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Indian Gaming Regulatory Act (IGRA): 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 or Secretary) after October 17, 1988. The exceptions, however, raise the possibility of Indian gaming proposals for locations presently unconnected with an Indian tribe. Among the exceptions are land (1) 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; (2) acquired for tribes that had no reservation on the date of enactment of IGRA; (3) acquired as part of a land claim settlement; (4) acquired as part of an initial reservation for a newly recognized tribe; and (5) acquired as part of the restoration of lands for a tribe restored to federal recognition.

An implementing regulation was issued on May 20, 2009. It specifies the standards to be satisfied by tribes seeking to conduct gaming on lands acquired after October 17, 1988. The regulation includes limiting definitions of some of the statutory terms and considerable specificity in the documentation required for tribal applications. During the latter half of 2010, the Department of the Interior (DOI) conducted a series of consultation sessions with Indian tribes focusing on whether the implementing regulation should be revised. On June 13, 2011, DOI determined the regulation to be satisfactory and withdrew earlier departmental guidance, which had been issued before the regulation had become final. The guidance addressed how DOI handled tribal applications for off-reservation land acquisitions for gaming. It had elaborate requirements for a tribe to satisfy with respect to applications for gaming facilities not within commutable distances from the tribe's reservation.

A June 2012 U.S. Supreme Court decision, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, appears to have increased the possibility for challenges to secretarial decisions to take land into trust by (1) ruling that individuals who are potentially harmed by the proposed use of land taken into trust have standing under the Federal Administrative Procedure Act to bring suit, and (2) holding that suits to challenge the legality of a DOI decision to take land into trust that do not claim title to the land are not precluded by the Quiet Title Act, which contains a waiver of sovereign immunity for quiet title actions against the United States, except for suits involving Indian title.

Since the *Patchak* decision, there have been two noteworthy developments. First, the Bureau of Indian Affairs revised the land acquisition regulations to specify that, once there is final agency action, land is to be taken into trust immediately without a 30-day waiting period. Second, a June 4, 2015, *en banc* decision of a federal appellate court, *Big Lagoon Rancheria v. California,* 789 F. 3d 947 (9th Cir. 2015), held that a challenge to the validity of a trust acquisition must be brought within the Administrative Procedure Act's six-year statute of limitations.[1]

Nine laws have been enacted in recent Congresses with gaming prohibitions in connection with specific lands being taken into trust: (1) P.L. 114-69, the Albuquerque Indian School Land Transfer Act, which provides for trust acquisitions for 19 Pueblos and specifies that class I, class II, or class III gaming may not take place on the acquired trust land; (2) P.L. 114-181, which transfers in trust "for non-gaming purposes" certain federal Bureau of Land Management land in California for the benefit of the Susanville Indian Ranchera; (3) P.L. 113-179, the Gun Lake Trust Land Reaffirmation Act, which ratified the DOI's May 15, 2005, trust acquisition of the land at issue in *Match-E-Be-Nash-She-Wish Band of-Pottawatomi Indians v. Patchak*, and required that any federal court action relating to that land should be dismissed; (4) P.L. 113-134, which provides for the trust acquisition of certain federal land for the Pascua Yaqui Tribe of Arizona; (5)

P.L. 113-127, which provides for taking certain Bureau of Land Management land into trust for the benefit of the Shingle Springs Band of Miwok Indians and prohibiting IGRA class II and class III gaming on the land; (6) P.L. 112-97, which authorizes the acquisition of certain land for the Quileute Indian Tribe in the state of Washington; (7) P.L. 112-212, which declares certain federal land to be held in trust for the Bridgeport Indian Colony; (8) Section 2601(h)(4)(A) of P.L. 111-11, which prohibits class II and class III gaming on land that the provision transfers to be held in trust for the Washoe Tribe; and (9) P.L. 111-323, which prohibits gaming on federal land transferred to the Hoh Tribe.

Legislation proposed in the 114^{h} Congress includes two bills, S. 732 and H.R. 249, which would amend the Indian Reorganization Act to make all federally recognized Indian tribes eligible for trust land acquisition. There are also a number of bills providing federal recognition of or land acquisitions for particular tribes with provisions restricting IGRA gaming for those tribes or on those lands.

Contents

Requirements for Gaming on "Indian Lands" 1
Geographic Extent of IGRA Gaming 1
How Land Is Taken into Trust 2
Challenges to Taking Land into Trust 3
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak: Six-Year Statute of Limitations Applies to Land-into-Trust Decisions 3
Big Lagoon Rancheria v. California: Challenge to Validity of Trust Acquisition for a Tribe Not Recognized in 1934 Is Not Subject to Collateral Attack Decades Later 5
Secretarial Two-Part Determination Exception to IGRA's Prohibition of Gaming on Lands Acquired in Trust After Enactment of IGRA 7
Other Exceptions 7
Final Rule for Gaming on Newly Acquired Trust Lands 8
Secretarial Determination 9
Contiguous Lands 10
Land Claim Settlement 10
Initial Reservation for a Newly Acknowledged Tribe 10
Restored Lands 11
Bureau of Indian Affairs (BIA) Rescinded Guidance 13
DOI Review of the Standards for Taking Land into Trust for Gaming and Determination to Rescind the Guidance 14
Enacted and Proposed Legislation 16
111th Congress 16
112th Congress 17
113th Congress 17
Proposed Bills Addressing the Process 17
Other Proposed Bills 18
114th Congress 20
Other Proposed Bills 20

Contacts

Author Information 23

Requirements for Gaming on "Indian Lands"

The Indian Gaming Regulatory Act (IGRA)[2] provides a framework for gaming on "Indian lands,"[3] 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.[4] 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."[5] 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.[6] 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 allowing all forms of casino gaming.[7]

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";[8] 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."[9] 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.[10]

The second alternative has two prongs: (a) the land must be in trust or restricted[11] status, and (b) the tribe must exercise governmental authority over it. Determining trust or restricted status

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[2] P.L. 100-497, 102 Stat. 2467, 25 U.S.C. §§2701 - 2721; 18 U.S.C. §§1166 - 1168. *See* CRS Report R42471, *Indian Gaming: Legal Background and the Indian Gaming Regulatory Act (IGRA)*, by Jane M. Smith.

[3] 25 U.S.C. §2703(4).

[4] 25 U.S.C. §§2703(6) - (8), and 2710.

[5] 25 U.S.C. §§2710(b)(1)(A), and 2710(d)(1)(B)(4).

[6] 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/node/22.

[7] 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 sub nom* Sycuan Band of Mission Indians v. Wilson, 521 U.S. 1118 (1997); State ex rel. Clark v. Johnson, 120 N.M. 562; 904 P. 2d 11 (1995).

[8] 25 U.S.C. §2703(4)(A).

[9] 25 U.S.C. §2703(4)(B).

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

[11] "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 Secretary [of the Interior] because of limitations in the conveyance instrument pursuant to federal law." 25 C.F.R. §151.2. Under 25 U.S.C. §2703(4)(A), restricted land may only be considered "Indian lands," for IGRA purposes if the tribe "exercises governmental power" over it. *Kansas*

involves Department of the Interior (DOI or department) records. Determining whether a tribe exercises governmental authority may be a simple factual matter involving, for example, whether the tribe has a governmental organization that performs traditional governmental functions such as imposing taxes.[12] On the other hand, it could be a matter requiring judicial construction of federal statutes.[13]

How Land Is Taken into Trust

Congress has the power to determine whether to take tribal land into trust.[14] There are many statutes that require DOI to take land into trust for a tribe or an individual Indian.[15] 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 (IRA).[16] Although the IRA has been held by the Supreme Court[17] to apply only to tribes "under Federal jurisdiction" in 1934, a recent opinion of the Solicitor of the Department of the Interior provides guidance on how tribes may be able to satisfy that requirement.[18] Procedures for land acquisition are specified in 25 C.F.R., Part 151.[19] By this process, Indian owners of fee land, that is, land owned outright and unencumbered by liens that impair marketability, may apply to have their fee title conveyed to the SOI to be held in trust for their benefit. Among the effects of this process are 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. In determining whether to approve an application to take land into trust under this statute, the SOI is required to consider a number of factors[20] and to inform "state

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.

[12] *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.

[13] 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.

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

[15] See, e.g., §606 of the Omnibus Indian Advancement Act, P.L. 106-568, 114 Stat. 2868, 2909, 25 U.S.C. §1778d, mandating that the SOI take into trust any land acquired by the Torres-Martinez Desert Cahuilla Indians within certain defined areas.

[16] 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. For a discussion of a recent Supreme Court case confining the authority of DOI to take land into trust pursuant to this statute to those tribes which were "under Federal jurisdiction" when the Wheeler-Howard Act was enacted in 1934, *see* CRS Report RL34521, *Carcieri v. Salazar: The Secretary of the Interior May Not Acquire Trust Land for the Narragansett Indian Tribe Under 25 U.S.C. Section 465 Because That Statute Applies to Tribes "Under Federal Jurisdiction" in 1934*, by M. Maureen Murphy.

[17] Carcieri v. Salazar, 555 U.S. 379 (2009).

[18] U.S. Department of the Interior, Office of the Solicitor, M-3702, "The Meaning of 'Under Federal Jurisdiction' for the Purposes of the Indian Reorganization Act"(March 12, 2014), available at http://www.doi.gov/solicitor/opinions/M-37029.pdf. *See also* CRS Legal Sidebar, "Department of the Interior Issues Guidance in Connection with Carcieri v. Salazar," by Jane M. Smith (March 20, 2014).

[19] The procedures specified in 25 C.F.R., Part 151, are further explicated in a BIA publication, "Acquisition of Title to Land Held in Fee or Restricted Status" (Fee-to-Trust Handbook) (June 28, 2016), http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf.

[20] The factors are listed in 25 C.F.R. §§151.10 (on-reservation acquisitions) and 151. 11 (off-reservation acquisitions).

and local governments having regulatory jurisdiction over the land to be acquired," giving them "30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments."[21]

Challenges to Taking Land into Trust

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak: Six-Year Statute of Limitations Applies to Land-into-Trust Decisions

Until the U.S. Supreme Court's June 2012 decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[22] there was an assumption that U.S. sovereign immunity under the Quiet Title Act[23] barred challenges to any decision of the Secretary to take land into trust once title has passed to the United States. The Quiet Title Act authorizes the federal courts "to adjudicate a disputed title to real property in which the United States claims an interest," but not

For off-reservation acquisitions by tribes, there are supplemental requirements. An application from a tribe seeking to have any land taken into trust must show (1) statutory authority; (2)land use for a particular purpose; (3) impact of removal of land from state and local tax base; (4) potential jurisdictional and land use problems; (5) BIA's capacity to handle the new responsibilities; and (6) information for the SOI to meet environmental law responsibilities. 25 C.F.R. §151.10. In addition, a tribe seeking an off-reservation acquisition of land-into-trust will be subjected to the following criteria: (1) greater scrutiny as the distance from the reservation increases; (2) preparation of a business plan specifying potential economic benefits, if a business enterprise is contemplated; and (3) a requirement that the SOI give greater weight to concerns raised by the relevant state and local governments with respect to potential impacts on "regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. §151.11.

[21] 25 C.F.R. §151.10. The factors which the Secretary of the Interior (SOI) must weigh in considering an application for an on-reservation acquisition include the need for the land; its proposed use; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. §§151.10(b), (c), (d), (e), and (f). In addition to these factors, the SOI must consider other factors and give greater weight to state and local concerns when an off-reservation acquisition is at issue. The regulation reads:

> The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:
>
> (a) The criteria listed in §151.10....
>
> (b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.
>
> (c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.
>
> (d) Contact with state and local governments pursuant to §151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have land taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. 25 C.F.R. §151.11.

[22] ___ U.S. ___, 132 S. Ct. 2199 (2012).

[23] 28 U.S.C §2409a.

with respect to "trust or restricted Indian lands."[24] In *State of South Dakota v. U.S. Department of the Interior*,[25] a federal circuit court made such an assumption, prompting DOI to issue a regulation requiring a 30-day waiting period between the date of the Secretary's final determination to take land into trust and the actual trust acquisition.[26]

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[27] the U.S. Supreme Court ruled that the Quiet Title Act's preservation of sovereign immunity for quiet title actions involving Indian trust lands did not extend to suits in which the plaintiff is not seeking to claim title, that is, to take over the land. Moreover, the Court held that the Federal Administrative Procedure Act's judicial review provision permitted suits within its six-year statute of limitations period. The decision also includes a broad interpretation of who may maintain standing under the main statute under which land is taken into trust, 25 U.S.C. Section 465, refusing to accept the arguments of DOI and the Indian tribe that standing should be limited to those, such as state and local governments who might lose tax revenues or nearby Indian tribes who might have competing claims to the land, who would be directly affected by the land acquisition. Instead, the Court determined that a plaintiff who owns nearby property and asserts that the planned use of the land as a gaming casino will harm his enjoyment of his property satisfies the standing requirements, placing his interests "at least arguably ... 'within the zone ... protected or regulated by [25 U.S.C.§465].'"[28]

In response to the decision, the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) revised its Land Acquisition regulations, 25 C.F.R., Part 151,[29] to eliminate the 30-day waiting period and specify how parties seeking judicial review of land-into-trust decisions may discern when final agency action occurs for the two kinds of decisions possible for land-into-trust applications. Decisions by the SOI or the Assistant Secretary of the Interior for Indian Affairs (AS-IA) are final agency actions. When the SOI or the AS-IA issues a decision to take land into trust, the DOI must publish a notice of the decision "promptly" in the *Federal Register* and take the land into trust "[i]immediately."[30] In contrast, land-into-trust decisions by Bureau of Indian Affairs officials (BIA-level decisions) are not final agency action and do not require *Federal Register* notice. They require notice in "a newspaper of general circulation serving the affected area of the decision" as well as notice to state and local officials with "regulatory jurisdiction over the land to be acquired" and to "interested parties who have made themselves known, in writing,

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[24] *Id.*

[25] 69 F. 3d 878 (8th Cir. 1995).

[26] 61 Fed. Reg. 18082 (April 24, 1996). In *State of South Dakota v. U.S. Department of the Interior*, 69 F. 3d 878 (8th Cir. 1995), confronted by the DOI position that its acquisition of trust land was unreviewable, a federal circuit court found the Indian Reorganization Act provision to be an unconstitutional delegation of authority. While the case was pending before the Supreme Court, DOI cured the defect by issuing a regulation specifying a 30-day waiting period between the date of the final determination to take land into trust and the actual trust acquisition. 61 *Fed. Reg.* 18082 (April 24, 1996). The Supreme Court, therefore, vacated the judgment. *Department of the Interior v. South Dakota*¸19 U.S. 919 (1996).

[27] ___ U.S. ___, 132 S. Ct. 2199 (2012).

[28] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, ___ U.S. ___, 132 S. Ct. 2199, 2210, quoting Ass'n. of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 143 (1970).

[29] 78 Fed. Reg. 67928 (November 13, 2013). https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[30] The regulations specify that the SOI shall "[i]mmediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment of the requirements of 25 C.F.R. 151.13 [pertaining to title examination] and any other Departmental requirements." 25 C.F.R. §151.12(c)(2), 78 Fed. Reg. 67928, at 67937-67938 (November 13, 2013). https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

to the official prior to the decision."[31] Land may not be taken into trust pursuant to BIA-level decisions "until administrative remedies are exhausted ... or ... the time for filing a notice of appeal has expired and no administrative appeal has been filed."[32] Once a BIA-level decision has become final, the land is to be acquired in trust "[i]mmediately."[33]

Big Lagoon Rancheria v. California: Challenge to Validity of Trust Acquisition for a Tribe Not Recognized in 1934 Is Not Subject to Collateral Attack Decades Later

In a June 4, 2015, *en banc* decision, in *Big Lagoon Rancheria v. California,*[34] the U.S. Court of Appeals for the Ninth Circuit held that a claim that land taken into trust for a tribe not recognized in 1934 may not be raised decades after the trust acquisition in a collateral attack on the trust acquisition. Instead, according to the decision, a challenge to the validity of a trust acquisition must be brought under the Administrative Procedure Act (APA)[35] and is, therefore, subject to a six-year statute of limitations.[36]

The *en banc* court overturned an earlier opinion issued by a divided three-judge panel. The case involves a tract of land taken into trust in 1994 for the Big Lagoon Rancheria of California (Big Lagoon). Big Lagoon first appeared on the list of "Indian Tribal Entities That Have a Government-to-Government Relationship With the United States" in 1979.[37] The dispute with California was precipitated by a breakdown in negotiations for a tribal-state gaming compact under IGRA when California objected to the site preferred by the Big Lagoon for its gaming operation.[38] On the basis of the Supreme Court's *Carcieri v. Salazar*[39] decision, the state claimed that the site had not been validly taken into trust because the tribe had not been under federal jurisdiction in 1934.[40] It, therefore, asserted that the state was under no obligation to negotiate in

[31] 25 C.F.R. §151.12(d)(2), 78 Fed. Reg. 67928, at 67938. https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[32] 25 C.F.R. §151.12(d)(2)(iv), 78 Fed. Reg. 67928, at 67938. https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[33] The regulations specify that the SOI shall "[i]mmediately acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies ... and upon the fulfillment of the requirements of § 151.13 [pertaining to title examination] and any other Departmental requirements." 25 C.F.R. §151.12(d)(2)(iv), 78 Fed. Reg. 67928, 67938. https://www.federalregister.gov/articles/2013/11/13/2013-26844/land-acquisitions-appeals-of-land-acquisition-decisions.

[34] 789 F. 3d 947 (9th Cir. 2015).

[35] 5 U.S.C. §§701 and 706.

[36] Under 28 U.S.C. §2401(a), civil actions brought against the United States must be commenced "within six years after the right of action first accrues." In *Wind River Mining Corp. v. United States*¸946 F. 2d 710, 713 (9th Cir. 1991), the U.S. Court of Appeals for the Ninth Circuit held that this statute applies to actions brought under the Administrative Procedure Act.

[37] 44 Fed. Reg. 7235 (Feb. 6, 1979).

[38] 741 F. 3d 1032 at 1037.

[39] 555 U.S. 397 (2009).

[40] Id. at 1037-1038.

good faith for tribal gaming on a tract of trust land that did not meet IGRA's definition of "Indian lands,"[41] and, thus, was not eligible for IGRA gaming.[42]

A majority of the Ninth Circuit three-judge panel agreed with California. It found that "[t]here was no family or other group on what is now the Big Lagoon Rancheria in 1934";[43] that Big Lagoon was not a tribe under federal jurisdiction in 1934;[44] and, therefore, that the DOI had no authority under the IRA to take land into trust for Big Lagoon.[45] According to the majority, Big Lagoon could not rely on the DOI's action in taking the particular land into trust to assert tribal jurisdiction over it for IGRA purposes. A dissenting opinion[46] argued that the APA, which has a six-year statute of limitations, was the only avenue to challenge a land-into-trust decision. The majority, however, rejected this argument, and ruled that the APA covered only challenges involving procedural violations. Quoting from an earlier case, the court reasoned that "'[t]he government should not be permitted to avoid all challenges to its action, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs.'"[47] It, therefore, held that the land was not "Indian lands" for IGRA purposes. According to the court, California could contest the validity of the trust acquisition as a defense to a claim that it was not negotiating in good faith because, with respect to "contests [of] the substance of an agency decision as exceeding constitutional or statutory authority," a "challenger may ... [raise such a challenge] later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger."[48]

The *en banc* court rejected this approach. It quoted the statement by the Supreme Court in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* that "a challenge to the BIA's 'decision to take land into trust' is 'a garden-variety APA claim.'"[49] It contrasted the Big Lagoon fact situation—"a belated collateral attack"—from the timely challenge to a SOI decision to take land into trust that was at issue in *Carcieri.*[50] Citing various Ninth Circuit precedents, the court stated that:

> [a]llowing California to attack collaterally the BIA's decision to take the eleven-acre parcel into trust outside the APA would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the Federal government.[51]

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[41] The Indian Gaming Regulatory Act (IGRA) defines "Indian lands" as follows: "[t]he term "Indian lands" means-(A) all lands within the limits of any Indian reservation; and (B) 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" 25 U.S.C. §2703(4),

[42] 741 F. 3d 1032, 1038.

[43] *Id.* at 1044-1045.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1045 (Rawlinson, J., dissenting).

[47] *Id*, at 1043, quoting Wind River Mining Corp. v. United States, 946 F. 2d 710, 715 (9th Cir. 1991).

[48] *Id.*

[49] Big Lagoon Rancheria v. California, 789 F. 3d 947, 953, quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, ___ U.S. ___, 132 S.Ct. 2199, 2208 (2012).

[50] *Id.* at 953.

[51] *Id.* at 954, citing United States v. Backlund, 689 F. 3d 986, 1000 (9th Cir. 2012), and United States v. Lowry, 512 F. 3d 1194 (9th Cir. 2008), both of which involved denial of attempts by criminal defendants to collaterally attack administrative decisions at times circumventing the statute of limitations.

Secretarial Two-Part Determination Exception to IGRA's Prohibition of Gaming on Lands Acquired in Trust 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" land. One exception, sometimes referred to as a two-part determination, permits gaming on lands newly taken into trust with the consent of the governor of the state in which the land is located after the 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."[52]

Other Exceptions

Other exceptions permit gaming on after-acquired land and do not require gubernatorial 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.[53]
2. If a tribe 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."[54]
3. A tribe may have gaming on lands taken into trust as a land claim settlement.[55]

[52] 25 U.S.C. §2719(b)(1). For recent SOI two-part determination decisions see U.S. Department of the Interior, Press Release, "Interior Approves Fort Berthold Land Trust Application for New Refinery" (October 19 2012), http://www.doi.gov/news/pressreleases/Interior-Approves-Fort-Berthold-Land-Trust-Application-for-New-Refinery-in-North-Dakota.cfm, 77 *Fed. Reg.* 62523 (October 15, 2012), http://www.gpo.gov/fdsys/pkg/FR-2012-10-15/pdf/2012-25255.pdf; U.S. Department of the Interior, News Release, "Echo Hawk Issues Two Decisions on Tribal Gaming Applications" (December 20, 2011) (Keweenaw Bay Indian Community and Cayuga Nation of New York) http://www.bia.gov/cs/groups/public/documents/text/idc015848.pdf; and U.S. Department of the Interior, News Release, "Assistant Secretary Echo Hawk Issues Four Decisions on Tribal Gaming Applications" (September 2, 2011) (Enterprise Rancheria of Maidu Indians, North Fork Rancheria of Mono Indians, Guidiville Band of Pomo Indians, and Pueblo of Jemez), http://www.bia.gov/cs/groups/public/documents/text/idc015848.pdf.

[53] 25 U.S.C. §2719(a)(2)(A)(i) and 2719(a)(2)(A)(ii).

[54] 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).

[55] 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.

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.[56]
5. A tribe may have gaming on lands representing "the restoration of lands for an Indian tribe that is restored to Federal recognition."[57]

Final Rule for Gaming on Newly Acquired Trust Lands

The Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) issued a final rule for gaming on newly acquired trust lands, 25 C.F.R., Part 292, on May 20, 2008.[58] The rule applies to all requests under 25 U.S.C. Section 2719 on which there has not been final agency action prior to June 19, 2008, the effective date of the regulation. It contains an exception for opinions issued by the DOI or the National Indian Gaming Commission (NIGC)[59] before that date that reserve "full discretion to qualify, withdraw or modify such opinions."[60]

In addition to specifying procedures for securing determinations as to whether land may qualify for one of IGRA's exceptions to its prohibition on gaming on newly acquired trust lands, the rule specifies factors that will be considered in making determinations under the statute. The rule covers both the two-part Secretarial Determination that gaming would benefit the tribe and not be detrimental to the surrounding community and the other exceptions to IGRA's ban on gaming on lands acquired after October 17, 1988: lands contiguous to the reservation boundaries; lands taken into trust on the basis of land claims settlements; initial reservations for newly acknowledged tribes; and lands restored to newly restored tribes. Requests for Secretarial Determinations must be directed to the SOI.[61] Land-into-trust applications or applications requiring a determination of reservation status are to be directed to the BIA's Office of Indian Gaming;[62] requests for opinions

[56] 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_nottawaseppihuronpotawatomibnd.pdf&tabid=120&mid=957.

[57] 25 U.S.C. §2719(b)(1) (B)(iii).

[58] 73 Fed. Reg. 29354. On October 5, 2006, the Bureau of Indian Affairs (BIA) issued a proposed regulation setting standards for determining whether class II or class III gaming may take place on after-acquired lands. 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. There were earlier proposed regulations that never became effective, 65 Fed. Reg. 55471 (September 14, 2000). An earlier proposal, 57 *Fed. Reg.* 51487 (July 15, 1991), was never issued in final form.

[59] The National Indian Gaming Commission (NIGC) is a three-member Commission established by IGRA; it is composed of a Chairman, appointed by the President with the advice and consent of the Senate, and two associate members, appointed by the SOI. 25 U.S.C. §§2704 (a) and (b)(1). It is charged with certain regulatory responsibilities with respect to gaming under IGRA. For further information, see the NIGC website at http://www.nigc.gov/.

[60] 25 C.F.R. §292.26. The regulation specifies that it "shall not apply to applicable agency actions when, before the effective date ... the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. §2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions." 25 C.F.R. §292.26(b).

[61] 25 C.F.R. §292.13(a).

[62] 25 C.F.R. §292.3(b).

on whether a particular parcel meets one of the other exceptions may be directed either to the BIA's Office of Indian Gaming or the NIGC.[63]

Secretarial Determination

The rule specifies both procedures and application requirements for Secretarial Determinations that gaming on newly acquired lands would be in the best interest of the tribe and not detrimental to the surrounding community.[64] The information to be included in consultation letters sent to state and local governments is specified.[65] The rule specifies that a tribal application for a Secretarial Determination may be submitted at the same time as the application to have the land taken into trust.[66] The regulation includes (1) a definition of "surrounding community" that covers local governments and tribes within a 25-mile radius;[67] (2) detailed requirements as to projections that must accompany the application respecting benefits to the tribe and local community, potential detrimental effects, and proposals to mitigate any detrimental impacts.[68] In addition to projected benefits and detrimental impacts, the application for the Secretarial Determination must include (1) proof of present ownership and title status of the land; (2) any approved gaming ordinance, tribal organic documents, or gaming management contract; (3) distance of the land from any tribal reservation or trust lands and from the tribal governmental headquarters; and (4) the class III gaming compact, if one has been negotiated, otherwise, the proposed scope, including size, of the gaming operation.[69]

Among the detailed information that an application must contain on the projected benefits of the proposed gaming establishment are projections about income; tribal employment; benefits to the relationship with the non-Indian community; distance from the tribal government's location; and evidence of "significant historical connections, if any, to the land."[70] The rule also specifies that the following types of information may be included to "provide a basis for a Secretarial Determination": consulting agreements, financial and loan agreements, and any other agreements relating to the gaming establishment or the land on which it will be located.[71]

For evaluating the potential detrimental impact on the surrounding community, the rule requires submission of information to satisfy requirements of the National Environmental Policy Act.[72] It

[63] 25 C.F.R. §292.3(a).

[64] 25 C.F.R. §§292.3.13-.24.

[65] 25 C.F.R. §292.20. The letter rule stipulates topics which recipients are to be asked to address in their comments; these parallel the potential detrimental effect factors which the tribe must address in its application. 25 C.F.R. §§292.20 (b) (1) - (6) (consultation letter); 25 C.F.R. §§292.18(b) - (g) (tribal application).

[66] 25 C.F.R. §292.15.

[67] 25 C.F.R. §292.2. In Citizens for a Better Way v. U.S. Dep't. of the Interior, 2015 WL 5658925, at *13 (E.D. Cal. Sept. 24, 2015), a case challenging a Secretarial two-part determination on various grounds, the court found that the BIA's "decision to use a 25-mile radius was not arbitrary and capricious." According to the court, the decision was backed by "a reasonable explanation,""[t]he 25-mile radius best reflects those communities whose governmental functions, infrastructure or services may be affected by the potential impacts of a gaming establishment."

[68] 25C.F.R. §§292.17 - 18.

[69] 25 C.F.R. §292.16.

[70] 25 C.F.R. §292.17. "Significant historical connection" is defined elsewhere to mean "that the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation, the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. §292.2.

[71] 25 C.F.R. §292.17(j).

[72] 42 U.S.C. §4321 et seq.

also details a variety of factors that must be addressed as aspects of the potential impact on the social and economic life of the surrounding community. For example, the application must address anticipated impacts on the community's character, land use patterns, economic development, and compulsive gambling within the community. Costs and potential sources of revenue to mitigate these effects must be identified. There is also a provision that requires an assessment of the impact on the "traditional cultural connection to the land" of any other tribe that has a significant historical connection to the land.[73]

Upon determining that gaming on the new lands would be in the best interest of the tribe and not detrimental to the local community, SOI must notify the state's governor. For the application to be approved, the governor must affirmatively concur in the determination within one year, with a possible one-time 180-day extension. If the governor does not affirmatively concur within the required time, the SOI will inform the applicant tribe that the application is no longer under consideration.[74]

Contiguous Lands

IGRA exempts newly acquired trust lands "within and contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988."[75] The rule defines "contiguous" to mean "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point."[76]

Land Claim Settlement

IGRA includes an exception to its prohibition of gaming on after-acquired lands for "land ... taken into trust as part of ... a settlement of a land claim."[77] The rule elaborates on this by setting forth three methods by which land resulting from a land claim may qualify for this exception: (1) the land may have been the subject of land claim settlement legislation;[78] (2) the land may have been acquired under the settlement of a land claim executed by the parties, including the United States, which returns some land to the tribe and "extinguishes or resolves with finality the claims regarding the land returned";[79] or (3) the land may have been acquired under the settlement of a land claim not executed by the United States but entered into as a final court order or "an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue."[80]

Initial Reservation for a Newly Acknowledged Tribe

IGRA provides an exception to its prohibition on gaming on after-acquired lands for "lands ... taken into trust as part of ... the initial reservation of an Indian tribe acknowledged by the

[73] 25 C.F.R. §292.18.

[74] 25 C.F.R. §292.23.

[75] 25 U.S.C. §2719(a)(1).

[76] 25 C.F.R. §292.2.

[77] 25 U.S.C. §2719(b)(1)(B)(i).

[78] 25 C.F.R. §292.5(a). The rule covers land "[a]cquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe in legislation enacted by Congress."

[79] 25 C.F.R. §292(5)(B)(1).

[80] 25 C.F.R. §292.5.

Secretary under the Federal acknowledgment process."[81] To satisfy this exception, the rule requires that (1) the tribe must have been acknowledged through the administrative acknowledgment process under 25 C.F.R., Part 83; (2) the tribe must have no gaming facility under the newly restored lands exception under IGRA; and (3) the land must be the first proclaimed reservation after acknowledgment.[82] If the tribe has no proclaimed reservation, the tribe must demonstrate its governmental presence and tribal population in the state and its significant historical connections with the area within the state, as well as a modern connection.[83]

On July 29, 2016, a three-judge panel of the U.S Court of Appeals for the District of Columbia[84] upheld the December 12, 2014, ruling of the U.S. District Court for the District of Columbia in *The Confederate Tribes of the Grand Ronde Community of Oregon v. Jewell*.[85] The case involves a decision by the SOI to take land into trust for gaming as an initial reservation for the Cowlitz Indian Tribe.[86] With respect to the issue of whether the trust acquisition met the requirements for gaming on "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process,"[87] both courts upheld the SOI's determination. The district court found that the SOI's determination that the regulatory requirement, under 25 C.F.R. §292.6, that there be a "significant historical connection" between the tribe and any land to be considered an initial reservation was satisfied by the SOI's finding that the tribe seeking the acquisition had shown that it had used and occupied land in the vicinity of the land in question.[88] According to the district court, the tribe need not show occupation and use of the actual land that it seeks to be considered as its initial reservation for purposes of the IGRA gaming exception.[89]

Restored Lands

IGRA provides an exception to its prohibition of gaming on after-acquired lands for "lands ... taken into trust as part of ... the restoration of lands for an Indian tribe that is restored to Federal

[81] 25 U.S.C. §2719(b)(1)(B)(ii).

[82] 25 C.F.R. §§292.6(a)(b) and (c).

[83] 25 C.F.R. §292.6(d). Two modern connections are mentioned, either of which would qualify: the land must be near where a significant number of tribal members reside; it must be within a 25-mile radius of tribal headquarters or facilities that have existed at least two years at that location.

[84] Confederated Tribes of the Grand Ronde Com'ty of Oregon v. Jewell, No. 14-5326, 2016 WL 40560092 (D.C. Cir. July 29, 2016).

[85] 75 F. Supp.3d 387 (D.D.C.). For further information, see CRS Legal Sidebar entry, "D.C. District Court Upholds Interior's Interpretation of Sections 5 and 19 of the Indian Reorganization Act after the Supreme Court's Carcieri Decision," by Jane M. Smith (Mar. 5, 2015).

[86] The Cowlitz Indian Tribe was officially acknowledged as an Indian tribe in 2002, 67 Fed. Reg. 607 (Jan. 4, 2002). To take the land into trust for the Cowlitz Indian Tribe, the Dep't. of the Interior cited 25 U.S.C. §465 and found that the Cowlitz Indian Tribe met a requirement of that statute, i.e., it was "under Federal jurisdiction" in 1934. This determination was upheld by both the district court and the appellate court, and that aspect of this case is discussed further in CRS Report RL3452, *Carcieri v. Salazar:* The Secretary of the Interior May Not Acquire Trust Land for the Narrragansett Indian Tribe Under 25 U.S.C. Section 465 Because That Statute Applies to Tribes "Under Federal Jurisdiction" in 1934.

[87] 25 U.S.C. §2719(b)(1)(B)(ii).

[88] 75 F. Supp. 3d at 410.

[89] According to the court , [t]he regulation does not require that the occupancy and use be 'long term' or that the tribe claim any ownership or control, exclusive or otherwise, over the land. Nor does the regulation require the Cowlitz Tribe to have occupied or used the Parcel or the land adjacent to it." *Id.* Moreover, the court also rejected an argument offered by plaintiffs that would have required the secretary to identify with precision a geographic area in which the tribe had "significant historical connections" as a preliminary to finding that the parcel in question fell within such an area. *Id.* at n. 15.

recognition."[90] The rule generally[91] specifies that the tribe must satisfy three requirements before the restored lands exception may be invoked: (1) the tribe must have been federally recognized at one time;[92] (2) it must have lost its government-to-government relationship with the federal government;[93] and (3) it must have been restored to federal recognition.[94] The lands must meet certain criteria.[95] Trust acquisition of the lands may have been mandated by restoration legislation.[96] If trust acquisition is authorized but not mandated by restoration legislation and the legislation does not specify a particular geographic area, the rule requires that (1) the lands must be in the state where the tribe's government or population is located; (2) the tribe must demonstrate one or more modern connections to the land;[97] (3) it must show significant historical connection to the land; and (4) there must be a temporal connection between the date of acquisition of the land and the date of the tribe's restoration.[98] Similar requirements apply to tribes acknowledged under the administrative process, provided they have not had an initial reservation proclaimed after October 17, 1988. Tribes recognized by judicial determination or settlement agreement to which the United States is a party are also subject to similar requirements.[99]

[90] 25 U.S.C. §2719(b)(1)(B)(iii).

[91] A grandfathering provision, 25 C.F.R. §292.26(b), provides an exception for "agency actions, when, before the effective date of these regulations, the Department [of the Interior] or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. §2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions." In County of Amador, California v. United States Dep't. of the Interior, 136 F. Supp. 3d 1193, 1222 (E.D. Cal. 2015), the court upheld an acquisition for the Ione Band of Miwok Indians as "restored lands" although it did not satisfy any of the criteria in 25 C.F.R. §292.7. The court stated that the grandfathering provision, 25 C.F.R. §292.26(b), "reasonably safeguards against conflict with agency actions in which attempts to seek gaming were underway" and found the provision was not arbitrary or capricious.

[92] The regulation provides a non-exclusive list of four methods by which a tribe may establish its having been federally recognized: (1) treaty negotiations with the United States; (2) the existence of a determination by DOI that the tribe could organize under the IRA or the Oklahoma Indian Welfare Act; (3) federal legislation indicating the existence of a government-to-government relationship; and (4) acquisition by the United States at one time of land for the benefit of the tribe. 25 C.F.R. §§292.8(a) - (d).

[93] Ways of establishing loss of government-to-government relationship that are specified in the rule are: termination legislation, restoration legislation, and "[c]onsistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship." 25 C.F.R. §292.9.

[94] 25 C.F.R. §292.7. To establish that it has been restored to federal recognition, a tribe must show: restoration legislation; recognition under the administrative process, 25 C.F.R., Part 83; or judicial determination in a settlement agreement entered into by the United States. 25 C.F.R. §292.10.

[95] 25 C.F.R. §§292.11 - 12.

[96] 25 C.F.R. §292.11(a) (requirements for trust acquisitions for tribes restored by federal legislation).

[97] Modern connections include reasonable commuting distance of tribal reservation; if tribe has no reservation, land must be near where a significant number of tribal members reside; land must be within a 25-mile radius of where the tribal governmental headquarters have been for at least two years. 25 C.F.R. §292.12(a).

[98] A temporal relationship may be evidenced by a tribe's first request for newly acquired lands since restoration or if the tribe is not gaming on other lands, a request for trust acquisition within 25 years of restoration. 25 C.F.R. §292.12(c).

[99] 25 C.F.R. §§292.11(b) (administrative acknowledgment); 292.11(c) (judicial determination).

Bureau of Indian Affairs (BIA) Rescinded Guidance

On January 3, 2008, less than five months before promulgating the final rule applicable to gaming on newly acquired lands, DOI issued departmental "Guidance on taking off-reservation land into trust for gaming purposes"[100] (Guidance), which it rescinded on June 13, 2011.[101] Virtually simultaneously with issuing the Guidance and based on the criteria in the Guidance, the department sent letters to approximately 22 tribes either rejecting their applications to take off-reservation land into trust for Indian gaming or returning them as incomplete.[102] The Obama Administration subjected the guidance to scrutiny[103] and withdrew it on June 13, 2011, following government-to-government consultations with tribal leaders and a review of BIA's land acquisition regulations[104] and those applicable to gaming on lands taken into trust after October 17, 1988.[105]

The rescinded Guidance was premised on an interpretation of the Indian Reorganization Act of 1934 (IRA),[106] which often provides the statutory basis for BIA to take land into trust for an Indian tribe, as primarily intended to be a means for tribes to consolidate reservation lands that were lost through the earlier allotment policy, which the IRA repudiated.[107] The 2008 Guidance,

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[100] "Guidance on taking off-reservation land into trust for gaming purposes," Memorandum from Assistant Secretary for Indian Affairs, Carl Artman, to All Regional Directors, Bureau of Indian Affairs, and George Skibine, Office of Indian Gaming (January 3, 2008), http://www.bia.gov/idc/groups/public/documents/text/idc-001896.pdf.

[101] "Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes," Memorandum from Assistant Secretary—Indian Affairs Larry Echo Hawk, to All Regional Directors, Bureau of Indian Affairs, and Director, Office of Indian Gaming (June 13, 2011). (Hereinafter, June 13, Memorandum).

[102] Denial letters were issued to: the Big Lagoon Rancheria, the Chemehuevi Indian Tribe, the Hannahville Indian Community, the Pueblo of Jemez, the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, the Los Coyotes Band of Cahuilla & Cupeno Indians, the Mississippi Band of Choctaw Indians, the St. Regis Mohawk Tribe, the Stockbridge Munsee Community of Wisconsin, the Seneca-Cayuga Tribe of Oklahoma, and the United Keetoowah Band of Cherokee Indians. In addition BIA notified the following tribes that their applications were incomplete and no further action would be taken on them as submitted: Ysleta del Sur Pueblo, Turtle Mountain Band of Chippewa Indians, Muckleshoot Tribe of Washington, Lower Elwha Klallam Tribe, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Kickapoo Tribe and Sac and Fox Nation, Ho-Chunk Nation, Dry Creek Rancheria, Colorado River Indian Tribes, Confederated Tribes of the Colville Reservation, and the Burns Paiute Tribe. Documents may be found at http://www.indianz.com/News/2008/006500.asp.

[103] "Echo Hawk Announces Tribal Consultation on Indian Gaming Land into Trust Determinations," Office of the Assistant Secretary—Indian Affairs, U.S. Department of the Interior, News Release (August 31, 2010), http://www.bia.gov/idc/groups/public/documents/text/idc010772.pdf.

According to this News Release,

> Secretary Salazar issued a directive on July 18, 2010, recommending a thorough review of the "current guidance and regulatory standards" used to make decisions for off-reservation two-part determinations under Section 20 of the Indian Gaming Regulatory Act (IGRA) and its implementing regulations. In accordance with the Secretary's directive, and in keeping with the Department of Interior's commitment to government-to-government consultation, the OIG [Office of Indian Gaming] will engage with tribal governments on three major subjects: (1) the January 3, 2008 Memorandum regarding Guidance on Taking Off-reservation Land into Trust for Gaming Purposes; (2) whether there is a need to revise any of the provisions of 25 C.F.R. Part 292, Subpart A (Definitions) and Subpart C (Two-Part Determinations); and (3) whether the Department of the Interior's process of requiring compliance with 25 C.F.R. Part 151 (Land Into Trust Regulations) should come before or after the Two-Part Determination.

[104] 25 C.F.R., Part 151.

[105] 25 C.F.R., Part 292.

[106] 25 U.S.C. §§461 et seq.

[107] The specific IRA provision upon which the trust acquisitions rely, however, does not limit the BIA's power to take

emphasized the criteria set forth in 25 C.F.R. Section 151.11(b) requiring BIA to scrutinize anticipated benefits from off-reservation acquisitions. A key element of the Guidance was an assessment of how much negative effect there would be on reservation life if proposed gaming facilities are located farther than "a commutable distance from the reservation," including (1) how the on-reservation unemployment rate will be affected; (2) the effect of any exodus of tribal members from the reservation on reservation life; (3) if tribal members leave the reservation, the impact on their descendants in terms of tribal membership and identification with the tribe; and (4) specific on-reservation benefits of the proposal, including whether jobs will be created. The Guidance presumed that state and local governments at a distance from a reservation would be unfamiliar with Indian trust land jurisdictional issues and that distance from the reservation will hamper the efficiency of tribal government operations. It virtually required intergovernmental cooperative agreements and compatibility with state and local zoning and land use requirements.

DOI Review of the Standards for Taking Land into Trust for Gaming and Determination to Rescind the Guidance

DOI conducted consultation sessions with tribal leaders throughout the United States focusing on the need for the Guidance; whether any of the provisions of the regulation on qualifying newly acquired land for gaming, 25 C.F.R., Part 292, Subparts A and C, as previously promulgated, should be revised; and whether compliance with the land acquisition regulation, 25 C.F.R., Part 151, should come prior to the two-part determination for taking off-reservation land into trust.[108]

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land into trust to lands within existing reservations. It reads as follows: "The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment lands, within or without existing reservations, including otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing lands for Indians." 25 U.S.C. §465. There is another IRA provision, 25 U.S.C. §467, which specifically permits the SOI to proclaim "new Indian reservations on lands acquired pursuant" to various IRA provisions, including §465.

[108] Letter from George T. Skibine, Acting Principal Deputy Assistant Secretary—Indian Affairs, to Tribal Leaders (August 24, 2010), http://www.bia.gov/idc/groups/public/documents/text/idc010719.pdf. A list of nine issues for consultation is appended to the letter. It reads as follows:

LIST OF ISSUES FOR CONSULTATION

1. Whether the definitions of the following terms in 25 C.F.R. 292.2 should be amended: (1) Appropriate State and local officials; (2) Nearby Indian tribe; (3) Significant historical connection; and (4) Surrounding community.

2. Whether any of the provisions in 25 C.F.R.292.19 (How must an application describe the benefits and impacts of the proposed gaming establishment to the tribe and its members) should be modified.

3. Whether any of the provisions in 25 C.F.R. 292.18 (What information must an application contain on detrimental impacts to the surrounding community) should be modified.

4. Whether the consultation process with appropriate State and local officials and officials of nearby tribes described in 25 C.F.R. 292.19 is adequate.

5. Whether the information sought from consulted parties in 25 C.F.R. 292.20 is sufficient.

6. Whether the evaluation criteria contained in 25 C.F.R. 292.21 are appropriate.

7. Whether the timeframes for a governor's concurrence contained in 25 C.F.R. 292.23(b) should be modified.

8. Whether the Memorandum issued by Assistant Secretary Carl Artman on January 3, 2008, regarding guidance on taking off-reservation land into trust for gaming purposes should be

The result of the review was a determination that both regulations were fully sufficient and that the Guidance should be withdrawn. The Guidance was found to be unnecessary for processing applications to qualify "off-reservation" land for gaming under 25 C.F.R., Part 292, and potentially confusing with respect to processing applications to take land into trust, under 25 C.F.R., Part 151, in situations where gaming was contemplated. There was no change recommended with respect to the question of whether the application for gaming should accompany the application for taking land into trust. The current rule permits this but does not require it.[109]

The review and consultation process was the result of a June 18, 2010, memorandum issued by Secretary of the Interior, Ken Salazar, directing the Assistant Secretary of the Interior for Indian Affairs to review DOI's decisionmaking guidance and regulatory standards with respect to handling applications to take land into trust for gaming.[110] In the memorandum, the Secretary required DOI, in connection with this process, to "engage in government-to-government consultations … to obtain input from Indian tribes." The review covered both land-into-trust acquisitions on an off-reservation basis under the two-part determination and "reservation and equal footing exceptions."[111] The latter category covers acquisitions on-reservation or under the exceptions for settlement of a land claim, part of an initial reservation, or restoration of lands.

In ordering the consultation, the Secretary noted that, as of the date of the memorandum, there were nine applications requiring a two-part determination, and that consultation was likely to mean a delay in processing those application, but that "given the Department's discretion in this area, it is appropriate that we take the necessary time to identify and adopt principled and transparent criteria regarding such gaming determinations," and "deliberate government-to-government consultations will lead us to the implementation of a sound policy in this area."[112] The Secretary noted that, since IGRA's enactment, only 36 applications have been approved as settlements of land claims, initial reservations, or restoration of lands; and that, at the time of the memorandum, 24 such applications were pending before the department. He also stated that decisions on these applications "largely depends upon a legal determination" and recommended that the DOI Solicitor's Office provide a determination on such applications.[113]

DOI conducted six government-to-government consultations and elicited the following input on the issue of whether the Guidance should be modified, rescinded, or become part of 25 C.F.R., Part 292:

> Many tribes recommended that the Department rescind the Guidance Memorandum because it was not subject to tribal consultation and because it was, in their view, inconsistent with broader Federal Indian policy. Other tribes contended that the Guidance Memorandum was unreasonable because it makes inappropriate judgments regarding what

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withdrawn, modified, or incorporated into the regulations in 25 C.F.R. Part 292.

9. Whether land on which an Indian tribe proposes to establish a gaming establishment should be taken into trust before or after compliance with the requirements of the two-part determination in 25 U.S.C. 2719(b)(I)(A).

[109] 25 C.F.R. §292.15.

[110] "Decisions on Indian Gaming Applications," Memorandum from Secretary Ken Salazar to Assistant Secretary—Indian Affairs (June 18, 2010), http://www.bia.gov/WhatWeDo/ServiceOverview/Gaming/index.htm.

[111] *Id.* at 2. The Secretary further stated that he expected the Assistant Secretary to "undertake regular and meaningful consultation and collaboration with tribal leaders to continue to develop sound federal Indian gaming policy … [i]n addition, it is important that we keep the United States Congress fully aware of our efforts." *Id.* at 3.

[112] *Id.* at 2.

[113] *Id.* at 2 - 3.

> is in the 'best interests' of tribes, assumes that a tribe will experience a reduced benefit if its gaming facility is located at a certain distance from its reservation, and equates 'reduced benefit' with a harm to the tribe. Other tribes maintained that the Guidance Memorandum unfairly prejudices tribes with reservations located at great distances from population centers and ignores historical facts regarding the locations where the Federal Government created reservations. Some tribal leaders expressed support for the primary objective of the Guidance Memorandum, which is to limit off-reservation gaming to areas close to existing reservations.[114]

Assistant Secretary for Indian Affairs, Larry Echo Hawk, in a June 13, 2011, memorandum, set forth the statutory and regulatory requirements which tribes must satisfy in order to gain approval for a gaming facility on land acquired in trust after IGRA's enactment under the "off-reservation" exception.[115] He noted that decisions on gaming involve particularized facts varying with each tribe, and that the January 2008 Guidance failed to fully provide a means for considering, on a case-by-case basis, the array of factors which should be considered in each decision. According to his analysis, the Guidance established a virtually inflexible approach that assumes that a distant casino will have a deleterious effect on tribal life. His final conclusion was that the existing regulation governing gaming on after-acquired lands provides "comprehensive and rigorous standards that set forth the Department's authority and duties when considering applications for off-reservation gaming.... [and] adequately provide standards for evaluating such acquisitions...."[116] He characterized the regulation as offering "strict and transparent standards for evaluating tribal applications to conduct off-reservation gaming."[117] With respect to the general land acquisition regulation under 25 C.F.R., Part 151, the conclusion was that the Guidance was unnecessary and that it might "unnecessarily constrain the Department's decision making process." Under the regulation, according to Assistant Secretary Echo Hawk's memorandum, the Secretary must weigh the impact of the trust acquisition on specified aspects of state and local jurisdiction in a manner that considers all the factors in the regulation, and, unlike the Guidance, the regulation does not mandate disapproval of an application on a single issue.

Enacted and Proposed Legislation

111th Congress

Several bills proposed in the 111th Congress providing federal recognition or authorizing the placement of land into federal trust status contained provisions aimed at precluding gaming. Two of these bills were enacted:

[114] Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes," Memorandum from Assistant Secretary—Indian Affairs Larry Echo Hawk, to All Regional Directors, Bureau of Indian Affairs, and Director, Office of Indian Gaming, 3 (June 13, 2011). (Hereinafter, June 13, Memorandum.)

[115] June 13, Memorandum, at 1. In the Memorandum, Assistant Secretary Echo Hawk states that any gaming on newly acquired land must satisfy three criteria: (1) it must have been taken into trust; (2) it must satisfy one of the exceptions to the prohibition of gaming on lands acquired in trust after IGRA's enactment; and (3) if class III gaming is involved, there must be a tribal-state compact. With respect to the second of these, Assistant Secretary Echo Hawk distinguished between "equal footing" exceptions—for Restored Lands, Settlement of a Land Claim, and Initial Reservation—and the two-part determination exception, which he characterized as the "off-reservation" exception. (He notes that because this requires several layers of review, including concurrence in a secretarial two-part determination, only five tribes have succeeded in securing a gaming facility under this exception.)

[116] June 13, Memorandum, at 5 (with reference to 25 C.F.R., Part 292).

[117] June 23, Memorandum at 7.

- Section 2601(h)(4)(A) of P.L. 111-11, 123 Stat. 991, 1115, transfers certain federal land to the SOI to be held in trust for the benefit of the Washoe Tribe and states that such land "shall not be eligible, or considered to have been taken into trust, for class II or class III gaming (as those terms are defined in section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703))."
- P.L. 111-323 prohibits gaming on federal land transferred to the Hoh Tribe.

112th Congress

Two bills enacted in the 112th Congress contained gaming prohibitions in connection with land-into-trust acquisitions: P.L. 112-97, relating to land to be taken into trust for the Quileute Indian Tribe in the state of Washington, and P.L. 112-212, transferring certain federal land in trust for the Bridgeport Indian Colony.

113th Congress

P.L. 113-179, the Gun Lake Trust Land Reaffirmation Act, ratified the DOI's May 15, 2005, trust acquisition of the land at issue in *Match-E-Be-Nash-She-Wish Band of-Pottawatomi Indians v. Patchak*[118] and required that any federal court action relating to that land should be dismissed.[119]

In addition, two bills enacted in the 113th Congress contained gaming prohibitions in connection with land-into-trust acquisitions: P.L. 113-134, providing for the trust acquisition of certain federal land for the Pascua Yaqui Tribe of Arizona; and P.L. 113-127, taking certain Bureau of Land Management land into trust for the benefit of the Shingle Springs Band of Miwok Indians and prohibiting IGRA class II and class III gaming on that land.

Proposed Bills Addressing the Process

S. 477,[120] the Tribal Gaming Eligibility Act, would have required tribes to satisfy new standards before newly acquired lands could be found to be eligible for IGRA gaming. It would have applied to three of the exceptions to IGRA's general prohibition of gaming on lands acquired after IGRA's enactment: land claim settlement, initial reservation for a newly acknowledged tribe, or restoration of lands for a newly restored tribe. Under this bill, for a tribe to rely on one of these exceptions for gaming on newly acquired trust land, before the land is taken into trust, the tribe must have "received a written determination from the Secretary that the land is eligible for gaming" that included findings that the tribe has "a substantial, direct, modern connection to the land" and "a substantial, direct, aboriginal connection to the land."[121]

Under the bill, for a tribe with a reservation to establish a modern connection to the land, the tribe would be required to show both geographic and temporal connections to the land. The land would need to be within a 25-mile radius of either the tribal headquarters (for tribes with a reservation) or the residence of "a significant number" of tribal members (for tribes without a reservation). A tribe which has a reservation would have to show both modern and aboriginal connections to the land and wait five years after restoration or recognition to be eligible for one of these exceptions. A tribe without a reservation would need to show modern and aboriginal connections to the land,

[118] ___ U.S. ___; 132 S. Ct. 2199 (2012).

[119] On June 16, 2015, the U.S. District Court for the District of Columbia dismissed the case. Patchak v. Jewell, 108 F. Supp. 3d 152 (D.D.C. 2015).

[120] S. 477, 113th Cong., 1st Sess. (2013).

[121] *Id.*, §2, adding 25 U.S.C. §2719(b)(2)(A).

and (1) the land must be part of its first request for newly acquired land after being recognized or restored; (2) the application to take the land into trust would need to be received by the Secretary within five years of recognition or restoration; and (3) the tribe may not be conducting gaming on any other land. The modern connection to the land requirement means that any tribe seeking one of these exemptions would have to demonstrate "a temporal connection to, or routine presence on, the land" during the period from October 17, 1988, to the date of the Secretary's determination. To determine whether a tribe satisfies the requirement for an aboriginal connection to the land, the proposed legislation contains a list of factors which the Secretary may consider, including historical presence on the land; lineal descent or cultural affiliation of members based on 43 C.F.R. Section 10.14;[122] whether the land is in an area where the tribe's language has been used; whether the land is near tribal "culturally significant sites"; whether the tribe was officially removed from the land; and other factors showing tribal presence on the land antedating the presence of "nonnative individuals, the Federal Government, or any other sovereign entity."[123]

Other Proposed Bills

Other bills not enacted would have provided for federal recognition of tribal status or taking land into trust for a tribe along with explicit provisions relating to gaming. Among them were the following:

- S. 416/H.R. 841[124] would have treated land acquired in trust for the Confederated Tribes of the Grand Ronde Community of Oregon as on-reservation lands for purposes of considering applications to take the land into trust and specifies that land taken into trust within a specific area after October 17, 1988 (the date of enactment of IGRA), would be part of the reservation.
- S. 1074/H.R. 2190, the Thomasina E. Jordan Indian Tribes of Virginia Recognition Act, would have provided federal recognition for six Virginia Indian Tribes: the Chickahominy Indian Tribe; the Chickahominy Indian Tribe-Eastern Division; the Upper Mattaponi Tribe; the Rappahannock Tribe, Inc.; the Monacan Indian Nation; and the Nansemond Indian Tribe. It included provisions prohibiting each of these tribes from "conducting gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission."[125]
- S. 1167/H.R. 2455,[126] the Elko Motocross and Tribal Conveyance Act, included a provision transferring approximately 373 acres of Bureau of Land Management land to be held in trust for the Te-moak Tribe of Western Shoshone Indians of Nevada for certain specified purposes. The legislation would have provided that the land "shall not be eligible, or considered to have been taken into trust, for

[122] This is a regulation implementing the Native American Graves Protection and Repatriation Act of 1990. P.L. 101-601; 25 U.S.C. 3001–3013; 104 Stat. 3048–3058.

[123] S. 477, adding 25 U.S.C. §2719(b)(2)(C).

[124] S. 416, 113th Cong., 1st Sess. (2013); H.R. 841, 113th Cong., 1st Sess. (2013).

[125] H.R. 2190, 113th Cong., 1st Sess. (2013); S. 1074, 113th Cong., 1st Sess. (2013), Sections 106(d); 206(d); 306(d); 406(d); and 506(d).

[126] S. 1167, 113th Cong., 1st Sess. (2013), H.R. 2455, 113th Cong., 2d Sess. (2013).

class II gaming or class III gaming (as those terms are defined in section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703)).”[127]

- H.R. 323,[128] the Muscogee Nation of Florida Federal Recognition Act, would have recognized and authorized the SOI to take land into trust for the Muscogee Nation of Florida. It contains explicit authority for the SOI to take land into trust for the Muscogee Nation of Florida under 25 C.F.R., Part 151.
- S. 402,[129] an amendment to the Siletz Tribe Indian Restoration Act,[130] would have authorized the Secretary to take land into trust for the Siletz Indian Tribe, subject to specified conditions, provided that the land is within the boundaries of the original 1855 Siletz Coast Reservation, and that the real property taken into trust is not to be “eligible, or used, for any gaming activity carried out under the Indian Gaming Regulatory Act.... ”[131]
- S. 1132/H.R. 1803,[132] the Lumbee Recognition Act, would have provided for federal recognition of the Lumbee Tribe of North Carolina and authorized the Secretary to take land into trust for the Tribe. It includes a provision prohibiting the Tribe from conducting “gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act … or under any regulations thereunder promulgated by the Secretary of the Interior or the National Indian Gaming Commission.”[133]
- H.R. 2442[134] would have provided federal recognition for the Duwamish Tribe and authorized the SOI to take land into trust within an area to be identified, within 10 years, by the SOI as the aboriginal homelands of the Duwamish Tribe.
- H.R. 1225, the Samish Indian Nation Homelands Act of 2012, subject to certain conditions, would have required the Secretary to take certain land into trust for the Samish Indian Nation and prohibited IGRA gaming on the land.[135]
- H.R. 2455[136] would have transferred certain Bureau of Land Management land to the Secretary in trust for the Te-Moak Tribe of Western Shoshone Indians of Nevada and prohibited IGRA gaming on the land. The bill would also have transferred land to be held in trust for each of the following tribes: Fort McDermott Paiute and Shoshone Tribe; the Shoshone Paiute Tribes of the Duck Valley Indian Reservation; the Summit Lake Paiute Tribe; the South Fork Band Council; the Reno-Sparks Indian Colony; and the Pyramid Lake Paiute Tribe.

[127] *Id.*, §2(d)(1).

[128] H.R. 323, 113th Cong., 1st Sess. (2013).

[129] S. 402, 113th Cong., 1st Sess. (2013).

[130] 25 U.S.C. §711e.

[131] S. 402, §1, adding 25 U.S.C. §711e(f)(4).

[132] S. 1132, 113th Cong., 1st Sess. (2013); H.R. 1803, 113th Cong., 1st Sess. (2013).

[133] *Id.*, §4(b).

[134] H.R. 2442, 113th Cong., 1st Sess. (2013).

[135] H.R. 1225, 113th Cong., 1st Sess. (2013).

[136] H.R. 2455, 113th Cong., 1st Sess. (2015).

- H.R. 3313,[137] the Santa Ynez Band of Chumash Mission Indians Land Transfer Act of 2013, would have authorized the Secretary to take certain land into trust for the Tribe and prohibited IGRA gaming on the land.
- H.R. 4018,[138] the Blackwater Trading Post Land Transfer Act, would have required the Secretary to take 50.3 acres in Pinal County, Arizona, into trust for the benefit of the Gila River Indian Community of the Gila River Indian Reservation, and prohibited gaming on the land under IGRA or inherent tribal authority.

114th Congress

Two bills enacted in the 114th Congress contained gaming prohibitions in connection with land-into-trust acquisitions: P.L. 114-69,[139] the Albuquerque Indian School Land Transfer Act, requiring the SOI to take certain land into trust for 19 Pueblos and specifying that "[n]o class I gaming, class II gaming, or class III gaming ... shall be carried out on the Federal land taken into trust" and P.L. 114-181,[140] transferring in trust "for nongaming purposes" certain Bureau of Land Management Land in California, for the benefit of the Susanville Rancheria and stating that "[c]lass II and class III gaming ... shall not be permitted at any time on the land."

Other Proposed Bills

- S. 132[141]/H.R. 308,[142] the Oregon and California Land Grant Act of 2015, includes provisions that would transfer certain land to be held in trust for the benefit of the Cow Creek Bank of Umpqua Tribe of Indians and make such land ineligible for gaming under IGRA.
- S. 152[143]/H.R. 308,[144] the Keep the Promise Act of 2015, would prohibit, until January 1, 2027, all class II and class III IGRA gaming on land within the Phoenix, Arizona, metropolitan area, that has been acquired after April 9, 2013.
- S. 175[145]/H.R. 387,[146] the Economic Development Through Tribal Land Exchange act, would require the SOI "pursuant to all applicable State and local laws," to take certain land in the City of Banning into trust for the Morongo Band of Mission Indians.
- S. 414,[147] the California Desert Conservation and Recreation Act of 2015, contains provisions which would require the SOI to take certain land into trust as

[137] H.R. 3313, 113th Cong., 1st Sess. (2013).
[138] H.R. 4018, 113th Cong., 2d Sess. (2014).
[139] 129 Stat. 558, 114th Cong., 1st Sess. (2015).
[140] 130 Stat.447 (2016).
[141] S. 32, tit. II, subtit. A, 114th Cong., 1st Sess. (2015).
[142] H.R. 308, 114th Cong., 1st Sess. (2015).
[143] S. 152, 114th Cong. 1st Sess. (2014).
[144] H.R. 308, 114th Cong., 1st Sess. (2015).
[145] S. 175, 114th Cong., 1st Sess. (2015).
[146] H.R. 387, 114th Cong., 1st Sess. (2015).
[147] S. 414, 114th Cong., 1st Sess. (2015).

the Lone Pine Paiute Shoshone Reservation Addition and stating that that land is ineligible for IGRA gaming.

- S. 465[148]/ H.R. 872,[149] the Thomasina E. Jordan Indian Tribes of Virginia Recognition Act. This legislation would provide federal recognition for six Virginia Indian Tribes: the Chickahominy Indian Tribe; the Chickahominy Indian Tribe-Eastern Division; the Upper Mattaponi Tribe; the Rappahannock Tribe, Inc.; the Monacan Indian Nation; and the Nansemond Indian Tribe. It includes provisions prohibiting each of these tribes from "conducting gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission."[150]
- S. 814[151]/ H.R. 1438,[152] the Oregon Coastal Lands Act, includes provisions which would transfer certain land to be held in trust for the benefit of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and make such land ineligible for gaming under IGRA.
- S. 815[153]/ H.R. 1436,[154] the Cow Creek Umpqua Land Conveyance Act, includes provisions which would transfer certain land to be held in trust for the benefit of the Cow Creek Band of Umpqua Tribe of Indians and declare it ineligible for gaming under IGRA.
- S. 817[155]/H.R. 3211[156] would provide for the addition of certain real property to the reservation of the Siletz Tribe in Oregon and would state that the property is not eligible for gaming under IGRA.
- S. 472[157]/H.R. 925,[158] the Douglas County Conservation Act of 2015, would require transfer of 1,016 acres of federal land to the SOI to be placed in trust for the benefit of the Washoe Tribe of Nevada and California. Included is a provision stating that the land is not eligible for gaming under IGRA.
- S. 1436/H.R. 2733, the Nevada Native Nations Land Act, would require the SOI to convey approximately 71,055 acres from the Bureau of Land Management to five federally recognized tribes in Nevada (Fort McDermitt Paiute and Shoshone Tribe, Summit Lake Paiute Tribe, Reno-Sparks Indian Colony, Pyramid Lake Paiute Tribe, and the Duckwater Shoshone Tribe) and approximately 82 acres from the Forest Service to the Shoshone Paiute Tribes of the Duck Valley Indian Reservation to be held in trust for the benefit of those tribes. Included is a

[148] S. 465, 114th Cong., 1st Sess. (2015).

[149] S. 872, 114th Cong., 1st Sess. (2015).

[150] S. 465, 114th Cong., 1st Sess. (2015); H.R. 872, 114th Cong., 1st Sess. (2015), Sections 106(d); 206(d); 306(d); 406(d), and 506(d).

[151] S. 814, 114th Cong., 1st Sess. (2015).

[152] H.R. 1438, 114th Cong., 1st Sess. (2015).

[153] S. 814, 114th Cong., 1st Sess. (2015).

[154] H.R. 1436, 114th Cong., 1st Sess. (2015).

[155] S. 817, 114th Cong., 1st Sess. (2015).

[156] H.R. 3211, 114th Cong., 1st Sess. (2015).

[157] S. 872, 114th Cong., 1st Sess. (2015).

[158] H.R. 925, 1145h Cong., 1st Sess. (2015).

statement that the land "shall not be eligible, or considered to have been taken into trust, for class II gaming or class III gaming."

- S. 1761[159]/H.R. 2212[160] would take into trust approximately 301 acres of Bureau of Land Management Land for the benefit of the Susanville Indian Rancheria and state that "[c]lass II gaming and class III gaming ... shall not be allowed at any time on the land."
- S. 1822[161]/H.R. 3079[162] would place in trust certain U.S. Forest Service land in Tuolumne County, California, for the benefit of the Tuolumne Band of Me-Wuk Indians and state that "[c]lass II and class III gaming ... shall not be permitted at any time on the land."
- S. 1986,[163] the Moapa Band of Paiutes Land Conveyance Act, would mandate a transfer of certain Bureau of Land Management and Bureau of Reclamation land to the SOI to be held in trust for the Moapa Band of Paiutes and make the land ineligible for gaming under IGRA.
- S. 2285,[164] the Lumbee Recognition Act. This legislation would provide for federal recognition of the Lumbee Tribe of North Carolina and authorize the Secretary to take land located within Robeson County, North Carolina, into trust for the Tribe. It includes a provision stating that "[l]and taken into trust under this section shall be eligible, or considered to have been taken into trust, for class II gaming or class III gaming."[165]
- H.R. 184,[166] the Lumbee Recognition Act, would provide for federal recognition of the Lumbee Tribe of North Carolina and authorize the Secretary to take land located within Robeson County, North Carolina, into trust for the Tribe. It includes a provision stating that "[t]he tribe may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act ... or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission."[167]
- H.R. 496,[168] the Alabama Hills National Scenic Area Establishment Act, would require the SOI to take 132 acres into trust as part of the Lone Pine Paiute-Shoshone reservation and provide that gaming under IGRA would not allowed to be conducted on that land.
- H.R. 1157,[169] the Santa Ynez Band of Chumash Mission Indians Land Transfer Act, would require the SOI to take certain land into trust. It includes a statement

[159] S. 1761, 114th Cong., 1st Sess. (2015).
[160] H.R. 222, 114th Cong., 1st Sess. (2015).
[161] S. 1822, 114th Cong, 1st Sess. (2015).
[162] H.R. 3079, 114th Cong., 1st Sess. 2015).
[163] S. 1986, 114th Cong, 1st Sess. (2015).
[164] S. 2285, 114th Cong., 1st Sess. (2015).
[165] *Id.*, §6(c).
[166] H.R. 184, 114th Cong., 1st Sess. (2015).
[167] *Id.*, §4(b).
[168] H.R. 496, 114th Cong., 1st Sess. (2015).
[169] H.R. 1157, 114th Cong. 1st Sess. (2015).

that "[t]he Tribe may not conduct .... gaming activities [on the land] ... as a matter of claimed inherent authority ... or under any Federal law, including the Indian Gaming Regulatory Act ... and regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission under that Act."

- H.R. 1632,[170] the Samish Indian Nation Land Conveyance Act of 2015, would require the SOI to take certain land into trust for the benefit of the Samish Indian Tribe. It includes a statement that "[t]he Tribe may not conduct gaming activities on land taken into trust pursuant to this Act, either as a matter of claimed inherent authority, under any Federal law ..., or under regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission."
- H.R. 2009,[171] the Pascua Yaqui Tribe Land Conveyance Act, would declare that "subject to valid existing rights and payment to the United States of fair market value," certain federal lands are to be held in trust for the Pascua Yaqui Tribe. It includes a statement that "[t]he Tribe may not conduct .... gaming activities [on the land] ... as a matter of claimed inherent authority ... or under any Federal law, including the Indian Gaming Regulatory Act ... and regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission under that Act."
- H.R. 2538,[172] the Lytton Rancheria Homelands Act, states that certain lands owned by the Lytton Rancheria are "hereby taken into trust" and "shall be part of the Tribe's reservation. It includes a provision that the lands "shall not be eligible for gaming in the Indian Gaming Regulatory Act." There are also provisions stating that future trust acquisitions in Sonoma County for the Tribe will not be eligible for gaming until after March 15, 2036, and making certain lands in Sonoma County permanently ineligible for IGRA gaming.[173]
- H.R. 4688,[174] the Douglas County Economic Development and Conservation Act of 2016, would require transfer of 1,016 acres of federal land to the SOI to be placed in trust for the benefit of the Washoe Tribe of Nevada and California and state that this land is not eligible for gaming under IGRA.

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[170] H.R. 1632, 114th Cong., 1st Sess. (2015).

[171] H.R. 2009, 114th Cong., 1st Sess. (2015).

[172] H.R. 2538, 114th Cong., 1st Sess. (2015).

[173] *Id.*

[174] H.R. 4688, 114th Cong., 2d Sess. (2016).

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