# 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

# 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)

# 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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|---|---|---|
| **Bush I** | **1988** | **IGRA is Enacted**<br>• No prohibition of off-reservation gaming. |
| **Clinton** | **1995** | **Part 151 adopts off-reservation criteria in § 151.11.**<br>• 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."<br>• Greater concern for local impacts: give greater weight to the state and local government concerns<br>• See concern for distance: greater scrutiny as distance from the reservation and the land to be acquired increases. |

# Administration Transitions and Gaming Policy

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|---|---|---|
| **Clinton** | **Jan. 16, 2001** | **Final Part 151 established a more demanding standard for off-reservation acquisitions.**<br>•Created a presumption in favor of land acquisition within reservation boundaries, and established more demanding standards for land acquisition outside reservation boundaries.<br>•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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|---|---|---|
| **Bush II** | **151 policy proposals** | **Draft policy considerations**: e.g., suspending trust land acquisition until new regs issued.<br><br>**More stringent standards considered**:<br>• Automatic disapproval for severe negative impacts to the environment or local community<br>• Higher burden on tribes to demonstrate need for off-reservation acquisitions<br>• Ability of members to commute for off-reservation employment<br>• 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

***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

# 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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