

UNDERSTANDING THE FEDERAL FEE-TO-TRUST LAND ACQUISITION PROCESS

Presented by

Kevin Quigley & Tom Foley

Foley & Quigley PLC

Indian Affairs | Gaming Business Counsel

May 24, 2018

CONTEXT: IN CONSIDERATION OF ANNOUNCED PAMUNKEY TRIBE INDIAN GAMING PLANS

- Virginia does not have any legal “casinos.”
- But, Virginia currently permits certain forms of gambling: e.g. pari-mutual horse racing and Simulcast races, state lottery, charity bingo and raffles.
- In addition, unless otherwise prohibited by a specific congressional act, the Indian Gaming Regulatory Act (IGRA), Pub. L. 100-497, generally permits a federally-recognized tribe located within Virginia’s borders to conduct gaming activities on their “reservation” or their “trust lands” over which the tribe exercises governmental powers.

TYPES OF GAMING PERMITTED UNDER IGRA

- IGRA identifies three types of gaming that a federally-recognized tribe can conduct on their reservation or trust lands:
 - Class I gaming includes traditional social or ceremonial games played for prizes of minimal value.

This type of gaming is regulated solely by the tribe.
 - Class II gaming includes, among others, paper bingo games, linked e-bingo machines, other games similar to bingo, paper pull-tabs, e-pull-tabs machines; also includes card games if games are played consistent with state law.

This type of gaming is regulated primarily by the tribe with oversight by the National Indian Gaming Commission, a federal agency – no State role.
 - Class III gaming includes slot machines, blackjack games, lotteries, craps, roulette and other “casino” type games.

This type of gaming only permitted if tribe enters into a “compact” with the State authorizing such gaming.

PAMUNKEY INDIAN TRIBE HISTORY & ANNOUNCED GAMING PLANS

- The Pamunkey Indian Tribe became a federally-recognized Indian tribe pursuant to the federal “25 CFR Part 83” administrative process in 2015.
- Pamunkey tribe has announced plans to develop \$700 million gaming facility; tribe does not currently have a federally-recognized Indian reservation, but its financial partner has purchased 600+ acres in New Kent County near I-64/I-295 intersection.
- Unlike six other tribes in Virginia who recently received federal recognition via 2018 congressional legislation, which included a provision prohibiting IGRA gaming on their tribal lands, the Pamunkey tribe has no such restriction.
- Pamunkey tribe may conduct gaming under IGRA if the tribe has: (1) IGRA-eligible gaming lands, (2) NIGC approved gaming ordinance and (3) Dept. of Interior approved Tribal-State Compact if Class III gaming is to be conducted.
- Focus of this presentation is on the federal process necessary for acquiring IGRA-eligible gaming lands.

OVERVIEW OF PROCESS FOR ACQUIRING IGRA-ELIGIBLE GAMING LANDS

- Federally-recognized tribes are sovereign nations akin to states under U.S. Constitution and have government-to-government relationship with Federal Government.
- All Indian trust land applications require Congressional authority.
- 25 USC § 465 - Indian Reorganization Act (IRA)

Generally allows Secretary of the Interior to take land into trust for Indians, thereby restricting the jurisdiction and sovereignty of the State where the land is located.

Carcieri issues with recently recognized tribes (i.e. post-1934)

OVERVIEW OF PROCESS FOR ACQUIRING IGRA-ELIGIBLE GAMING LANDS

- **25 CFR Part 151** regulations implement trust land acquisitions under IRA.
First adopted in 1980 and amended in 1995 and 2013.
Currently under revision consideration by DOI.
These regulations establish the criteria and procedure used by the Federal Government for moving land into Federal trust for tribes.
- National Environmental Policy Act (NEPA) applies to trust application decisions.
Makes environmental information available to federal officials and public before decisions and action are taken.
- Any after-acquired trust parcel (i.e. post-October 17, 1988 acquisitions) for gaming purposes is subject to **25 CFR Part 292** regulations in addition to Part 151.

PART 151 PROCESS

- Part 151 criteria include: description of need for additional land, proposed use, impact on State and its political subdivisions from the removal of land from tax rolls, any jurisdictional problems or potential conflicts of land use which may arise.

See DOI Fee-to-Trust Process handout

- All trust land applications must be approved by the Secretary of the Interior.
- Secretary must give 30-day comment period to State and local governments as part of process.
- If approved by Secretary or AS-IA, decision is published in Federal register and land is “immediately” acquired in trust; but decision is immediately subject to APA legal action.

See OIG Gaming Land Trust Application Process handout

COMMON QUESTIONS RE: PART 151 PROCESS

- What are local government's rights or involvement in the application process?
See Part 151.10(e) [tax rolls] and (f) [jurisdictional problems/land use conflicts]
- What kind of issues or subjects do local governments most often provide comment on in the application?
Part 151.10(e) [tax rolls] and (f) [jurisdictional problems/land use conflicts]
Also see NEPA

COMMON QUESTIONS RE: PART 151 PROCESS

- Other than the 30 day comment period is there any other way a local government can contribute input?

Additional input route is mainly through public lobbying of congressional delegation and executive branch policy makers.

- What else can a local government do to mitigate any impacts to the local government, e.g., loss of property tax revenues?

Enter into cooperative agreements with the tribe as to services, land use, etc.

COMMON QUESTIONS RE: PART 151 PROCESS

- If trust land is not subject to State or local control does that nullify state authority or controls over land use once the land is placed into federal trust?

Once in trust for the benefit of the tribe, the land is not subject to state regulatory jurisdiction, nor State or local taxation and property taxes. See IRA Section 465.

- How long does the trust application process generally take for moving land into federal trust?

Depends on nature of trust acquisition and its specific circumstances; in our experience it is not uncommon for gaming-related trust applications to stretch out 8 years or more before any final decision is made.

COMMON QUESTIONS RE: PART 151 PROCESS

- Have any local governments/municipalities successfully contested a proposed transfer of tribal-owned land into federal trust?

Most recent local government objections to trust land applications that have been successful in delaying a transfer have focused on the so-called Carcieri “not under federal jurisdiction” in 1934 challenge.

- May a tribe “automatically” conduct gaming activities on land taken into trust under the Part 151 process?

Not all trust lands are eligible for gaming purposes under the IGRA. See 25 U.S.C. § 2719.

Any land acquired in trust after October 17, 1988 may be used for gaming activities only if it meets one of IGRA’s express exceptions to the so-called “after-acquired trust lands prohibition”; and this determination is subject to the 25 Part 292 regulations.

PART 292 PROCESS

- Under Part 292 process, a tribe makes request to federal government agencies for determination that newly acquired trust lands meets one of IGRA's statutory exceptions.
- IGRA exceptions to after-acquired trust lands prohibition include:
 - “2719(a) Location” exception – i.e. land is located “within or contiguous to” 1988 reservation boundaries or “within last recognized” reservation in State where tribe is presently located
 - “Land Settlement Claim” exception
 - “Initial Reservation” exception
 - “Restored Lands” exception
 - “Secretarial Two-Part” Determination exception

PART 292 PROCESS

- Under the “Initial Reservation” exception, gaming is permitted on the land if all the following are met:
 - The tribe has been acknowledged through the Part 83 administrative process, and
 - The tribe has no gaming facility on newly acquired lands under the “restored land” exception; and
 - The land is the first proclaimed reservation of the tribe following acknowledgement, or if no proclaimed reservation as of May 20, 2008, the tribe demonstrates that the land is located within the State where the tribe is now located and within an area where the tribe has significant historical connections **and** the tribe can demonstrate a “modern connection” to the land.

PART 292 PROCESS

- Under the “Initial Reservation” exception, a tribe can demonstrate a “modern connection” to the land by one or more of the following:
 - Showing that the land is near where a significant number of tribal members reside; or
 - The land is within a 25-mile radius of the tribe’s headquarters or other governmental facilities that have existed for at least 2 years at the time of the land-into-trust application; or
 - The tribe can demonstrate other factors establishing the tribe’s current connection to the land.

PART 292 PROCESS

- Under “Secretarial Two-Part” determination gaming is permitted if:
 - (I) Secretary determines, after consulting with the “Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes,” that gaming would “be in the best interest of the tribe and its members” and “not be detrimental to the surrounding community,” **and**
 - (II) the Governor of the relevant State agrees with the Secretary’s determination.

COMMON QUESTIONS RE PART 292 PROCESS

- What other processes, local and state, are initiated by a proposed gaming use of trust land?

None, except for Part 292 regulations concerning "Secretarial" two-part determinations. See Part 292.19

- Who ultimately decides whether gaming is an allowed use on the tribal trust lands?

Federal Government through Secretary of the Interior or NIGC, subject to judicial review.

RECENT DEVELOPMENTS RE: GAMING-RELATED TRUST LAND ACQUISITIONS

- Trump Administration trust land policy attitudes
 - DOI personnel – Cason, Bernhardt, Tahsuda, Sweeney
- April 2017 Acting AS-IA Memo re: gaming related acquisitions procedures
- October 2017 Proposed Part 151 revisions
 - Replaced by “10 questions” consultation
- Congressional leaders & committees attitudes
- Court trust land determination decisions