

**U.S. DEPARTMENT OF THE INTERIOR
OFFICE OF INSPECTOR GENERAL**



EVALUATION REPORT

**PROCESS USED TO ASSESS
APPLICATIONS TO TAKE LAND INTO
TRUST FOR GAMING PURPOSES**



United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, D.C. 20240

SEP - 1 2005

Memorandum

To: Assistant Secretary for Indian Affairs
Solicitor
Chairman, National Indian Gaming Commission

From: Anne L. Richards *Anne L. Richards*
Assistant Inspector General for Audits

Subject: Final Evaluation Report on the Process Used to Assess Applications to Take Land Into Trust for Gaming Purposes (Report No. E-EV-BIA-0063-2003)

This report presents the results of our evaluation to determine whether the Department of the Interior (Department) administered the subject process in accordance with applicable laws and regulations.

We concluded that the Department's process for assessing tribal applications for the Secretary of the Interior to take land into trust status for Indian gaming was in accordance with laws and regulations. However, during our evaluation, we also found that some tribes had converted the use of non-gaming trust lands to gaming uses and that the Department and the National Indian Gaming Commission (NIGC) lack a process for ensuring that all lands used by Indian tribes for gaming meet the requirements of the Indian Gaming Regulatory Act.

The draft report contained six recommendations; Recommendations 1 and 2 were directed to the Assistant Secretary for Indian Affairs, Recommendation 3 was directed to the Office of the Solicitor, and Recommendations 4, 5, and 6 were addressed to Chairman of NIGC. We received responses from the Acting Assistant Secretary for Indian Affairs, the Solicitor, and the Chairman of NIGC. Based on the responses, we closed Recommendation 1, classified Recommendations 3 and 6 as resolved and implemented and are requesting additional information for Recommendations 2, 4, and 5. The status of all recommendations is presented in Appendix 10. The response from the Acting Assistant Secretary also provided revised information on the Aging Schedule of Approved and Denied Applications (Appendix 1) and Pending, Returned, and Withdrawn Applications as of September 2003 (Appendix 2). We have revised these Appendices to reflect the information for these applications that were within the scope of our evaluation.

The legislation as amended, creating the Office of Inspector General requires that we report to Congress semiannually on all audit reports issued, actions taken to implement our recommendations, and recommendations that have not been implemented

We appreciate the cooperation provided by the BIA, Solicitor, and Office of Indian Gaming Management staff during our evaluation. If you have any questions regarding this report, please call me at (202) 208-5512.

Attachment

cc: Director, Office of Indian Gaming Management
Audit Liaison Officer, Bureau of Indian Affairs
Audit Liaison Officer, Office of the Solicitor

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BACKGROUND

Indian Gaming Regulatory Act and Tribal Gaming

On October 17, 1988, the Congress passed the Indian Gaming Regulatory Act¹ (IGRA or Act) to, among other things, establish (1) a statutory basis for operating and regulating Indian tribal gaming, (2) Federal standards for Indian gaming operations, and (3) the National Indian Gaming Commission (NIGC) as the Federal regulatory authority responsible for overseeing the Indian gaming industry.

Gaming has become an important source of income for many tribes. The NIGC reported that for the fiscal year 2002, there were 330 tribal gaming operations being conducted by 201 tribes in 28 states. NIGC reports that revenues from these operations have steadily increased from about \$9.8 billion in 1999 to \$16.7 billion in 2003, as illustrated in the following chart (Figure 1):



Figure 1

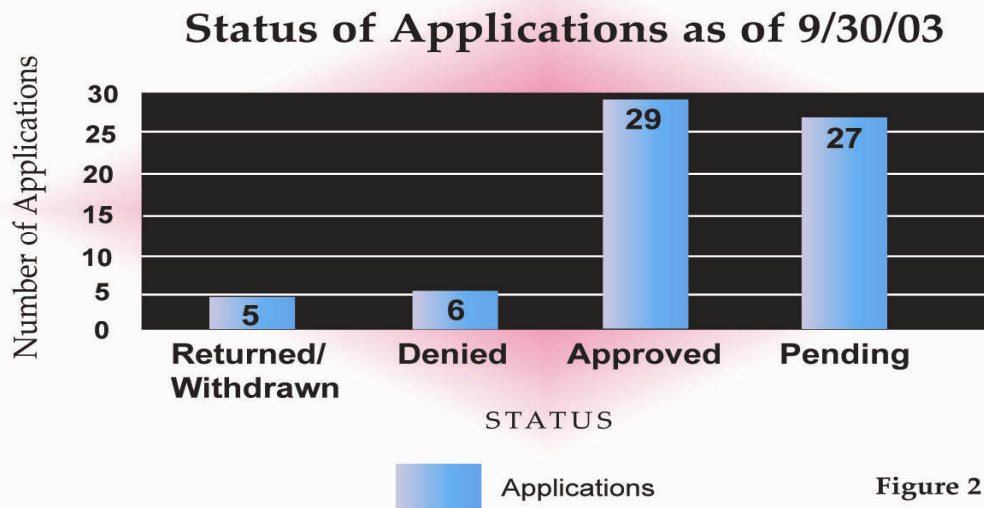
For Indian tribes to acquire land for gaming purposes, they must apply to the Department of the Interior to take the land into trust. Section 5 of the Indian Reorganization Act of 1934 (IRA) gives the Secretary discretion to acquire land in trust for Indian tribes and individuals.² Regulations at 25 C.F.R. Part 151 set forth the administrative procedures governing the

¹ Public Law 100-497, October 17, 1988, 102 Stat. 2467 (25 U.S.C. § 2701 et seq.)

² 25 U.S.C. § 465; Land held in trust for an Indian tribe or individual Indian is exempt from state and local taxation.

acquisition of land into trust for Indian tribes and individual Indians under Section 5 of IRA. In addition to the Secretary’s discretionary authority under Section 5 of the IRA, Congress can enact legislation on behalf of a tribe requiring the Secretary to take land into trust for those tribes or directly transfer land into trust via statute.

Since passage of IGRA in October 1988, through the end of our evaluation period in September 2003, Indian tribes have submitted 67 applications to the Secretary to take land into Federal trust status for Indian gaming and gaming-related activities. The status of these applications is summarized in Figure 2 and shown in detail in Appendix 1 (Aging Schedule of Approved and Denied Applications) and Appendix 2 (Pending, Returned, and Withdrawn Applications).



Section 20 of IGRA (Appendix 3) prohibits gaming on lands acquired in trust for an Indian tribe after the enactment date of IGRA (October 17, 1988), unless--

- (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
- (2) the Indian tribe has no reservation on October 17, 1988, and—
 - (A) such lands are located in Oklahoma and—
 - (i) are within the boundaries of the Indian tribe’s former reservation, as defined by the Secretary, or
 - (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
 - (B) such lands are located in a State other than Oklahoma and are within the Indian tribe’s last recognized reservation within the state or states within which such Indian tribe is presently located. (25 U.S.C. § 2719)

Provisions in 25 U.S.C. § 2719(b) provide additional exceptions to the general prohibition against gaming on lands acquired after the passage of IGRA (after-acquired lands), including where lands are taken into trust as part of –

- a settlement of a land claim, 25 U.S.C. § 2719(b)(1)(B)(i);
- the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, 25 U.S.C. § 2719(b)(1)(B)(ii); or
- the restoration of lands for an Indian tribe that is restored to Federal recognition, 25 U.S.C. § 2719(b)(1)(B)(iii).

If none of these exceptions applies, approval of gaming on off-reservation, after-acquired land requires the Secretary to consult with the Indian tribe and appropriate state and local officials, including officials of other nearby Indian tribes. The Secretary must also make a two-part determination that the proposed gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and not detrimental to the surrounding community. Once the Secretary makes a positive determination, the Secretary forwards it to the governor of the state in which the gaming activity is to be conducted. The governor then must concur with the Secretary's determination before gaming can occur.

Approval of gaming for off-reservation, after acquired lands that are not already in Trust also requires compliance with 25 C.F.R. Part 151. The decision to acquire land in trust under Part 151 and the two-part determination under IGRA's Section 20 are closely linked. Under 25 C.F.R. Part 151.11, the Department analyzes whether the acquisition is beneficial to the tribe and is necessary to facilitate tribal self-determination, economic development, or Indian housing. The Department does not have regulations implementing Section 20; however, the best interest determination typically involves similar but closer examination of many of the same factors which are evaluated under Part 151.

Regulations and Laws Governing Federal Acquisitions of Land for Indian Gaming

The regulations contained in 25 C.F.R. Part 151 prescribe the authorities, policies, and procedures for the acquisition of land by the Federal government for individual Indians and Tribes. The regulations set forth the information³ a tribe or individual Indian must provide in its application for trust land. In addition, the Assistant Secretary for Indian Affairs issued a checklist⁴ that requires tribal applications for Federal trust acquisition of land for gaming to comply with 25 C.F.R. Part 151 – Land Acquisitions, IGRA; the National Environmental Policy

³ Each application must contain a discussion of the ownership status of the property and identification of parties involved in the acquisition; a legal land survey of the property; a plat map or map to show the distance and/or proximity of the property to the reservation, the reservation boundaries, or to trust lands whichever is applicable; a copy of the tribal resolution authorizing the trust acquisition request; a statement justifying the need for the additional land; and the past and present uses of the land.

⁴ October 2001 Checklist for Gaming Acquisitions, Gaming Related Acquisitions, and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act. BIA has advised us in its response that the Checklist was revised in March 2005.

Act of 1969 (NEPA)⁵; and other applicable requirements, such as the Archeological Resources Protection Act.

Review Process for Applications

The process for reviewing proposed land acquisitions for gaming includes technical reviews by BIA agency and regional offices and the Office of Indian Gaming Management (OIGM)⁶, field and headquarters legal reviews by the Office of the Solicitor (SOL) and consultation with the Secretary's Office. When tribes applying to have land taken into trust simultaneously submit gaming ordinances or management contracts to NIGC for its approval, the NIGC, in consultation with the SOL, determines whether the lands to be acquired are eligible for gaming under the IGRA requirements. Other Federal, state, and local government officials can also be involved in the review process because of effects on the affected community and/or applicable Federal laws affecting the proposed acquisition.

Evaluation Objective and Scope

Our objective was to determine whether the Department complied with the laws and regulations governing the Federal acquisition of land taken into trust for gaming purposes. The evaluation's scope included all approved, denied, and pending applications for land acquisitions for gaming purposes processed from October 1988, through September 2003. The methodology and prior audit coverage are included in Appendix 4. In addition, the sites visited and contacted during this evaluation are presented in Appendix 5.

⁵ Public Law 91-190, January 1, 1970, 83 Stat. 852 (42 U.S.C. §§ 4321-4347)

⁶ In April 2003, OIGM was realigned from the BIA to the Office of the Assistant Secretary for Indian Affairs.

RESULTS OF EVALUATION

We concluded that the Department has instituted a process that is sufficient for reviewing and approving tribal applications for Federal trust acquisition of land for gaming purposes. However, the process took an average of 17 months from receipt of an application to final action by BIA, with a range of less than a month to about 6 years (Appendix 1). The process is impacted by: (1) tribal submission of incomplete or insufficient applications to BIA, (2) insufficient resources in the SOL for environmental reviews, and (3) lawsuits opposing acquisitions. Our evaluation also found that some tribes had converted the use of land acquired for non-gaming purposes to gaming, but the Department and the National Indian Gaming Commission do not have a process for ensuring that all lands used by tribes for gaming meet the requirements of IGRA.

Process for Reviewing Applications for Gaming Acquisitions



Tribes prepare an application in accordance with 25 C.F.R. Part 151 and the Checklist and submit the application to a BIA agency office, if one is associated with a particular tribe, or a BIA Regional Office. In all cases, the applications must be reviewed by a Regional Office.

Regional Offices Review

At Regional offices, applications are reviewed by environmental specialists for compliance with NEPA, realty personnel for establishing and maintaining the acquisition file, gaming specialists for coordinating the review and assisting with evaluating the proposed acquisition's compliance with IGRA, and attorneys for the status of the land. Key areas covered include:

- An environmental analysis of the site and the impacts of the proposed gaming or gaming-related facility.
- A preliminary title opinion from the Regional Solicitor on the status of the land and any encumbrances or liens against the land. The opinion would describe the actions that must be taken to bring the land into trust. Regional solicitors will also, on occasion, assist with making a determination whether the land to be acquired is eligible for gaming under IGRA.
- A financial determination of whether the acquisition would be in the best interest of the tribe (in two-part determinations).

- An assessment of whether the proposed acquisition would not be detrimental to the surrounding community (in two-part determinations).

The BIA Regional Office, after completion of the reviews, prepares and forwards a “Findings of Fact and Conclusions” to OIGM in Washington, DC.

OIGM and Headquarters SOL Review

In the OIGM, a gaming management analyst, an environmental specialist, and the Director review each application and the “Findings of Fact and Conclusions,” to determine whether the application meets the IGRA and 25 C.F.R. Part 151 requirements. This includes ensuring that the application contains evidence of the Regional Office’s consideration of impacts that the proposed acquisition would have on the local community and the BIA, support for contacts with the local community, required NEPA documentation, the preliminary title opinion, the financial arrangements for acquiring the land, and the financial arrangement for building the gaming facility. OIGM then submits the documents to the Associate Solicitor for Indian Affairs for review.

Two attorneys within the Associate Solicitor’s office concurrently review the application and determine whether it complies with IGRA, 25 C.F.R. Part 151, NEPA, and other applicable Federal laws. One attorney determines whether the land to be acquired qualifies for gaming under the exceptions contained in IGRA. This determination is known as performing a lands determination. A second attorney reviews the application for compliance with NEPA. Generally, this review will determine whether the parcel in question qualifies for categorical exclusion under NEPA (such as no change in the use of the land) or the acquisition is required by statute. If the application does not qualify for a categorical exclusion, the attorney will determine whether the acquisition will require an Environmental Assessment or an Environmental Impact Statement. This determination is made in consultation with BIA environmental officials within the Regional Office and the OIGM.

Upon completion of these reviews the application is forwarded to the Associate Solicitor for Indian Affairs for evaluation. The Associate Solicitor will provide comments on the application and return it to the OIGM. The OIGM will then forward the application with its recommendation for approval or disapproval to the Assistant Secretary for Indian Affairs for a final decision made in consultation with the Secretary.⁷

⁷ In accordance with a July 1990 Policy Memorandum from the Secretary of the Interior, all requests to acquire land in trust for gaming purposes will be approved or disapproved by the Assistant Secretary for Indian Affairs after discussions with the Secretary. If approval is granted, the authority to accept title land into trust status for BIA is delegated to the Regional Director.

If the application is approved, OIGM will publish in the Federal Register a 30-day notice of intent to take the land into trust. The application is also forwarded to the Regional or Field Solicitor to prepare the final title opinion. Upon satisfactory completion of all title requirements and following the 30-day period after publication in the Federal Register, the property is taken into trust and the title is recorded in the appropriate BIA title office.

Factors Prolonging Application Review Process

Incomplete or Insufficient Application Packages

BIA personnel from five Regional Offices and headquarters in Washington, DC, told us that reviews of proposed acquisitions are delayed, in part, due to incomplete or insufficient application data from the tribes. Insufficient environmental documentation required under NEPA was noted among BIA officials as a major cause for delays. To avoid or reduce delays, these officials indicated that the tribes should contact BIA for guidance before submitting an application.

Insufficient Resources for SOL Environmental Reviews

In the Washington Office of the SOL, only one staff attorney was assigned the task of reviewing the tribal applications to determine NEPA compliance. This staff attorney said that once she receives the application, it frequently takes her 3 months to complete her review, and she recognizes that this creates a bottleneck. The staff attorney also said that reviewing the NEPA issues in the land acquisition package were just a portion of her workload. The Acting Associate Solicitor for Indian Affairs stated that improvements could be made in the process to avoid the bottlenecks cause by NEPA reviews by providing more resources to the SOL to handle fee to trust reviews.

Lawsuits Opposing Acquisitions

Lawsuits cause many delays in the approval process. Suits are filed by other tribes, local citizens, and state advocacy groups. For example, in Oregon, a group had been attempting to block a tribe from building and operating a casino on trust land adjacent to the town of Florence, Oregon. At least three court cases (two in Federal court and one in the Oregon Supreme Court) delayed casino construction for at least 5 years.

Use of Lands for Gaming

During our evaluation, we also found that certain tribes had converted the use of land acquired for them in trust by the Secretary for economic development (other than gaming) to gaming. This was done without a determination of eligibility of the land for gaming. Furthermore, the Department and NIGC do not have a process for ensuring that all lands used by tribes for gaming are eligible under IGRA.

Non-Gaming Lands Converted to Gaming

During our evaluation, we found that certain Indian tribes were conducting gaming on lands that had been taken into trust after October 17, 1988, for non-gaming purposes. Specifically, BIA regional and NIGC officials informed us of 10 instances in which tribes converted the use of lands that were taken into trust after October 17, 1988, from non-gaming to

gaming operations (Appendix 6). Of the 10 parcels reported to us by the BIA or NIGC, the Department subsequently determined that five were eligible for gaming under IGRA. However, four have not received any determination and one has been determined not to be eligible and was later closed. Additionally, tribes operating gaming enterprises on lands not eligible for gaming under IGRA may be subjected to severe financial and legal consequences. For example:

The Wyandotte Tribe of Oklahoma (Tribe) had a parcel known as the Shriner Tract located in downtown Kansas City, Kansas, taken into trust on July 15, 1996. The land was taken into trust for economic development. On August 28, 2003, the Tribe commenced gaming on the land and, on September 2, 2003, the Tribe notified NIGC it had starting a gaming operation. In March 2004, the NIGC issued a determination that the land did not meet the exceptions specified in IGRA and that the Tribe could not lawfully conduct gaming on the land. In April 2004, Kansas state officials raided the casino, confiscated 153 gaming machines worth approximately \$1 million and cash from the facility and related bank accounts totaling approximately \$500,000.

When we met with NIGC and OIGM officials, they indicated there was a potential problem in the fee-to-trust process in that it did not systematically evaluate whether converted lands were eligible for gaming. These officials stated that one possible solution would be to amend the requirements in 25 C.F.R. Part 151 to require all tribes that have taken land into trust since the passage of IGRA to certify in writing, subject to criminal penalties (Title 18), that (1) no gaming is taking place on those lands; or (2) the lands have been converted and that the use of the lands for gaming has been approved through an official land determination made by the DOI.

Process Lacking to Determine Status of All Gaming Lands

Presently, land determinations are performed only when an Indian tribe applies to have land taken into trust for gaming, or when a tribe submits gaming ordinances or management contracts that include site specific information to the NIGC for its approval. Other than this, neither the Department nor NIGC have a process to determine whether all lands used for Indian gaming are actually eligible. In addition to converted lands, the potential exists for other gaming lands to be ineligible. For example, of the approximately 330 gaming operations, the Department and NIGC estimate that they have performed about 80 lands determinations. Although the remaining 250 operations may be properly conducted on reservation lands that existed prior to the passage of IGRA, this assumption has not been verified.

RECOMMENDATIONS

Opportunities for Improvement

We believe that there are opportunities for accelerating the review process for fee-to-trust applications for gaming purposes. Training should be provided to tribes making applications to expedite the review process by reducing the number of common errors preventing applications from moving forward, including issues related to NEPA compliance. Funding additional positions within the SOL would accelerate the title opinions, lands determinations, and NEPA reviews. We also believe that NIGC should establish a process by which tribes that have taken land into trust since 1988 certify the lands' status and establish and maintain a database containing eligibility information for all Indian gaming operations. As such:

We recommend that the Assistant Secretary for Indian Affairs (IA):

1. Consider giving the Regional Offices authority to approve applications for on-reservation and Congressionally-mandated land acquisitions.

IA Response The response did not concur with this recommendation and stated that gaming acquisitions have been subject to the approval of the Assistant Secretary for Indian Affairs since 1990. The approval level at the Assistant Secretary level was established in order to give "policy-makers a voice in approving often controversial decisions" relating to these acquisitions.

OIG Reply During our evaluation, we saw an opportunity for streamlining the approval process related to non-contentious acquisitions, such as those mandated by the Congress. We also recognize the current sensitivity surrounding tribal acquisitions of land for the purpose of gaming. Therefore, we do not oppose the Acting Assistant Secretary's decision to keep the approval of all gaming acquisitions at the Assistant Secretary level. As such, we have classified this recommendation as closed.

2. Offer training to tribes seeking to submit applications to take land into trust for gaming purposes. This training should provide detailed descriptions and examples to those tribes on how to assemble a complete fee to trust for gaming purposes application.

IA Response The response concurred with this recommendation. BIA stated that OIGM already provides such training to individual tribes at their requests and "it is our understanding that many regional offices of the Bureau of Indian Affairs also conduct training on the fee-to-trust process."

OIG Reply Although the response agreed with the recommendation, additional information is needed to determine the structure of the training.

We recommend that the Solicitor:

3. Allocate sufficient resources to establish a dedicated legal team to expeditiously review all fee to trust for gaming applications.

Solicitor Response The Office of the Solicitor did not concur with this recommendation. The Solicitor stated the Office has various other responsibilities that take precedence over reviewing new applications, such as litigation, including the Cobell litigation and other priorities set by the Secretary. The response stated that in managing these various responsibilities the Solicitor simply does not have the staff to divert to reviewing land-into-trust applications. The response, however, did state that since our review two additional attorneys are available to assist in the application reviews.

OIG Reply Although the Solicitor did not concur with this recommendation, the fact that two additional attorneys were made available to assist in reviewing the applications meets the intent of the recommendation. Therefore, we consider the recommendation resolved and implemented.

We recommend that the Chairman, NIGC:

4. In consultation with Indian tribes, establish regulations which require that tribes certify that for all trust lands acquired since October 17, 1988 gaming is not being conducted or that gaming on those lands was established and approved in accordance with IGRA and other applicable authority.

NIGC Response NIGC agreed that regulations requiring notice when a tribe plans to game on a particular site may have some merit. However, before pursuing a regulatory process, NIGC would need to consult with tribes to determine the wisdom and feasibility of such a project.

OIG Reply While NIGC agreed to pursue this matter with the tribes, additional information is needed on how it plans to proceed.

5. Establish and maintain an automated data base to store and retrieve land determinations and related information for all Indian gaming operations.

NIGC Response The NIGC concurred with this recommendation. NIGC stated that it recently embarked on an effort to establish and maintain a data base to store and retrieve land determinations and related information for Indian gaming operations and that its ultimate goal is to establish an electronic data base of these files.

OIG Reply Although NIGC stated that the majority of the initial work will be accomplished by the end of July 2005, the title of the responsible official and a target date for completing the entire data base is needed.

6. Issue temporary closure orders on those gaming operations that are conducted on lands that have been determined not to be eligible for gaming under IGRA.

NIGC Response The response stated that NIGC “does close facilities when the gaming cannot be properly conducted and the Commission has the authority to close the facility.” The response also said that NIGC cannot issue closure orders when gaming is conducted on lands outside the jurisdiction of NIGC. An example, cited in the response, is fee lands within the State of Oklahoma. These lands are not within the boundaries of the reservation

and not held in trust or restricted from “alienation.” According to the response, NIGC’s Office of General Counsel opined that such lands are not Indian lands and are subject to state jurisdiction.

OIG Reply

The new database of land determinations and related information on gaming operation should enable NIGC to expeditiously exercise its authority to issue temporary closure orders for gaming on ineligible lands. Therefore, we consider this recommendation resolved.

RELEVANT SECTIONS OF IGRA

Section 2719

01/02/01

-EXPCITE-

TITLE 25 - INDIANS
CHAPTER 29 - INDIAN GAMING REGULATION

-HEAD-

Sec. 2719. Gaming on lands acquired after October 17, 1988

-STATUTE-

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless -

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and -

(A) such lands are located in Oklahoma and -

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when -

(A) the Secretary, after consultation with the Indian 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, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of -

(i) a settlement of a land claim,

- (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
 - (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.
- (2) Subsection (a) of this section shall not apply to -
- (A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or
 - (B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.
- (3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.
- (c) Authority of Secretary not affected
- Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.
- (d) Application of title 26
- (1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.
 - (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

-SOURCE-

(Pub. L. 100-497, Sec. 20, Oct. 17, 1988, 102 Stat. 2485.)

OBJECTIVE, SCOPE, METHODOLOGY, AND PRIOR AUDIT COVERAGE

Our objective was to determine whether the Department complied with the laws and regulations governing the Federal acquisition of land taken into trust for gaming purposes. We reviewed BIA's regional and headquarters processes for reviewing and approving or denying applications for trust land acquisitions. As part of our review, we also obtained documents from and interviewed officials from the National Indian Gaming Commission, the Solicitor's Office, the Assistant Secretary for Indian Affairs, the Secretary's Immediate Office, BIA's Office of Indian Gaming Management, BIA's Division of Real Estate Services and seven BIA Regional Offices (Appendix 5). We also obtained and analyzed pertinent laws, regulations, and checklists governing the review of applications for gaming.

The scope of our evaluation included all approved, denied, and pending applications for land acquisitions for gaming purposes processed by BIA from October 17, 1988, through September 2003. We also conducted testing of four judgmentally selected applications to determine whether BIA had complied with applicable laws and regulations in approving or denying those applications. We did not test pending applications. Additionally, we prepared an aging schedule of 32 approved and denied applications to analyze the timing of the review process.

We performed this evaluation in accordance with the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency. We did not obtain information directly from the tribes, nor did we test the completeness of the statistical information provided to us by the BIA regarding the total numbers of applications received from the tribes. We also did not verify whether there were additional sites where tribes had converted trust lands intended for other uses to gaming uses. The sites visited or contacted during the review are listed in Appendix 5.

The Government Accountability Office issued Report No. RCED-00-11R on October 1, 1999 and determined that a complete list of lands acquired for gaming after the passage of IGRA was not readily available. The Government Accountability Office's list included only acquisitions that had been approved by OIGM or the Secretary.

SITES VISITED/CONTACTED

Sites Visited

Bureau of Indian Affairs (BIA), Office of Indian Gaming Management, Washington, DC.
BIA, Midwest Region, Ft. Snelling, MN.
BIA, Northwest Region, Portland, OR.
Office of the Solicitor (SOL), Headquarters Office, Washington, DC.
SOL, Northwest Regional Office, Portland, OR.
SOL, Twin Cities Field Office, Ft. Snelling, MN.
National Indian Gaming Commission, Washington, DC.
Assistant Secretary for Indian Affairs, Washington, DC.
Secretary's Immediate Office, Washington, DC.

Sites Contacted by Phone

BIA, Great Plains Region, Aberdeen, SD.
 - Yankton Agency
BIA, Southern Plains Region, Anadarko, OK.
BIA, Eastern Region, Nashville, TN.
BIA, Eastern Oklahoma Region, Muskogee, OK.
 - Osage Agency,
 - Miami Field Office, and
 - Chickasaw Agency.
BIA, Pacific Region, Sacramento, CA.
BIA, Chief of the Division of Real Estate Services, Washington, DC.
State of Oklahoma, Historic Preservation Office.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240



JUN 16 2005

Memorandum

To: Assistant Inspector General for Audits

From: Acting Principal Deputy Assistant Secretary – Indian Affairs *for [Signature]*

Subject: Comment on Draft Evaluation Report – “Process Used to Assess Applications to Take Land into Trust for Gaming Purposes” (Assignment No. E-EV-BIA-0063-2003)

Following are our comments on the above-referenced Draft Evaluation Report. The Draft Evaluation Report makes two recommendations to the Assistant Secretary - Indian Affairs, one recommendation to the Solicitor, and three recommendations to the Chairman of the National Indian Gaming Commission (NIGC). We only address the two recommendations made to the Assistant Secretary for Indian Affairs and defer to the Solicitor and the Chairman of the NIGC on the recommendations affecting their respective offices.

Recommendation No. 1: The Assistant Secretary should consider giving Regional Offices authority to approve applications for on-reservation and Congressionally-mandated land acquisitions for gaming.

Response: Indian Affairs does not concur with this recommendation. Gaming acquisitions have been subject to the approval of the Assistant Secretary - Indian Affairs since 1990. The reason to pull back the approval of gaming acquisitions to Central Office was to give policy-makers a voice in approving often controversial decisions relating to gaming acquisitions. Although off-reservation gaming acquisitions are often more controversial than on-reservation gaming acquisitions, that is not always the case. With respect to mandatory acquisitions, we believe that the determination of whether an acquisition is or is not mandatory should be made at the Assistant Secretary's level, with input from the Solicitor's Office. In conclusion, we believe that as a matter of policy, all gaming acquisitions should be reviewed and approved or disapproved at the Assistant Secretary's level, and we do not believe that there are sufficient reasons to exempt either on-reservation or mandatory gaming acquisitions from this requirement.

Recommendation No. 2: The Assistant Secretary should offer training to tribes seeking to submit applications to take land into trust for gaming purposes. This training should provide detailed descriptions and examples to those tribes on how to assemble a complete fee to trust application.

Response: Indian Affairs concurs with this recommendation. The Office of Indian Gaming Management (OIGM) already provides technical assistance and training to individual Indian tribes at their request when such tribes are contemplating submitting applications to take land into trust for gaming. In addition, it is our understanding that many regional offices of the Bureau of Indian Affairs also conduct training on the fee-to-trust process. Therefore, we do not believe that additional training is necessary.

Technical Comments

In the third paragraph on page 3 of the Draft Evaluation Report, a modification to the paragraph is required to clarify that the requirements of 25 C.F.R. Part 151 only come into play if the after-acquired land is not already in trust. It is possible for a tribe who has acquired off-reservation land into trust for non-gaming purposes after October 17, 1988, to change the use of the property from non-gaming to gaming. If that happens, the tribe will have to submit an application for a two-part determination under Section 20(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), but the land acquisition process under 25 C.F.R. Part 151 will not be applicable since the land is already in trust. Finally, in the second sentence of this third paragraph, the applicable provision of 25 C.F.R. Part 151 that is implicated is 25 C.F.R. 151.11, not 151.10.

Footnote 4 on page 3 should be modified to reflect that the Checklist for Gaming Acquisitions was revised in March 2005.

In the section entitled "OIGM and Headquarters review," on page 6 of the Draft Evaluation Report, the narrative does not include a discussion of the review of the two-part determination under Section 20(b)(1)(A) of IGRA when an application for taking off-reservation land into trust is subject to the requirements of this section of IGRA. We recommend that a discussion of this particular issue be weaved into the narrative. Also, in the last paragraph of this section at the bottom of page 6, please note that the Regional Office does not publish the Federal Register notice. The notice is prepared by OIGM and forwarded to the Federal Register for publication.

Please find attached revised versions of Appendix 1 and Appendix 2 that brings these appendices up to date.

If you have any questions, please do not hesitate to contact me at [REDACTED]

Attachments

cc: Director, Office of Audits and Evaluation
Acting Deputy Assistant Secretary – Policy and Economic Development
Chairman, National Indian Gaming Commission



United States Department of the Interior

OFFICE OF THE SOLICITOR
1849 C STREET N.W.
WASHINGTON, DC 20240

MAY 3 1 2005

Memorandum

To: Anne L. Richards
Assistant Inspector General for Audits

From: Sue Ellen Wooldridge *(Signature)*
Solicitor

Subject: Draft Evaluation Report on the Process Used to Assess Applications to
Take Land Into Trust for Gaming Purposes (Assignment No. E-EV-BIA-
0063-2003)

Thank you for allowing us the opportunity to comment on the Draft Evaluation Report. As it relates to the Solicitor's Office, we do not concur in the Recommendation.

In the above-referenced report, the Office of the Inspector General (OIG) reviews the process that the Bureau of Indian Affairs uses to evaluate a tribe's application to have land taken into trust. OIG makes six Recommendations. Only one of these Recommendations pertains to the Solicitor's Office. In particular, the OIG recommends that the Solicitor allocate sufficient resources to establish a dedicated team to expeditiously review all fee-to-trust for gaming applications. It should be noted that at the time the OIG interviewed Division of Indian Affairs staff, only one attorney was assigned to review most NEPA for land-into-trust applications. Currently, there are two additional attorneys that are available to assist in those reviews although all of them have other matters that they handle.

In recommending a dedicated team for reviewing land-into-trust applications, the OIG does not appear to consider the overall workload of the attorneys in the Division of Indian Affairs. For the attorneys in the Division of Indian Affairs, the first priority is litigation. This includes the *Cobell* litigation, as well as the approximately 25 tribal trust suits. In the area of land-into-trust, litigation over land-into-trust decisions takes precedence over reviewing new applications. In addition, there is litigation concerning acknowledgment, education, contract support costs, water rights, and others too numerous to name. The Solicitor's Office, in managing these various responsibilities, has allocated attorney staff as necessary to meet them; it simply does not have the staff to divert from litigation priorities to reviewing land-into-trust applications.

In addition to litigation, the attorneys in the Division of Indian Affairs provide legal advice to all of the Bureau of Indian Affairs (BIA) offices, including advice regarding acknowledgment, gaming, law enforcement, detention centers, social services, Indian

self-determination, self-governance, water rights, trust-reform, management of trust assets, environmental issues, tribal government matters, social services, economic development, and Indian education. In fact, the Division of Indian Affairs has only one attorney that provides legal services to the Office of Indian Education even though it represents over half of the BIA's budget.

Finally, we do not concur in the Recommendation, as it does not take into consideration that the attorneys in the Division of Indian Affairs respond to the priorities set by the Secretary, Assistant Secretary-Indian Affairs, and the Solicitor. These priorities are often set by courts and other external factors. While processing land-into-trust applications more quickly may benefit a particular tribe's economic development goals, it does not necessarily fit into the overall priorities in Indian Affairs such as trust reform, education, and law enforcement. And it does not necessarily fit the needs of all of Indian country.

We thank you for your consideration and Recommendation concerning this matter. We would be happy to discuss this matter further should you so desire. You should feel free to contact Ms. Edith Blackwell, Deputy Associate Solicitor, Division of Indian Affairs, at (202) 208-3401.



June 17, 2005

Anne L. Richards
Assistant Inspector General for Audits
Office of Inspector General
Department of the Interior
1849 C St. NW, MS 5341
Washington, DC 20240

Dear Ms. Richards:

We write in response to your May 6, 2005, memorandum which seeks our response to a draft report on the process used to assess application to take land into trust for gaming purposes. We apologize for the delay. We did not receive the draft, however, until June 16, 2005. Our comments follow:

With respect to the first two recommendations for the Chairman of the National Indian Gaming Commission (NIGC or Commission), we agree that the NIGC should have an inventory of the gaming lands. While the vast majority of gaming is conducted within the boundaries of Indian reservations, the Commission needs to be assured that any off-reservation gaming that it regulates is being conducted in accordance with the requirements of the Indian Gaming Regulatory Act (IGRA).

With that in mind, the Commission recently embarked on an effort to establish and maintain a data base to store and retrieve land determinations and related information for the Indian gaming operations. The Commission is first bringing together all of its documentation on Indian lands, and then will be soliciting the assistance of the Bureau of Indian Affairs and the Regional Offices to provide documentation on the lands that are not already included within the existing NIGC files. We expect that a majority of this initial work will be accomplished by the end of July 2005.

Our ultimate goal is to establish an electronic data base of these files. We are in the process of updating and expanding our electronic capabilities and will not know for several months to what extent an electronic data base will prove practicable.

Further, NIGC regulations requiring notice when a tribe plans to game on a particular site may have some merit. We are less certain that a certification process for nongaming trust lands would be useful to the Commission. We expect that there are a vast number of nongaming trust lands. Documentation on these lands would require a large database that would only be useful on those rare occasions when a tribe does decide to convert an existing trust parcel to gaming. When a tribe indicates that this might happen, we could

seek documentation at that time. Before we can decide whether to pursue a regulatory process, however, we will need to consult with tribes to determine the wisdom and feasibility of such a process.

The third recommendation offered is that the NIGC should issue temporary closure orders on gaming operations that are not eligible for gaming under IGRA. The Commission does close facilities when the gaming cannot be properly conducted and the Commission has the authority to close the facility. For example, on the Wyandotte Tribe's trust parcel in the State of Kansas, the Chairman issued an Order of Temporary Closure. He reasoned that the parcel was acquired into trust after October of 1988 and that the land did not come within one of the exceptions to the general prohibition that gaming cannot be conducted on lands acquired in trust after October of 1988. The Commission, as a whole, upheld that decision. The Commission's decision is being reviewed by the federal district court.

On the other hand, the Commission cannot issue such orders when the lands are not Indian lands and, therefore, not within the jurisdiction of the Commission. For example, the United Keetoowah Band is conducting gaming on fee lands within the State of Oklahoma. These lands are not within the boundaries of the reservation and they are not lands held in trust or restricted from alienation. Consequently, the Office of General Counsel issued an opinion concluding that the lands are not Indian lands and are subject to the jurisdiction of the State rather than the jurisdiction of the NIGC.

We also recommend that you update and revise Appendix 6 to reflect the above information on the Wyandotte Tribe of Oklahoma. In addition, the Office of General Counsel is drafting a legal opinion on the status of the Poarch Creek Band's Indian lands. We expect to complete that opinion within the next few weeks.

Thank you for the opportunity to comment on your draft evaluation report. If you have any questions, please feel free to contact me.

Sincerely,



Philip N. Hogen
Chairman

STATUS OF REPORT RECOMMENDATIONS

<u>Recommendation</u>	<u>Status</u>	<u>Action Required</u>
1	Closed	No further action required
2	Management concurs; additional information requested.	Provide documentation on the nature and extent of training provided to the Tribes by OIGM and regional offices
3 and 6	Resolved and Implemented	No further action required
4 and 5	Management concurs; Additional information requested.	Provide a plan for completing the action, including target dates and the names of responsible officials.

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By Mail:

U.S. Department of the Interior
Office of Inspector General
Mail Stop 5341 MIB
1849 C Street, NW
Washington, D.C. 20240

By Phone:

24-Hour Toll Free 800-424-5081
Washington Metro Area 202-208-5300

By Fax:

202-208-6081

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