TESTIMONY
OF
JERRY GIDNER
DIRECTOR, BUREAU OF INDIAN AFFAIRS
BEFORE THE
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ON
H.R. 3522, H.R. 3490, S. 2457, and H.R. 5680

April 9, 2008

Mr. Chairman and Members of the Committee, my name is Jerry Gidner. I am the Director for the Bureau of Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's testimony on H.R. 3522, a bill to ratify a conveyance of a portion of the Jicarilla Apache Reservation to Rio Arriba County, State of New Mexico, pursuant to the settlement of litigation between the Jicarilla Apache Nation and Rio Arriba County, State of New Mexico, to authorize issuance of a patent for said lands, and to change the exterior boundary of the Jicarilla Apache Reservation accordingly, and for other purposes; H.R. 3490 the Tuolumne Me-Wuk Land Transfer Act of 2007; S. 2457, a bill to provide for extensions of leases of certain lands by the Mashantucket Pequot (Western) Tribe; and H.R. 5680, a bill to amend certain laws relating to Native Americans, and for other purposes.

H.R. 3522, a bill to ratify a conveyance of a portion of the Jicarilla Apache Reservation to Rio Arriba County, State of New Mexico, pursuant to the settlement of litigation between the Jicarilla Apache Nation and Rio Arriba County, State of New Mexico, to authorize issuance of a patent for said lands, and to change the exterior boundary of the Jicarilla Apache Reservation accordingly, and for other purposes.

H.R. 3522 would provide Congressional ratification of a settlement to a long-standing dispute and court case between the Jicarilla Apache Nation (Tribe) and Rio Arriba County, New Mexico (County). The settlement reached by the parties requires Congressional action. The Department supports this legislation.

This legislation centers around a dispute between the Tribe and County regarding the ownership status of a road on a parcel of land in Rio Arriba County, known as the Theis Ranch. The Jicarilla Apache Nation acquired title to the Ranch in 1985. The United States acquired the property in trust for the benefit of the Tribe in March 1988 and proclaimed it part of the Tribe's reservation in September 1988. In October 1987, the County filed a lawsuit in District Court for the State of New Mexico, asking the court to determine which entity owned the road. On December 10, 2001, the District Court determined that the Jicarilla Apache Nation was the proper owner of the portions of the road traversing the Tribe's reservation. The County appealed this decision and the matter is currently pending before the Court of Appeal of the State of New Mexico, although it

has been stayed pending outcome of a Settlement Agreement reached by the parties during mediation.

The Settlement Agreement was executed by the Tribe and County on May 3 and 15, 2003, respectively, and approved by the Department on June 18, 2003. It would settle all claims in the appeal by removing certain lands within the Theis Ranch from trust and reservation status and conveying them to the County. The transferred lands would be subject to restrictive covenants limiting their use to governmental purposes and prohibiting their use for prison, jail or incarceration facility.

In order for the Tribe and County's jurisdictional plan to work, the parcels at issue would be removed from trust and reservation status. Land can only come out of trust status through Congressional action. Congressional action would remove the lands from trust status and realign the Tribe's reservation boundaries, thereby resolving which entity has jurisdiction over the road. Both the County and Tribe have performed their respective duties under the Settlement Agreement and it is ready for Congressional action to remove the subject lands from trust and reservation status.

The Department supports this bill because it encourages cooperation and proactive solutions to resolve jurisdictional and land conflicts between Indian tribes and their neighbors. While the Department does not believe that removal of land from trust status or diminishment of reservation boundaries may be an appropriate solution in all future cases, the Department applauds the work of the parties in reaching this settlement and supports enactment.

H.R. 3490, the Tuolumne Me-Wuk Land Transfer Act of 2007.

H.R. 3490, the "Tuolumne Me-Wuk Land Transfer Act of 2007" transfers to the Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria lands currently administered by the Bureau of Land Management (BLM) to be held in trust by the United States for the benefit of the Tribe. The Department supports the bill with an amendment.

The Tuolumne Me-Wuk Land Transfer Act represents years of cooperative effort between the Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria (Tribe) and the BLM.

This bill would transfer three parcels of BLM land to the Tribe. The Tribe seeks the first tract, an approximately 50-acre parcel, to establish a cultural center. The second tract, of approximately 15.35 acres, would help meet the Tribe's agricultural, housing, and open space needs. The third tract, of approximately 0.4 acres, contains a cemetery where tribal members and other Indians are buried. These scattered tracts of public lands are adjacent to the current Tuolumne Indian Rancheria, located just north of the small community of Tuolumne, in rural northwest Tuolumne County.

The land in question has been managed by the BLM pursuant to a 1983 Management Framework Plan (MFP) for the Tuolumne River Management Area. The MFP was

replaced by the Sierra Resource Management Plan (SRMP) through a Record of Decision on February 15, 2008. The SRMP clearly identifies these scattered tract parcels as potentially available for disposal based on current land uses. Transfer of the three parcels to the Tribe would therefore conform to the SRMP.

The Department is pleased that H.R. 3490 addresses valid and existing rights and gaming. However, we are concerned with the 180-day timeline to complete the survey of the three tracts to determine it they are ready for transfer. This time period is not sufficient to allow completion of survey fieldwork. We suggest the language be changed to "as soon as practicable" or, if a date is determined necessary, perhaps "90 days following completion of the required fieldwork" since such fieldwork is not currently scheduled. The timing of completion will depend on funding availability.

In summary, the Department has had a cooperative working relationship with the Tuolumne Band of Me-Wuk Indians on this requested land transfer and supports H.R. 3490 with the above amendment.

S. 2457, a bill to provide for extensions of leases of certain land by the Mashantucket Pequot (Western) Tribe.

S. 2457 would allow the Mashantucket Pequot Tribe or a Tribal corporation chartered pursuant to 25 U.S.C. § 477 to lease the Tribe's restricted fee land with options for extensions of the lease term of more than the time period currently set forth by statute at 25 U.S.C. § 477.

Section 477 allows certain tribal corporations to lease tribal land for a term of 25 years. This legislation would allow the Mashantucket Pequot Tribe to enter into leases for a 25-year term with options to extend the lease for not more than two additional terms of up to 25 years each. Approval of the lease extensions would not be subject to Secretarial approval and would only require approval of the Mashantucket Pequot Tribal Council. The Department would not be liable for any losses resulting from the lease renewals. Gaming would also not occur on any land leased with an option to renew pursuant to this legislation.

There is precedent for this bill's attempt to lengthen the lease period as several tribes have already received specific exemptions from similar lease limitations in Section 415(a); those tribes may enter into leases with 99-year terms with the Secretary's approval. The Mashantucket Pequot Tribe seeks lease terms that may, with optional extensions, reach 75 years and has demonstrated sound business judgment in its economic ventures. The Department therefore, supports this legislation.

H.R. 5680, a bill to amend certain laws relating to Native Americans, and for other purposes.

The Department has concerns with many of the provisions in H.R. 5680 as currently drafted.

Annual disbursement to the Colorado River Indian Tribes (CRIT)

Section 2 of H.R. 5680 provides the Secretary of the Interior discretion to make an annual disbursement to the Colorado River Indian Tribes (CRIT) from revenues deposited into the Treasury pursuant to 25 U.S.C. 385c from power operations on the CRIT reservation. The Department of the Interior opposes this section. Section 2 could divert appropriated funds intended for the Bureau of Indian Affairs' (BIA) Colorado River Agency to the CRIT. Such a diversion would be inappropriate because the funds are not held in trust by the United States and are necessary to maintain and operate the BIA's power system. In addition, the funds are the subject of pending litigation recently initiated by CRIT in federal district court.

The BIA's Colorado River Agency owns and operates irrigation facilities and a power system along the Colorado River which serves the CRIT reservation and also provides power to users off the reservation. Headgate Rock Dam is the centerpiece of this irrigation and power system. The BIA sells electricity generated by the dam's powerhouse to users of the power system and sends the revenue it collects to the United States Treasury. These funds may then be appropriated to BIA for use on the power system, or other purposes, as authorized by 25 U.S.C. 385c.

It would be inappropriate to disburse these power funds to CRIT, or any other Indian tribe, because the funds are not a trust asset and neither CRIT, nor any other tribe, has a beneficial interest in them. Funds appropriated to the BIA for the Colorado River Agency power system by 25 U.S.C. 385c should not be decreased because they allow BIA to operate and maintain its power system. Further, section 385c identifies certain general purposes for which power revenues may be expended, none of which involve disbursement to a tribe. CRIT has also filed a lawsuit against BIA in federal court. Section 2 could deplete the power fund contrary to CRIT's claims in court. For these reasons, the Department opposes section 2 of H.R. 5680.

Construction Contracts inclusion to 25 USC 415f, Gila River Indian Community

Section 3 of H.R. 5680 inserts new language "or construction contract" into 25 U.S.C. 415f, where any contract affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such contracts. This new language identifies that "construction contracts" are included within the meaning of 25 U.S.C. 415f. The Department raises no objection to this amendment to 25 U.S.C. 415f.

Sault Ste. Marie Tribe of Chippewa Indians of Michigan and Lac Du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin

Sections 4 and 5 of H.R. 5680 would allow the Sault Ste. Marie Tribe of Chippewa Indians of Michigan and the Lac Du Flambeau Band of Lake Superior Chippewa Indians

of Wisconsin, respectively, to transfer, lease, encumber, or otherwise convey, without further authorization or approval, all or any part of each Tribe's interest in any real property that is not held in trust by the United States for the benefit of the Tribe.

The Non-Intercourse Act, based on a 1763 proclamation of King George III and originally passed in 1793 by Congress, prohibits the conveyance of an interest in Indian land from any Indian tribe without the approval of the United States. There is some dispute whether fee land owned by a tribe would fall under this prohibition. We urge Congress to clarify this issue. Clarification will remove obstacles to economic development opportunities and it will enhance tribal sovereignty.

While we believe each Tribe identified in sections 4 and 5 has the authority to lease and convey its fee property as anyone else does who owns land within the United States, sections 4 and 5 of H.R. 5680, as they speak to the Sault Ste. Marie Tribe of Chippewa Indians of Michigan and to the Lac Du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, would provide important clarification. We do however, express concern with section 4, subsection (d), which makes the effective date of the section January 1, 2005 without reason or purpose or other background information.

Morongo Tribe Lease Extension

Section 6 of H.R. 5680 would amend 25 U.S.C. § 415(a) to allow the Morongo Band of Mission Indians to enter into non-agricultural leases for the Tribe's restricted fee land with lease terms of not more than 50 years. As noted above, Section 415(a) requires the Secretary of the Interior to approve leases of restricted land for public, religious, educational, recreational, residential, business and farming purposes. Leases of restricted land for non-agricultural purposes are generally required to contain a lease term of not more than 25 years with the possibility of an extension for an additional 25 years.

This legislation would insert a provision into Section 415(a) through which the Morongo Band would be able to enter into leases with an initial term of up to 50 years upon the Secretary's approval. Several tribes have already received specific exemptions from these lease limitations in Section 415(a); those tribes may enter into leases with 99 year terms with the Secretary's approval. The Department supports this section.

Cow Creek Band Leasing Authority

Section 7 of H.R. 5680 would amend 25 U.S.C. § 415(a) to include the Cow Creek Band of Umpqua Indians in the list of tribes that may enter into leases of their restricted fee land for terms of up to 99 years subject to the Secretary's approval. There are already several tribes that are authorized to enter into leases with such a term in Section 415(a), and the Department supports the inclusion of the Cow Creek Band into this group. The Department supports this section of the legislation if amended to remedy a typographical error in the name of the Tribe.

New Settlement Common Stock Issued

Section 8 of H.R. 5680 provides for specific new language that eliminates existing language that allowed, as an exception, 'the issuance of such Settle Common Stock by a majority of the class of existing holders of Settlement Common Stock carrying such rights separately approve[d] the granting of such rights. Further, the new language would eliminate current language that speaks to 'the articles of incorporation of the Regional Corporation,' which 'shall be deemed to be amended to authorize such class vote' consistent with the preceding granting of such rights, which is provided in the current chapter in the Alaska Native Claims Settlement Act (ANCSA) 43 U.S.C. Section 1606(g)(1)(B)(iii).

Additionally, the specific new language would eliminate the authority of transferring Settlement Common Stock as a gift "to a Native or a descendant of a Native (iii) as an inter vivos gift from a holder to his or her child, grandchild, great-grandchild, niece, nephew, or …brother or sister," which is currently allowed in 43 U.S.C. 1606(h)(1)(C)(iii).

The Department expresses concern with Section 8 of H.R. 5680 and seeks clarification. Section 8 proposes elimination of certain rights of a "class," as defined in 43 U.S.C. Section 1606(g)(1)(B)(iii), and its proposed elimination of a gift transfer currently authorized for Settlement Common Stock under 43 U.S.C. 1606(h)(1)(C)(iii), without reason or purpose or other background information. In addition, we are concerned with the potential effect of this section on ANCSA corporations as business corporations under state law.

Columbia River Treaty Fishing Access Sites

Section 9 of H.R. 5680 lifts a restriction that requires funds to be invested in low earning federally-backed instruments. These investments tend to yield a lower percentage of earnings, which may be inadequate for the Tribe's annual Operation and Maintenance needs. This legislation would allow investment of operation and maintenance funds for the Columbia River treaty fishing access sites using the prudent investment standard. Under this provision, the funds might be invested in stocks that could yield a higher rate of return or that could cause the funds to lose a significant part of their value. On November 8, 2007, the Department testified before this Committee on H.R. 3994, the "Department of the Interior Tribal Self-Governance Act of 2007". In that statement, the Department testified in opposition to use of the prudent investment standard. We expressed our concern that if there is a loss to an investment, services may cease and the federal government may need to provide more funding and, in essence, pay twice for the program or project. Current law requires that these funds be invested in obligations or securities of the United States or securities that are guaranteed or insured by the United States. The Department has been working with the Committee staff on this issue and looks forward to continuing discussions with the Committee.

Miccosukee Tribe of Indians of Florida

Section 10 of H.R. 5680 provides that the Secretary shall take certain lands into trust for the benefit of the Miccosukee Tribe of Indians of Florida (Tribe) and include it as part of the Tribe's reservation. The land is described as Tracts A and B of the Kendale Lakes North Section One, consisting of 229.3 acres in Miami-Dade County, Florida. The land is currently under consideration as an off-reservation trust land acquisition by the Eastern Regional Office in accordance with 25 CFR 151, Land Acquisitions. The proposed acquisition is a discretionary trust land acquisition authorized by Section 5 of the Act of June 18, 1934 (48 Stat. 984, 25 USC 465), as amended.

The Department recognizes Congress' authority to legislatively act on taking land into trust for the benefit of an Indian tribe. However, the Department prefers the administrative process for taking land into trust authorized 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, of course, the acquisition is legislatively mandated.

This concludes my prepared testimony. I am happy to answer any questions the Committee may have.