Order Code RS21499
Updated April 2, 2007

CRS Report for Congress

Indian Gaming Regulatory Act: Gaming on Newly Acquired Lands

M. Maureen Murphy
Legislative Attorney
American Law Division

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 in the 110th Congress and two reported bills in the 109th Congress, H.R. 4893 and S. 2078, all of which contain provisions to 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

[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 restricted[9] 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], 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.

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. 106-658, 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).

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 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 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/nigc/documents/land/potawatomi.jsp] (last visited March 24, 2005).

[20] 25 U.S.C. § 2719(b)(iii).

[21] 71 *Fed. Reg.* 58769. The comment period was extended to February 1, 2007, 71 Fed. Reg. 70335 (December 4, 2006); 71 Fed. Reg. 70335 (January 17, 2007), and corrections issued. 71 Fed. Reg. 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, only one bill, H.R. 1654, has been introduced addressing the issue of gaming on newly acquired lands. It 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 a newly restored tribes.

---

[22] Proposed 25 C.F.R. § 292.17 and 292,18, 71 *Fed. Reg.* 58769, 58774-58775..

[23] 65 *Fed. Reg.* 55471 (September 14, 2000). An earlier proposal, 57 *Fed. Reg.* 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 *Fed. Reg.*58769, 58774-58775.

In the 109th Congress, there were several bills, two of which were reported, S. 2078 (by the Senate Committee on Indian Affairs) and H.R. 4893 (by the House Committee on Resources).

S. 2078 would have eliminated, except for applications received by the SOI as of April 15, 2006, the exception to IGRA's prohibition on gaming on land acquired in trust after IGRA's passage that is based on the two-part SOI determination. It would have limited 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, it would have required: (1) the land to be in the state to which the tribe has "an historical and geographic nexus, as determined by the Secretary"; (2) a "temporal connection ... between the acquisition of the land and the date of recognition of the tribe, as determined by the Secretary" and (3) that SOI 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. 4893 would have preserved the exceptions to IGRA's prohibition on gaming on lands acquired after October 17, 1988, for lands that are within or contiguous to a tribe's reservation as it existed on October 17, 1988. It also would have preserved other exceptions for tribes that had submitted written trust or gaming applications prior to March 7, 2006, but would have required that the land be in the state where the tribe primarily resides and within the area where the tribe has a "primary geographic, historical, and temporal nexus." For tribes without such pre-March 2006 applications, the bill would have eliminated the ability to use a land claim settlement as a means of having gaming on newly acquired lands. H.R. 4893 would have applied more stringent standards than current law for newly recognized, acknowledged, restored or landless tribes to qualify lands for gaming. Had the bill been enacted, such tribes would have had to secure: (1) an SOI determination that the land is within the tribe's state and its "primary geographic, social, historical, and temporal nexus"; (2) an SOI determination that gaming on the lands would not be detrimental to the surrounding community and nearby Indian tribes; (3) gubernatorial concurrence in conformance with the laws of the state; and, (4) a mitigation agreement between the tribe and the county or parish government with respect to the "direct effects of the tribal gaming activities on the affected county or parish infrastructure and services." The bill also would have: (1) permitted tribes, subject to certain conditions, including state legislative approval, to lease land (except in Arizona) for gaming to another in-state tribe; (2) prohibited gaming on non-contiguous, out-of-state lands that have not, prior to enactment of this legislation, been approved for gaming by the SOI, the National Indian Gaming Commission, or a federal court; and (3) required SOI to issue a regulatory requirement that all applications for gaming on new lands establish an aboriginal or analogous historic connection to the land.