Gaming, Lodging & Leisure
Native American Finance
U.S. and Canada
Special Report

Native American Gaming Insights

Off-Reservation Gaming Approvals: How Will the Feds Play Their Hand?

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Introduction

After two decades of spectacular growth, the Native American gaming industry is at a crossroad. Two critically important issues will determine the future for expansion of the industry: whether tribes will have access to the debt capital needed to finance growth, and federal government policy decisions regarding approvals for future Native American gaming developments on off-reservation lands. With respect to access to debt capital (in the form of bonds and bank loans, which historically have been the primary source used to finance growth of the industry), it is not surprising that investor sentiment on the sector has soured over the past 18 months, as poor trends in regional gaming markets pressure credit profiles, three tribes defaulted on bond payments in 2009, and the Mashantucket Pequot Tribal Nation announced a forbearance agreement with its senior lenders as the tribe seeks to restructure its debt load. However, recent credit market activity, most notably an October 2009 $200 million bond issuance by the Mohegan Tribe of Connecticut, which represents the first bonds sold in Indian Country since May 2008, illustrates that investors remain willing to lend to tribal entities despite the relative lack of hard asset security and the unique legal issues involved in lending to a sovereign government.

Fitch believes it is unlikely a tribe would be successful in arranging debt financing for a large-scale greenfield casino development in the current operating and credit market environment. However, over the longer term, assuming an economic recovery leads to stabilization of gaming operating trends and improved investor sentiment, an even more limiting factor is the position of the federal government relative to granting regulatory approvals to construct such a project on trust land. These regulatory approvals are critical to the viability of such projects, because operating a casino on trust land confers unique benefits relative to commercial gaming activity, which is heavily regulated and taxed by state governments.

Since the promulgation of the Indian Gaming Regulatory Act (IGRA) set the framework for the Native American gaming industry in 1988, there has been significant political controversy. Proponents of expansion tout the benefits of economic development, while opponents decry "reservation shopping" and the ills associated with the expansion of casino gaming. What is indisputable, however, is that it has never been easy for a tribe to obtain regulatory approval for gaming on off-reservation land. Complying with the myriad requirements necessary to gain these approvals consumes vast amounts of resources, and from start to finish the process can take more than 10 years. Whenever a tribal government begins this process, obtaining eventual approval is always far from guaranteed, and recent developments have made the likelihood of a successful outcome even more remote. These developments include guidance and a rule published by the U.S. Department of the Interior (DOI) in 2008, as well as the 2009 U.S. Supreme Court ruling in Carcieri v. Salazar.

The actions taken by the DOI under the Bush Administration in 2008 were clearly an effort to curb off-reservation gaming expansion. Since the Obama Administration took office in January 2009, there has been speculation as to whether the federal government will at some point take action to roll back the prohibitive Bush era policies. DOI officials have recently made public comments that the department is reviewing its off-reservation gaming approval policy, while several bills introduced in Congress would provide a legislative solution for the issue raised by the Carcieri v. Salazar ruling. Fitch is closely monitoring developments on the federal legislative and policy front to assess their impact on the sector.

This report explains the 2008 DOI actions and the Carcieri ruling, the associated impact of these developments on the approval process, and the actions the federal government now may take with respect to these issues. The report also provides a summary of the implications for the credit outlook for the sector. The Appendix (beginning on page 7) provides a glossary of relevant terms and a simplified overview of the most critical section of IGRA with respect to off-reservation gaming approval.

Federal Legislation Relevant to Off-Reservation Gaming Project Approvals

- The Indian Reorganization Act of 1934. The federal government derives its authority to take land into trust for the benefit of tribes from this legislation, specifically Part 151. A decision with respect to a land into trust application is sometimes referred to as a "Part 151 determination."
- The Indian Gaming Regulatory Act. When promulgated in 1988, IGRA set the framework for the Native American Gaming Industry. Unless a parcel of off-reservation land taken in trust after 1988 meets IGRA requirements, it is not eligible for gaming.

U.S. Supreme Court Decision: Carcieri v. Salazar

Background

To conduct gaming on a given parcel of land, a tribe must secure two important approvals regarding land status. The land must be taken in trust by the federal government for the benefit of the tribe, and that parcel of trust land must be approved to be used for gaming purposes. The DOI has the authority to make these decisions, and two separate pieces of legislation are involved: the Indian Reorganization Act of 1934 (IRA), and IGRA.

- The IRA gives the DOI the authority to take land into trust and outlines the considerations for doing so, but the legislation has nothing do to with Indian gaming specifically.
- To be approved for gaming purposes, a parcel of land taken into trust after 1988 must meet the requirements of IGRA. The DOI calls this step a "lands determination."
- The DOI has never formally specified a particular sequence for considering approval of an off-reservation gaming proposal. Assessment of the land into trust application and the IGRA lands determination can happen simultaneously or separately, if a tribe decides to convert use of a parcel previously taken in trust to gaming at a later date.

A February 2009 U.S. Supreme Court ruling has affected the step of the approval process that involves having land taken into trust. In this case, Carcieri v. Salazar, the state of Rhode Island challenged a Bureau of Indian Affairs decision to take land in trust for the Narragansett Indians for the purposes of developing a housing project. In its ruling, the U.S. Supreme Court effectively stated that the federal government cannot take land into trust for a Native American tribe that was not under federal jurisdiction as of 1934, when the IRA was enacted.

Impact

The ruling will affect all pending or future land into trust applications for tribes that were not clearly under federal jurisdiction in 1934. The ruling has implications for all land into trust requests, not just those intended to be used for casino gaming purposes. Indeed, the majority of land into trust applications to the DOI are for purposes other than gaming, including other tribal government or economic development uses. For those tribes that were under federal jurisdiction in 1934, the processing of land into trust applications

should proceed as before the ruling. The term "under federal jurisdiction" is ambiguous. Clearly, a tribe that is federally recognized can be classified as being under federal jurisdiction, so those tribes which were federally recognized by 1934 are unaffected by the ruling. The most significant impact will be felt by those tribes that were not federally recognized before 1934 and either have a land into trust application pending or seek to submit such an application in the future. A possible solution for those tribes may be to prove that they were under federal jurisdiction at the time of enactment of the IRA. Tribes will have to work with the DOI to pursue this course of action, and there is currently no process identified for how this would proceed.

Nationwide, there are many tribes operating casino gaming on trust lands which were not federally recognized and therefore not clearly under federal jurisdiction by 1934. Fitch believes that these gaming operations are unlikely to be affected by the ruling. Only Congress has the power to place land into or remove land from trust, and existing law limits challenges to federal land acquisitions after occurrence to a narrow set of circumstances, preventing these lands from being taken out of trust.

Possibility of a Legislative "Fix"

Congressional legislation would be the most straightforward method to fix the problem raised by the ruling. Three separate bills recently introduced in Congress (one in the Senate, two in the House) would accomplish this by making slight amendments to the language of the IRA to reaffirm the ability of the U.S. government to take land into trust for all federally recognized tribes. Based on public comments from DOI officials, the Obama Administration supports a legislative solution that restores the ability of all federally recognized tribe to pursue land into trust applications. However, the timing of the legislative process with respect to these bills is unclear and there are certainly many higher legislative priorities facing Congress at this time. It appears that the DOI is continuing to process land into trust applications in the meantime. However, evaluating the status of the land into trust application process is difficult, as it is hard to obtain accurate information as to the number of pending applications and the intended use of the lands. What is clear is that it has always been a cumbersome process. The U.S. Government Accountability Office has published reports critical of the DOI's process for evaluating applications, citing a huge backlog of requests and a long lag time in processing applications, although much of the delay is attributable to litigation opposing trust acquisitions.

2008 DOI Guidance and Rule

Background

In May 2008, DOI promulgated a rule under IGRA, specifically related to the sections of the legislation that describe the exceptions a parcel of off-reservation land acquired in trust after 1988 must meet in order to qualify for gaming purposes. The rule clarifies the standards the DOI will use when interpreting the various exceptions. The May 2008 rule followed guidance published by the DOI in January 2008, which addressed taking off-reservation land into trust for gaming purposes. The January 2008 guidance related specifically to the criteria used by DOI when considering a land into trust application, which are stipulated by the IRA. The May 2008 rule and January 2008 guidance attempt to address the controversy related to off-reservation land acquisitions for gaming purposes, which has been a hot-button political issue ever since the passage of IGRA set the framework for the Native American gaming industry in 1988.

The 2008 DOI rule and guidance did not go as far as Congressional bills introduced in 2005–2006 by Sen. John McCain and other legislators in curbing the potential for off-reservation casino projects. Sen. McCain's draft bill proposed complete elimination of the IGRA two-part determination process for gaming on off-reservation land, which is

2008 DOI Guidance and Rule Are Interrelated, but Address Different Issues

- The January 2008 guidance addressed the land into trust application process.
- The May 2008 rule addressed the circumstances under which a parcel of off reservation land qualifies under one of the IGRA exceptions to allow gaming on lands taken into trust after 1988.

considered the most controversial of the IGRA exceptions. Although that legislation ultimately died in committee, Congress could again consider legislative changes to IGRA, which would supersede the relevance of any DOI rules of guidance.

Impact

One of the most important parts of IGRA is Section 20, which relates to gaming on lands acquired after Oct. 17, 1988 and allows for off-reservation gaming on these "newly acquired lands" under certain circumstances, which are called exceptions. (For a more complete explanation of the IGRA exceptions, see the side box and Appendix on page 7). The May 2008 rule addresses three primary issues.

- It clarifies the interpretation of the exceptions by providing definitions for key terms in IGRA Section 20, the original language of which is vague.
- It clarifies what conditions a parcel of newly acquired land must meet to qualify under the settlement of a land claim, initial reservation, or restored lands exceptions.
- It clarifies the process the DOI will use when assessing a parcel under the two-part determination exception, including specifics on what information must be provided to the DOI during the application process.

The most controversial aspect of the rule involves the requirement that a tribe demonstrate a modern connection to a parcel of off-reservation land that it is seeking to use for gaming purposes under the initial reservation or restored lands exceptions. For tribes seeking a two-part determination, the rule stipulates that the application provide information on the distance of the land from the location where the tribe has its core governmental functions, as part of assessing the potential benefits and adverse impacts of the project to the tribe and its members.

The modern connection requirement has been interpreted by many involved parties as a "commutability" standard. While the rule does not specify an exact distance limitation, it stipulates that the land be located within a "reasonable commuting distance of the tribe's existing reservation," "near where a significant number of tribal members reside," or "within a 25-mile radius of the tribe's headquarters or other tribal government facilities."

The May 2008 DOI rule and January 2008 DOI guidance address different issues. While the May rule addresses considerations for gaming use approval for a parcel of off-reservation land, the January guidance addresses considerations for assessing land into trust applications. As noted earlier in this report, the two issues are closely related; a land into trust application and consideration of whether the parcel will meet one of the IGRA exceptions can be reviewed by the DOI simultaneously. The impact of the January guidance with respect to the approval process is very similar to that of the May rule. Like the May rule, the January guidance introduced the idea of a commutability standard when DOI is considering off-reservation land into trust applications for gaming purposes.

At the time of the publication of the January 2008 guidance, 30 tribes had land into trust applications pending for off-reservation gaming sites. The DOI immediately rejected 10 of these on the basis that the lands were further than a "reasonable commuting distance" from the reservation, and returned the applications of another 11, citing incomplete information.

Per IGRA, gaming is allowed on off-reservation land taken in trust after 1988 (sometimes referred to as "newly" or "after-acquired lands") only if it meets one of these exceptions:

- The land is taken in trust as a result of the settlement of a land claim.
- The land is the initial reservation of a newly federally recognized tribe.
- The land is restored to trust status for the benefit of a tribe that was stripped of and later restored to federal recognition.

If the land does not qualify under one of these exceptions, the tribe must pursue approval of a two-part determination (see the Appendix on page 7).

DOI Actions on Trust Applications Following January 2008 Guidance

Applications Returned Citing Incomplete Information	Applications Denied
Yseleta del Sur Pueble of Texas (Dona Ana County, NM)	Stockbridge Munsee Community of WI, (NY Catskills)
Turtle Mountain Chippewa Tribe (Grand Forks, ND)	Big Lagoon Rancheria and Los Coyotes Band of Cahuilla and Cupeño Indians (Barstow, CA)
Muckleshoot Tribe of Washington (King and Pierce Counties, WA)	Hannahville Indian Community (Romulus, MI)
Lower Elwha Tribe (Clallam County, WA)	Chemehuevi Tribe (Barstow, CA)
Lac Vieux Desert Band of Lake Superior Chippewa Indians (Dickinson County, MI)	St Regis Mohawk (NY Catskills)
Kickapoo Tribe and the Sac and Fox Nation (Wyandotte County, KS)	Jemez Pueblo, NM (Anthony, NM)
Ho-Chunk Nation (Cook County, IL)	Lac du Flambeau Band of Lake Superior Chippewa (Shullsburg, WI)
Dry Creek Rancheria (Sonoma County, CA)	Mississippi Band of Choctaw Indians (Jackson County, MS)
Colorado River Tribes (Blythe, CA)	Seneca-Cayuga Tribe of Oklahoma (Montezuma, NY)
Confederated Tribes of Colville, WA (Wenatchee, WA)	—
Burns Paiute Tribe (Ontario, OR)	—

Source: U.S. Department of the Interior.

Outlook Under the Obama Administration

The impact of the 2008 DOI rule and guidance amounts to an effective ban on approvals for new off-reservation gaming projects at the present time. The important question at the moment is whether the federal government under the Obama Administration will take action to relax the modern connection requirement. The DOI has held consultation sessions with tribal governments on the issue, and officials have recently indicated in public comments that the government is reviewing its off-reservation gaming approval policy. However, there has been no clear indication as to the timing of a decision, and it is uncertain whether the department will reverse the current stance.

The issue remains highly controversial politically, and since the 2008 guidance and rule were published many members of Congress have made known their position on either side of the issue. Legislators from Nevada, California, and Arizona — all states with substantial existing gaming interests, both Native American and commercial — recently expressed their opposition to off-reservation expansion in a letter to the DOI. This was countered by a response from New York Sens. Schumer and Gillibrand, who support off-reservation casino proposals in the Catskills region. While no member of Congress has indicated that they will introduce legislation during this session to address off-reservation gaming approvals, such action could be precipitated by whatever decisions are made by the DOI in its current policy review. If Congress were to pass legislation addressing the issue, it would supersede the relevance of any DOI rules or guidance. The last time legislation to address the issue was seriously considered by Congress was in 2005–2006, when several bills proposed changes to IGRA that would have drastically limited off-reservation expansion.

Credit Implications

The current roadblocks to industry expansion are a near-term positive for Native American tribes with established casinos, as well as for their commercial counterparts, particularly in the context of depressed credit markets and a poor gaming operating environment. The effective ban on off-reservation gaming approvals will provide a curb on the amount of additional gaming capacity coming online. Fitch does not expect that either the ruling in the Carcieri v. Salazar case or the 2008 DOI actions will jeopardize the legal status of off-reservation casino operations established prior to these developments.

Over the longer term, Fitch believes that clarity on the issue of off-reservation trust land acquisitions would benefit all parties involved in the gaming industry. At the present time, vast amounts of money and other resources are wastefully deployed, not only by tribal governments seeking off-reservation casino approvals, but also by many other constituents with an interest in the outcome of these decisions. Furthermore, the ability to take land into trust is a unique and valuable economic development tool used by Native American tribes, and the utility goes far beyond gaming. Certainly in the case of the Carcieri ruling, but also in some respects of the 2008 DOI actions, the ability of tribes to use this tool for purposes other than gaming land acquisitions has been affected, potentially affecting other tribal government and economic development initiatives.

Appendix

Glossary of Terms

The following list is a selected group of terms that are often used in reference to trust land acquisitions and gaming land use approvals. The source of the definitions includes the relevant legislation and other federal government publications.

Indian Reorganization Act of 1934 (IRA). With respect to gaming land use approvals, the IRA governs the part of the process that involves the federal government taking the land into trust for the benefit of the tribe. The federal government derives this authority from part 151 of the IRA.

Part 151 Determination. Term sometimes used to refer to the process of the DOI assessing a tribe's land into trust application.

Indian Gaming Regulatory Act (IGRA). This 1988 legislation set the framework for the Native American gaming industry.

Indian Lands. This term is important with respect to IGRA. IGRA defines "Indian Lands" as 1) all lands within the limits of any Indian reservation, and 2) any lands with trust or restricted fee status. All lands meeting the first part of the definition are eligible for gaming, and lands meeting the second part of the definition after 1988 are eligible if they meet the criteria of one of the IGRA Section 20 exceptions.

IGRA Section 20. The section of IGRA that describe the criteria lands taken in trust after 1988 must meet to be eligible for gaming purposes.

Newly or After Acquired Lands. Lands acquired in trust after passage of IGRA in 1988. These lands must meet one of the Section 20 exceptions to qualify for gaming use.

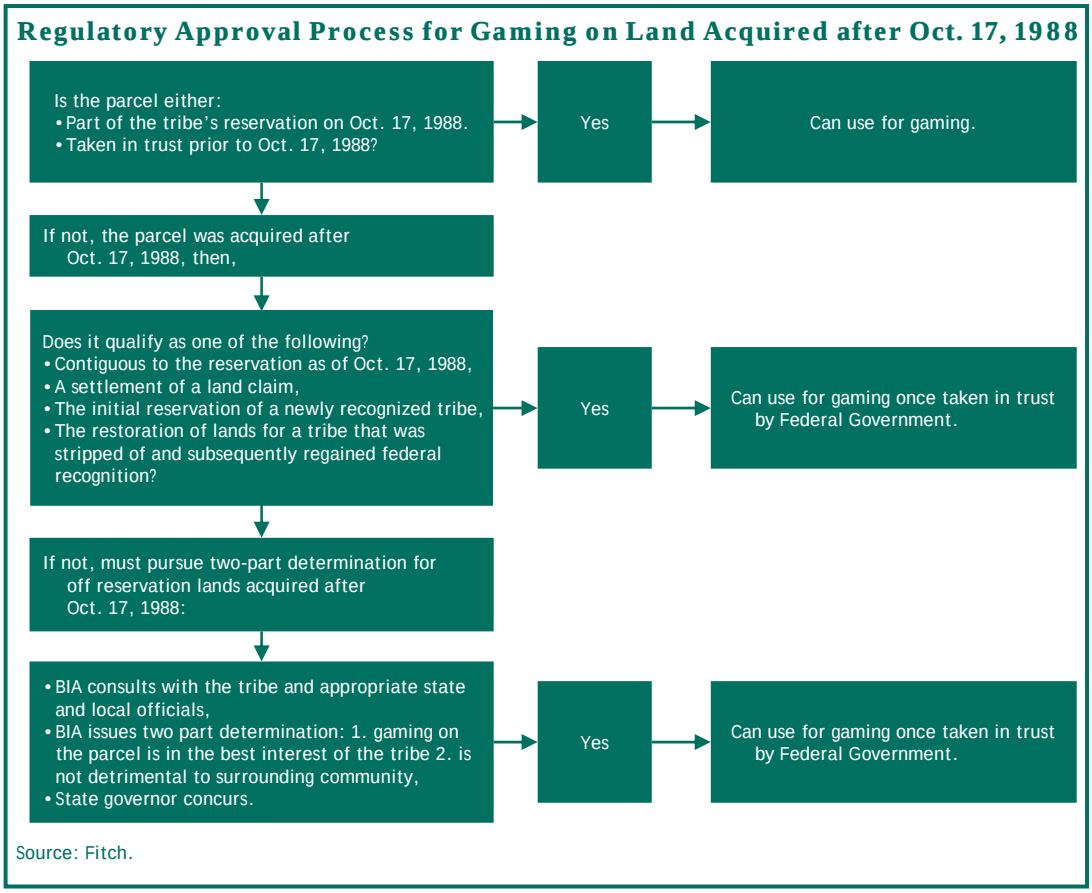
Modern Connection. This term was introduced by the May 2008 DOI rule implementing Section 20 of IGRA. The rule says that a tribe can demonstrate a modern connection to a parcel of land by one of the following: 1) the land is located near where a significant number of tribal members live; 2) the land is within reasonable commuting distance of the tribe's reservation; 3) the land is within 25 miles of the tribe's governmental headquarters or facilities; 4) other factors (left open-ended).

Commutable Distance. As defined in the January 2008 DOI guidance on taking off-reservation land into trust for gaming purposes: "A commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off reservation."

IGRA Lands Determination. Term sometimes used to refer to the process of assessing whether a parcel qualifies for gaming purposes per the language of IGRA.

IGRA Two-Part or Secretarial Determination. A determination by the federal government that, for a parcel of off-reservation land taken in trust after 1988 and which does not meet one of the other Section 20 exceptions, 1) a proposed gaming facility is in the best interest of the tribe and its members, and 2) it would not be detrimental to the surrounding community.

Illustration Of IGRA Lands Determination Process



Source: Fitch.