U.S. Department of the Interior
Office of Inspector General

Investigative Report

Allegations Involving Irregularities in theTribal Recognition Process and Concerns Related to Indian Gaming

A Report Initiated at the Request of Secretary Gale Norton and Congressman Frank Wolf

Report No. 01-I-00329 **February 2002**

This report contains exempt information that is being withheld pursuant to exemptions (b)(6) and (b)(7)(C) of the Freedom of Information Act, 5 U.S.C. § 552.

Introduction

This investigation was initiated at the request of Secretary Gale Norton and Congressman Frank R. Wolf of Virginia who were concerned about a series of *Boston Globe* articles that covered allegations of misconduct by senior officials of the Bureau of Indian Affairs (BIA) during the final few months of the Clinton Administration. Specifically, the allegations involved irregularities in the tribal recognition process and concerns related to Indian gaming. The initial investigation was conducted between April 2001 and November 2001, in Washington, DC, Hammond, LA, and Albany, NY during which over fifty personal interviews were conducted. Several additional follow-up interviews took place during early January 2002.

At the outset, in a meeting between the Office of Inspector General (OIG) and Congressman Wolf's staff, five issues were identified for investigation:

1. **Issue:** Review the six tribal recognition decisions made by Clinton Administration BIA appointees that were contrary to the recommendations made by the career staff of the Branch of Acknowledgment and Research (BAR).

   - **Finding in Brief:** Using a consultant with questionable credentials to bolster their position, BIA officials Kevin Gover, Michael Anderson and Loretta Tuell were determined to recognize the six tribes that BAR had concluded did not meet the regulatory criteria. Gover issued four decisions contrary to BAR's recommendation. Anderson attempted to issue two decisions, which were also contrary to BAR's recommendation. In one instance, however, Anderson failed to sign the decision document prior to leaving office on January 19, 2001. With the knowledge of Deputy Commissioner M. Sharon Blackwell and other career Department of the Interior (the Department or DOI) employees, Anderson signed the decision document on January 22, 2001, subsequent to his leaving office, and therefore, without authority to do so. The Department of Justice declined prosecution against Anderson and Blackwell.

2. **Issue:** Review the legal provisions that allow former BIA employees to represent Federally recognized tribes immediately upon departure from the government, and determine the nature of certain contacts by former DOI/BIA employees with current DOI/BIA employees.

   - **Finding in Brief:** Generally, former officers and employees of the United States employed by Indian tribes may represent the tribes in any matter pending before any government entity, as authorized by 25 U.S.C. § 450i (j). However, Hilda Manuel, former Deputy Commissioner for BIA, contacted employees within the Department on a matter that would not fall under 25 U.S.C. § 450i (j). In that instance, the Department of Justice declined prosecution against Manuel.

3. **Issue:** Determine the effect of former Acting Assistant Secretary for Indian Affairs Michael Anderson's January 19, 2001 ruling approving an ordinance for "electronic pull-tab machine" gaming for the Seminole and Miccosukee Tribes.

- **Finding in Brief:** As Acting Assistant Secretary, Anderson affirmed the decision of the National Indian Gaming Commission (NIGC) that the proposed "electronic pull-tab machine" gaming activities of the Seminole tribes were Class II and gave his approval to engage in these activities. Nonetheless, Anderson's decision was rescinded to allow the present Solicitor and Assistant Secretary the opportunity to re-evaluate the decision.

4. **Issue:** Assess the oversight role of the NIGC and review the management contract between the Mohegan Tribe and Trading Cove Associates (TCA) to determine whether it exceeded the 30% cap established by Congress.

   - **Finding in Brief:** The Indian Gaming Regulatory Act (IGRA) conveys to the NIGC the authority to oversee and regulate contracts between Indian tribes and management companies. The IGRA does not, however, convey authority to the NIGC to regulate agreements between tribes and "consultants." Most tribes elect consulting agreements, and as such, are not subject to oversight by NIGC. Of the 332 gaming operations nationwide, 301 operate without management contracts and thus, do not fall under the regulatory and enforcement authority of the NIGC. The management contract between the Mohegan Tribe and Trading Cove Associates exceeded the 30% cap and was controversial within NIGC.

5. **Issue:** Determine the effect of former Deputy Assistant Secretary for Indian Affairs Michael Anderson's October 6, 2000 letter concerning the Constitutional Government of the St. Regis Mohawk Tribe.

   - **Finding in Brief**: The letter from former Acting Assistant Secretary Michael Anderson merely affirmed the results of a Federal District Court ruling which effectively terminated recognition of the Constitutional Government of the St. Regis Mohawk Tribe. The letter, however, appears to have been issued without going through the official clearance process.

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Summary of Findings

1. Tribal Recognition Decisions

Six tribal recognition decisions were the subject of investigation:

- Eastern Pequot Petition
- Paucatuck Eastern Pequot Petition
- Little Shell Petition
- Chinook Petition
- Duwamish Petition
- Nipmuc 69A Petition

The tribal recognition process is a regulatory process by which Indian groups petition for Federal recognition as a tribe. BIA is responsible for reviewing such petitions and making a determination on these petitions for recognition. Federal recognition of a tribe conveys financial benefits and significant rights as a sovereign entity, including Federal assistance programs, exemptions from state and local jurisdictions, and the ability to establish casino gambling operations.

The Branch of Acknowledgement and Research (BAR) is the technical staff responsible for review of recognition petitions. BAR had recommended that each of these petitions be denied. BAR makes its determination using the mandatory criteria set forth in 25 C.F.R. §§ 83.7 (a)-(g) *Mandatory Criteria for Federal Acknowledgement.*

BAR consists of a Chief and seven researchers. The Chief of BAR reports to the Director of Tribal Services, who reports to the Deputy Commissioner for Indian Affairs. The Deputy Commissioner for Indian Affairs is a career position that reports directly to the Assistant Secretary for Indian Affairs. The BAR staff researches the petitioning group's genealogy, history and culture in a time-consuming process throughout which the BAR staff and petitioning group exchange information. The process was intended to take approximately two years. In practice, however, the process takes far longer, due to limited staff in BAR, lack of procedures to address increased workload, and lack of clear interpretative guidance pertaining to the mandatory criteria. *See* General Accounting Office (GAO) Report #GAO-02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process,* November 2001.

At the conclusion of the review process, the BAR staff makes a recommendation to the Assistant Secretary for Indian Affairs. If the petitioner fails to meet any one of the seven regulatory criteria, BAR will issue a recommendation against acknowledgment. Prior to April 2000, only one determination had ever been issued by an Assistant Secretary that was contrary to the recommendation of BAR.

Between April 2000 and January 2001, however, BAR's recommendations against recognition for the six petitions at issue were reversed. Former Assistant Secretary Kevin Gover, who served as Assistant Secretary for the Bureau of Indian Affairs from January 1997 until January 3, 2001, reversed BAR's determination for the Eastern Pequot, the Paucatuck Eastern Pequot, the Little Shell, and the Chinook petitions, and issued decisions acknowledging these four tribes. Former acting Assistant Secretary Michael Anderson, who assumed his acting position on January 3, 2001, when Gover resigned, reversed BAR's determinations for the Duwamish and the Nipmuc.

The relationship between Gover and the BAR staff was strained from the beginning. Shortly after being appointed, Gover held a meeting with the BAR staff in which he stated, "acknowledgement decisions are political." BAR staff considered this to be an indication of how this Assistant Secretary would rule on their findings. BAR and the Solicitor who advises them were convinced that Gover did not like the regulatory process set forth in 25 C.F.R. Part 83 and, as a result, would base his acknowledgement decisions on his personal interpretation of the regulations.

When Gover did issue his decisions regarding the Eastern Pequot, the Paucatuck Eastern Pequot, Little Shell, and Chinook contrary to the recommendations of BAR, the BAR staff issued memoranda of non-concurrence for each of the four decisions. BAR had never before documented its disagreement with an Assistant Secretary.

The relationship between BAR and Anderson was even more troubled. The BAR staff collectively described the last seventeen days of the Clinton Administration as pure hell. BAR believed that Anderson and Acting Deputy Assistant Secretary Loretta Tuell viewed them as adversaries rather than subject matter experts. Tuell had pressured BAR for a positive outcome on the Nipmuc 69A and Duwamish proposed findings. BAR staff reported that Deputy Commissioner for Indian Affairs, M. Sharon Blackwell, had told them not to put their concerns on paper.

Unlike Gover who rewrote his own tribal recognition decisions, Anderson and Tuell directed BAR staff to incorporate edits that contradicted their own recommendation into their own findings. On January 18, 2001, BAR staff were told that the Nipmuc 69A and Duwamish decisions would have to be rewritten. Although they had started on the Duwamish rewrite, BAR staff did not receive edits and directions from Anderson and Tuell until 4:00 pm on January 19, 2001, after Anderson and Tuell returned from a party at Main Interior Building (MIB). The BAR staff stayed until 8:00 pm the evening of the 19th to complete the rewrite.

The troubled atmosphere was apparent to other BIA personnel as well. Then-Acting Deputy Assistant Secretary James McDivitt stated that on the morning of January 19, 2001, he spoke to a "very upset" BAR Chief who came to him seeking direction, since the BAR had not yet received the Nipmuc 69A edits. McDivitt stated that he knew little about the BAR process, but when he saw how upset the BAR Chief was, he advised the Chief not to do anything illegal. McDivitt was so concerned about the actions of Anderson and Tuell that he advised Deputy Commissioner Blackwell not to

return to MIB when he saw her leaving to attend a social function. McDivitt stated that he knew the actions taken by Anderson and Tuell on tribal acknowledgement would be subject to review by the incoming Administration and it was better not to witness any questionable actions by the Acting Assistant Secretary and his staff.

Deputy Commissioner Blackwell described her role throughout this process as somewhat of an intermediary, conveying the directives of Anderson and Tuell to the BAR staff, while attempting to protect BAR employees from any escalation. Blackwell stated that Tuell frequently said, "I'm counselor to the Assistant Secretary and the Assistant Secretary wants this done." Blackwell would then communicate the information to BAR, explaining, "This is where they want to go. They are intent on this."

Blackwell was specifically asked about the comment the BAR Chief attributed to her directing him not to put his concerns on paper. Blackwell initially denied making the comment, saying that it had become somewhat of an accepted practice for BAR to document its concerns on final determinations that were not in accordance with their initial findings. In a subsequent interview, Blackwell advised that she had given additional thought to the question and recalled a conversation with the BAR Chief. Blackwell stated that when the BAR Chief suggested documenting BAR's concerns, she said, "That will probably bring the house down." Blackwell said that she advised the BAR Chief to keep all his original drafts.

Blackwell acknowledged that on January 19, 2001, they were "trying to get [these decisions] out the door" prior to the change in Administration. BAR staff remained at work well into the evening, attempting to complete the requested changes. Blackwell stated that she also felt compelled to remain late for several reasons including the potential for conflict between BAR and Tuell. Blackwell stated that she considered physical confrontations a realistic possibility, expecting someone to "get slapped." Blackwell also expressed concern that if she had not been present, BAR staff could potentially end up with reprimands or disciplinary actions submitted to their personnel files. She said that any of these actions would have been unwarranted.

BAR staff eventually left the building around 8:00 pm after Tuell advised them that she would complete the changes. Tuell requested that Blackwell review the final determination in preparation for submission to the *Federal Register*. According to Blackwell, the final product was lacking some obvious analysis and in her opinion, would not pass judicial scrutiny.

On Monday January 22, 2001, the first working day of the Bush Administration, the BAR staff discovered that the *Summary Under the Criteria,* and two of the three *Federal Register* Notices for the Duwamish Tribe had not been signed by Anderson. All of the documents for Nipmuc 69A had been signed by Anderson and date stamped January 19, 2001. All of the documents for the Duwamish had not. The BAR Chief went to Deputy Commissioner Blackwell's office and spoke to [redacted] about the need to have Anderson sign the documents. The BAR Chief did not speak directly to Blackwell at that time about the unsigned documents.

Once it was brought to [redacted] attention, however, [redacted] contacted Anderson and told him that the documents had not been signed. Anderson agreed to drive to the Main Interior Building, where [redacted] left the building with the documents and presented them to Anderson. He signed them while sitting in his car outside of the building. [redacted] returned to the office and date-stamped the documents January 19, 2001. The documents were then returned to BAR.

Deputy Commissioner Blackwell was interviewed three times during the course of this inquiry. Initially, Blackwell stated that she had no knowledge of when the documents were signed.

In a second interview, requested by Blackwell, she recalled that the BAR Chief had advised her of the unsigned documents. Blackwell remembered telling the BAR Chief that Anderson had clearly intended to sign the documents and therefore, he would have to come over and sign them. Blackwell said that there was some discussion of how to date the documents and that she thought they should be dated when they were intended to have been signed. Blackwell said she was not actually involved in getting the documents signed, but that she was troubled by the fact that the documents were taken out of the building. Blackwell explained that she thought it would have been proper for Anderson to come to MIB, sign the documents, date them according to when they should have been signed and then make a note explaining the circumstances under which they were signed. Blackwell stated that since the "Assistant Secretary" (Anderson) had given clear instruction to issue the decision on the Nipmuc petition, she was acting on those instructions.

During a third interview, also requested by Blackwell, she said she had been reviewing the file involving the Nipmuc recognition petition and was troubled that there was no documentation concerning the manner in which the *Federal Register* Notices had been signed by Michael Anderson on January 22, 2001. Blackwell said that she now recalled analyzing the situation on January 22, 2001, when it was brought to her attention by the BAR Chief. In her analysis, Blackwell concluded that this was a *"nunc pro tunc"* condition (or "signing now for then") and that the documents could still be signed because it was clearly Anderson's intent that they should have been signed. When the BAR Chief inquired of Blackwell how they could get the file to Anderson, Blackwell replied that "Anderson needed to come in and sign the documents." Blackwell said that she did not direct the BAR Chief to get the documents signed, but agreed that it was clear that she had authorized it. Blackwell reiterated her concern that the documents had been taken out of the building to be signed.

On June 26, 2001, Michael Anderson was interviewed by the OIG at his law office, Monteau, Peebles and Crowell, L.L.P. Anderson stated that he was familiar with the series of critical *Boston Globe* newspaper articles related to tribal recognition, Indian gaming and partisan politics. He believed they did not accurately portray his actions while he was at BIA. Anderson stated that he was initially a proponent of BAR but came to dislike them as his dealings with them increased. Anderson considered the BAR staff

as merely "adequate civil servants constituting a mix of good and bad personnel." Anderson stated, "BAR would write books about tribal acknowledgement rather than produce just the meat of the regulations." He defined BAR's role as "an information gathering body that has overstepped its authority and needs to be put back in check." Anderson said that BAR was intrusive, too involved in the decision-making process, and showed little respect for the policy makers (he and Gover). He described the Solicitor's Office as intrusive. Anderson stated that he and Gover had both lost faith in the Solicitor's Office. Anderson readily admitted to returning to MIB and signing the *Summary Under the Criteria* for the Duwamish Tribe on January 22, 2001, although he stated that he did not backdate it to January 19, 2001, nor did he advise [redacted] to do so.

Former Assistant Secretary Gover was interviewed on October 11, 2001, at his law office at Steptoe & Johnson, in Washington, DC. He stated that he was very unhappy with two specific aspects of the BAR staff. He believed they took far too long to arrive at their conclusions and rather than making timely decisions, BAR's objective was academic excellence. He was convinced BAR's goal was to write decisions that could be defended in an academic environment rather than arriving at conclusions based upon evidence.

Gover never questioned the accuracy of BAR's findings, although he did question the necessity of the volume of information they produced. Gover maintains that the standard needed to grant an Indian group tribal status should be "the preponderance of evidence." Admittedly, he had problems with 25 C.F.R. §§ 83.7 (a)-(g) *Mandatory Criteria for Federal Acknowledgement*. Gover thought he could never secure sufficient backing to have the regulations amended. He chose instead to interpret these regulations with a more relaxed and accommodating standard than BAR. The two factors that Gover chose to interpret himself were 25 C.F.R. §§ 83.7 (b) and (c). These two factors deal specifically with an Indian group existing as a "distinct community" and "maintaining political influence or authority over its membership as an autonomous entity" from historical times to the present. Gover said, "From 1870 to 1930, the government did all they could to disrupt and disturb the American Indian." He said that because being an Indian during this time was not popular, most chose to keep a very low profile, making 25 C.F.R. §§ 83.7 (b) and (c) extremely hard to corroborate.

Gover's interpretation of 25 C.F.R. §§ 83.7 (b) and (c) appears to be the major area of disagreement between BAR and himself. Gover said, "Tribal recognition was not intended to be adversarial, but became so." Once it became adversarial, it was apparent to Gover that BAR and the Solicitor's Office (SOL) aligned themselves against his final decisions. Like Anderson, Gover had problems with the Solicitor's Office. Gover accused the SOL of attempting to usurp his decision-making authority.

Gover said that he had authorized the retention of a "recognition consultant" to review technical reports prepared by BAR and to ensure that BAR's findings were consistent with Title 25 C.F.R. Part 83. Loretta Tuell selected the consultant. Ms. Tuell

was the Director of the Office of American Indian Trust and worked closely with Gover and Anderson. The consultant traveled to Washington, DC from his home in Louisiana, doing the majority of his work from a hotel room in Arlington, Virginia.

The BAR and Solicitor's staff were troubled by the retention of the consultant. Although the consultant's position was never fully explained to BAR or SOL, they viewed him as a "hired gun" who was retained to offer legal advice and to assist the Assistant Secretary in rewriting his decisions that were contrary to BAR's recommendations. Review of the consultant's role determined that he did not provide legal counsel but he did critique BAR's findings for Gover & Anderson.

The BAR staff stated that they had little to no interaction with the consultant. They were never told what the consultant's responsibilities were. By his own admission, the consultant stated that he had very little interaction with the BAR staff or the Assistant Secretary. The consultant stated that he attended few meetings on tribal recognition and, instead, received his instructions from Loretta Tuell. The consultant provided Gover with two written proposals in October 2000 in support of a favorable determination of acknowledgement for the Duwamish and Chinook Tribes. Gover stated that he used the consultant's research as an "authoritarian basis from an expert on Indian law so that he would have a qualified opinion to oppose BAR's recommendations on petitions for Federal recognition."

An inspection of BIA personnel records revealed that the consultant was hired initially as a "Tribal Recognition Consultant." Although his appointment changed from a consultant to a contractor, his assignment remained the same. When the consultant/ contractor was interviewed, he stated that he "possesses an expertise in Indian law and he is thoroughly and uniquely qualified with the criteria set forth in 25 C.F.R. §§ 83.7 and 83.8." He supported his self-proclaimed expertise by saying that he successfully represented the Tunica-Biloxi Tribe of Louisiana when they petitioned BAR for Federal recognition in 1981.

The consultant worked for DOI from July 31 to September 30, 2000 as a "consultant;" he worked from November 20, 2000 to January 20, 2001 as a "contractor." The terms of his contract provided for payment of $387 per day plus per diem, not to exceed $22,500. On or about November 20, 2000, he was also awarded $8,500 for his "exemplary performance as a consultant."

Loretta Tuell declined a request for an interview related to this investigation.

The conduct of Michael Anderson and M. Sharon Blackwell concerning the signing of the Acknowledgment package on the Duwamish petition on January 22, 2001, was presented to the Department of Justice for prosecution under 18 U.S.C. § 912 (False Impersonation of an Officer or Employee of the United States and Conspiracy to Falsely Impersonate an Officer or Employee of the United States, respectively). The Department of Justice declined prosecution against Anderson and Blackwell. Because Blackwell is

still an employee of the Department, the matter against Blackwell was declined for prosecution in lieu of administrative action.

2. <u>Contact with Bureau of Indian Affairs by former employees</u>

18 U.S.C. § 207 sets forth the statutory restrictions on the conduct of former officers, employees, and elected officials of the Executive Branch. Depending upon the type of matter involved and the role of the former employee, the restrictions extend from one year to permanent. In every instance, however, the prohibited conduct involves the same criminal intent, by which the former employee "knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department [or] agency…in connection with a particular matter…"

A number of contacts involving former Federal (BIA or DOI) employees with BIA staff were at issue:

The first involved a draft of a proposed letter that was prepared by and faxed from the law firm of Steptoe & Johnson to Deputy Assistant Secretary for Indian Affairs Michael Anderson on May 22, 2000. The draft letter was to New York State Governor George Pataki from Assistant Secretary Gover. The letter outlined a plan to substitute the Cayuga Nation of Indians for the St. Regis Mohawks as partners with the Catskill Development Corporation. The letter was drafted approximately thirty-eight days after the St. Regis Mohawks had entered into an agreement with Park Place Entertainment Corporation, thus negating their contract with Catskill Development Corporation to build a casino at Monticello Raceway in Monticello, New York. Steptoe & Johnson represented the Cayuga Nation of Indians, and the attorney from whom the letter came was a former Department of the Interior official.

The second contact at issue was the telephonic contact made by former Acting Assistant Secretary Michael Anderson to a DOI Office of Indian Gaming Management (OIGM) Director on March 22, 2001, in which Anderson provided a "heads up" that he would be requesting a future meeting to discuss Mohawk gaming matters. The OIGM Director recalled that the phone call lasted less than one minute. He could not recall whether or not Anderson identified who he represented.

While these incidents of contact might otherwise be in violation of 18 U.S.C. § 207, the provisions of 25 U.S.C. § 450i(j) -- *Retention of federal employee coverage, rights and benefits by employees of tribal organizations* -- authorize a former officer or employee of a Federal agency to represent an Indian tribe, *notwithstanding any provisions of 18 U.S.C.§ 207 to the contrary* (emphasis added).

The third incident of contact occurred between Hilda Manuel and BAR employees. Manuel had been the Deputy Commissioner for Indian Affairs at BIA until April 2000, when she went to work for Steptoe & Johnson. On August 4, 2000, Manuel contacted a cultural anthropologist at BAR requesting copies of the acknowledgment petition for the Mashpee Wampanoag Indians. When Manuel first called, she did not

identify herself. The cultural anthropologist thought, by the tone of the conversation, that she was dealing with a BIA superior. The anthropologist said that Manuel demanded an immediate response and made it clear that any delay would not be accepted. Manuel later identified herself as "Hilda" and then asked, "Do you know who I am?"

Finally, on September 28, 2000, Manuel and another Steptoe & Johnson attorney, the former DOI official, met with Assistant Secretary Gover to propose a "pilot project" to outsource the review and analysis of material submitted by petitioning groups to support their claims for Federal acknowledgement. A contractor would replace BAR and would be selected and compensated by the petitioning group. Manuel made it clear that she wanted the Mashpee Wampanoag Indians to be the first pilot project group. The proposal was the subject of subsequent meetings, without Manuel being present, but was never implemented.

The Mashpee Wampanoag Indians are not a Federally acknowledged tribe and therefore, representation of these Indians does not fall under the exceptions of 25 U.S.C. § 450i(j). Therefore, this last matter was presented to the United States Attorney's Office, District of Columbia, for prosecution under 18 U.S.C. § 207. Prosecution was declined.

3. <u>Anderson's ruling on video slot machines in Florida</u>

On January 19, 2001, Acting Assistant Secretary for Indian Affairs Michael Anderson issued a letter to James Billie, former Chairman of the Seminole Indian Tribe and to Billy Cypress, Chairman of the Miccosukee Tribe (both tribes are located in Florida). Anderson's letters addressed the issue of Indian gaming in the State of Florida and affirmed the National Indian Gaming Commission Chairman's approval of the ordinance for "electronic pull-tab machines" in the Seminole casinos.

Three classes of gaming are defined in 25 U.S.C. § 2703 and 25 C.F.R. Part 502. Class I gaming is not regulated by the NIGC. Class II gaming requires the approval of the Chairman. Class III gaming must be approved by the Chairman, be permitted by the State in which it is located, and be conducted in conformance with a Tribal-State compact.

As Acting Assistant Secretary, Anderson confirmed the finding of the NIGC Chairman that "electronic pull-tab machines" were Class II gaming devices, permissible in the State of Florida, when he signed off on the ruling that had been prepared by career employees in the Office of Indian Gaming Management. Because Class II gaming requires only the approval of the Chairman, Anderson's decision served as authorization for the Seminole and Miccosukee Tribes to engage in "electronic pull-tab machines" gaming.

The Florida State Attorney General vehemently disagreed with this decision, claiming that "electronic pull-tab machines" are more similar to slot machines and should fall under Class III gaming restrictions. The State of Florida prohibits Class III gaming.

On June 29, 2001, however, Deputy Assistant Secretary for Indian Affairs McDivitt, issued letters to the Seminole and Miccosukee Tribes of Florida withdrawing the Anderson decision of January 19, 2001. The McDivitt letters were issued to allow the Solicitor and Assistant Secretary an opportunity to "evaluate the important issues" in dispute as a result of Anderson's January 19, 2001 letters.

4. Management Contract Review by NIGC

Management Contracts vs. Consulting Agreements

In 1988 the Indian Gaming Regulatory Act established the National Indian Gaming Commission to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences, to ensure that Indian tribes are the primary beneficiaries of gaming revenue, and to assure that gaming is conducted fairly and honestly by both operators and players. Among other responsibilities, the NIGC is responsible for reviewing and approving management contracts between the Indian tribes and management companies to ensure that the statutory provisions of the IGRA are met.

The NIGC identified two ways in which an Indian tribe may enter into a business arrangement with a management company. The first is a "management contract" that calls for the contracting company to be responsible for the "operations and management" of a gaming activity. Management contracts are subject to review and approval by the NIGC Chairman pursuant to 25 U.S.C. § 2710 (d)(9) and 2711. The NIGC reviews the management company as well as the terms of the contract to ensure, among other things, that the fee does not exceed the 30% statutory cap, without justification. The Chairman of the NIGC has the authority to raise this cap to 40% if the financial projections and capital investments allow him to do so. The NIGC takes approximately two years to complete this process and authorize a management contract.

According to NIGC, the second way a tribe might enter into an agreement with a management company is by way of a "consulting agreement." In a consulting agreement, the tribe retains the responsibility for day-to-day operations, and the management company provides agreed-upon services. By its own interpretation, NIGC has determined that consulting agreements do not fall within its jurisdiction for approval. Consulting agreements are free from NIGC oversight, and thus are preferred by the tribes because they allow casinos to become operational without the two-year wait required by the management contract.

The NIGC stated that, as of June 2001, there were 332 Indian gaming operations in the United States which vary in size from local firehouse style bingo operations to full-scale Las Vegas-quality casinos. Of the 332 gaming operations, only 31 are operating under management contracts approved by NIGC since its creation in 1993. (Although the NIGC was established by statute in 1988, it did not become operational until its regulations were published in 1993.) The remainder operate with consulting

agreements or without outside entities, and thus, do not fall under the regulatory and enforcement provisions of the NIGC.

If the NIGC determines that a partnership between a tribe and management company is based upon a consulting agreement, NIGC relinquishes oversight to the Office of Indian Gaming Management. If the agreement exceeds seven years, the OIGM will review it only in order to determine whether or not it is in the best interest of the tribe. If the agreement is for less than seven years, OIGM does not review it at all.

Consulting agreements require neither background checks on the business partners nor compliance with the National Environmental Policy Act (NEPA). These agreements have proven to be more lucrative, allowing the business partners to be compensated at a rate greater than 40% and, at the same time, freeing them from NIGC oversight.

Management Contract with Fees Exceeding 30% Statutory Cap

The contract between the Mohegan Tribe of Indians of Connecticut and Trading Cove Associates had been highlighted in one of the *Boston Globe* articles. This September 1995 contract contained terms that called for 40% of net revenues to be paid to TCA over seven years. The terms of the contract had been approved by then-Chairman of NIGC, Harold Monteau.

Two NIGC Commissioners believed that the terms of this contract, which had been negotiated by the Chairman, were not in compliance with the Indian Gaming Regulatory Act. The two Commissioners felt so strongly about this issue that they documented their objections in a memorandum dated September 28, 1995, in which they alleged that "the Chairman made a premature determination on the terms of the agreement contrary to staff concerns and many of the contract terms were negotiated privately…without participation by staff or fellow Commissioners and therefore we believe that this management agreement should not be approved." In spite of the two Commissioner's objections, Monteau approved the contract on September 29, 1995.

In February 1998 the Mohegan Tribal Gaming Authority, representing the Mohegan Tribe of Indians of Connecticut, and TCA entered into a Relinquishment Agreement that terminated the prior Management Contract, as well as an existing Hotel Management Agreement. The Relinquishment Agreement provided that the Mohegan Tribal Gaming Authority would assume management of their casino and TCA would receive 5 % of gross revenues over fifteen years for termination of its rights under the previous agreements and for an expansion project TCA would develop under a separate Development Agreement. For this Development Agreement the Mohegan Tribal Gaming Authority agreed to pay TCA a $14 million fee. Both the Relinquishment and Development Services Agreements were submitted to NIGC for a determination.

On March 20, 1998, the NIGC Contract Division determined that both of these Agreements required NIGC approval. They considered the Relinquishment Agreement to be an amendment to the Management Contract with changes to the financial

compensation and term of contract to be awarded to TCA. Based on the Tribe's financial statements for the first fiscal year, when NIGC calculated the amount to be paid to TCA under the Relinquishment Agreement, it was found that it clearly exceeded the 40% cap. As a result, the Contract Division determined that the terms of the amended the Management Contract did not comply with IGRA and NIGC regulations.

Contrary to the Contract Division's determination, the NIGC Deputy General Counsel ruled on May 15, 1998 that the Relinquishment Agreement effectively eliminates all management controls by the contractor, and therefore, does not require approval by NIGC. Agreeing with the Contract Division on one issue, however, the Deputy General Counsel concluded that the "amount of money to be paid to TCA was egregious."

5. Anderson's letter on St. Regis Mohawk Tribal Court Authority

Since 1820, the St. Regis Mohawks had been governed by a three chief system of government. Elections were held in June 1995 and a new Constitutional Government was elected by the narrow margin of 50.9%. The Mohawk's Tribal Constitution requires a majority (51%) of the vote. A year later, the three chiefs attempted to have the newly elected Constitutional Government abolished. For several years, BIA continued to recognize the ruling Constitutional Government in spite of the protests from the three chiefs. The Constitutional Government remained the recognized governing body of the St. Regis Mohawks until September 1999 when U.S. District Court Judge Kotelly ruled that 50.9% did not meet the required 51% majority as set forth in the Tribal Constitution. The U.S. Government did not appeal the District Court's decision.

After the elections in 1995, while the St. Regis Mohawks sought to establish a solid representative government, they also negotiated to bring casino gaming to Monticello Raceway in the Catskill Region of New York. In July 1996, the Constitutional Government signed a contract with the Catskill Development Corporation (Catskill) to build a casino at Monticello Race Track. Catskill, aware that the Mohawks were re-establishing their government, entered into a Memorandum of Understanding with both tribal government factions in order to validate the existing contract.

Subsequent to the District Court's decision, the three chiefs regained control of the tribal government. A BIA field representative issued a letter on February 4, 2000, recognizing the three chief system of government. In April of 2000, the three chiefs government entered into a new casino development arrangement with Park Place Entertainment (Park Place), negating the existing contract with Catskill. Shortly after agreeing to partner with Park Place, the Mohawk leadership grew suspicious of what they believed were unnecessary delays. Park Place owns casinos in Atlantic City, New Jersey, and the tribal leaders suspected they were delaying their casino project in order to continue the profitability of their other operations. A $12 billion suit was filed by the Mohawks against Park Place charging fraudulent intent on the part of Park Place to develop a casino. The U.S. District Court returned it to the Tribal Court to be decided.

In March 2001, a $1.8 billion award was handed down to the plaintiffs. Park Place Entertainment appealed the award.

Following a September 2000 visit to the St. Regis Mohawk Akwesasne Reservation, Michael Anderson issued another letter recognizing the Chiefs elected under the Tribe's traditional government. Anderson went on to say: "Since you have determined the "constitutional faction" and its court system are without any legitimate authority, the Bureau of Indian Affairs shall disregard any issuance by that "court" of any summons, appearance notices, suits, etc." Although the letter was printed on official letterhead, and signed by Michael Anderson, a "surname" copy of the letter could not be found. The surname copy indicates who reviewed the letter prior to its issuance and confirms that the letter was issued using appropriate procedures.

This letter garnered the interest of the attorneys representing Park Place who have used it as a cornerstone in defense of their appeal. The basis for their appeal is that if BIA does not recognize the judicial system approving the $1.8 billion award, then it is invalid. The lawsuit has been transferred to the Second Circuit Court of Appeals.

Conclusion

1. While the circumstances surrounding the six tribal recognition petitions were highly unusual, each of the recognition decisions has been reconsidered by the current Administration before continuing with the regulatory decision-making process. The Department of Justice declined prosecution against Anderson and Blackwell. Because Blackwell is still an employee of the Department, administrative action should be considered against her and [redacted] for their respective roles in this matter.

2. While the statute clearly allows former BIA employees to represent Federally recognized tribes immediately upon departure from government, the Department should provide departing BIA employees with a standard briefing that clearly explains the exemption of 25 U.S.C. § 450i (j) and the departing employee's obligation to notify the Department of any personal and substantial involvement in any matter they might participate in post-employment.

3. Because Michael Anderson's decision concerning "electronic pull-tab machine" gaming activities of the Seminole tribes was rescinded to allow the present Administration the time to re-evaluate the decision, the issue has effectively been rendered moot.

4. The determination by the NIGC that it is without authority to review "consulting agreements" between tribes and gaming operation consultants precludes effective oversight by NIGC of the majority of Indian gaming operations. If the Department wishes to enhance this oversight function, or if Congress wishes to extend the oversight to all gaming operations, legislative action should be considered.

This report contains exempt information that is being withheld pursuant to exemptions (b)(6) and (b)(7)(C) of the Freedom of Information Act, 5 U.S.C. § 552.

5. The letter from former Acting Assistant Secretary Michael Anderson affirmed the results of a Federal District Court ruling that effectively terminated recognition of the Constitutional Government of the St. Regis Mohawk Tribe. The legal significance of the letter will likely be determined in Federal court.

~~***This document contains personal privacy information. Do not release to the public.***~~