



CRS Report for Congress

Indian Gaming Regulatory Act: Gaming on Newly Acquired Lands

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Summary

The Indian Gaming Regulatory Act (IGRA) (P.L. 100-497) generally prohibits gaming on lands acquired for Indians in trust by the Secretary of the Interior (SOI) after the date of enactment of IGRA, October 17, 1988. The exceptions, however, may be significant because they raise the possibility of Indian gaming proposals for locations presently unconnected with an Indian tribe. Among the exceptions are land: (1) contiguous to or within reservation boundaries; (2) acquired after the SOI determines acquisition to be in the best interest of the tribe and not detrimental to the local community and the governor of the state concurs; (3) acquired for tribes that had no reservation on the date of enactment of IGRA; (4) acquired as part of a land claim settlement; (5) acquired as part of an initial reservation for a newly recognized tribe; and (6) acquired as part of the restoration of lands for a tribe restored to federal recognition. On October 5, 2006, the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) issued a proposed regulation to specify the standards that must be satisfied by tribes seeking to conduct gaming on lands acquired after October 17, 1988. The proposal includes limiting definitions of some of the statutory terms and considerable specificity in the documentation required for such applications. Legislative proposals include H.R. 1654 and H.R. 2562, which contain provisions to tighten the standards for tribes to secure exceptions to IGRA's prohibition on gaming on lands acquired after 1988, and several bills dealing with recognition of particular tribes or transfers of specific pieces of property (S. 310/ H.R. 505, S. 375/H.R. 679, H.R. 28, H.R. 65, H.R. 106, H.R. 673, and H.R. 1294), which include provisions that preclude gaming. This report will be updated as warranted.

Requirements for Gaming on "Indian Lands". The Indian Gaming Regulatory Act (IGRA)¹ provides a framework for gaming on "Indian lands,"² according to which, Indian tribes may conduct gaming that need not conform to state law. The three classes of gaming authorized by IGRA progress from class I social gaming, through class

¹ P.L. 100-497, 102 *Stat.* 2467, 25 U.S.C. §§ 2701 - 2721; 18 U.S.C. §§ 1166 - 1168.

² 25 U.S.C. § 2703(4).

II bingo and non-banking card games, to class III casino gaming.³ One of the requirements for class II and class III gaming is that the gaming be “located in a State that permits such gaming for any purpose by any person, organization or entity.”⁴ The federal courts have interpreted this to permit tribes to conduct types of gaming permitted in the state without state limits or conditions. For example, tribes in states that permit “Las Vegas” nights for charitable purposes may seek a tribal-state compact for class III casino gaming.⁵ On the other hand, the fact that state law permits some form of lottery or authorizes a state lottery is not, in itself, sufficient to permit a tribal-state compact permitting all forms of casino gaming.⁶

Geographic Extent of IGRA Gaming. A key concept of IGRA is its territorial component. Gaming under IGRA may only take place on “Indian lands.” That term has two meanings. (1) “all lands within the limits of any Indian reservation”; and (2) “any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.”⁷ Under the first alternative, gaming under IGRA may take place on any land within an Indian reservation, whether or not the tribe or a tribal member owns the land and whether or not the land is held in trust. Determining the applicable boundaries of a reservation is a matter of congressional intent and may entail a detailed analysis of the language of statutes ceding tribal reservation land, and the circumstances surrounding their enactment as well the subsequent jurisdictional history of the land in question.⁸

The second alternative has two prongs: (a) the land must be in trust or restricted⁹ status, and (b) the tribe must exercise governmental authority over it. Determining trust or restricted status involves Department of the Interior (DOI) records. Determining whether a tribe exercises governmental authority may be a simple factual matter

³ 25 U.S.C. §§ 2703((6) - (8), and 2710.

⁴ 25 U.S.C. §§ 2710(b)(1)(A), and 2710(d)(1)(B).

⁵ *Mashantucket Pequot Tribe v. State of Connecticut*, 737 F. Supp. 169 (D. Conn. 1990), *aff’d*, 913 F.2d 1024 (2nd Cir.1990), *cert. denied*, 499 U.S. 975 (1991). Compacts may prescribe, with exacting detail, the specifics of each game permitted. See, e.g., the compact between New York State and the Seneca Nation, Appendix A, listing 26 permitted games and the specifications for each, available at [<http://www.sni.org/gaming.pdf>].

⁶ *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F. 3d 1250 (9th Cir. 1994), *opinion amended on denial of rehearing*, 99 F. 3d. 321 (9th Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997); *State ex rel. Clark v. Johnson*, 120 N.M. 562; 904 P. 2d 11 (1995).

⁷ 25 U.S.C. § 2703(4).

⁸ See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Solem v. Bartlett*, 465 U.S. 463 (1984).

⁹ “Restricted fee land” is defined to mean “land the title to which is held by an individual Indian or tribe and which can only be alienated or encumbered by the owner with the approval of the SOI because of limitations in the conveyance instrument pursuant to federal law.” 25 C.F.R. § 151.2 If restricted land is involved, it may only be considered “Indian lands,” for IGRA purposes if the tribe “exercises governmental power” over it. *Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001), held that a tribe could not accept governmental authority by consent from owners of restricted land whom the tribe had accepted into membership.

involving whether the tribe has a governmental organization that performs traditional governmental functions such as imposing taxes.¹⁰ On the other hand, it could be a matter requiring judicial construction of federal statutes.¹¹

How Land is Taken Into Trust. Congress has the power to determine whether to take tribal land into trust.¹² There are many statutes that require DOI to take land into trust for a tribe or an individual Indian.¹³ An array of statutes grant the Secretary of the Interior (SOI) the discretion to acquire land in trust for individual Indian tribes; principal among them is the Wheeler-Howard, or Indian Reorganization Act of 1934.¹⁴ Procedures for land acquisition are specified in 25 C.F.R., Part 151. By this process Indian owners of fee land, i.e., land owned outright and unencumbered by liens that impair marketability, may apply to have their fee title conveyed to SOI to be held in trust for their benefit. Among the effects of this process is the removal of the land from state and local tax rolls and the inability of the Indian owners to sell the land or have it taken from them by legal process to collect on a debt or for foreclosure of a mortgage.

“Indian Lands” Acquired After Enactment of IGRA. Lands acquired in trust after IGRA’s enactment are generally not eligible for gaming if they are outside of and not contiguous to the boundaries of a tribe’s reservation. There are exceptions to this policy, however, that allow gaming on certain “after acquired” or “newly acquired” lands. One exception permits gaming on lands newly taken into trust with the consent of the governor of the state in which the land is located after SOI: (1) consults with state and local officials, including officials of other tribes; (2) determines “that a gaming establishment on the newly acquired lands would be in the best interest of the Indian tribe and its members”; and (3) determines that gaming “would not be detrimental to the surrounding community.”¹⁵

Other Exceptions for Gaming on Land Acquired after October 11, 1988. Other exceptions permit gaming on after-acquired land and do not require gubernatorial

¹⁰ See, e.g., *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F. 2d 967 (10th Cir. 1987), involving a tribe that exercised taxing authority.

¹¹ See, e.g., *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp 796 (D. R.I. 1993), *aff’d, modified*, 19 F. 3d 685 (1st Cir. 1994), *cert. denied* 513 U.S. 919 (1994). This case held that, despite the fact that a federal statute conveyed civil and criminal jurisdiction over a tribe’s reservation to a state, the criterion of exercising governmental power was satisfied by various factors including federal recognition of a government-to-government relationship, judicial confirmation of sovereign immunity, and a federal agency’s treatment of the tribe as a state for purposes of administering an environmental law.

¹² U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause), and *id.*, art. IV, § 3, cl. 2 (Property Clause).

¹³ See, e.g., § 707 of the Omnibus Indian Advancement Act, P.L. 106-568, 114 Stat. 2868, 2915, 25 U.S.C. § 1042e, mandating that the SOI take any land in Oklahoma that the Shawnee Tribe transfers.

¹⁴ Act of June 18, 1934, ch. 57, 48 *Stat.* 985, 25 U.S.C. § 465. This statute specifies that such land is to be exempt from state and local taxation.

¹⁵ 25 U.S.C. § 2719(b)(1).

consent, consultation with local officials, or SOI determination as to tribal best interest and effect upon local community. They relate to any of five circumstances:

(1) Any tribe without a reservation on October 17, 1988, is allowed to have gaming on newly acquired lands in Oklahoma that are either within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status by SOI for the tribe.¹⁶

(2) If a tribe that had no reservation on October 17, 1988, and is "presently" located in a state other than Oklahoma, it may have gaming on newly acquired lands in that state that are "within the Indian tribe's last recognized reservation within the State."¹⁷

(3) A tribe may have gaming on lands taken into trust as a land claim settlement.¹⁸

(4) A tribe may have gaming on lands taken into trust as the initial reservation of a tribe newly recognized under the Bureau of Indian Affairs' process for recognizing groups as Indian tribes¹⁹;

(5) A tribe may have gaming on lands representing "the restoration of lands for an Indian tribe that is restored to federal recognition."²⁰

Proposed Regulation for Gaming on Newly Acquired Trust Lands. On October 5, 2006, the Bureau of Indian Affairs (BIA) issued a proposed regulation setting standards that DOI will use in determining whether class II or class III gaming may take place on after-acquired lands.²¹ With respect to the two-part determination, the proposal includes: (1) a requirement that the application for a gaming determination on land not yet in trust must be filed at the same time as the application to have the land taken into trust; (2) a definition of "surrounding community" that covers local governments and tribes within a 25-mile radius; (3) detailed requirements as to projections which must accompany the application respecting benefits to the tribe and local community, potential detrimental effects, and proposals to mitigate any detrimental effects.

¹⁶ 25 U.S.C. § 2719(a)(2)(A)(i) and 2719(a)(2)(A)(ii).

¹⁷ 25 U.S.C. § 2719(a)(A)((2)(B). There are other specific exceptions for certain lands involved in a federal court action involving the St. Croix Chippewa Indians of Wisconsin and the Miccosukee Tribe of Indians of Florida. 25 U.S.C. § 2719(b)(2).

¹⁸ Under this provision SOI took into trust a convention center in Niagara Falls, N.Y., now being used for casino gaming by the Seneca Nation, on the basis of legislation settling disputes over the renewal of 99-year leases in Salamanca, N.Y., 25 U.S.C. §§ 1174, et seq.

¹⁹ See CRS Report RS21109, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes*, by M. Maureen Murphy. In an opinion on "Trust Acquisition for the Huron Potawatomi, Inc.," the DOI Solicitor General's office stated that "the first time a reservation is proclaimed ..., it constitutes the 'initial reservation' under 25 U.S.C. § 2719(b)(1)(B), and the ... [tribe] may avoid the ban on gaming on 'newly acquired land' for any lands taken into trust as part of the initial reservation — those placed in trust before or at the time of the initial proclamation. Land acquired after the initial proclamation of the reservation will not fall within the exception." Memorandum to the Regional Director, Midwest Regional Office, Bureau of Indian Affairs 2 (December 13, 2000). [http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f33_nottawaseppihuronpotawatombnd.pdf&tabid=120&mid=957].

²⁰ 25 U.S.C. § 2719(b)(iii).

²¹ 71 *Federal Register* 58769. The comment period was extended to February 1, 2007, 71 *Federal Register* 70335 (December 4, 2006); 71 *Federal Register* 70335 (January 17, 2007), and corrections issued. 71 *Federal Register* 70335.

The proposed regulation includes a level of specificity that may prove controversial. Indian gaming interests may criticize elements of the proposed regulation as too restrictive; opponents of gaming may seek further limiting interpretations of various statutory language. On the other hand, some may find that the proposed regulation involves a degree of specificity that will further transparency, thereby improving the deliberative process as well as the ability of potential challengers to assess the pros and cons of appealing SOI decisions on land acquisition for gaming. For example, applicants must provide information on: (1) distance of the land from tribal “core governmental functions”; (2) consulting agreements; (3) financial and loan agreements; (4) proposed programs for compulsive gamblers; (5) impact costs to the local community and means of mitigation; (6) projected benefits to the relationship between the tribe and the local community; and (7) “anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community.”²² Upon determining that a trust acquisition is in the best interest of the tribe and not detrimental to the local community, SOI must notify the state’s governor, who must act within one year, with a possible one-time 180-day extension, or SOI will inform the applicant tribe that the application is no longer under consideration.

Unlike earlier proposed regulations, issued for public comment but never finalized,²³ the current proposal is not limited to the two-part SOI determination. It also covers: (1) newly acquired contiguous lands, defining “contiguous” to include parcels separated by non-navigable waters or a public road or right-of-way; (2) initial reservations for newly acknowledged tribes, requiring the land to be “within an area where the tribe has significant historical and cultural connections,” and located within 50 miles of the tribal headquarters or within a 50-mile radius of the residences of a majority of the tribe’s members; (3) “restored lands” for a tribe restored to federal recognition, requiring that if “restoration legislation does not provide geographic parameters ... the tribe [must have] ... a modern connection and a significant historical connection to the land and ... a temporal connection between the date of the acquisition of the land and the date of the Tribe’s restoration”; and (4) land acquisitions under land claim settlements, by requiring that the land must have been acquired in trust as part of the settlement of a land claim filed in federal court or included in DOI’s list of potential pre-1966 claims and involving a relinquishment of the tribe’s legal claim to land or a return to the tribe of “tribal lands identical to the lands claimed by the tribe.”²⁴ The proposal also specifies how a tribe may establish its connection to land, both in modern times and historically.

Legislation. To date, in the 110th Congress, two bills, H.R. 1654 and H.R. 2562, have been introduced addressing the process by which gaming may be authorized on newly acquired lands. H.R. 1654 would apply the two-part SOI determination, but not the gubernatorial concurrence, to the exceptions for land claim settlements, initial reservations for newly recognized tribes, and restored lands for newly restored tribes. H.R. 2562 would require the state legislature as well as the governor to concur in the SOI

²² Proposed 25 C.F.R. § 292.17 and 292.18, 71 *Federal Register* 58769, 58774-58775.

²³ 65 *Federal Register* 55471 (September 14, 2000). An earlier proposal, 57 *Federal Register* 51487 (July 15, 1991) was never issued in final form.

²⁴ Proposed 25 C.F.R. §§ 292.2, 292.5, 292.6, 292.7, and 292.11. 71 *Federal Register* 58769, 58774-58775.

two-part determination and eliminate the exceptions for land claim settlements, initial reservations for newly recognized tribes, and restored lands for newly restored tribes.

There are other bills, moreover, which would prohibit gaming in connection with providing federal recognition to a certain tribe or entity or transferring land to a particular tribe. Among them are:

S. 310 and H.R. 505. These bills provide a process for federal recognition of a Native Hawaiian governing entity and preclude gaming by that entity.

S. 375 and H.R. 679. These bills would remove a particular limitation presently applicable to a parcel of real property in Marion County, Oregon, deeded by the United States to the Confederated Tribes of Siletz Indians of Oregon and the Confederated Tribes of the Grand Ronde Community of Oregon, and preclude gaming on the land.

H.R. 28. This would transfer certain land in Riverside County, California, and San Diego County, California, from the Bureau of Land Management to be held in trust for the Pechanga Band of Luiseno Mission Indians, and restrict the use of the lands to “protection, preservation, and maintenance of the archaeological, cultural, and wildlife resources thereon.”

H.R. 65. This would provide federal recognition for the Lumbee Tribe and preclude tribal gaming.

H.R. 106. This would provide federal recognition for the Rappahannock Tribe and preclude gaming on lands taken into trust for the tribe.

H.R. 673. This would direct the SOI to take lands in Yuma County, Arizona, into trust as part of the reservation of the Cocopah Indian Tribe and prohibit IGRA gaming on those lands.

H.R. 1294. This would provide federal recognition for six Virginia Indian tribes and preclude tribal gaming.