

The Evolution of Acquiring Land in Trust For Gaming : What Tribes Need to Know

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Office of Indian Gaming

The Office of Indian Gaming is responsible for implementing gaming-related activities assigned to the Secretary by the Indian Gaming Regulatory Act

OIG develops policies and procedures for review and approval of:

- Tribal-State Compacts and Secretarial Procedures
- Per capita distributions of gaming revenues
- Requests to take land into trust for the purpose of conducting gaming
- Indian Lands Determinations and Two Part Determinations

Objectives

Understand how the policies and processes for acquiring land in trust for gaming have evolved over time and how the changes affect tribes today

- Three primary legal authorities
- Acquisition policies of the Obama Administration
- Application process for Tribes

Legal Authorities

Three statutes govern the process of taking land in trust for gaming:

1. Indian Reorganization Act of 1934 (IRA)

- The IRA grants the Secretary of the Interior the authority to acquire land in trust for tribes
- The Department's regulations at 25 C.F.R. Part 151 implement trust land acquisition under the IRA

2. National Environmental Policy Act (NEPA)

- Purpose is to make environmental information available to federal officials and the public before decisions are made and actions are taken

Legal Authorities

3. Indian Gaming Regulatory Act (IGRA)

- Congress enacted IGRA “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...”
- Section 20 of IGRA generally prohibits gaming on lands acquired in trust after October 17, 1988 (newly acquired lands)

Legal Authorities

- Section 20 also provides exemptions and exceptions to this general prohibition for newly acquired lands:
 - Reservation exemptions
 - Restored lands for restored tribe
 - Settlement of a land claim
 - Initial reservation
 - Two Part Determination (off-reservation)

Relationship between the IRA, NEPA, and IGRA

All three statutes are necessary for taking land in trust for gaming

- Section 20's implementing regulations at 25 C.F.R. Part 292 set forth criteria to determine whether land is eligible for gaming
- IGRA does not authorize the Secretary to acquire land in trust (need separate acquisition authority such as the IRA)
- Trust land acquisitions for gaming must comply with the IRA and its implementing regulations at 25 C.F.R. Part 151
- Both Part 151 and Part 292 require compliance with NEPA
 - See § 151.10 (h) (fee-to-trust application)
 - See §292.18 (a) (detriment to surrounding communities)

Evolution of acquiring land in trust for gaming: IRA

Implementation of these statutes has evolved over time

Indian Reorganization Act:

Supreme Court decision in *Carcieri v. Salazar* (2009)

- Department must now determine if a tribe was “under federal jurisdiction” in 1934
- Tribes must now expend resources to research historical data
- Solicitor’s Office must prepare opinions for each tribe
- *Carcieri* review sometimes proceeds at different pace than rest of application due to additional analysis

Evolution of acquiring land in trust for gaming: Part 151

25 C.F.R. Part 151:

- First BIA regulations governing acquisition of land in trust established in 1980
 - Established a national framework for decision making on all trust acquisition decisions
 - Set basic standard for acquisition which remains today: weighing a tribe's anticipated benefits with local concerns
- 1995 amendments introduced off-reservation criteria, gave increased weight to local concerns, and introduced distance criteria

Evolution of acquiring land in trust for gaming: Part 151

Preamble to 1995 Regulations (elements of today's analysis):

- “In recent years, the Bureau has witnessed a number of requests by tribes for the acquisition of land in trust, located outside of and noncontiguous to the reservation, for purposes of economic development projects, and, in particular, gaming establishments. These enterprises, which are often located in urbanized areas, are sought by tribes as a stated means of achieving economic and financial self-sufficiency.”
- “Such acquisitions have in many cases become highly visible and controversial due to their possible impact on local governments. The loss of regulatory control and removal of the property from the tax rolls are the objections most often voiced by local governments to the acquisition of noncontiguous, off-reservation land in trust status.”

Evolution of acquiring land in trust for gaming: NEPA, IGRA

National Environmental Policy Act:

- Environmental impact statements for gaming now heavily focused on socio-economic impacts
- Threat of litigation results in lengthy documents
- BIA ultimately wins in litigation

Indian Gaming Regulatory Act:

- BIA established criteria to determine if land is eligible for gaming in 25 C.F.R. Part 292 (2008)
- Part 292 codified earlier decisions and court decisions
- Courts now have standards to review decisions

Comparison

Bush 2000 - 2008

- **17** applications were approved under the Section 20 exceptions
- **4** Requests for Governor's concurrence were made for off-reservation gaming

Obama 2009 – to present

- **11** applications were approved under the Section 20 exceptions
- **5** Requests for Governor's concurrence were made for off-reservation gaming

The Beginning of the Obama Administration

There were several critical developments at the beginning of the Obama Administration that influence land acquisition policy

- **August 2008: Department issues first regulations for Section 20 of IGRA (25 C.F.R. Part 292)**
 - Department conducted consultation on proposed regulations
- **January 2009: President Obama sworn into Office**
- **February 2009: Supreme Court decides *Carcieri v. Salazar***
 - Department must determine if a tribe was “under federal jurisdiction” in 1934 to have land taken into trust
 - Department immediately conducts consultation

Departmental Gaming Policy

- **June 2010: Secretary Salazar issues “Decisions on Indian Gaming Applications” memo**
 - Signals new commitment to moving forward on gaming applications
 - Department conducts new consultation on Part 292
- **June 2011: Assistant Secretary Echo Hawk issues “Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes” memo**
 - Withdraws 2008 Commutability Guidance memo

Recent Precedent and Policy

- **2012: Supreme Court decides *Patchak v. Salazar***
 - Supreme Court held that judicial review of Departmental decisions to acquire land in trust could proceed even after land is taken into trust
 - In response, the Department amends Part 151 to allow for immediate trust acquisition after decisions are made by the Assistant Secretary

Recent Litigation Affirms Obama Administration Policies

Confed. Tribes of Grand Ronde v. Jewell (Dec. 2014)

- Cowlitz Indian Tribe federally acknowledged in 2002
- Filed fee to trust application for 152 ac. In Clark County, Washington, for gaming as “initial reservation”
- Assistant Secretary issued final decision to acquire land in 2013
- ***Carcieri* challenge:** Cowlitz not under federal jurisdiction
 - Court: upheld DOI’s *Carcieri* analysis (1st major litigation test)
- **IGRA and Part 292 challenge:** land was not “initial reservation”
 - Court: upheld DOI’s 292 regs (1st determination for initial reservation) and DOI’s findings
- **NEPA challenge:** inadequate NEPA analysis
 - Court: upheld DOI’s analysis and conclusions

Recent Litigation Affirms Obama Administration Policies

Big Lagoon Rancheria v. California (June 2015)

- In 2009, Big Lagoon filed suit against CA, alleging that CA failed to negotiate a tribal-state gaming compact with the Tribe in good faith as required by IGRA
- CA alleged it was not required to negotiate because Big Lagoon was not “under federal jurisdiction” in 1934
- CA also questioned Big Lagoon’s status as federally recognized

Court:

- Rejected CA’s attempt to use *Carcieri* to attack 1994 trust acquisition and federal recognition
- Rejected CA’s attempt to use compact dispute to challenge trust status of land

Steps in the Application Process

The application process now reflects the evolution of the IRA, NEPA and IGRA

Step 1:

- Tribe submits an application to the Regional Director to take land in trust under Part 151
- Tribe submits a written request to the Regional Director under Part 292 for a determination that the land is eligible for gaming

Key elements:

- 151 & 292: Tribe must provide detailed and complete application that addresses the applicable sections

Steps in the Application Process

Step 2:

- The Regional Director reviews the Tribe's application and request to ensure that all required documentation has been submitted
 - If the Tribe's application is incomplete, the Regional Director requests additional information
 - An inactive or incomplete application may be subject to disapproval by the Assistant Secretary

Key elements:

- Tribe should submit information that help in the review: maps, economic analysis, projected tribal employment, letters of support, etc.
- Tribe should submit a fact-specific unmet needs assessment (not wish list): need for land, inability to provide services & housing, need for employment & economic development, etc.

Steps in the Application Process

Step 3:

If the request is complete, the Regional Director will forward the Tribe's request to the Gaming Office for review

- Two Part: The Regional Director will consult with nearby tribes and local governments as required by Part 292
- A copy of all comments will be sent to the Tribe for response

Key elements:

- Comments and concerns of the state, local governments, citizen groups, and nearby tribes must be carefully considered and addressed by BIA

Steps in the application process

Step 4:

- The Regional Director continues to review the Tribe's application under Part 151 and NEPA

Key elements:

- All regulatory criteria of Part 151 must be addressed
- Comments of local governments regarding removal from the tax rolls and jurisdictional concerns must be carefully considered and addressed by BIA
- NEPA documents must be thorough and contain analysis that will withstand judicial review
- NEPA documents can provide significant factual support for the final decision

Steps in the Application process

Step 5:

The Gaming Office will determine if the lands are eligible for gaming under IGRA and inform the Tribe

Step 6:

- Regional Director will forward a Recommendation to the Gaming Office with findings made under Part 292, Part 151 and NEPA

Step 7:

- The Gaming Office will review the Regional Director's Recommendation, the Tribe's application, and the administrative record for completeness and prepare a Recommendation for the Assistant Secretary

Steps in the Application process

Step 8:

- A final decision on the Tribe's application (Part 151, Part 292, NEPA) will be made by the Assistant Secretary

For Two Part Determinations:

If the Assistant Secretary makes a favorable Determination:

- Sends it to the Governor for concurrence
- If Governor concurs, the Regional Office continues to process the application under Part 151 and NEPA
- If the Governor does not concur or fails to act, the Two Part Determination expires and the lands are not eligible for gaming

If the Assistant Secretary makes an unfavorable Determination:

- The land is not eligible for gaming and will not be taken into trust for gaming purposes
- May be taken in trust for non-gaming purposes

Examples

Part 292

- Menominee Two Part Determination (Aug. 23, 2013)
- Kaw Two Part Determination (May 17, 2013)
- Cowlitz Initial Reservation (April 22, 2013)
- Mechoopda Restored Lands Exception (Jan. 24, 2014)
- Soboba Contiguous Exception (May 19, 2015)
- Spokane Two Part (June 15, 2015)

Part 151

- Kaw Acquisition Decision (March 10, 2014)

Carcieri

- Cowlitz (April 22, 2013)
- Mechoopda (Jan. 24, 2014)

<http://www.bia.gov/WhoWeAre/AS-IA/OIG/index.htm>

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