




# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

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Memorandum

To: All Regional Directors, Bureau of Indian Affairs  
Director, Office of Indian Gaming

From: Assistant Secretary – Indian Affairs 

Subject: Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes

On June 18, 2010, Secretary Salazar issued a memorandum regarding the gaming policy of the Department of the Interior (Department) noting that the Indian Gaming Regulatory Act (IGRA) generally prohibits Indian gaming on lands acquired in trust after October 17, 1988. The Secretary also described the two types of exceptions to this general prohibition: the “equal footing” exceptions, and the “off-reservation” exception. The Secretary directed me to move forward in processing applications under the “equal footing” exceptions, while also recommending that I undertake a review of issues, guidance, and regulatory standards relating to off-reservation gaming, in consultation with tribal leaders.

Since that time, my office has participated in six tribal consultation sessions with tribal leaders, and has thoroughly reviewed issues and policies regarding off-reservation gaming. I am writing you to explain the findings of my review and to inform you that, for all of the reasons discussed herein, I am withdrawing the January 3, 2008, memorandum of the Assistant Secretary – Indian Affairs, entitled “Guidance on taking off-reservation land into trust for gaming purposes.” This memorandum also describes how we will consider applications for gaming under IGRA’s “off-reservation” exception moving forward.

## I. BACKGROUND

One of the most important authorities and responsibilities I have at the Department is to acquire land in trust for tribes and individual Indians pursuant to the legal standards set forth in Federal law, including the Indian Reorganization Act (IRA). In addition, I also have the authority and responsibility under IGRA to determine whether gaming can occur on lands acquired after October 17, 1988, the date of IGRA’s enactment.<sup>1</sup> These decisions often raise difficult and contentious issues among the parties involved.

<sup>1</sup> This responsibility is shared with National Indian Gaming Commission (NIGC) under certain circumstances. See, e.g., 25 C.F.R. §292.3; Memorandum of Agreement Between the NIGC and DOI (2007). available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/indianlands/mou/DOIMOU022607.pdf>.

It is important to note that there are three independent and distinct requirements that a tribe must satisfy in order to legally operate a Class III facility on lands acquired in trust after IGRA's enactment. First, the Department must acquire lands in trust for the tribe pursuant to applicable Federal law. Second, those lands must be eligible for gaming pursuant to one of IGRA's exceptions. Lastly, the tribe must enter into a valid tribal-state gaming compact. Each of these requirements has varying levels of review, which can result in a process that consumes both time and resources.

With respect to the second requirement, as the Secretary noted in his June 18, 2010, memorandum, IGRA's "equal footing" exceptions were intended to place recently recognized and restored tribes on an equal footing with those tribes that were federally recognized at the time of IGRA's enactment. For example, IGRA provides exceptions to allow tribes to game on lands that qualify as "Restored Lands" (25 C.F.R. § 292.7), lands that are provided to the tribe as a "Settlement of a Land Claim" (*Id.* at § 292.5), or lands that qualify as a tribe's "Initial Reservation." *Id.* at § 292.6.

The "off-reservation" exception, meanwhile, offers tribes a limited opportunity to conduct gaming outside of their existing reservations where appropriate. Local communities have several meaningful opportunities to contribute to the Secretary's review of a tribe's application for off-reservation gaming. In addition, a state's governor must concur in all gaming proposals under the "off-reservation" exception as well as execute a tribal-state gaming compact with the tribe. Due largely to the multiple layers of this review process, the off-reservation exception has proven difficult to satisfy since the enactment of IGRA. Since 1988, only five tribes have received final approval from both the Secretary and the state governor in order to successfully establish an off-reservation gaming facility.

## II. DISCUSSION

### A. January 3, 2008 Guidance Memorandum

On January 3, 2008, prior to the Department's promulgation of the 25 C.F.R. Part 292 regulations, then-Assistant Secretary – Indian Affairs Carl Artman issued a memorandum entitled "Guidance on taking off-reservation land into trust for gaming purposes" (Guidance Memorandum) to Regional Directors and the Office of Indian Gaming. The Guidance Memorandum provided internal guidance to Bureau of Indian Affairs staff regarding the interpretation and application of the fee-to-trust regulations at 25 C.F.R. Part 151. The Guidance Memorandum was issued without government-to-government consultation with tribal leaders. It was referenced in letters disapproving numerous off-reservation gaming applications issued the very next day, on January 4, 2008.<sup>2</sup>

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<sup>2</sup> As noted above, when the Guidance Memorandum was issued the Department was in the process of promulgating regulations governing the eligibility of Indian lands for gaming. Those regulations, finalized on May 20, 2008, and located at 25 C.F.R. Part 292, set forth the process by which the Secretary makes a determination regarding off-reservation gaming applications.

On August 24, 2010, my office sent a letter to tribal leaders announcing that we would conduct a series of six government-to-government consultations regarding the Department's guidance and regulatory standards for taking land into trust for gaming.<sup>3</sup> That letter specifically identified eight different issues for consultation, including: whether certain provisions of the Department's regulations governing off-reservation gaming, at 25 C.F.R. Part 292, should be amended; and, "[w]hether 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 withdrawn, modified, or incorporated into the regulations in 25 C.F.R. Part 292."

During the tribal consultation process, we received a number of comments regarding the Guidance Memorandum. 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 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 Indian reservations.

I have carefully considered the viewpoints expressed during our recent tribal consultations. Based upon those consultations and comments provided during the same, as well as for the additional reasons stated herein, I have decided to withdraw the Guidance Memorandum.<sup>4</sup>

#### **B. Processing "off-reservation" gaming applications under Part 292.**

The Guidance Memorandum does not reflect the varied and complex issues that exist for tribes based on their own unique circumstances, and therefore may unintentionally constrain the Secretary's consideration of a tribe's application. The Department rarely has authorized a tribe to engage in off-reservation gaming. Nevertheless, it is vital that any decision regarding

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<sup>3</sup> Letter from George Skibine, Acting Principal Deputy Assistant Secretary – Indian Affairs, U.S. Department of the Interior, to Tribal Leaders (Aug. 24, 2010), *available at* <http://www.indianaffairs.gov/idc/groups/public/documents/text/idc010719.pdf>.

<sup>4</sup> It is the policy of this Administration to engage in government-to-government consultations to secure meaningful input from tribes with respect to certain actions taken by the Department. When directing me to conduct a review of the Department's "current guidance and regulatory standards" governing off-reservation exception, the Secretary recognized that this is an area where "deliberate government-to-government consultations would lead [the Department] to the implementation of a sound policy in this area." *See* Memorandum from the Honorable Ken Salazar, Secretary, DOI to Larry Echo Hawk, Assistant Secretary – Indian Affairs, DOI (June 18, 2010).

off-reservation gaming carefully examine and apply the rigorous criteria and standards provided by applicable laws and regulations in a fact-specific manner, rather than in the abstract. In my view, IGRA and the Department's regulations, at 25 C.F.R. Parts 151 and 292, adequately account for the legal requirements and policy considerations that must be addressed prior to approving fee-to-trust applications, including those made pursuant to the "off-reservation" exception.<sup>5</sup> Specifically, the recently enacted Part 292 regulations require exacting review of requests for off-reservation gaming.

The Part 292 regulations were promulgated pursuant to IGRA and other statutory authorities. Under the IGRA's "off-reservation" exception, a tribe may conduct gaming on lands acquired after October 17, 1988 only if:

- 1) The Secretary, after consultation with the [applicant] tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that 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; and
- 2) The Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

25 U.S.C. § 2719(b)(1)(A). This evaluation is often referred to as the "Two Part Determination."

On May 8 2008, shortly after the release of the Guidance Memorandum, the Department published final regulations that implement the "off-reservation" exception. These regulations set forth four general steps an applicant tribe must take prior to successfully receiving a positive determination:

- 1) The tribe must submit a written request to the Secretary for a determination that the proposed gaming establishment is in the best interest of the tribe and is not detrimental to the surrounding community. 25 C.F.R. § 292.13(a). The tribe's application must include, among other things:
  - "[T]he distance of the land from the tribe's reservation or trust lands, if any, and the governmental headquarters;"<sup>6</sup> and
  - Information to assist the Secretary in making a determination regarding whether the proposed gaming establishment will be in the best interest of the tribe and its

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<sup>5</sup> My decision is also consistent with the views tribal leaders expressed during our government-to-government consultation on the Department's guidance and regulatory standards for taking land into trust for gaming purposes. During the consultations a number of tribes expressed frustration that they participated in the consultations during the initial drafting and promulgation of 25 C.F.R. Part 292, and that the Department should simply move forward with processing applications under that Part rather than seeking further comment.

<sup>6</sup> *Id.* at § 292.16(d).

members,<sup>7</sup> including, but not limited to, information regarding projected tribal income and employment; projected benefits to the tribe and its member from projected income; possible adverse impacts on the tribe and its members and plans for addressing such impacts; and distance of the land from the location where the tribe maintains core governmental functions;<sup>8</sup> and

- Information to assist the Secretary in determining whether the proposed gaming facility will not be detrimental to the surrounding community,<sup>9</sup> including, but not limited to, anticipated impact on the social structure, infrastructure, services, housing, community character and land use patterns of the surrounding community; anticipated impacts on the economic development, income, and employment of surrounding community; and if any nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land.<sup>10</sup>
- 2) Once the applicant tribe submits the required information, the Secretary will then consult with the tribe and appropriate state and local officials, including officials of nearby Indian tribes, regarding the tribe's request for a secretarial determination. 25 C.F.R. § 292.13(b).
  - 3) Following that consultation, the Secretary will determine whether the proposed gaming establishment is in the best interest of the tribe, and whether the gaming establishment would be detrimental to the surrounding community. 25 C.F.R. § 292.13(c).
  - 4) If the Secretary makes a positive determination, he will then notify the Governor of the affected state. The Governor must then determine whether to concur in the Secretary's determination. 25 C.F.R. § 292.13(d).

In conjunction with IGRA and the IRA, the regulations provide comprehensive and rigorous standards that set forth the Department's authority and duties when considering applications for off-reservation gaming. I find that the Department's regulations governing off-reservation gaming acquisitions adequately provide standards for evaluating such acquisitions and, consequently, that the Guidance Memorandum's interpretation of our fee-to-trust regulations is unnecessary.

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<sup>7</sup> *Id.* at § 292.16(e).

<sup>8</sup> *Id.* at § 292.17.

<sup>9</sup> *Id.* at § 292.16(f).

<sup>10</sup> *Id.* at § 292.18.

C. Processing “off-reservation” gaming applications under Part 151.

The Guidance Memorandum provided interpretation and guidance with respect to 25 C.F.R. § 151.11(b), the regulation governing taking off-reservation land into trust for a tribe. On this point, I also view that guidance as unnecessary and potentially confusing. The Department’s fee-to-trust regulations, which govern the process by which the Secretary acquires land in trust on behalf of tribes and individual Indians, have been in effect for 30 years. Where a tribe seeks to have land acquired in trust outside of its existing reservation:

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:

...

(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 [by state and local governments regarding regulatory jurisdiction, real property taxes and special assessments].

25 C.F.R. § 151.11 (emphasis added).

The land acquisition process already provides an opportunity to scrutinize applications that seek to acquire land off-reservation. The Secretary must consider concerns raised by state and local officials pursuant to 25 C.F.R. §§ 151.11 and 151.10, and must balance those concerns when making his determination.

The Guidance Memorandum thus has the potential to unnecessarily constrain the Department’s decision making process. Clearly, the Department must consider the impact of jurisdictional issues identified for consideration in the regulations. At the same time, each tribe’s relationship with its state and local governments is unique and each should be considered on a case-by-case basis by balancing *all* of the relevant factors identified in the regulations, not just those identified in the Guidance Memorandum. Finally, the regulations do not require the Department to deny an application based on any single issue to be considered thereunder. The regulations speak for themselves and no guidance beyond the regulations is necessary in guiding the Department’s case-by-case analysis for each unique fee-to-trust application.

### III. CONCLUSION

For all of the reasons discussed herein, I hereby withdraw the January 3, 2008, memorandum of the Assistant Secretary – Indian Affairs entitled “Guidance on taking off-reservation land into trust for gaming purposes.” In its place are the Department’s existing regulations, referenced above, which provide strict and transparent standards for evaluating tribal applications to conduct off-reservation gaming.

Going forward, the Department will review off-reservation gaming applications on a case-by-case basis to determine whether they comply with IGRA and existing regulations. It is worth noting once again that a positive gaming eligibility determination is only one of three necessary steps an applicant tribe must go through to open a Class III facility. In addition to a positive two-part determination under the “off-reservation” exception, the applicant tribe generally must have land acquired in trust on its behalf, and must enter into a valid tribal-state gaming compact.

I appreciate your consideration of these important and sensitive issues. If you have any questions regarding this letter, you may contact the Office of Indian Gaming.