

# Trends in Acquiring Land in Trust For Gaming : What Tribes Need to Know

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# Office of Indian Gaming

**The Office of Indian Gaming is responsible for implementing gaming-related activities assigned to the Secretary by the Indian Gaming Regulatory Act**

OIG develops policies and procedures for review and approval of:

- Tribal-State Compacts and Secretarial Procedures
- Tribal plans for per capita distributions of gaming revenues
- Requests to take land into trust for gaming
- Indian Lands Determinations and Two Part Determinations

# Trends in Acquiring Land in Trust For Gaming

## The application process for acquiring land in trust for gaming is evolving

- Tribes must keep track of not only their application at the BIA, but also the views and actions of their neighbors communities, neighboring tribes, and local and state governments
- Litigation and courts also play a bigger role in how BIA reviews and processes applications and reaches final decisions
- Congress plays a significant role through oversight of the Indian Gaming Regulatory Act (IGRA)
- Accordingly, tribe have to take an active role in the process

# Engage Supporters

## Identify supporters and gain allies

- **Nearby tribes:** strong tribal alliances are important
- **Citizens and citizen groups:** want assurances that the local environment and community aren't negatively impacted, and that law enforcement and social services problems aren't created
- **Business groups:** want business opportunities and a strengthened economy
- **Local governments (city, county):** want assurances that local citizens are not negatively impacted and that their budgets aren't impacted

# Engage Supporters

- **State agencies:** want assurances that local citizens are not negatively impacted and that their budgets not impacted
- **State representatives:** considers extent of local support and opposition, and views of constituents
- **Governor:** considers extent of local support and opposition, and views of constituents, but can be an ally and advocate
- **Congressional delegation:** considers extent of local support and opposition and views of constituents, but also thinks about national policy issues, and can be an advocate with DOI

# Solidify Support

## Memorandum of Understanding (MOU)

- Binding agreements between tribes and local governments that can address concerns of potential supporters through impact mitigation and agreements to cooperate
- Typically provide funding (one time and/or continuing) from casino revenue for:
  - **Infrastructure upgrades:** water/sewer, roads, utilities
  - **Education:** school funding, libraries, playgrounds
  - **Social services:** problem gambling, charitable organizations
  - **Emergency services:** new personnel, new equipment, cross deputization, “will serve” agreements
  - **Environmental mitigation:** wetlands & open space preservation

# Solidify Support

## Key Provisions in MOUs (one size does not fit all)

- **Tribal waiver of sovereign immunity:** Typically required
- **Dispute resolution procedures:** binding arbitration, tribal court, and/or state court
- **Continuation of tribal payments while in dispute resolution**
- **Continuation of local government services while in dispute resolution**
- **Statements of support and cooperation**



# Publicize Support

## **Inform the public and state/federal officials about support for the Tribe's project**

- Positive impact on the tribe
- Number of new jobs created, positive impact on the economy and community
- Protection of the environment
- Publicize through:
  - City and County proclamations of support
  - Press statements by partners and supporters
  - Letters to the Governor, congressional delegation
  - Letters to the Secretary and Assistant Secretary
  - Letters from the Governor and congressional delegation to the Secretary and Assistant Secretary

# Identify the Opposition

**Understand why they oppose**

**Can an agreement be reached?**

- **Nearby tribes:** concerned about infringement on aboriginal territory, market competition
- **Citizens:** can influence state/federal officials, letter writing campaigns
- **Citizen groups:** sometimes prepared to litigate
- **Business groups:** can influence state/federal officials
- **Local governments :** sometimes prepared to litigate, can pass resolutions
- **State officials and congressional delegation:** express their opposition directly to DOI

# Watch the Courts

## Recent cases set important precedent

### *Confed. Tribes of Grand Ronde v. Jewell* (Dec. 2014)

- Cowlitz Indian Tribe federally acknowledged in 2002
- Filed fee to trust application for 152 ac. In Clark County, Washington, for gaming as “initial reservation” Assistant Secretary issued final decision to acquire land in 2013
- ***Carcieri* challenge:** Cowlitz not under federal jurisdiction
  - Court: upheld DOI’s *Carcieri* analysis (1<sup>st</sup> major litigation test)
- **IGRA challenge:** land was not “initial reservation”
  - Court: upheld DOI’s regs (1<sup>st</sup> determination for initial reservation) and DOI’s findings
- **NEPA challenge:** inadequate NEPA analysis
  - Court: upheld DOI’s analysis and conclusions

# Watch the Courts

## ***Big Lagoon Rancheria v. California (June 2015)***

- In 2009, Big Lagoon filed suit against State, alleging that State failed to negotiate a tribal-state gaming compact with the Tribe in good faith as required by IGRA.
- State alleged it was not required to negotiate because Big Lagoon was not “under federal jurisdiction” in 1934 (*Carcieri*)
- State questioned Big Lagoon’s status as federally recognized

### **Court:**

- Rejected State’s attempt to use *Carcieri* to attack 1994 trust acquisition and federal recognition
- Rejected State’s attempt to use compact dispute to challenge trust status of land

# Watch Congress

## **Indian Gaming is a “hot topic”**

- Two committees typically review Indian gaming issues:
  - Senate Indian Affairs Committee
  - House Natural Resources Committee, Subcommittee on Indian, Insular and Alaska Native Affairs
- The Assistant Secretary – Indian Affairs typically testifies before one or both committees several times each year on Indian gaming issues
- The committees are interested in specific tribal projects, national Indian gaming policies, and proposals to amend the Indian Gaming Regulatory Act (IGRA)

# Watch Congress

## **Read past testimony and follow proposed legislation**

- Recent concerns include:
  - Infringement on aboriginal territory
  - The needs of specific tribes for a casino project
  - Tribes taking land in trust for non-gaming purposes and then quickly conducting gaming

# Submit a Complete Application

- When submitting an application to the Regional Office to take land in trust address each requirement under 25 CFR Part 151
- When submitting a request to the Regional Office for a determination that the land is eligible for gaming, address each requirement of 25 CFR Part 292
  - Reduces delay in reviewing and processing the application
  - Allows BIA to fully analyze issues and address potential plaintiffs arguments

# Submit a Complete Application

- Submit information that helps in the review: maps, economic analysis, projected tribal employment, letters of support, historical data, etc.
- Tribe should submit a fact-specific unmet needs assessment (not wish list): need for land, inability to provide services & housing, need for employment & economic development, etc.
- Comments and concerns of the state, local governments, citizen groups, and nearby tribes must be carefully considered and addressed by BIA



# Recent DOI Gaming Decisions

## **25 C.F.R. Part 292**

- Menominee -Two Part Determination (Aug. 23, 2013)
- Kaw - Two Part Determination (May 17, 2013)
- Cowlitz - Initial Reservation (April 22, 2013)
- Mechoopda - Restored Lands Exception (Jan. 24, 2014)
- Soboba - Contiguous Exception (May 19, 2015)
- Spokane Tribe – Two Part Determination (June 15, 2015)
- Cloverdale Rancheria – Restored Lands Exception (Apr. 29, 2016)

## **Part 151**

- Kaw Acquisition Decision (March 10, 2014)

## ***Carcieri***

- Cowlitz (April 22, 2013)
- Mechoopda (Jan. 24, 2014) (Jan. 24, 2014)
- <http://www.bia.gov/WhoWeAre/AS-IA/OIG/index.htm>