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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. S. 1260, S. 2078, H.R. 2353,H.R. 3431, H.R. 4696, and H.R. 4893 include more stringent standards for gaming on newly acquired Indian lands. As reported by the Senate Committee on Indian Affairs on June 6, 2006, S. 2078 would tighten the standards for tribes to secure exceptions to IGRA's prohibition on gaming on lands acquired after 1988. 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 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

[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).

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

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 restricted[9] status, and (b) the tribe must exercise governmental authority over it. Determining trust or restricted status involves Department of the Interior records. Determining whether a tribe exercises governmental authority may be a simple factual matter involving whether the tribe has a governmental organization that performs traditional governmental

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[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 (2st 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], when visited April 10, 2003.

[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.

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 the Department of the Interior to take land into trust for a tribe or an individual Indian.[13] An array of statutes grant the 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 consents and 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 consent, consultation with local officials, or Secretarial determination as to tribal best interest and effect upon local community. They relate to any of five circumstances:

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[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. 106-658, 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).

(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 tribes[19];

(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 Regulations for Gaming on Newly Acquired Trust Lands. On January 25, 2006, the Department of the Interior issued, in draft form, a proposed rule that would establish criteria for implementing IGRA's section 20, regarding the eligibility for gaming on land taken into trust after October 17, 1988.[21] In 2000, SOI had sought public comments on a proposed regulation to govern the two-part determination process,[22] extended the comment period,[23] but never issued final regulations. SOI expects to circulate the current draft proposal to Indian tribes for consultation before publishing a proposed rule in the *Federal Register*.[24]

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[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 of the Interior 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)91)(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/nigc/documents/land/potawatomi.jsp], last visited March 24, 2005.

[20] 25 U.S.C. § 2719(b)(iii).

[21] Available at [http://www.indianz.com/docs/bia/bia012506.pdf] (last visited February 1, 2006).

[22] 65 *Fed. Reg.* 55471 (September 14, 2000). An earlier proposal, 57 *Fed. Reg.* 51487 (July 15, 1991) was never issued in final form.

[23] 66 *Fed. Reg.* 666847.

[24] Hearing Before the Senate Committee on Indian Affairs on Off-Reservation Gaming: The (continued...)

Legislation. In the 109th Congress, on March 17, 2005, the House Committee on Resources held a hearing on draft legislation to be introduced by Chairman Pombo to restrict off-reservation gaming.[25] The language of the draft legislation and some details of use of the exceptions over the years is included in the testimony of Earnest L. Stevens, Jr., Chairman of the National Indian Gaming Association.

S. 1260 would require tribes seeking gaming on new lands, with gubernatorial consent, to meet a higher standard than the current standard of best interest of the tribe and not detrimental to surrounding community and would also require concurrence of the state legislature. Under the legislation, SOI must consider the results of an economic impact study of the proposed gaming, and determine that the gaming "would not have a negative economic impact, or any other negative effect, on any unit of government, business, community, or Indian tribe located within 60 miles of the land." In addition, there is a requirement that the gaming be on land within a state where the tribe is primarily located and with which there is the tribe's "primary geographic, social, and historical nexus." There is also a provision requiring that tribes prepare environmental impact statements before using Indian lands for class II or class III gaming. S. 1518 would limit class III gaming to games permitted in the state for commercial purposes and subject tribal class III gaming to state laws and restrictions.

S. 2078 would eliminate the exception to IGRA's prohibition on gaming on land acquired in trust after IGRA's passage that is based on the two-part secretarial determination except for written requests submitted to the Secretary before April 15, 2006. It would limit the exception based on land claim settlements to require statutory authority and that the land be in a state in which the tribe's reservation or last recognized reservation land is located. For an exception based on initial reservation, there would be three requirements: (1) the land must be in the state to which the tribe has "an historical and geographic nexus, as determined by the Secretary"; (2) there must be a "temporal connection ... between the acquisition of the land and the date of recognition of the tribe, as determined by the Secretary" and (3) the Secretary must determine (after consultation with tribal and local officials, providing public notice, an opportunity to comment, and a public hearing) "that a gaming establishment on the land ... would be in the best interest of the Indian tribe and members of the tribe ... and [that it] would not create significant, unmitigated impacts on the surrounding community."

H.R. 2353 would prospectively limit each tribe's gaming to one parcel in the state where the tribe "has its primary geographic, social, and historical nexus and within the State or States where the tribe is primarily located." It would also require that applicants seeking to have land placed in trust declare whether or not they intend to have gaming on the land and be bound by any declaration that the land is not to be used for gaming. It would also require tribes seeking gaming on after-acquired lands, with gubernatorial consent, to meet a higher standard than the current test of best interest of tribe and not

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[24] (...continued)
Process for Considering Gaming. Testimony of George Skibine, Acting Deputy Assistant Secretary, Policy and Economic Development for Indian Affairs, U.S. Department of the Interior. [http://indian.senate.gov/2006hrgs/020106hrg/Skibine.pdf]

[25] [http://resourcescommittee.house.gov/archives/109/full/031705.htm], last visited March 24, 2005.

detrimental to surrounding community. Under the legislation, SOI would have to conduct an economic impact study and determine that gaming on the newly acquired lands "would not have a negative economic impact on business, government or Indian tribes within a 50 mile radius." The bill would also permit landless, newly recognized, or newly restored tribes to have gaming only if SOI determines: (1) that the proposed site is on "lands within the State where the Indian tribe has its primary geographic, social, and historical nexus to the land"; (2) that the gaming would be in the best interest of the tribe and not detrimental to the surrounding community; and (3) approval is given by the "State, city, county, town, parish, village and other general purpose political subdivisions of the State with authority over the land."

H.R. 3431 would eliminate the land claim, new reservation, and restored lands exceptions to the prohibition on gaming on newly acquired lands and would require the state's governor and legislature to approve an SOI determination that gaming on newly acquired lands is in tribe's best interest and not detrimental to the local community.

H.R. 4696 would amend IGRA prospectively. For class II or class III gaming to take place on lands acquired after the bill is enacted, a tribe must have declared its intention to have gaming in its application for trust status for the land and obtained approval for its tribal-state compact from the state legislature and governor. The bill would replace IGRA's section 20(b) provisions allowing gaming on newly acquired lands in instances involving land claim settlements, initial reservations, or restored lands, with a provision permitting gaming on newly acquired lands for newly acknowledged, restored, or landless tribes provided three criteria are met: (1) SOI determines that the lands ... are "lands within the State where the Indian tribe has its primary geographic, social, and historical nexus to the land"; (2) SOI determines that gaming on the land is in the best interest of the tribe and not detrimental to the surrounding community; and, (3) state and local government authorities approve. Gaming under IGRA would be limited to one contiguous parcel where "the Indian tribe has its primary geographic, social, and historical nexus and within the State or States where the Indian tribe is primarily located."

H.R. 4893 prohibits an Indian tribe from conducting gaming in any state other than a state in which it has a reservation as of the date of enactment. It limits IGRA gaming on lands acquired, after the date this legislation is enacted, by newly recognized, restored, or landless tribes to lands on which gaming is determined by the SOI not to be detrimental to the surrounding community or to nearby tribes. Such a determination by the SOI must be approved by the state's governor and legislature and by tribes within 75 miles. There must also be a local county or parish referendum, paid for by the tribe, before the regional BIA office may forward a tribe's application to take land into trust for purposes of gaming and a memorandum of understanding between the tribe and local government providing for payment by the tribe to mitigate local government costs. Subject to certain conditions, including state legislative approval, a tribe with an existing reservation may lease land for gaming to another tribe.