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PLACING OFF-RESERVATION LAND INTO TRUST FOR TRIBAL GAMING AND THE STATE'S ROLE

SUMMARY

A tribe in New Mexico seeking to place off-reservation land into trust for casino gambling must navigate both federal and state statutory requirements and administrative regulations. In some cases, the off-reservation trust acquisition may be subject to a two-part consultation process under federal law that requires input from local governments, tribes and state officials. This bulletin summarizes that process.

FEDERAL LAW

The Indian Gaming Regulatory Act (IGRA) establishes the federal jurisdictional framework that regulates Indian gaming. The act aims to promote tribal economic development and self-sufficiency by providing a legal basis for gaming. IGRA also created an independent regulatory agency, the National Indian Gaming Commission (NIGC), which possesses broad authority to monitor and regulate gaming on Indian lands.

Pursuant to IGRA, casino gaming is lawful if four requirements are met. First, the gaming must be conducted on Indian lands within the tribe's jurisdiction. For off-reservation trust lands to qualify as "Indian lands", the tribe must have jurisdiction and exercise governmental power over the parcel. Second, the gaming must be authorized by an ordinance adopted by the tribal government and approved by the NIGC. Third, the activity must be located in a state that permits casino gaming. Finally, the tribe and the state must enter a "tribal-state compact" that includes terms regulating the operation of gaming activities.

Statutory Authority and Restrictions for Off-Reservation Trust Acquisitions

A tribe may seek to have lands outside the boundaries of its reservation acquired into trust by the federal government for the specific purpose of gaming. IGRA does not provide any statutory authority to take land into trust for Indian tribes; rather, the secretary of the interior is authorized to acquire trust land for a tribe pursuant to the Indian Reorganization Act of 1934 (IRA). If the trust acquisition is not mandated by Congress, the secretary has discretionary authority under the IRA to acquire the land and must consider numerous factors found in Bureau of Indian Affairs (BIA) regulations when making a decision.

When the intended use of a trust acquisition is gaming-related, all applications for the trust acquisition must also comply with Section 2719 of IGRA. Section 2719 *prohibits* gaming on lands acquired by the secretary in trust for the benefit of a tribe *after* October 17, 1988, unless one of the enumerated exceptions under that section applies. For example, IGRA's prohibition does not apply to land on or contiguous to a reservation, land acquired as part of land settlement claim, land that is part of a previously recognized reservation and restored land.

With regard to off-reservation gaming, Section 2719 states that the prohibition will not apply if a favorable determination for the tribe is made after a two-part consultation process. Under that process, the secretary first consults with the Indian tribe and state and local officials, including officials of other nearby Indian tribes. After the consultation, the secretary determines whether a gaming

establishment on newly acquired lands would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. If a positive determination is reached, the secretary must obtain the governor's concurrence in the determination before gaming can be conducted on the land.

Procedural Steps: Placing Off-Reservation Land Into Trust for Gaming

Tribal requests for the acquisition of land into trust for gaming purposes are submitted to BIA regional offices. Two regional offices cover New Mexico: the Navajo Regional Office located in Gallup and the Southwest Regional Office located in Albuquerque. Upon receiving a request, regional directors are required to compile a complete file of the tribe's application and information that exhibits compliance with BIA regulations, IGRA and other applicable federal laws and regulations.

BIA regulations permit off-reservation land to be acquired into trust for a tribe after consideration of several factors. For example, the secretary must consider the tribe's need for additional land, where the land is located relative to state boundaries and the distance from the tribe's formal reservation. The secretary must apply greater scrutiny to the acquisition request as the distance between the tribe's reservation and the land increases. If the land is to be acquired for gaming, the tribe must present a plan that details the expected economic gains associated with the use. Moreover, in accordance with the National Environmental Policy Act, the tribe must provide information that allows the secretary to make a determination on the environmental impact of gaming activities.

When the secretary receives the tribe's request, the secretary must notify both the state and local governments with regulatory jurisdiction over the land. The notice must inform those governments that they each have 30 days to submit written comment as to the

expected impacts of the acquisition on regulatory jurisdiction and property taxes.

If the off-reservation acquisition is subject to the two-part consultation process, the regional director must also present separate factual findings to support a determination by the secretary that gaming on the land is in the best interest of the tribe and its members and is not detrimental to the surrounding community. The BIA regional offices and regional directors have been delegated the authority to conduct the consultation process on the secretary's behalf.

The regional director begins the consultation process by sending a letter to the tribe, state officials (including the governor) and other local and neighboring tribal officials. In order to assist the secretary in deciding whether the gaming facility would be in the best interest of the tribe and its members, the tribe applying for the acquisition is asked to address the following:

1. projections of income statements, balance sheets, fixed assets accounting and cash flow statements for the gaming entity and the tribe prepared in accordance with NIGC standards;

2. projected tribal employment, job training and career development, including the basis for projecting an increase in tribal employment considering the off-reservation location of the facility and the impact on the tribe if tribal members leave to take jobs off-reservation;

3. projected benefits to the tribe from tourism and proposed uses of the increased tribal income;

4. projected benefits to the relationship between the tribe and the surrounding community; and

5. possible adverse impacts on the tribe and plans for dealing with those impacts.

Furthermore, to aid the secretary in assessing whether the gaming facility would not be detrimental to the surrounding community, all officials consulted and the applicant tribe are asked to address the following:

1. evidence of environmental impacts and plans for mitigating adverse impacts;
2. reasonably anticipated impact on the social structure, infrastructure, services, housing, community character and land use patterns of the surrounding community;
3. impact on the economic development, income and employment of the surrounding community;
4. costs of impacts to the surrounding community and sources of revenue to accommodate them; and
5. proposed programs for compulsive gamblers and the source of funding.

The regional director is required to provide, at a minimum, 30 days for the officials and the applicant tribe to comment and respond to the consultation letter. The regional director has the discretion to extend this time period considering the number of parties involved, the size of the gaming project and the measure of public support or opposition to the project.

Upon completion of the two-part consultation, the secretary is required to objectively assess the factual findings regarding the respective interests of the parties as well as the impacts on their communities and resources. If the secretary decides that gaming on the land is in the best interests of the tribe and would not be detrimental to the surrounding community, the secretary then requests the concurrence of the governor of the state in which the land is located. Until the governor concurs, the secretary does not have the appropriate authority under the two-part consultation process of Section 2719 to take the land into trust for the tribe for gaming purposes.

The Two-Part Consultation Process: Duration and Past Success

Receiving a positive determination in the two-part consultation process constitutes only one requirement the tribe must meet to conduct gaming on off-reservation trust acquisitions. Additionally, the secretary must decide to acquire the off-reservation land into trust for the

tribe under BIA regulations. In the majority of cases, it may take up to two years or more from the time a tribe applies to have land acquired into trust before a decision is made by the secretary. Therefore, the BIA advises tribes intending to place off-reservation land into trust for gaming to complete the two-part consultation process prior to purchasing the parcel. Completing the two-part consultation first may save the tribe time and money if a negative determination concerning gaming is made by either the secretary or the governor.

To date, only three tribes have successfully navigated the two-part consultation process and had land acquired into trust for gaming purposes (Forest County Potawatomi Tribe in Milwaukee, WI, in 1990; Kalispel Tribe in Spokane, WA, in 1997; and Keweenaw Bay Indian Community in Marquette, MI, in 2000). In April 2004, four tribes lost an appeal in the Seventh Circuit Court of Appeals after the governor of Wisconsin failed to concur in the secretary's positive determination under the two-part consultation process. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F. 3d 650 (7th Cir. 2004). The Seventh Circuit Court upheld the governor's concurrence power under the Section 2719 exception of IGRA, holding the gubernatorial concurrence requirement did not violate separation of powers principles, the nondelegation doctrine, the appointments clause, principles of federalism or the federal government's trust obligations to Indians. In recent weeks, the tribe submitted an appeal of this decision to the U.S. Supreme Court.

NEW MEXICO LAW

The Compact Negotiation Act, Sections 11-13A-1 through 11-13A-5 NMSA 1978, establishes the procedures by which New Mexico may negotiate and execute a tribal-state compact as required by IGRA. The Compact Negotiation Act requires that a new compact or an amendment to an existing compact be negotiated by the governor and approved by the

legislature. If a compact has previously been approved by the legislature, as was done in 2001, the act permits the governor to execute additional compacts identical to the one approved without submitting it for legislative approval. Consequently, the act presents two options for a tribe seeking to enter a tribal-state compact authorizing gaming on off-reservation lands:

1. a tribe can request that the governor approve and sign the compact previously approved by the legislature, which expires in 2014; or

2. a tribe can request that the state negotiate a new compact, which would require legislative approval.

Legislative Options

The New Mexico Legislature could conceivably curtail the governor's ability to concur in a positive determination made by the secretary in IGRA's two-part consultation process. According to the Seventh Circuit in *Lac Courte Oreilles Band*, IGRA's gubernatorial concurrence provision does not impermissibly interfere with the functioning and structure of state government. The court concluded that IGRA neither requires the governor to legislate state gaming policy nor vests the governor of Wisconsin with authority to act beyond the limits of Wisconsin state law. Rather, the governor's consideration of the secretary's request for concurrence is informed by the state's constitution, statutes and existing gaming policy.

The New Mexico Legislature has granted the governor authority to enter into tribal-state compacts on behalf of the state that are subject to legislative approval. However, New Mexico law is silent regarding the governor's authority to concur under the two-part consultation process. In view of the Seventh Circuit's interpretation of IGRA, the governor's authority to concur in the secretary's positive determination could be limited by New Mexico law and Section 2719 would not provide a

broader statutory basis to carry out that function.

The three Wisconsin Chippewa tribes in *Lac Courte Oreilles Band* petitioned the U.S. Supreme Court on October 15, 2004 for review of the Seventh Circuit's decision. The tribes' petition argues that the gubernatorial concurrence provision violates principles of federalism by unconstitutionally rearranging the structure of state government to allow one state constitutional officer to make policy decisions without state legislative involvement.

REFERENCE LIST

BIA Regulations on Land Acquisitions, 25 C.F.R. Part 151.

Compact Negotiation Act, Sections 11-13A-1 through 11-13A-5 NMSA 1978.

Department of the Interior, BIA Checklist for Gaming and Gaming-Related Acquisitions, October 2001.

Final Report of the Independent Counsel In Re: Bruce Edward Babbitt, August 22, 2000.

Indian Gaming Regulatory Act, 25 U.S.C. Section 2701 *et seq.* (1995).

Indian Reorganization Act, 25 U.S.C. Section 465 (1995).

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, 367 F. 3d 650 (7th Cir. 2004).

Statement of Aurene M. Martin, Principal Deputy Assistant Secretary-Indian Affairs, Dept. of the Interior, before the Committee on Resources, U.S. House of Representatives, on Gaming on Off-Reservation, Restored and Newly Acquired Lands, July 13, 2004.

This Information Bulletin does not represent a policy statement of the Legislative Council Service or its staff. This Information Bulletin was written by Evan Blackstone. For more information, contact the Legislative Council Service at (505) 986-4600.

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