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
• Administration transitions and gaming policy
• Acquisition policies of the Obama Administration
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
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)
Section 20 - Exemptions/Exceptions

Overview

Section 20 generally prohibits gaming on lands acquired in trust after October 17, 1988, but provides exemptions/exceptions to this general prohibition:

- **Reservation Exemptions**
  - Within/contiguous to a tribe’s reservation
  - If no reservation, within former reservation (Oklahoma)
  - If no reservation, within last recognized reservation in current state (outside Oklahoma)

- **Exceptions**
  - Settlement of a land claim
  - Initial Reservation (used for landless tribes)
  - Restored lands for restored tribe (often used for landless tribes)
  - Secretarial (Two-part) Determination (off-reservation)
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

• 21 applications were approved under the Section 20 exceptions

• 6 Requests for Governor’s concurrence were made for off-reservation gaming
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: 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
## Administration Transitions and Gaming Policy

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<tr>
<th>Administration</th>
<th>Year</th>
<th>Action</th>
<th>Details</th>
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<tr>
<td>Bush I</td>
<td>1988</td>
<td>IGRA is Enacted</td>
<td>- No prohibition of off-reservation gaming.</td>
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| Clinton        | 1995 | Part 151 adopts off-reservation criteria in § 151.11. | - More applications for off-reservation casinos. “Such acquisitions have in many cases become highly visible and controversial due to their possible impact on local governments.”  
- Greater concern for local impacts: give greater weight to the state and local government concerns.  
- See concern for distance: greater scrutiny as distance from the reservation and the land to be acquired increases. |
# Administration Transitions and Gaming Policy

| Clinton | Jan. 16, 2001 | Final Part 151 established a more demanding standard for off-reservation acquisitions.  
|---------|--------------|-----------------------------------------------|
|         |              | • Created a presumption in favor of land acquisition within reservation boundaries, and established more demanding standards for land acquisition outside reservation boundaries.  
|         |              | • Give increased weight to local concerns; increased analysis of distance of land from reservation.  |
| Bush II | Nov. 9, 2001 | Withdrawal of 2001 amendments by incoming Bush II Administration |
## Administration Transitions and Gaming Policy

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<tr>
<th>Bush II</th>
<th>151 policy proposals</th>
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<td><strong>Draft policy considerations</strong>: e.g., suspending trust land acquisition until new regs issued.</td>
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**More stringent standards considered:**
- Automatic disapproval for severe negative impacts to the environment or local community
- Higher burden on tribes to demonstrate need for off-reservation acquisitions
- Ability of members to commute for off-reservation employment
- Analysis of anticipated benefits to the reservation from off-reservation casino.
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


- 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 (1*st* major litigation test)
- **IGRA and Part 292 challenge:** land was not “initial reservation”
  - Court: upheld DOI’s 292 regs (1*st* 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.
Recent Decisions

- 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 - Secretarial Determination (June 15, 2015)
- Mashpee - Mashpee Initial Reservation (Sept. 18, 2015)
- Cloverdale Restored Lands Exception (Apr. 29, 2016)
- Pokagon Restored Lands Exception (Nov. 17, 2016)

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