs (BIA). They are: (1) on-reservation and (2) off-reservation. We have approximately 1,211 fee-to-trust submissions pending, of which over 1,100 are not yet ripe for decision. On- reservation requests maybe made by both tribal and individual Indians, off-reservation requests maybe made by Indian tribes.

Taking land into trust is an important decision not only for the Indian tribe seeking the determination but for the local community where the land is located. The transference of fee land title to trust status may have serious tax and jurisdictional consequences that must be considered before any discretionary action maybe taken. Additionally, the Federal Government must ensure that the land acquisition will be in the best interest of the applicant and that the Federal Government has sufficient resources to properly manage the property.

The 151 process is initiated when an Indian tribe or an individual Indian submits a request to take land into trust. The regulations require that an applicant submit a written request describing the land to be acquired and other required information. Once a request arrives at the BIA agency or regional office, it is entered into the BIA's Fee-to-Trust Tracking System. The request is reviewed to determine whether all information has been submitted and whether there are additional steps needed to complete the application. The BIA works with the applicant to complete the application.

The applicant must submit: (1) a map and a legal description of the land (a survey may be needed if the land cannot be described by an "aliquot" legal description); (2) a justification of why the land should be in trust; and (3) information on the present use of the property, the intended use of the property, and whether there are any improvements on the land.

The BIA must also take several internal steps necessary to assess the application. These include determining whether the land is on the applicant's reservation or contiguous to it

and whether the trust acquisition is mandatory or discretionary. We check whether there are access roads to and from the property as we will not acquire landlocked parcels.

We also determine whether the applicant already has an undivided fractional trust or restricted interest in the land it is requesting to have placed into trust, and how much trust or restricted land the applicant has an interest in overall. We assess whether the land is already under the tribe's jurisdiction and, if not, whether there are any anticipated additional responsibilities we would assume if the fee land were taken into trust. We may also examine if the property lies within the Indian tribe's approved Land Consolidation Plan.

For off-reservation land acquisitions, additional information is required. The BIA will request a business plan if the land is to be used for economic development. If the land is within the reservation of another Indian tribe, the applicant must receive written consent from the other Indian tribe's governing body if the applicant does not already own a fractional trust or restricted fee interest in the property to be acquired. If the land is off-reservation, we examine the proximity to the applicant's other trust or restricted land.

Once an applicant has submitted sufficient information, the BIA sends out notification letters to the state, county, and municipal governments having regulatory jurisdiction over the land, with a request to respond within thirty (30) days with a description of the impacts of transferring the land into trust regulatory jurisdiction, real property taxes and special assessments.

The next stage in the process, compliance with National Environmental Policy Act (NEPA) is essential to the BIA's decision-making, and takes substantial time to complete. These assessments are done to determine if the proposed use of the land is feasible or desirable and what effect the proposed project will have on the human environment, local habitation and wildlife. Depending on the type of environmental review done, this process can take months or years. A Categorical Exclusion (CAT-EX) can be used if there has been previous environmental documentation or there will be no change in land use for compliance with NEPA.

Applicants are encouraged to begin their NEPA process at the same time the BIA sends out the impact notification letters. The NEPA process begins with the publication in the Federal Register of a "Notice of Intent" to conduct an EA or EIS. Most of the non-gaming applicants conduct an EA.

In addition, an applicant must conduct a hazardous materials survey. This survey alerts the applicant and the BIA to any environmental hazards associated with the land that might conflict with the project's use or make the land undesirable.

For on-reservation applications, the Regional Office or Agency Superintendent makes the final determination of whether to approve the acquisition. For off-reservation non-gaming acquisitions, the Regional Offices send the recommended decisions on the applications to the Central Office in Washington, D.C., for review.

When the BIA approves the fee-to-trust application, it conducts a title examination to determine whether there are any liens, encumbrances, or other clouds on the title that make the land unmarketable.

After the decision, the BIA prepares a "Notice of Decision" to take the land into trust for publication. At this point, any governmental entity or individual with standing who objects to the decision to take the land into trust may file an appeal. If the appeals process upholds our decision to take land into trust, this is also published.

ENVIRONMENTAL IMPACT STATEMENTS

When an Indian tribe submits a request to the BIA to fund, issue a permit for, or approve an undertaking, the BIA produces an EA or EIS, usually by contract, to help inform a federal decision by analyzing the project's potentially significant impacts to the environment. The most common BIA "federal actions" are lease approvals and transfers of land into or out of trust status.

Three occasions during the EIS process require a notice in the Federal Register: (1) the "Notice of Intent to Prepare an EIS" at the start of the process, (2) the "Notice of Availability of a Draft EIS" when a draft EIS is completed and issued, and (3) the "Notice of Availability of the Final EIS" at the time the final EIS is completed and issued. When the BIA is the lead agency, it prepares and issues the "Notice of intent to Prepare an EIS." The Regional Director oversees the scope of the project.

When the Draft EIS is complete, a "Notice of Availability" is published in the Federal Register by both the EPA and the BIA. The BIA's "Notice of Availability of the Draft EIS" informs the public that we are preparing or making available an EIS, and there is a timeframe provided in which they must provide their comments. Once the agency has received and responded to comments, it publishes the "Notice of Availability of the Final EIS."

After issuance of the Final EIS, the BIA has sufficient information to make a policy decision on whether to approve the acquisition. The Regional Director or Agency Superintendent makes this decision for most non-gaming matters, and issues a Record of Decision (ROD) indicating whether the project has been approved or disapproved. Lawsuits on the sufficiency of the EIS and on the BIA's consideration of the regulatory criteria under 25 C.F.R. Part 151 take place at this point.

The length of time necessary to prepare an EIS depends on the complexity of the proposed project. In addition, public comment may point out weaknesses in the EIS that require further studies or assessments before the Final EIS may be issued. Statements are susceptible to delays when multiple agencies must coordinate work on an EIS. Delays also occur when the Federal EIS is stalled because the tribe alters the project plan or scope.

APPRAISALS

Appraisals are conducted to provide impartial estimates of market value for a variety of real property trust interests. Consistent with regulatory requirements, the vast majority of trust transactions (including the purchase of fractional interests by the Indian Lands Consolidation Office) require an appraisal be conducted to ensure a fair return on the use of trust assets. Appraisals are generally used to identify a beginning rate at which to initiate the negotiation of lease terms.

In FY 2002, pursuant to Secretarial Order, the management and operation of the real estate appraisal function was transferred from the BIA to the Office of the Special Trustee for American Indians (OST). This transfer was conducted to eliminate the appearance and potential for a conflict of interest that could arise in response due to the reporting structure that required appraisers to report to the BIA Regional Directors who were requesting the appraisal. In FY 2005, funding for the program likewise was transferred to the OST.

Appraisals are requested by the BIA when required for a trust transaction. The BIA issues the appraisal request to the OST Office of Appraisal Services (OAS) which conducts the appraisal and returns the completed valuation to the BIA for its use. OAS appraisers aim to complete appraisals to meet the due dates requested by BIA.

Currently, there is a backlog of appraisal requests in every region except the Eastern region. the largest backlog is in the Alaska region, where unique conditions exist relating to the large number of native organizations that request appraisals directly from OAS instead of through the BIA, as well as weather and accessibility issues that limit the ability of OAS to conduct appraisals year round.

To address the backlog of appraisals, OAS has been working to carefully review each region's workload to determine those appraisals that are currently required. In addition, OAS is working to contract the vast majority of appraisal work to third parties, and to focus the role of staff appraisers on reviewing the appraisal, which is a federally inherent function. In March 2007, OST introduced the ITARS appraisal tracking system. All requests for appraisals are entered and tracked through this system. ITARS will provide a variety of management reports for evaluating the effectiveness of the appraisal program and an early detection system should the backlog begin to be a problem.

LEASE APPROVALS

Commercial development leases may involve tribal land, allotted land, or both. Most reservations do not have master plans and the development proposals may cover hundreds of acres. While delays are often incurred in obtaining BIA approval of these negotiated leases, especially where allotted land is involved, significant delays may also arise from the tribal Land Use and Economic Development processes administered by various tribal departments and committees. Delays in processing by the BIA may involve

either the terms of the leases themselves, or the need for additional supporting documents to satisfy statutory or regulatory requirements or other trust-based obligations to the Indian landowners.

These leases are typically negotiated by representatives of the parties. As a result, the appraisal needed to establish an acceptable "Minimum Rent" and the extensive documentation needed to comply with NEPA, are often not obtained by the lessee until after the basic lease terms have been agreed upon.

To expedite the process, appraisals may be obtained with the cost to the lessee, and submitted for review and approval by the Department's Office of Appraisal Services, but the terms of those appraisal assignments may need to be negotiated in advance. For the type of long-term mixed use projects being undertaken on allotted land located in urban areas, the BIA may also complete an economic analysis; based on such an analysis, the BIA may then seek to negotiate a shorter lease term and/or require that the leases also provide for the payment of an "Additional Rent," to ensure that rent payments to the landowners keep up with land values over time.

Congressional incorporation of a single "land use" provision in the Indian Land Consolidation Act Amendments of 2000 has streamlined the landowner consent process for commercial leasing of allotted land, with the consent of only a percentage of the ownership now being needed. As amended in 1970, the Long-Term Leasing Act requires that BIA ensures, before approving a lease, that "adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased land will be subject." Though these "impact-based" standards were enacted shortly after NEPA, the courts have held that leases of Indian trust lands are subject to NEPA and other federal land use statutes, and leases which have been approved without proper NEPA documentation have been found to be void even after the lessee has acted in reliance on the approval.

The Department's current trust reform effort will soon result in the publication of final, integrated "Business Leasing" regulations, including provisions which will, for the first time, implement the 1970 amendment to the Long-Term Leasing Act. The new rules will incorporate standards of review and review time lines for commercial leases, as well as standards of review for the assignments, subleases, and financing agreements entered into under such leases, which are generally subject to very strict "turnaround time" requirements.

The process may be complicated in some locations. Land ownership patterns and market forces will vary greatly, and the tribal role in the process may be that of: (1) a co-owner; (2) the local regulator of development, with responsibility for both pre-lease and post-lease approvals and permitting; (3) the administrator of the BIA's realty program under a 638 contract or self-governance compact; and/or (4) the lessee itself, via a tribal

development enterprise. Whatever role(s) the Indian tribe may assume, the BIA and the Indian tribe will generally share the mutual goal of developing both tribal and allotted land to its highest and best use, on fair and reasonable terms consistent with the wishes of the landowners and the land use policies of the Indian tribe.

To that end, BIA offices and Indian tribes with significant commercial land holdings should work together to:

1. standardize lease provisions (to the extent possible), integrate duplicative review procedures, and clarify pro-lease documentation requirements, so that any necessary BIA input occurs earlier, and final lease approval becomes more of a formality;
2. facilitate project financing and tenant subleases through the use of form documents and/or stipulated approvals, while protecting the economic interests of the landowners in the event of a default or the relinquishment or reversion of undeveloped property;
3. minimize the risk of nonperformance to the Indian owners, by requiring (prior to lease approval) that lessees provide business references, financial references, final statements, project pro formas, site plans, and limited guaranties or other forms of security;
4. identify the steps needed to comply (prior to lease approval) with applicable tribal and federal land use laws, including NEPA and the National Historic Preservation Act, and the extent to which "programmatic" NEPA documents might be used for planning purposes and then supplemented for individual projects;
5. establish basic criteria for the establishment of 'Minimum Rent' for both improved and unimproved properties (including unimproved properties where adjustments must be made for offsite costs that will not be reimbursed, and improved properties where the terms of existing leases are being extended to facilitate new investment);
6. impose reasonable limits on the authority of owner-agents to consent on behalf of all of the owners (to assignments, subleases, etc.), and consider ways in which the arbitration remedy might be limited and/or defaults made subject to other negotiated remedies;
7. provide for the documentation and/or dedication of easements within leasehold projects, and eliminate obstacles to the establishment of offsite easements needed to provide access and utilities to new developments;
8. assemble development tracts (with permitted uses which are narrowly but reasonably defined) and develop broad-based marketing strategies, to increase the rental value of the land while at the same time furthering the Indian tribe's land use goals;
9. promote meaningful owner participation in project revenues, through specific "Additional Rent" structures/assumptions for various types of developments, and alternative forms of project ownership; and
10. provide for the aggressive enforcement of both monetary and non-monetary lease obligations, and the implementation of appropriate land records and lease

management systems, to account for the use of the land and the income derived therefrom.

Distinctions can and should be made between the manner in which (and the terms on which) tribal and allotted land is leased, with the expectation being that those leases executed or approved by BIA on behalf of non-consenting individual owners will generally be subject to a higher standard. Comparisons should also be made between commercial leases of reservation lands and those involving neighboring lands administered by the states and cities.

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