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IN FOCUS

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Indian Gaming Regulatory Act: Gaming on Indian Lands

Overview

Under the U.S. Constitution, Congress has broad power over tribal affairs, including gaming on tribal lands. In the 1970s, some federally recognized tribes established bingo gaming operations to raise funding for tribal government operations. At that time, there was no statutory framework specifically governing tribal gaming. State governments sought to regulate tribal gaming under state gaming laws, but courts were divided over whether tribal gaming was within state or federal jurisdiction. (Gaming and gambling are used synonymously in this In Focus.) In 1987, the Supreme Court held that once a state has legalized any form of gambling, tribes within that state can offer the same game on tribal land held in trust by the United States without any state regulation (*see* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)). In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA, P.L. 100-497, 25 U.S.C. §§2701–2721), to regulate gaming on tribal land without disrupting the Supreme Court's holding in *Cabazon*. As of 2023, over 200 tribes own, operate, or license more than 500 gaming establishments in 29 states. This In Focus describes IGRA's key provisions, issues with the law, and possible options for Congress.

IGRA's Gaming Classes

Among other things, IGRA and its implementing regulations authorize three classes of gaming activities:

- *Class I gaming*, social gaming with minimal prizes and traditional Indian gaming;
- *Class II gaming*, including bingo and "non-banking card games"; and
- *Class III gaming*, comprising all other games, including casino games.

The degree of federal and state involvement in tribal gaming activities varies with each gaming class. The National Indian Gaming Commission (NIGC)—the federal Indian gaming regulatory body created by IGRA—regulates Class II gaming and some aspects of Class III gaming. IGRA requires Class III gaming to be regulated through compacts between tribes and states with approval from the Secretary of the Interior (Secretary).

Indian Lands Under IGRA

Under IGRA, tribes may conduct gaming activities on various types of "Indian lands." IGRA's definition of Indian lands is not tied to a tribe's location in any particular state but to the land's status as reservation, trust, or restricted-fee land, and the tribe's jurisdiction over that land (25 U.S.C. §2703).

Land can be taken into trust through the *land into trust* (or fee-to-trust) process, which is carried out by the Department of the Interior (DOI) under 25 C.F.R. §151. A tribe may petition DOI to take land into trust on its behalf. Congress can pass laws that require DOI to accept a specific parcel of land into trust (*mandatory acquisition*) or may permit DOI to take land into trust (*discretionary acquisition*) for a particular tribe or tribes. If the proposed trust land acquisition's stated purpose is gaming, DOI's Bureau of Indian Affairs (BIA) processes the application concurrently with DOI's Office of Indian Gaming.

IGRA Exceptions That Allow Gaming on Newly Acquired Tribal Trust Lands

IGRA generally prohibits gaming activities on lands taken into trust after October 17, 1988, unless the proposed lands meet certain conditions (25 U.S.C. § 2719). In general, gaming may occur if the tribe had a reservation on October 17, 1988, and the newly acquired lands are located within or contiguous to (i.e., sharing a border with) that reservation. Alternatively, gaming may occur if the tribe did not have a reservation on October 17, 1988, and

- if the newly acquired lands are in Oklahoma, the lands are contiguous to other land held in trust or restricted status, or located within the tribe's last reservation; or
- if the newly acquired lands are not in Oklahoma, the lands are within the tribe's last reservation in the state or states in which the tribe is now located.

The IGRA exceptions to this rule include the following:

Secretarial Determination Exception. This exception allows gaming on new trust land if the Secretary determines, with the state governor's concurrence, that the acquisition for a gaming establishment

- is in the best interest of the tribe; and
- is not detrimental to the local community.

"Settlement of a Land Claim" Exception. This exception allows gaming on new trust land if that land is acquired as part of a tribal land claim settlement. These settlements can be (1) enacted in legislation, (2) ordered by a court, or (3) part of agreements where the United States is a party (25 C.F.R. §292.5).

Initial Reservation Exception. This exception allows gaming on new trust land if the land was acquired as part of an initial reservation for a newly recognized tribe. Under 25 C.F.R. §292, the following conditions must be met:

- the tribe must have been federally recognized (or acknowledged) through DOI's Federal Acknowledgment Process under 25 C.F.R. §83;
- the tribe must have no gaming facility on lands under the IGRA restored lands exception; and
- the land must be the first-proclaimed reservation after DOI's acknowledgment.

Restored Lands Exception. This exception allows gaming on new trust land if the land was acquired as part of the restoration of lands for a tribe restored to federal recognition after termination during the *Termination Era*. During the 1950s and 1960s, federal policy focused on disestablishing reservations, diminishing tribal sovereign authority, and ending the federal recognition of tribes.

Tribes may send requests for opinions on whether a particular trust parcel meets one of the exceptions to DOI's Office of Indian Gaming. When the proposed gaming lands are already in trust status, DOI regulations instruct the applicant to contact NIGC (25 C.F.R. §292).

Issues and Options for Congress

Some Members of Congress view IGRA as representing a delicate balance between many interests in the conduct of gaming. On one hand, gaming is viewed "as a means of generating needed tribal revenues and employment," while on the other hand, it raises concerns for federal, state, and tribal governments about issues such as preventing criminal activity (S.Rept. 114-199). In recent years, Congress has passed legislation prohibiting gaming on some tribal lands. For example, the Pala Band of Mission Indians Land Transfer Act of 2023 (P.L. 118-11) prohibited gaming on lands transferred into trust by the act. Several Members spoke in favor of the gaming prohibition, arguing that it allowed tribes to enjoy their "sacred land" without disruption from any gambling operations.

Jurisdiction. Congress continues to express an interest in ensuring that all tribes are subject to federal gaming jurisdiction. In 2022, the Supreme Court reenforced the applicability of both *Cabazon* and IGRA to tribal gaming. In *Ysleta del Sur v. Texas*, 142 S.Ct. 1929 (2022), the Court held that Texas cannot enforce gaming regulations against federally recognized tribes covered by the Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act (Restoration Act, P.L. 100-89), when the game was not fully prohibited in the state and where the relevant act of Congress expressly granted state jurisdiction over gaming *prohibitions*, not gaming *regulations*. The Court held that because Congress passed the Restoration Act after *Cabazon*, the act is subject to *Cabazon*'s interpretation of state jurisdiction over tribal gaming, meaning gaming not prohibited in the state would still be regulated by IGRA. After *Ysleta*, the 118th Congress introduced H.R. 2873/S. 1536 to ensure that the *Ysleta* tribes are subject to regulations under IGRA.

Off-Reservation Gaming. Congress has debated limiting tribes from gaming "off-reservation" (i.e., on trust or restricted-fee lands without a geographic or historical connection to the tribe). For example, under the Tribal Gaming Eligibility Act (S. 477, 113th Congress), the Interior Secretary would have to determine that a tribe has "a substantial, direct, modern connection to the land" proposed for gaming and "a substantial, direct, aboriginal connection to the land." Some non-tribal entities, such as the American Gaming Association, have supported the limitation on off-reservation gaming. For example, in *W. Flagler Assocs., Ltd. v. Haaland,* 71 F.4th 1059 (D.C. Cir. 2023), non-tribal gambling operators asserted that a compact between Florida and the Seminole Tribe of Florida violated IGRA by authorizing sports betting occurring off tribal lands (through mobile sports wagers using servers located on tribal lands within Florida). The U.S. Court of Appeals for the D.C. Circuit concluded that the challenged compact provisions did not violate IGRA because they merely discussed, but did not authorize, gaming off tribal lands, and that offsite gambling was instead authorized by state laws that were not challenged before the court.

Internet/Mobile Gaming. Congress may consider addressing tribal gaming activities, such as online gaming, that have emerged since IGRA's enactment. The National Congress of the American Indians has asserted that IGRA and existing tribal-state compacts should be protected in any new tribal gaming legislation. In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (P.L. 109-347), which allowed states and tribes to permit internet gambling within their borders if they apply certain safeguards. In 2022, DOI published a rule which included proposed language clarifying that a compact may include provisions allocating jurisdiction to address statewide remote wagering or internet gaming (25 C.F.R. §293.29). In addition, IGRA permits the use of electronic, computer, or other technological aids in connection with Class II games (25 U.S.C. §2703(7)(A)(i)). NIGC regulations establish minimum technical standards for using these aids, but only on a case-by-case basis (25 C.F.R. §547). Congress could consider imposing a national standard.

Sports Betting. Congress could consider regulating sports betting in the tribal context. In *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), the Supreme Court struck down a 1992 federal law that banned commercial sports betting in most states, spurring most states to authorize sports wagering, including 22 states that have tribal gambling. Sports betting is a Class III game; therefore, IGRA permits it when in a tribal-state compact. Some tribes have opposed sports betting because it might force them to reopen compacts that gave them exclusive gaming rights.

Congress could examine the costs and benefits of expanding federal licensing and regulation of online gaming and sports betting, including the potential effects on tribal economic development. Alternatively, Congress might consider costs and benefits of adding further restrictions to tribal gaming.

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