Case No. 15-17253

In the United States Court of Appeal
For the Ninth Circuit

COUNTY OF AMADOR, CALIFORNIA
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*,
Defendants - Appellees,

IONE BAND OF MIWOK INDIANS,
Intervener/Defendant - Appellee.

COUNTY OF AMADOR'S OPENING BRIEF ON APPEAL

On Appeal from the United States District Court
for the Eastern District of California
The Honorable Troy L. Nunley, Presiding
District Court Case No. 2:12-cv-01710-TLN-CKD

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CORPORATE DISCLOSURE STATEMENT
FED. R. APP. PROC. 26.1

Amador County, California, appellant herein, is not a "nongovernmental corporate party."

RECORD CITATIONS

The following abbreviations are used in citations to the Record throughout this Brief:

"PER": Plaintiff's Excerpts of Record, filed herewith pursuant to 9th Circuit Rule 30-1. Citations to the Excerpts are in the form "(PER[Page#]-[Page#].)"

"AR": Citations to portions of the Administrative Record in this case that are not included in Plaintiffs Excerpts of Record. Citations to the Administrative Record are in the form "(AR[Page#]-[Page#].)"

"AA": Appendix of Authorities, filed herewith pursuant to Fed. R. App. Proc. 28(f). Citations to the Appendix of Authorities are in the form "(AA[Page#]-[Page#].)"

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* Documents marked with an asterisk are included in Plaintiff's Appendix of Authorities, submitted herewith pursuant to Federal Rule of Appellate Procedure 28(f).

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I.

INTRODUCTION.

Amador County, California, challenges an unlawful and results-oriented determination of the Department of Interior ("Department"), which—if given effect—would take land in the County into federal trust on behalf of the Ione Band of Miwok Indians, intervener herein ("Ione Band" or "Band"), and permit the Band to establish a third large-scale, Las Vegas-style casino operation, which would overwhelm this small, rural County in the Sierra Nevada mountains and foothills, with a total population of less than 39,000 persons, and with limited road and related infrastructure and public services. (AR005425.) The Department's determination is arbitrary, capricious and contrary to law.

There is already one large, Las Vegas-style Indian casino and hotel complex in the County at the Jackson Rancheria; consequently, the County has faced demands on County resources, including the traffic it generates on narrow local roads, which creates serious public safety problems and traffic delays. (*Id*.) A second tribe—the Buena Vista Rancheria—has also obtained permission from the federal government to open a casino in the County. (*Id*.) The addition of a third new casino would overwhelm the County with demands for public safety and other services, clog County roadways by

generating far more traffic than they can handle, and harm air and water quality, among other adverse impacts. (*Id.*) Fearing these impacts, more than 80% of the County's voters recently voted to oppose any new casino in the County. (*Id.*)

In the pursuit of its goal of bringing another casino to Amador County, the Band applied to the Secretary of Interior ("Secretary")[1] in 2005 to have certain lands in the County known as the Plymouth Parcels[2] taken into trust on the Band's behalf pursuant to the Secretary's authority under Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465 (AA1-3). (AR002751-3482.)

However, merely having lands taken into trust on its behalf is not enough to enable the Band to conduct gaming on the Plymouth Parcels. To prevent the opportunistic siting of casinos in unforeseen (and profitable) locales near population centers, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), prohibits gaming on Indian lands acquired in trust

[1] The Secretary of Interior ("Secretary") heads the Department, which is the executive department responsible for the federal government's dealings with Indian tribes. Within the Department is housed the Bureau of Indian Affairs ("Bureau" or "BIA").

[2] The Plymouth Parcels consist of several parcels of land totaling 228 acres and located both within the City of Plymouth and in the unincorporated area of Amador County. These parcels are not currently owned or occupied by the Band. (*See* Dkt. #59, ¶ 17, sentence 1; Dkt. #46, ¶ 17, sentence 1.)

for an Indian tribe after October 17, 1988, unless one of several exceptions applies. 25 U.S.C. § 2719(a) (AA11-12). Since the Plymouth Parcels would be acquired in trust for the Ione Band after that date, gaming is prohibited unless one of the IGRA exceptions applies.

One such exception permits Indian gaming on lands acquired after 1988 if the Band complies with a two-part administrative process (the "Two-Part Test"). This process requires that both the Secretary and California's Governor conclude that gaming would be "in the best interest of the Indian tribe and its members" and would "not be detrimental" to the surrounding community. 25 U.S.C. § 2719(a) and (b)(1)(A). By imposing these requirements, IGRA protects local interests like those of Amador County, which as a small rural county will be drastically and adversely affected by additional large-scale gambling operations, by requiring the Secretary to "consult with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). This "Two-Part Test," designed to give affected local interests a role in the process for authorizing additional gaming, is the exception that must, as a matter of law, be satisfied before the Plymouth Parcels may be used for gaming.

The Ione Band, however, refuses to satisfy the Two-Part Test. Instead, it has sought to invoke another exception, which permits gaming on lands that are taken into trust after October 17, 1988, as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). To this end the Band also filed a request for an "Indian Lands Determination" ("ILD"), asserting that the Plymouth Parcels should be deemed "restored lands" in connection with its Fee-to-Trust Application for those parcels. (AR001401-2532.) Were it applicable (and the County does not believe it is), this "restored lands of a restored tribe" exception would permit gaming on the Plymouth Parcels without affording Amador County and its residents the protections of the Two-Part Test.

This action challenges the Record of Decision ("ROD"), issued on May 24, 2012, by Donald E. Laverdure, Acting Assistant Secretary of Indian Affairs, that, among other things:

- determined to take the "Plymouth Parcels" into trust for the Band; and
- determined that the Plymouth Parcels qualify as "restored lands of a restored tribe" on which the Ione Band may conduct gaming under IGRA, without proceeding through the Two-Part Test.

(PER139-141.) Both decisions are abuses of discretion, arbitrary, capricious and contrary to law.

First, the Department's determination is contrary to Congress's plain intention in adopting IGRA, which the Department has acknowledged was to preclude informally-recognized "tribes" like the Band from being deemed a "restored tribe." Such tribes may only obtain off-reservation gaming by proceeding through the Two-Part Test.

The Department's determination also exceeds the Secretary's authority to take land into trust under Section 5 of the IRA. That statute only authorizes the acquisition of land on behalf of tribes that were both "recognized" and "under federal jurisdiction" in 1934, when the IRA was enacted. *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"). The Band was neither "recognized" nor "under federal jurisdiction" in 1934.

II.

JURISDICTIONAL STATEMENT.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2202-03 (U.S. 2012).

This appeal is from the final judgment, entered October 13, 2015, disposing of all claims. This Court has appellate jurisdiction under 28 U.S.C.

§ 1291. The appeal was timely filed November 10, 2015. FED. R. APP. PROC. 4(a)(1)(B).

III.

ISSUES PRESENTED.

1. Whether the district court erred in upholding the Department's decision to "grandfather" the 2006 Indian Lands Determination, where that court (a) refused to apply the factors that this Court has adopted for determining whether an agency may refuse to enforce new regulatory rules retroactively, when that refusal is contrary to congressional intent, and (b) improperly deferred to the Department's determination on retroactivity, contrary to this Court's precedents?

2. Whether, applying the de novo review prescribed by this Court's precedents, the Department's decision to "grandfather" the 2006 ILD was contrary to law?

3. Whether the Secretary exceeds his authority by taking land into trust under Section 5 of the IRA for a purported "tribe" that was admittedly not "recognized" in a formal, political way in 1934?

4. Whether the Band was "under federal jurisdiction" in 1934, in view of the fact that: (a) the federal government's attempts to obtain land for the Band were unsuccessful, (b) Band members were purportedly "successors-in-interest" to Indians who were parties to an *unratified* treaty from the 1850s, (c) Band members were included on lists of landless, non-reservation individual Indians in 1906 and 1915, (d) Band members never received services or benefits from the government, and (e) the ROD relied exclusively on the failed efforts to acquire land, and not the treaty negotiations or 1906 and 1915 lists?

IV.

STATEMENT OF FACTS.

It is undisputed that Amador County was home to a handful of Indians in the early part of the 20th Century. In 1905 and 1915, the BIA compiled two lists of landless, non-reservation Indian individuals in Amador County—the first by Special Indian Agent C.E. Kelsey, and the second by his successor, John Terrell. (PER334, PER556-559.) The 1915 list identified a genealogically and linguistically mixed population of 101 Indians, scattered at various locations around Ione and its vicinity, including on the Jackson Rancheria and "At Richey" (which became the Buena Vista Rancheria). (PER334, PER493, PER552, PER576-603, PER668-669, PER676-677.)

A. THE FEDERAL GOVERNMENT'S UNSUCCESSFUL EFFORT TO PURCHASE A 40-ACRE TRACT OF LAND NEAR THE CITY OF IONE, PURSUANT TO CONGRESSIONAL APPROPRIATIONS FOR "LANDLESS" CALIFORNIA INDIANS (1916-1930).

In the early 20th Century, recognizing the plight of Indians in California, Congress established a land purchase program to enable the BIA to purchase tracts of land throughout the State, upon which "landless Indians" could be settled. (PER311-333, PER335-336.) In 1990 Hazel Elbert, Deputy Assistant Secretary of Interior–Indian Affairs, described this program thus:

> The California land purchase program was aimed at buying acreage for miscellaneous, landless Indians, whether or not they then existed as part of a tribal entity or had previously been federally recognized. The purchase of land for these Indians did not, in and of itself, prove or establish the existence of a government-to-government relationship between an Indian tribe and the United States.

(PER376; *see also* PER605.)

Beginning around 1915, Special Agent Terrell determined to use funds allocated by Congress for "landless Indians" to purchase a 40-acre tract of land near the City of Ione, inhabited by several of the local Indians but owned by Ione Iron & Coal Company (the "Arroyo Seco property"). In part, this decision was motivated by a desire to keep landless Indians from being evicted from a site which they did not own, but where they had built homes

and lives; these early efforts also appear to have been related to the inadequacies of the nearby Jackson Rancheria. (PER566-567.)

Because it was unable to obtain clear title to the Arroyo Seco property, the government ultimately abandoned its efforts to acquire the land. (PER341.) Instead, Buena Vista Rancheria, a 70-acre parcel of land four miles south of Ione, was purchased for Amador County Indians in 1928 (PER570.)

In the early 1930s, further desultory attempts at obtaining land for landless Indians near Ione were made, but they also failed.

These abortive land-acquisition efforts were the extent of the federal government's dealings with the Ione-area Indians during this period. In a 1991 declaration, submitted to the Eastern District of California by the Department,[3] former Ione Band chairman Harold Burris detailed the relationship between the Ione Indians and the federal government during the period of Mr. Terrell's efforts to obtain the Arroyo Seco property.[4] He declared that the Ione-area Indians "supported the efforts of the United States to purchase land for [them]" due to fears that they would lose their

[3] The litigation in which that declaration was made is discussed below.

[4] The families living on the Arroyo Seco tract elected Mr. Burris to be their "chairman" in 1970, and he served in that position into the mid-1990s. He also lived on the Arroyo Seco property from 1924 to 1942, and 1945 onward. (PER865-867.)

homes on land they did not own, but that "[t]here was never any expectation that any further relationship or further services would develop out of the government's efforts to buy the land for [them]." (PER866.) There is no record that any federal aid or other benefits that are normally available to recognized tribes were ever provided to members of the "Ione Band" before 1994.

B. THE SECRETARY DID NOT ASK THE IONE BAND TO VOTE ON ACCEPTANCE OF THE INDIAN REORGANIZATION ACT IN 1934.

In 1934, Congress enacted the Indian Reorganization Act. June 18, 1934, ch. 576, 48 Stat. 988 (AA6-10).[5] Section 18 of the IRA as originally enacted required the Secretary to hold a special election, within one year of the "passage and approval of the Act," for each Indian tribe then under federal jurisdiction, to decide whether the tribe wished to be organized under the IRA, and adopt a tribal constitution. *Id*. § 18 (codified at 25 U.S.C. § 478). In Amador County, the Jackson and Buena Vista "tribes" each voted to accept the terms of the IRA (PER738), but the "Ione Band" held no such election, and there is no evidence it was ever invited to do so. (PER482, PER716-768.)

Indeed, with the exception of a single inquiry in 1941 regarding the possibility of clearing title to Arroyo Seco (PER341-342), there was no record

[5] Section 5 of that Act provides the statutory authority by which the Secretary purports to take land into trust for the Band. (PER141.)

of communication between the Ione-area Indians and the federal government from 1930-1970.

C. FOLLOWING COMMISSIONER LOUIS BRUCE'S EQUIVOCAL 1972 LETTER, ISSUED OUTSIDE THE NORMAL REGULATORY PROCESS AND WITHOUT CONSIDERATION OF THE TRADITIONAL "COHEN CRITERIA," WHICH STATED THAT "FEDERAL RECOGNITION WAS *EVIDENTLY* EXTENDED TO" THE IONE BAND WHEN THE GOVERNMENT SOUGHT TO PURCHASE THE 40-ACRE ARROYO SECO PROPERTY, THE DEPARTMENT REPEATEDLY CONFIRMED THAT THE BAND WAS NOT RECOGNIZED AS A TRIBE, AND WAS REQUIRED TO SUBMIT A FORMAL APPLICATION FOR RECOGNITION.

In 1970, the residents of the Arroyo Seco plot—who, according to Harold Burris, "had never acted as a tribe" (PER521)—decided to organize as a tribe for the purpose of seeking title to the land on which they had lived for decades. (PER521, PER867.) Mr. Burris was elected chairman of the Ione Band. (*Id.*) The residents filed a quiet title action in California state court, and obtained title to the Arroyo Seco property in 1972. (PER867.) Thereafter, several Band members sought to have the land taken into trust, to exempt themselves from property taxes. (*Id.*)

In 1972, BIA Commissioner Louis Bruce sent a letter to Nicholas Villa, as the purported representative of the Band, in which Commissioner Bruce stated that "Federal recognition was evidently extended to the [Band]" at the time a purchase of 40 acres for the Band was contemplated between approximately 1915 and 1930, and stating that he intended to take the 40-

acre parcel into trust. (PER344.) Various documents establish that Commissioner Bruce made his determination without undertaking any effort to assess "the so-called 'Cohen criteria,' which was the Department's informal standard for recognition from 1942 to 1978." (PER347 [1973 letter from Chief, Division of Tribal Govt Servs. to Sacramento Area Director inquiring into the factual basis for recognizing Ione Band]; *see also, e.g.*, PER392.)[6] Subsequent research, conducted in the early 1990s by the Bureau's Branch of Acknowledgment and Research (which is responsible for researching the historical bases for claims of federal tribal recognition, *see* PER784-785),[7] concluded that the Bruce letter was "an administrative anomaly," because it was handled outside the normal administrative process

[6] "In connection with the tribal reorganization established under the IRA, the Department of Interior, under the guidance of Felix Cohen, the first solicitor of the BIA, developed five hierarchical considerations (known as the 'Cohen criteria') to determine whether a group constituted a tribe, including whether: (i) the group has had treaty relations with the United States; (ii) the group has been denominated a tribe by act of Congress or executive order; (iii) the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe; (iv) the group has been treated as a tribe or band by other Indian tribes; and (v) the group has exercised political authority over its members, through a tribal council or other governmental forms." *Allen v. United States*, 871 F. Supp. 2d 982, 990 (N.D. Cal. 2012).

[7] *See also Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013).

(by Real Estate Services, rather than by Tribal Relations), and because it was based on "no evaluation of [the Band's] history and ancestry." (PER477.)

In light of the "anomalous" circumstances surrounding the Bruce letter, the Department did not treat it as conclusive, even at the time it issued, and no action was ever taken to formally recognize the Band or take the identified parcels into trust.[8] In fact, extensive correspondence—both within the Bureau itself, and between the Bureau and the Band—reflected the Bureau's position that the Band's status was under review and that the Band had the affirmative duty to establish that it was entitled to federal recognition. (*See, e.g.*, PER345, PER346-349, PER351-356, PER390-393, PER469.)

In December 1978, the Secretary of Interior promulgated regulations establishing procedures whereby groups of Indians could attain federal "recognition" as "tribes." 25 C.F.R. §§ 83.1–83.13 ("the Acknowledgment Regulations" or "Part 83") (AA56-73). The BIA concurrently issued two lists. The first identified all federally-recognized Indian tribes (the "1978 List"). (PER361-363.) The second identified all groups whose petitions for

[8] In fact, no land was ever taken into trust by the United States for the benefit of the Ione Band. These 40 acres comprising the Arroyo Seco property are approximately 12 miles away from the Plymouth Parcels at issue here and are unrelated to the Band's request. (AR005429.)

recognition were on file at the BIA, but that were not federally-recognized tribes. (PER356-357.) The Ione Band was placed on the second list. Though it had not formally submitted a petition for recognition when the two lists were published in 1978 (*id*.; *see also* PER359-360, PER368), in light of the government's effort to purchase land in 1916, it was treated as having applied for acknowledgment at that time. (PER354-355.)

There is no record of communications between the Band and the Department between January 1979 and 1989, though the record indicates that members of the Band sought to collect historical information to attempt to justify their recognition under the regulations. (PER364-371.) In mid-1989, a faction of the Band's membership unsuccessfully sought acknowledgement as a federally-recognized tribe by filing a "tribal" resolution with the Department, without proceeding through the regulatory acknowledgement process or providing the records and other materials required by those regulations. (PER372-374, PER406, AR000618-39.)

In February 1990, the Department wrote an extensive letter to Glen Villa, Sr., concerning the Band's informal request for acknowledgment, demonstrating in correspondence dated as early as October 1973 that the Band had not met the criteria for federal recognition. That letter further explained that the Band "was not recognized as an Indian tribe within the

meaning of Federal law," and that the only option for the Band to achieve such federal status was through the acknowledgment regulations. (PER380-384.)

Hazel Elbert, Deputy Assistant Secretary of Interior–Indian Affairs, sent a similar letter to Harold Burris on February 15, 1990 (PER769-774), and to U.S. Senator Alan Cranston on the same date as the Villa letter (PER375-379). Among other things, the Cranston letter stated:

- "After extensive research in our files regarding the Bureau of Indian Affair's (Bureau) historic relationship with this group, we have determined that the Ione Band is not recognized presently to be an Indian tribe within the meaning of Federal law...."
- "Even if the Bureau had been successful in its attempt to purchase land, this may not have constituted Federal recognition of the Ione Band as an Indian tribe. The California land purchase program was aimed at buying acreage for miscellaneous, landless Indians, whether or not they then existed as part of a tribal entity or had previously been federally recognized. The purchase of land for these Indians did not, in and of itself, prove or establish the existence of a government-to-government relationship between an Indian tribe and the United States."
- "Commissioner Bruce's letter indicates clearly the intent of the Bureau to recognize and establish a trust land base for the Ione Band. However, the letter is of no legal effect, in and of itself, because these actions were never implemented. ... The Ione Band had no acknowledged government-to-government relationship with the United

> States prior to this letter, and there is no evidence that the Commissioner based his decision on the recognition criteria then being utilized by the Department."
>
> - "Subsequent correspondence and memoranda in our files indicate that despite the Commissioner's letter, the question of Ione recognition remained open."

(*Id.*)

Sometime after April 8, 1990, Department staff prepared a memorandum entitled "Ione Acknowledgment Issues" (PER711), which relates much of the same history as the Villa and Cranston letters, and explicitly states, "[I]t is clear that the Ione Band had no acknowledged government-to-government relationship with the United States prior to" 1972, and also, "Thus it is clear that the Ione Band was not considered by the Department to be a federally recognized tribe either before or after 1979." (PER712-713.) Further attempts by the Band faction favoring federal recognition outside the acknowledgement regulations were rebuffed on August 20, 1990. (PER395-396.)

D. THE "IONE BAND" UNSUCCESSFULLY SUES THE FEDERAL GOVERNMENT, DEMANDING TO BE RECOGNIZED AS A "TRIBE."

In August 1990, the Ione Band sued the Department in the Eastern District of California, seeking to require recognition of the Band as a "tribe" and to have the Arroyo Seco plot taken in trust. *Ione Band of Miwok Indians*

v. Burris, Civ. No. S-90-0993 LKK/EM (E.D. Cal.) (hereinafter "*Ione Band Lawsuit*"). Amador Countys' Treasurer-Tax Collector was also named as a defendant in that action, because the Band sought a declaration that, as "Indian land," the property was not subject to taxation by the County. (PER658-659, PER914.) The plaintiffs named the Burris faction of the group—which opposed federal recognition—as defendants too. (PER168-192.)

In Paragraph 3 of the complaint, the Ione Band alleged that it "has been recognized by the United States as being under federal jurisdiction." (PER170.) The Band included similar allegations throughout the complaint. The Band sought a declaration from the Court that the Band had been and remains a federally recognized tribe with all the rights and sovereignty enjoyed by other Indian tribes. It also sought title to land held in common with the Burris faction of Ione Indians. And, the Band challenged the constitutionality of the Part 83 Regulations. (PER190-192.)

The United States and the Burris faction of Ione Indians consistently disputed the Band's claim to have been a federally-recognized tribe, including in their Answers (PER195 & PER212) and Status Reports (PER231 ["The government denies that the Ione Band of Miwok Indians has ever been a federally-recognized tribe."] & PER236).

In 1991, the United States moved for summary judgment in its favor on the ground that the Band failed to exhaust administrative remedies by applying for recognition through the BIA's acknowledgment regulations, and that the regulations were the sole mechanism for the Ione Band to gain federal recognition. (PER397-437.) Throughout briefing on that motion, the government expressly disputed the Band's claim to have been a federally-recognized tribe, and further disavowed the notion that the Bruce letter evidenced "recognition" of the Band. (*See, e.g.*, PER403 ["In 1972, the head of BIA, Commissioner Louis Bruce, was not entirely convinced that the Ione Band was federally recognized."]; PER409 ["To the extent that plaintiffs viewed this decision as a change from recognition status to nonrecognition status, *which change the government disputes*, plaintiffs were bound to bring suit no later than 1985 pursuant to the statute of limitations set forth at 28 U.S.C. 2401(a)."]; PER459 ["the Commissioner did not make a determination or findings that the Ione Band was a tribe within the meaning of the IRA"].)

The district court granted the United States' motion for summary judgment, holding the Band must apply for recognition through the BIA's acknowledgment regulations, and held that the acknowledgement

regulations were the sole mechanism for the Ione Band to gain federal recognition. (PER634-659.)

Based on this decision, the BIA's Sacramento Area Director refused to review an economic development agreement submitted by the Band. The Band appealed the Area Director's decision to the Interior Board of Indian Appeals ("IBIA"), which upheld the refusal, further affirming that the Part 83 Regulations were the "exclusive mechanism" for the Band to be recognized, and for the Department "to correct any errors it may have made with respect to the recognition of appellant." (PER811-813.)

Sometime after summary judgment was granted in favor of the federal government in the *Ione Band Lawsuit*, the Department issued a "Briefing Paper" addressed to the "President of the United States," regarding the status of the Band, which unequivocally stated:

> It is the Department's position that this group [the Ione Band] has never attained Federal tribal status and is not, therefore, eligible for restoration.... the Ione Band was never considered to be a federally recognized tribal entity. It never appeared on any lists of federally recognized tribes and was not asked to vote on acceptance of the Indian Reorganization Act of 1934 as were the federally recognized tribes.

(PER482-483.)

On August 26, 1992, Eddie Brown, then-Assistant Secretary-Indian Affairs, wrote to Senator Inouye that "The Department has never viewed the

absence of the Ione Band from the Federal Register list of federally recognized tribes as a simple clerical error. This group has never attained Federal tribal status and is not, therefore, eligible for restoration of that status." (PER916.)

E. ASSISTANT SECRETARY ADA DEER ABRUPTLY REVERSES COURSE IN THE FACE OF CONGRESSIONAL PRESSURE, "AFFIRMS" THE BRUCE LETTER, AND ORDERS THE IONE BAND TO BE PLACED ON THE LIST OF RECOGNIZED TRIBES WITHOUT REQUIRING IT TO PROCEED THROUGH THE ACKNOWLEDGEMENT REGULATIONS.

Having lost its federal lawsuit and IBIA appeal, the Ione Band engaged in an extensive political lobbying effort. As related in the Declaration of Michael Lawson, Ph.D., an historian in the BIA's Branch of Acknowledgement and Research ("BAR"), members of the Band supporting recognition told him as early as 1990 that "the group was planning to 'put the squeeze' on the Assistant Secretary (through Congressional pressure) for a decision that the group was recognized." (PER788.) It appears to have worked. The record between 1989 and 1994 shows extensive communications between the Department and members of Congress,[9] and

[9] *See* PER373-379 (Sen. Cranston); PER385-389 (Rep. Shumway); PER394, PER481 & PER485-486 (Rep. Miller); PER473-475 & PER484 (Sen. Inouye); PER490 (Rep. Richardson), PER501-507 & PER509-512 (Senate staff), PER508 (Sen. Inouye, Reps. Richardson & Doolittle), PER515-517 (Rep. Fazio); PER479 (meeting with staff for Sen. Inouye and House committee staff).

in early 1994, Assistant Secretary Ada Deer abruptly reversed the federal government's long-held position and relieved the Band of the requirement to proceed through the acknowledgement regulations. (PER513.)

Purporting to "clarify the United States' political relationship" with the Band, Assistant Secretary Deer wrote that she was "reaffirming the portion of Commissioner Bruce's letter which reads .... 'Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated.'" (*Id.*) The Deer letter contains no mention of: (1) the contrary positions taken by the United States in the *Ione Band Lawsuit*, (2) the contrary conclusion of the BAR, which is specifically responsible for researching the historical bases for claims of federal tribal recognition (PER784-785); (3) the decision of the IBIA that the Band was never recognized and that proceeding through the regulations was the sole means of becoming recognized, (4) the purposeful omission of the Band from the 1978 list of recognized tribes, or (5) the many detailed letters—only some of which are discussed above—expressly concluding the Band had never attained Federal tribal status.

Notably, however, the Deer letter <u>does</u> mention meetings with members of Congress. (PER513 ["I am writing regarding our meeting on October 28, 1993 and subsequent discussions with Congressman

Doolittle."].) A contemporaneous file memorandum shows that this determination was also an administrative anomaly. The Deer letter issued without "program review and surname" (a process by which the Solicitor's office would review and endorse such communications, *see* PER350), and that "file copies were not prepared for distribution" in advance. (PER514.)

F. THE INITIAL DETERMINATION IN 2006 THAT THE PLYMOUTH PARCELS WERE "RESTORED LANDS OF A RESTORED TRIBE" ELIGIBLE FOR GAMING; AND AMADOR COUNTY'S FIRST LEGAL CHALLENGE THERETO.

In 2004, the Band petitioned the National Indian Gaming Council ("NIGC") for an "Indian lands determination" regarding the Plymouth Parcels, under the "restored lands for a restored tribe" exception to the prohibition of gaming on lands acquired after 1988. 25 U.S.C. § 2719(b)(1)(B)(iii). (AR001401-2549.) And in November 2005, the Band applied to the Secretary to have the Plymouth Parcels taken into trust. (AR002751-3482.) Amador County and the State of California opposed both requests. (AR004204-4414, AR004851-53, AR004862-4908, AR004915-5012.)

On September 19, 2006, then-Associate Solicitor, Division of Indian Affairs, Carl Artman opined—based on the actions of Assistant Secretary Deer—that the Plymouth Parcels are "restored lands for a restored tribe";

then-Associate Deputy Secretary James Cason concurred on September 26. (PER604-609, AR005094-95.)

Amador County and the State of California appealed the Artman/Cason determination to the IBIA (AR005119-38, AR005150-51), and following that body's determination that it lacked jurisdiction over the appeal, Amador County filed suit in federal court challenging the ILD. *County of Amador v. United States Dep't of Interior*, Case No. 2:07-cv-00527-LKK-GGH (E.D. Cal. filed Mar. 16, 2007). The Band intervened in the action, waiving its tribal immunity as a condition of the County's non-opposition to intervention. (PER627.)

The federal defendants and the Ione Band moved to dismiss that suit on the ground that the Artman/Cason memoranda did not constitute "final agency action" under the APA, and that judicial review of the ILD had to wait until a final decision was made to approve the Band's trust application. (PER610-611.) The district court granted the motion to dismiss but stated, "If and when DOI approves the trust application, final agency action will exist, and the county will be able to sue." (PER621.)

G. REVERSAL AND WITHDRAWAL OF THE 2006 INDIAN LANDS DETERMINATION BY THE SOLICITOR IN 2009.

In January 2009, Department Solicitor David Bernhardt sent a memorandum to George Skibine, Acting Deputy Assistant Secretary for

Policy and Economic Development, withdrawing the 2006 Artman/Cason memorandum. (PER633.) That letter stated in part, "We are now in the process of reviewing the preliminary draft Final Environmental Impact Statement for the Plymouth parcel. As a result, I determined to review the Associate Solicitor's 2006 Indian lands opinion and have concluded that it was wrong. I have withdrawn and am reversing that opinion. It no longer represents the legal position of the Office of the Solicitor. The opinion of the Solicitor's Office is that the Band is not a restored tribe within the meaning of IGRA." (*Id*.)

H. THE SUPREME COURT DECIDES *CARCIERI* AND THE COUNTY SUBMITS A LETTER EXPLAINING HOW THAT DECISION PRECLUDES THE SECRETARY FROM ACCEPTING LAND IN TRUST FOR THE BAND.

In 2009, the Supreme Court decided *Carcieri*, holding that § 19 of the IRA, 25 U.S.C. § 479 (AA4-5), "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." 555 U.S. at 382. On July 15, 2009, Amador County wrote to Larry EchoHawk, then-Assistant Secretary of Indian Affairs, explaining why *Carcieri* precludes the Department from taking land into trust on behalf of the Ione Band. (AR007757-97.)

I. THE RECORD OF DECISION REVERSES COURSE YET AGAIN.

On May 24, 2012, Defendant Laverdure made a final decision to take the Plymouth Parcels into trust on behalf of the Ione Band. (PER88-155.) The ROD reversed the Bernhardt opinion, reinstated the Artman opinion, and rejected the conclusion that *Carcieri* precludes the Secretary from taking land into trust for the Ione Band. Flip-flopping once again, the ROD stated that the Parcels are "restored lands of a restored tribe." (PER139-149.)

V.

STATEMENT OF THE CASE.

Amador County filed its complaint on June 27, 2012, naming the Department, then-Secretary of Interior Ken Salazar, and then-Acting Assistant Secretary of Indian Affairs Donald Laverdure as defendants. (Dkt. #1.) A group of local citizens filed a parallel lawsuit, which was designated as "related" to the case on appeal herein. *No Casino in Plymouth v. Jewell*, No. 2:12-cv-01748-TLN-CMK (E.D. Cal.) ("*NCIP*").

The County filed a First Amended Complaint on September 20, 2012, and moved to file a Second Amended Complaint, but pursuant to a stipulation between the parties, certain contested documents were included in the administrative record, the First and Second Amended Complaints

were withdrawn, and the original complaint was revived as the operative pleading (Dkt. #45).

The district court granted the Ione Band's unopposed motion to intervene on September 13, 2013. (Dkt. #55.)

Following the lodging of the administrative record on May 7, 2013 (Dkt. #42), and lodging of the supplemental administrative record on February 19, 2014 (Dkt. #64), the County moved for summary judgment pursuant to a court-ordered briefing schedule, and the Federal Defendants and Ione Band filed cross-motions. (Dkt. #s 65, 82, 84.) Briefing on those motions was completed in October 2014, and a hearing set for November 6. (Dkt. #s 85-87, 89-90, 92).

On November 3, 2014, the district court vacated the November 6 hearing, taking the cross-motions under submission without oral argument. (Dkt. #91.) On September 30, 2015, the district court entered an order denying summary judgment to Amador County and granting it to the Federal Defendants and Ione Band. (Dkt. #95.) That same day, the court issued a parallel order denying summary judgment to the plaintiffs in *NCIP* and granting summary judgment to the Federal Defendants and Band in that case too. (PER54-87.) The order in this case cross-referenced the order in *NCIP*.

Judgment was entered in both cases on October 13, 2015, and timely appeals were filed.

VI.

STANDARD OF REVIEW APPLICABLE ON APPEAL.

This Court reviews a district court's grant of summary judgment *de novo*, "applying the same standards that applied in the district court." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). It owes no deference to the district court's ruling. *Univ. of Wash. Med. Ctr. v. Sebelius*, 634 F.3d 1029, 1033 (9th Cir. 2011).

Under the APA, this Court will set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Applying this standard, "[t]he APA requires meaningful review; and its enactment meant stricter judicial review of agency factfinding than Congress believed some courts had previously conducted." *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999). When determining whether an agency's action was arbitrary, capricious, or contrary to law, courts "engage in a substantial inquiry ... a thorough, probing, in-depth review of [the] discretionary agency action." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). "Courts must

carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute...." *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003) (quoting *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir. 2003)) (ellipses in original).

The Court "must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the [agency]'s conclusion, and may not affirm simply by isolating a specific quantum of supporting evidence." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citation and internal quotation marks omitted).

VII.

SUMMARY OF ARGUMENT.

First, the Secretary of Interior has *expressly* recognized, in adopting regulations in 2008 to govern the process of taking land into trust for gaming purposes, that when Congress enacted IGRA it *did not intend* for tribes to be able to take advantage of the "restored lands" exception when those "tribes" were informally recognized outside the formal acknowledgement regulations, as the Ione Band indisputably was.

The ROD, however, relied on a "grandfather" provision in the 2008 regulations that exempted tribes from plain congressional intent if they had received an opinion from the Department or the NIGC, prior to the regulations' effective date, that they did qualify as a "restored tribe," even if no final agency action had been taken based on that opinion. The Department's circumvention of congressional intent was contrary to law. The D.C. Circuit has articulated the narrow circumstances in which an agency may "grandfather" past administrative practices that run contrary to congressional intent, in *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) (hereafter "*NRDC*"), and *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail Union*"), and this Court has "adopted the framework set forth by the D.C. Circuit in *Retail Union*" and *NRDC*. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2013) (en banc).

The district court, however, refused to apply the *NRDC* factors, due to a demonstrable misreading of that case. It also deferred to the Department's decision to grandfather pre-2008 decisions that were not the basis of any final agency action, which is contrary to this Court's precedents prescribing de novo review for such decisions.

Moreover, as discussed more fully below, applying that de novo review leads to the conclusion that grandfathering the Ione Band's 2006 ILD was improper. In adopting and applying Regulation 292.26(b), the Secretary failed to address any of the *NRDC* criteria but one (reliance), and it applied that criterion incorrectly, failing to require *actual, reasonable* reliance, instead of hypothetical reliance. Any reliance by the Band on the preliminary ILD, prior to final agency action, could not have been reasonable, especially in light of the course of events in this case.

Second, the ROD itself notes that the Ione Band was not "recognized" until 1972 (at the earliest), and in fact, as late as the 1990s the Department asserted in litigation that the Band was not and never had been federally recognized. *Ione Band of Miwok Indians v. Burris*, No. S-90-0993-LKK/EM (E.D. Cal.); PER397-467, PER775-889. That being so, the Secretary lacks authority to take land into trust for the Band under Section 5 of the IRA, which only authorizes trust acquisitions for a tribe that was a "recognized tribe" in 1934.

And finally, though the ROD takes the position that the Band was a "tribe" that was "under federal jurisdiction" in 1934, as *Carcieri* unquestionably requires, the ROD's assertion relies solely on the federal government's *failed* attempts to acquire land for the Band between 1915 and

1930, which does not remotely rise to the level of establishing "federal jurisdiction" over the Ione Band in 1934. The government's efforts to acquire land for many landless California Indians did not create "jurisdiction" over groups of Indians and convert them into "tribes" under the IRA. In fact, long-standing case law, the legislative history of the IRA, and contemporaneous administrative practice reflect the understanding that "federal jurisdiction" over an Indian tribe in 1934 went hand-in-hand with the federal government's ownership and superintendence of land on the tribe's behalf, which undisputedly did not occur here.

Nor is "federal jurisdiction" established by two other facts that the ROD notes (but does not ultimately rely on):

1. That certain Ione Band members are purportedly successors-in-interest of signatories to an *unratified* treaty from the 1850s; and
2. That ancestors of present Band members were included on two lists of landless, non-reservation Indians in California in 1906 and 1915.

An unratified treaty is a nullity, and cannot give rise to obligations or rights on the part of the federal government or the Band. And there is no authority to support the premise that the appearance of individual, landless Indians on a list establishes federal jurisdiction over that Indian's "tribe."

Again, in 1934 it was understood that—with respect to Indian tribes—federal jurisdiction meant federal land.

VIII.

THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARDS IN UPHOLDING THE DEPARTMENT'S ILLEGAL DECISION TO "GRANDFATHER" THE 2006 INDIAN LANDS DETERMINATION ("ILD").

If the Ione Band were to initiate a land-to-trust application today, there is no question it would be unable to take advantage of the "restored lands" exception under IGRA, because in 2008 the Secretary of Interior adopted regulations (25 C.F.R., Part 292, the "Part 292 Regulations") that foreclose a "tribe" that was administratively recognized outside the formal Part 83 Acknowledgment Process from availing itself of that exception.

Specifically, 25 C.F.R. § 292.10 (AA13), provides that to qualify as a "restored tribe" the tribe must have been restored by (1) congressional legislation, (2) a judgment or settlement agreement in a federal court case, to which the United States is a party, or (3) recognized "*through the administrative Federal Acknowledgment Process under § 83.8 of this chapter [Part 83.]*" It is undisputed that the Band does not fit within any of the foregoing provisions; instead the ROD asserts the Band was *informally*

"recognized" by Ada Deer in 1994 *outside* of the "Federal Acknowledgement Process under § 83.8." (PER139-141, AR007156.)

The exclusion of informally-recognized tribes from Section 292.10's definition of "restored tribe" was no oversight; it was a conscious choice, designed to implement Congress's acknowledged intention in adopting IGRA.

Following publication of the draft Part 292 regulations, the Secretary received comments suggesting that the regulations be amended to include tribes (like the Ione Band) that were purportedly "restored" pursuant to agency action outside the Part 83 regulations. The Secretary rejected those suggestions, stating: "We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. ***We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations."*** 73 Fed. Reg. 29354, 29363 (May 20, 2008) (emphasis added) (AA38). The Secretary further elaborated:

> In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process. The part 83 regulations were adopted in 1978. These regulations govern the determination of which groups of Indian descendants were entitled to be acknowledged as continuing to exist as Indian tribes. *The regulations were*

> *adopted because prior to their adoption the Department had made ad hoc determinations of tribal status and it needed to have a uniform process for making such determinations in the future. We believe that in 1988 Congress did not intend to include within the restored tribe exception these pre-1979*[10] *ad hoc determination.* [sic] *Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified only the part 83 procedures as the process for administrative recognition.*

Id. (emphasis added).

Despite acknowledging that treating informally-recognized tribes like the Ione Band as "restored tribes" contravenes congressional intent, the ROD concluded that the Band could avail itself of the "restored tribe" exception pursuant to 25 C.F.R. § 292.26(b) (AA14), which provides:

> These [2008] regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

(PER139-141.)

In applying this grandfathering provision, the Department acted contrary to law. The district court erred in holding otherwise.

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[10] The ROD states that "in 1972, Commissioner Bruce sent a letter that amounted to recognition for the Tribe in accordance with the practices of the Department at the time." (PER141.)

A. THE DISTRICT COURT ACTED CONTRARY TO THIS COURT'S PRECEDENTS IN (1) REFUSING TO APPLY THE "*NRDC* FACTORS" FOR DETERMINING THE NARROW CIRCUMSTANCES IN WHICH AN AGENCY MAY GRANDFATHER PAST REGULATORY ACTIONS THAT ARE CONTRARY TO CONGRESSIONAL INTENT, AND (2) DEFERRING TO THE DEPARTMENT'S DETERMINATION ON RETROACTIVITY.

It is black-letter law that administrative agencies must apply statutes in accordance with congressional intent. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). However, the courts have held that, in some narrow circumstances, past practices that were inconsistent with congressional intent can be "grandfathered" for equitable reasons. In *NRDC*, the D.C. Circuit articulated the following "considerations governing an agency's duty to apply a rule retroactively":

> (1) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (2) the extent to which the party against whom the new rule is applied relied on the formed [sic] rule, (3) the degree of the burden which a retroactive order imposes on a party, and (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

838 F.2d at 1244 (quoting *Retail Union*, 466 F.2d at 390).

Again, this Court has "adopted the framework set forth by the D.C. Circuit in *Retail Union*" and *NRDC*. *Garfias-Rodriguez*, 702 F.3d at 518 (en banc).

The district court, however, concluded that the *NRDC* factors were inapplicable because (1) it determined that *NRDC* only applied to cases

where the agency "refused to provide any grandfathering," rather than cases like this one where it chose to do so (PER48), and (2) it concluded that, though "[t]here is some inconsistency between the Department's position in the final rule that administrative restoration of tribes—at least prior to promulgation of the Part 83 regulations—be foreclosed as a route to being a 'restored tribe'; and the Department's position that administrative restoration is permitted in the Ione Band's case" (PER44), it was proper to "afford[] deference to the Department in its decision to promulgate the grandfathering provision as part of the Part 292 regulations." (*Id*.) Both determinations were wrong as a matter of law.

First, the district court appears to have simply misread *NRDC*, insofar as it concluded that case dealt only with an agency's *refusal* to grandfather. In fact, *NRDC* addressed challenges to both an agency's refusal to grandfather *and its decision to do so*. *See* 838 F.2d at 1243 ("*The agency has in several cases grandfathered stacks ... NRDC attacks several elements of the grandfathering as too generous* ...." (emphasis added)). The D.C. Circuit identified the factors listed above as "[s]ome general principles [that] are applicable to all these issues." *Id*. at 1244.

Nor is *NRDC* the only case the County cited that applied those criteria to overturn an agency's refusal to apply a new rule retroactively. *See, e.g.*,

Sierra Club v. EPA, 719 F.2d 436, 467 (D.C. Cir. 1983) (applying *NRDC* factors to overturn EPA rule that grandfathered-in stack heights).

In other words, contra the district court, the *NRDC* factors apply whether the agency chooses to grandfather or not.

Likewise, the district court erred in concluding that the agency's decision to grandfather pre-2008 ILD's was entitled to deference. The application of the *NRDC* factors "is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision[.]" *Retail Union*, 466 F.2d at 390; *see also Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1144 (9th Cir. 1988) ("The question of whether new [administrative] standards should be applied retroactively is one of law, which we review under the *de novo* standard."); *Garfias-Rodriguez*, 702 F.3d at 515 (en banc) (declining to remand to agency for determination of retroactivity, because "there is no need to defer to an agency's position on the issue").

Moreover, *Chevron* deference is not a warrant for courts to "rubber-stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute ...." *Friends of Yosemite Valley*, 348 F.3d at 793.

B. APPLYING THE *NRDC* FACTORS AND THE DE NOVO REVIEW PRESCRIBED BY THIS COURT'S PRECEDENTS, THE DEPARTMENT'S GRANDFATHERING OF THE IONE BAND'S 2006 ILD WAS CONTRARY TO LAW.

The *only* rationale the Secretary gave for "grandfathering in" interim ILDs that were not yet the basis for final agency action under 25 C.F.R. § 292.26(b) was that "It is expected that in those cases, the tribe and perhaps other parties may have relied on the legal opinion to make investments into the subject property or taken some other actions that were based on their understanding that the land was eligible for gaming." 73 Fed. Reg. 29354, 29372 (emphasis added). This cannot sustain the Department's action. It wholly ignores the other *NRDC* criteria, and it applies the reliance prong erroneously.

1. First *NRDC* factor: refusing to treat tribes recognized outside the Part 83 process as "restored tribes" was not "an abrupt departure from well-established practice" that warranted grandfathering.

In adopting the grandfather provision the Secretary did not address the first *NRDC* factor—whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law. "If a new rule 'represents an abrupt departure from well established practice,' a party's reliance on the prior rule is likely to be reasonable, whereas if the rule 'merely attempts to fill a void in an unsettled

area of law,' reliance is less likely to be reasonable." *Garfias-Rodriguez*, 702 F.3d at 521 (en banc).

This factor militates against grandfathering the 2006 ILD in this case.

Prior to 2008, a determination of whether a given tribe was a "restored tribe" was an *ad hoc* inquiry, made by the NIGC or Solicitor's Office on a case-by-case basis. (73 Fed. Reg. 29354-55; AR002613.) Trust acquisitions by the Secretary for gaming purposes were governed by a "Checklist" that contained no guidance regarding the criteria for a "restored tribe." (AR002604-18.) The entire purpose of the Part 292 regulations was to provide concrete rules where none previously existed.

Moreover, treating informally-restored tribes as "restored tribes" was not a well-established practice under the *ad hoc* analysis. The administrative record identifies only one other tribe that was informally recognized outside of the Part 83 regulations—the Lower Lake Rancheria in Santa Rosa. (AR006193). The record does not indicate that the Lower Lake Rancheria was issued an ILD prior to the adoption of the Part 292 Regulations, but in fact, in November 2008 (*i.e.*, after the Part 292 Regulations were already in

effect) the NIGC ruled that the Lower Lake Rancheria was not a "restored tribe."[11]

The district court cited one other example, based on extra-record evidence submitted by the Ione Band—the case of the Karuk Tribe of California. But as the district court *itself* described the facts, the NIGC concluded that the Karuk Tribe was not a "restored tribe" in 2004, and only reversed course in 2012—four years *after* the agency decided to adopt the grandfathering provision (and only weeks before the ROD issued in this case). The Department's *2012* decision to reverse course and treat the Karuk Tribe as a "restored tribe" under the grandfather clause cannot logically serve as a reasonable justification for the Department's *2008* decision to adopt that clause in the first place.

Simply put, neither *Lower Lake* nor *Karuk*, nor anything else in the record of this case, reveal a "well established" practice of treating tribes acknowledged outside the Part 83 regulations as "restored" tribes that would have justified the adoption of the grandfather provision in 2008.

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[11] *See* http://www.nigc.gov/images/uploads/indianlands/Lower%20Lake%20Appeal%2010.07.08.pdf (last visited Mar. 10, 2016).

2. Second *NRDC* factor: the grandfather clause fails to require a showing of *actual* reliance, and under the specific facts here any reliance by the Ione Band would not have been reasonable.

Though the Secretary's rationale for the grandfathering clause did address the second *NRDC* factor—reliance—it took that factor into account in a wholly improper way.

When an agency seeks to grandfather prior actions that are contrary to congressional purpose, the agency's grandfathering rule must require a showing of *actual* and *reasonable* reliance by the affected party. *Garfias-Rodriguez*, 702 F.3d at 519 & 522 (en banc); *NRDC*, 838 F.2d at 1248; *Sierra Club*, 719 F.2d at 467-68.

However, 25 C.F.R. § 292.26(b) does not require a showing of *actual* reliance on the previously-issued ILD, and in any event, reliance by the Band on pending (rather than final) agency action would been unreasonable,[12] *especially* in light of the events leading up to the ROD's issuance:

- Regulation 292.10 was initially proposed by the BIA in substantially its present form on October 5, 2006, *less than 10 days after the final 2006 ILD was made public*. *See* 71 Fed. Reg.

[12] The County does not challenge 25 C.F.R. § 292.26*(a)*, which grandfathers decisions upon which final agency action was *already taken* prior to the regulations' 2008 adoption. In this case, however, there was no final agency action until May 2012.

58769, 58774 (Oct. 5, 2006) (AA15-28). From the beginning, the proposed regulation included the requirement that only tribes administratively restored through the Part 83 process could be a "restored" tribe, and that initial version of the regulations did *not* contain a "grandfather" clause (which did not appear until the final adoption in May 2008). *Id*. Thus, the Band was on notice from the time the 2006 ILD issued that their eligibility to proceed thereunder was tenuous, and there can have been no reasonable reliance between the issuance of the 2006 ILD and May 2008.

- Amador County and the State of California appealed the 2006 ILD within a month of its issuance (AR5119-38, AR 5150-51), and the County filed suit challenging the ILD's "restored tribe" determination several months later. (PER627.) The Band intervened in that challenge. (*Id.*; PER610.) When that case was dismissed as unripe, the court said the County could sue later, and the County made clear its intention to do so, including in the stipulation to dismiss the appeal signed by the Band itself. (PER626-631.)
- Even after issuance of the final Part 292 Regulations, the Department reserved "full discretion to qualify, withdraw or

modify such opinions." 25 C.F.R. § 292.26(b). This retained discretion was fully consistent with the Department's position in the County's prior challenge that "[a]n examination of the opinion memorandum shows that its determination has no effect unless the land at issue is acquired in trust by the United States" and that the ILD was therefore not final agency action.[13] An administrative action becomes final agency action if it is the agency's intention that third parties will rely upon that action. *See Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 438 (D.C. Cir. 1986).

- Any claim of reliance by the Band also conflicts with the Band's own characterizations of the ILD in the earlier litigation: "as a *preliminary* assessment intended to assist the Secretary in making a final determination with regard to the [Band]'s pending fee-to-trust application"[14]; as an "interim," "interlocutory," and merely "advisory" opinion[15]; and as a document that "standing

[13] PER257.
[14] PER280 (emphasis added).
[15] PER272, PER279, PER295.

alone has no legal force or practical legal implications" unless the fee-to-trust application was approved.[16]

- Finally, there cannot have been any reasonable reliance after Solicitor Bernhardt *withdrew* the ILD in 2009 (PER633). The record shows the Band learned of that withdrawal almost immediately. (AR007120.)

Simply put, the Ione Band always faced—and acknowledged—the prospect that the ILD might be changed, withdrawn, or overturned at any time prior to final agency action being taken. Under such circumstances, any action that the Band took "in reliance" on the ILD was at its own peril, and any claim of reliance is wholly unjustified as a rationale for grandfathering an ILD that is otherwise inconsistent with Congress's recognized intention in adopting IGRA. *See Garfias-Rodriguez*, 702 F.3d at 521-22 (en banc) (reliance on prior administrative actions generally not reasonable where that action has been subject to ongoing challenges, faced possibility of being overturned, and where—as here—it was one of "multiple changes in the agency's position"); *WRT Energy Corp. v. FERC*, 107 F.3d 314, 321 (5th Cir. 1997) (where energy company "apparently relied, perhaps imprudently," on a preliminary administrative decision subject to further review, the Court

[16] PER295.

rejected a claim by WRT that the FERC's ruling was impermissibly retroactive in light of its reliance).

3. Third *NRDC* factor: refusing to treat the Ione Band as a "restored" tribe in accordance with congressional intent would not impose an unfair burden on the Band, because it would not prevent the Band from conducting gaming under IGRA but would only require that it engage in the two-step consultation process.

The Secretary also did not address the third *NRDC* factor—the degree of burden that retroactive application would impose on a party—but that factor also cuts against grandfathering in the 2006 ILD. Overturning the determination that the Ione Band is not a "restored" tribe does not mean that it can never have a gaming facility (assuming the Band is entitled to have land taken into trust on its behalf under *Carcieri*, *see infra*). It simply means that the Band must comply with a Two-Part Test set out by Congress, in which the Secretary and California's Governor both conclude, after consultation with affected interests, including local governments, that gaming would be "in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," 25 U.S.C. § 2719(a) & (b)(1)(A). The ILD is nothing more than an attempt by the Ione Band to circumvent the process set out by Congress (just as it evaded the Part 83 acknowledgement process via political pressure).

4. Fourth *NRDC* factor: there is a strong statutory interest in preventing tribes from improperly taking advantage of the exceptions to the consultation process prescribed by IGRA before allowing gaming.

Nor did the Secretary address the fourth *NRDC* factor—the statutory interest in applying a new rule despite the reliance of a party on the old standard (though, of course, the Band did not reasonably rely)—but this prong also militates against grandfathering the 2006 ILD. In enacting IGRA, Congress concluded that unless certain narrow exceptions applied, the State and local governments who would be affected by casino gaming should be consulted before the effects of such an impactful business could be imposed upon them and their residents. The Band cynically seeks to deprive the State and Amador County of the protections conferred upon them by Congress.

In summary, the ROD's determination that the Ione Band may acquire land for gaming purposes under the "restored tribe" exception rests on an ILD that is inconsistent with Congress's acknowledged intent and the Secretary's own regulations, and the Department's attempt to "grandfather in" that ILD was contrary to law.

IX.

THE IONE BAND IS NOT ELIGIBLE TO HAVE LANDS TAKEN INTO TRUST UNDER THE INDIAN REORGANIZATION ACT.

The Secretary may not take land into trust on behalf of Indians who were not "members of any recognized Indian tribe now under federal jurisdiction," *i.e.*, a tribe that was both "recognized" and "under federal jurisdiction" in June 1934.

This requirement has two separate dimensions. There must have been a formal government-to-government relationship in 1934—hence "recognized" tribe—and that tribe also had to be "under federal jurisdiction," which in 1934 meant living on federally-supervised Indian lands, exempt from state law. To the extent the Secretary proposes to take lands into trust for "tribes" that do not meet these requirements, he exceeds his delegated authority and usurps power that may only be exercised by Congress.

A. THE IONE BAND IS NOT A "RECOGNIZED INDIAN TRIBE" WITHIN THE MEANING OF THE IRA.

1. The IRA requires "recognition" in 1934.

The IRA authorizes the Secretary to take land in trust for "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. It is undisputed (because the Supreme Court has said so) that the phrase "now under Federal jurisdiction" refers to tribes that were under federal

jurisdiction in 1934. *Carcieri*, 555 U.S. at 395. It is also clear that the phrase "now under Federal jurisdiction" modifies the term "recognized Indian tribe." It follows that the Act requires the tribe to be "recognized" at the same time at which it was "under Federal jurisdiction"—in 1934. That is because the temporal limitation of the modifying term ("now under Federal jurisdiction") necessarily applies to the modified term ("recognized Indian tribe"). A tribe cannot be a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934.

In fact, the only time the Supreme Court addressed this question, it concluded that a tribe had to be recognized in 1934. In *United States v. John*, 437 U.S. 634 (1978), the Court explained that "[t]he 1934 Act defined 'Indians' ... as 'all persons of Indian descent who are members of any recognized [*in 1934*] tribe now under Federal jurisdiction.'" *Id.* (quoting 25 U.S.C. § 479) (brackets in original; emphasis added). The bracketed phrase "in 1934" reflects the Court's understanding that the word "now" restricts the operation of the IRA to tribes that were "recognized" in 1934.

Likewise, in *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975), the D.C. Circuit stated that "the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation *at that time*"—*i.e.*, when the IRA was enacted in

1934. *Id.* at 1256 (emphasis added). In *United States v. State Tax Commission of Mississippi*, 505 F.2d 633 (5th Cir. 1974), the Fifth Circuit held that "[t]he language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the additional language to like effect." *Id.* at 642. And in *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157 (D.D.C. 1980), the court held that "the IRA was intended to benefit only those Indians federally recognized at the time of passage." *Id.* at 161 n.6. These authorities confirm that the IRA unambiguously requires recognition in 1934.

2. The term "recognized Indian tribe" refers to formal political recognition.

The phrase "recognized Indian tribe" was a term of art by 1934, and it unambiguously referred to a tribe's political status. A 1934 Solicitor's Opinion states that "[a] tribe is not a geographical but a political entity." (AA79.) A year earlier, the Supreme Court discussed "recognition" in political terms, when it held that only *Congress* could determine "'to what extent, and for what time [Indian tribes] *shall be recognized and dealt with as dependent tribes* requiring the guardianship and protection of the United States." *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting *United States v. Sandoval*, 231 U.S. 28, 45 (1913) (emphasis added)).

Decades earlier, Congress abrogated the Executive's power to treat with Indian tribes in unequivocally political terms: "No Indian nation or tribe within the territory of the United States shall be *acknowledged or recognized* as an independent nation, tribe, or power with whom the United States may contract by treaty." Appropriations Act of March 3, 1871, ch. 120, § 1, 6 Stat. 544 (codified as amended at 25 U.S.C. § 71) (emphasis added). And in 1884, the Supreme Court discussed the political significance of recognition when it described the condition of Massachusetts Indians as "remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 108-09 (1884). Congress obviously understood "recognized" to denote a political status by 1934.

Consistent with this understanding, in the *Ione Band Litigation*, the federal government observed in its reply brief supporting summary judgment:

> Normally a group will be treated as a tribe or a "recognized" tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has had some continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs.

(PER459-460 n.15 [quoting Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 6 (1982)]; underline in U.S. brief.) In granting that motion, Judge Karlton

adopted this test (PER645), as have a number of other courts. *See, e.g.*, *Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 484 (1st Cir. 1987); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Atty*., 369 F.3d 960, 968 (6th Cir. 2004).

3. The ROD itself states that the Band was not "recognized" until 1972 (even assuming it was then).

The ROD is replete with statements that the Band was first "recognized" by the government as a tribe in 1972:

- The actions of the Department in furtherance of its efforts to acquire land for the Indians at Ione are not conclusive as to the Tribe's recognized tribal status. However, in 1972, Commissioner Bruce sent a letter that amounted to recognition for the Tribe in accordance with the practices of the Department at the time. (PER141.)

- In the 1970s the Bureau of Indian Affairs recognized the Ione Band as an Indian tribe based on the 1915 and later efforts to acquire land for the Band." (PER149.)

- "The [1972 Bruce] letter does recognize the lone Band as an Indian tribe based on the 1915 determination by the United States to acquire land for the Band." (*Id*.)

- The "2006 Indian Lands Determination ... found, inter alia, that the 1972 letter from Commissioner Bruce recognized the Ione Band as an Indian tribe." (*Id*.)

- The [1972] Bruce letter recognized the Ione Band as an Indian tribe based on the 1915 determination by the United States to acquire land for the Band. (PER151.)

The Department is bound by these statements, because agency action can only be upheld based on the rationale adopted by the agency in making the decision. *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

In light of these statements, and the requirement of the IRA that a "tribe" be "recognized" in 1934, there can be no question that the Secretary is not authorized to take land into trust on the Band's behalf under the IRA.

B. BECAUSE THE IONE BAND DID NOT LIVE ON FEDERALLY-RESERVED LAND AND DID NOT HAVE A TREATY, EXECUTIVE ORDER, OR LEGISLATION, IT WAS NOT "UNDER FEDERAL JURISDICTION" IN 1934.

1. Absent a treaty, "federal jurisdiction" over an Indian tribe unambiguously meant Indians on federally-held land in 1934.

The ROD itself flatly acknowledges, "The actions of the Department in furtherance of its efforts to acquire land for the Indians at Ione are not conclusive as to the Tribe's recognized tribal status." (PER141 [emphasis added].) If such unconsummated purchases were admittedly not conclusive as to the "recognized" tribal status of the Band, they certainly cannot be regarded as establishing that said Band was "under federal jurisdiction." To the contrary, the government's failure to acquire land for the Ione Band is conclusive evidence that the Band—regardless of its tribal status—was not then "under federal jurisdiction," because in 1934 federal jurisdiction over

Indians unambiguously went hand-in-hand with federally-supervised land reserved for those Indians, at least where there was no valid treaty in effect. That understanding is definitively established by long-standing case law, the legislative history of the IRA, and contemporaneous administrative practice.

As the legislative history of the IRA itself specifically noted, "Indians under Federal jurisdiction *are not subject to State laws*."[17] This is significant, because prior to the enactment of Public Law 280 in 1953 (*i.e.*, in 1934), whether an Indian or tribe was subject to state laws turned on whether that Indian or tribe was on federally-supervised land. *See Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 662 (9th Cir. 1975) ("Prior to passage of P.L. 280, Congress had encouraged, under § 476 of the Indian Reorganization Act, the formation and exercise of tribal self-government *on reservation trust lands*." (emphasis added)).

As the Supreme Court explained in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), citing a series of cases going back to 1913, Supreme Court case law requires "both a federal set-aside and federal superintendence [to conclude] that the Indian lands in question constituted Indian country and *that it was permissible for the Federal Government to exercise jurisdiction over them*. ... The federal set-aside requirement ensures

[17] PER161.

that the land in question is occupied by an 'Indian community'; *the federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question*." *Id.* at 530 (emphasis added; footnote omitted).

Thus, the courts have held that land taken into trust by the federal government under Section 5 of the IRA itself "is effectively removed from state jurisdiction." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1011 (8th Cir. 2010). *See also* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 116 (1942 ed.) ("That state laws have no force *within the territory of an Indian tribe* in matters affecting Indians is a general proposition that has not been successfully challenged, at least in the United States Supreme Court, since that Court decided" *Worcester* in 1832) (emphasis added) (AA81).

By contrast, Indians going beyond the boundaries of lands set aside for their protection were, and are, subject to state law. *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962); *Ward v. Race Horse*, 163 U.S. 504, 507-08 (1896) (Indian who killed game outside the boundaries of a reservation in violation of Wyoming state laws could be prosecuted by the

State); *Kennedy v. Becker*, 241 U.S. 556 (1916) (state could prosecute Indian for illegal spear-fishing off the reservation).

Consistent with this unambiguous, long-standing distinction between federal jurisdiction over Indians on federally-controlled Indian lands and state jurisdiction over Indians off-reservation, the Comptroller General opined in 1925 that:

> There exists no relation of guardian and ward between the Federal Government and Indians who have no property held in trust by the United States, have never lived on an Indian reservation, belong to no tribe with which there is an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress. The duty of relieving the indigency of such Indians devolves upon the local authorities the same as in the case of any other indigent citizens of the State and county in which they reside.

5 Comp. Gen. 86 (Aug. 3, 1925) (AA75).[18]

This is extremely significant, because in a 1933 letter from then-Superintendent of the Sacramento Indian Agency O.H. Lipps to then-Commissioner of Indian Affairs John Collier, quoted by the district court in the *NCIP* decision, Mr. Lipps described the Indians living near Ione thus:

> The situation of this group of Indians is similar to that of many others in this Central California area. <u>They are classified as non-wards under the rulings of the Comptroller General</u> because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or

[18] Opinions of the Comptroller General are subject to judicial notice by this Court. *Osage Tribe of Indians of Okla. v. United States*, 95 Fed. Cl. 469, 475 (2010).

> rancheria, and none of them have allotments in their own right held in trust by the Government. They are living on a tract of land located on the outskirts of the town of Ione.

(PER339-340 [emphasis added].)[19]

The IRA's legislative history also reflects that the addition of the phrase "under federal jurisdiction" was proposed by Commissioner Collier, "a principal author of the [IRA],"[20] and incorporated in Section 19 of that Act to prevent "tribes" not already living on federal land from taking improper advantage of the Act.

During consideration of the bill, several Senators voiced concerns that (1) there were already a number of self-identified "Indians" and "tribes" on whose behalf the federal government owned land, but who really should not have been under federal jurisdiction, and (2) concerns that the definitions of "Indian" and "tribe" in Section 19 were so broad that they threatened to create more such "Indians" and "tribes" who would be able to take advantage of the provisions of the Act, against the wishes of the Senators.[21]

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[19] *See also In re Blackbird*, 109 F. 139, 143 (W.D. Wisc. 1901) ("*The true and unimpeachable ground of federal jurisdiction in such a case as this is that the Indians placed upon these reservations in the states are the wards of the government*, and under its tutelage and superintendence, and that, congress having assumed jurisdiction to punish for criminal offenses, that jurisdiction is exclusive." (emphasis added)).

[20] *Carcieri*, 555 U.S. at 390 n.5 (quoting *United States v. Mitchell*, 463 U.S. 206, 221 n.21 (1983)).

[21] PER165-167.

As examples of the abuses that the legislative sponsors wished to avoid, the bill's chief co-sponsor in the Senate, Senator Wheeler, noted that former Vice President Charles Curtis, whose claim to be an "Indian" was highly dubious, "ha[d] lands today under the supervision of the Department," which Senator Wheeler deemed "idiotic."[22] The Senator also pointed to the specific case of a so-called "tribe" in California, living on federal land, which in the Senator's estimation had no business being under federal jurisdiction. He believed that "Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way."[23] Commissioner Collier, when asked if other such "Indians" would be able to take advantage of the Act replied, "If they are actually residing within the present boundaries of an Indian reservation at the present time."[24]

Senator Wheeler cautioned that the purpose of the Act was not to deal with the problem of those "tribes" already (but improperly) under federal jurisdiction.[25] Nevertheless, he and other Senators were anxious that IRA not make the problem worse.[26] Thus, the legislative record contains a

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[22] *Id*.
[23] PER166.
[24] PER165 (emphasis added).
[25] PER163-164.
[26] PER165-167.

detailed discussion of the Catawba Indians in South Carolina, who did not then have a reservation. The question arose whether the Catawbas would be "Indians" within the meaning of the IRA. Senator Mahoney believed that they should be, because "the Catawbas certainly are an Indian tribe[,]" and he saw no reason "Why, if they are living as Catawba Indians, why should they limit them any more than we limit *those who are on the* reservation[.]"[27] Chairman Wheeler, however, disagreed, and Senator Mahoney suggested that the definitions of "Indian" and "tribe" would then need to be modified to avoid that result. It was in response to this suggestion that Commissioner Collier proposed the addition of the phrase "now under federal jurisdiction," to modify the term "recognized Indian tribe."[28] In sum, the whole purpose of that phrase was to leave existing reservation Indians unaffected, but limit the ability of non-reservation Indians to bring themselves within the Act.[29]

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[27] PER166.

[28] *Id.*

[29] In this same vein, the legislative history also reflects that "Representative Edgar Howard, who co-sponsored the IRA with Senator Burton Wheeler, made the following statements during the congressional debate regarding whom should be classed as an 'Indian:'

> "For purposes of this act, [the definitional section] defines the persons who shall be classed as Indian. *In essence, it recognizes the status quo of the present reservation Indians* and further includes all other persons of one-fourth Indian blood...."

Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002), *aff'd*, 386 F.3d 1271 (9th Cir. 2004) (quoting Congressional Debate on

Consistent with this intention, on August 15, 1934—only two months after passage of the IRA—Superintendent Lipps sent another letter to Commissioner Collier, listing the various Indian communities under the "jurisdiction" of the Sacramento Agency, which then included Amador County. (PER716-720.) The stated purpose of that letter was to respond to the Commissioner's request for information about Indian communities within the Sacramento Agency's jurisdiction, for the purpose of putting into effect the "Wheeler-Howard bill," *i.e.*, the IRA. (PER717.)[30] The Ione Band was not listed, though the Jackson Rancheria and Buena Vista Rancheria were; and the Band was not invited to organize under the Act.

This judicial, legislative and administrative background provide conclusive evidence that the term "federal jurisdiction" as used in the IRA was understood by those who were responsible for its drafting and enactment to apply only to tribes with a reservation set aside on its behalf (at least absent a specific treaty or legislation). *See Carcieri*, 555 U.S. at 390 n.5 ("In addition to serving as Commissioner of Indian Affairs, John Collier was 'a principal author of the [IRA].' [Citation.] And, as both parties note, he

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Wheeler-Howard Bill (1934) in THE AM. INDIAN AND THE UNITED STATES, Vol. III. (Random House 1973)) (emphasis in original).

[30] The "Wheeler-Howard Act" was the IRA. *Morton v. Mancari*, 417 U.S. 535, 537 (1974).

appears to have been responsible for the insertion of the words 'now under Federal jurisdiction' into what is now 25 U.S.C. § 479 ... Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it."); *id*. at 397 (Breyer, J., concurring) (rejecting deference to Department's interpretation of "now under federal jurisdiction" because Commissioner Collier favored a different interpretation when the IRA was enacted).

Despite attempts by the federal government to acquire land for the Ione Band, that never ultimately happened, and the Band was subject to state law at all relevant times. (PER372, PER527, PER531, PER537-550.) At most, the government's efforts to obtain land for the Ione Band constituted a failed attempt to establish "federal jurisdiction" over the Band. Thus, the Secretary cannot take land into trust for the Band.

2. The Department's proposed two-part inquiry for "under federal jurisdiction" cannot overcome the statute's plain meaning.

The meaning of "under federal jurisdiction" was not ambiguous with respect to Indian tribes in 1934. The plain legislative intent of incorporating the phrase "now under federal jurisdiction" was to limit the reach of the Act only to those "recognized Indian tribes" then residing on land held for the

tribe's benefit by the federal government. That being the case, there is no ambiguity to be resolved by administrative interpretation, and so the Secretary's newly-minted "two-step" analysis of "under federal jurisdiction" is not entitled to any deference. *See Alaska v. Babbitt*, 72 F.3d 698, 701 (9th Cir. 1995) (when "Congress 'has directly spoken to the precise question at issue' either in the statute itself or in the legislative history[,]" there is no need for "administrative interpretation" such as would warrant deference by this Court (quoting *Chevron*, 467 U.S. at 842); *Carcieri*, 555 U.S. at 396-97 (Breyer, J., concurring) (agreeing with majority's interpretation of the word "now" from the phrase "now under federal jurisdiction" because "the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty," so the Department's "interpretation is not entitled to *Chevron* deference, despite any linguistic ambiguity.").

Nevertheless, as the district court observed, the ROD cites two other "facts" for the proposition that the Band was "under federal jurisdiction" in 1934: (1) the fact that the members of the Band were purportedly successors in interest to the signatories of Treaty J, one of 18 unratified treaties negotiated by the Federal Government with California Indians in the mid-1800s, and (2) the fact that 36 Indians near Ione were included in a "census"

of California Indians accompanying Special Agent Kelsey's 1906 survey of the conditions of said Indians. (PER146-147.)

Crucially, though the ROD noted these purported "facts" in passing, it did not rely on them to support its ultimate conclusion, which was that "the continuous efforts of the United States beginning in 1915 to acquire land for the Ione Band as a permanent reservation demonstrates a consistent 'under federal jurisdiction' relationship between the Federal Government and the Ione." (PER148.) Again, agency action may only be upheld based on the rationale adopted by the agency in making the decision. *Chenery*, 318 U.S. at 87.

But even leaving that aside, these facts are insufficient to support the ROD's conclusions.

a. Failed treaty negotiations cannot establish that the Tribe was "under Federal jurisdiction."

As to the failed treaty negotiations in the 1800s, even if one accepts as true that members of the Band are descendants or "successors in interest" to those Indians that negotiated Treaty J, that fact has little bearing on whether the Band was "under federal jurisdiction" in 1934. The "Ione Band" was indisputably not a party to any "treaty with the United States *(in effect in 1934)*." *Id*. (Breyer, J., concurring) (emphasis added). No party claims

otherwise, and, indeed, in the *Ione Band Litigation*, the tribe "concede[d] that they are not a 'treaty tribe.'" (PER649.)

Treaty *negotiations* obviously cannot establish duties or obligations on the part of the United States such as would give rise to "federal jurisdiction," because an unratified treaty is "a legal nullity." *Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015), *cert. denied*, 2016 U.S. LEXIS 2194 (U.S. Mar. 28, 2016). One needs an *executed* treaty to establish any obligation on the part of the United States. *Donahue v. Butz*, 363 F. Supp. 1316, 1320 n.4 (N.D. Cal. 1973) ("said Karuk treaty, unratified by the Senate, cannot serve as a legal basis for any claim by plaintiffs in this action"). Indeed, "[t]he doctrine of governmental *ratification* has been firmly entrenched during the entire course of the Indian relationship." *Blackfeet et al. Nations v. U.S.*, 81 Ct. Cl. 101, 127 (1935) (emphasis added). *See also Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994) ("The California Indian population is unique in this country and must be understood in historical context. In the 1850s, Congress failed to ratify treaties that the Federal Government had entered into with Indian tribes in California. Thus, although they were eventually recognized in Federal law as individual 'Indians of California,' many California Indians are not members of federally recognized tribes.").

b. Including individual Indians living near Ione on a list of landless, non-reservation Indians also cannot establish that there was a "recognized tribe" that was "under federal jurisdiction."

As to the inclusion of some individual Indians near Ione in the 1906 list of Indians in California, that hardly demonstrates a tribe "under federal jurisdiction." After all, the list in question included Indians throughout Northern California, noting genealogical stock, but without distinguishing among "tribal" groups. Notably, the list includes members of purportedly separate "tribes" at the "Jackson Reservation," and at "Buena Vista" which subsequently obtained its own reservation, and Indians from other counties.

Moreover, that enumeration was undertaken in furtherance of Congress's land purchase program, which, as previously noted, "attempted to purchase land wherever it could for landless California Indians *without regard to the possible tribal affiliation of the members of the group*." (PER605 [emphasis added].)

Third, the fact that an Indian appears on a government list does not mean that there is a tribe under federal jurisdiction. As the government noted in the *Ione Band Litigation*, there is an extensive list of California Indians from 1928 who were included on a judgment roll for the taking of ancestral lands pursuant to 25 U.S.C. § 651, but "the creation of this Judgment Fund roll did not automatically extend federal recognition to the

myriad of tribal entities identified by Indian applicants who appear on the roll." (PER461.) If that list of Indians, which is far more formal than the Kelsey and Terrell lists, was insufficient to establish a federal relationship with those Indians' "tribes," surely the less formal lists are insufficient.

And finally, it is notable that no pre-*Carcieri* authority supports the proposition that appearing on an Indian "census" equates to federal "jurisdiction." This post-*Carcieri* innovation reflects the Department's well-known hostility to the *Carcieri* decision, and a blatant attempt to create a loophole in the Supreme Court's reading of the IRA to "make sure that all recognized—federally recognized Indian tribes have the same opportunity to acquire land into trust and to make sure that the *Carcieri* decision ... is not an impediment, cannot be—is not impediment for such a goal."[31]

[31] Tr. of BIA Carcieri Tribal Consultation: Arlington, Va., Wed., July 8, 2009, p. 17:6-11 (Comments of Acting Principal Assistant Secretary for Indian Affairs George Skibine), *online at* http://www.bia.gov/cs/groups/public/documents/text/idc-001871.pdf (last visited Mar. 29, 2016).

X.

CONCLUSION.

The district court's judgment should be **OVERRULED**, and remanded for entry of judgment in Amador County's favor.

Respectfully submitted,

Dated: April 1, 2016

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STATEMENT RE RELATED CASES
9TH CIRCUIT RULE 28-2.6

No Casino in Plymouth v. Rydzik, Case No. 2:12-cv-01748-TLN-CMK (E.D. Cal.), was designated by the trial court as related to this case. *NCIP* is also currently pending on appeal in this Court. *See* Appeal No. 15-17189 (9th Cir. filed Oct. 30, 2015).

Dated: April 1, 2016

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Attorney for Plaintiff County of Amador, California

Date Apr 1, 2016

9th Circuit Case Number(s) 15-17253

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Case No. 15-17253

In the United States Court of Appeal
For the Ninth Circuit

COUNTY OF AMADOR, CALIFORNIA
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*,
Defendants - Appellees,

IONE BAND OF MIWOK INDIANS,
Intervener/Defendant - Appellee.

PLAINTIFF COUNTY OF AMADOR'S APPENDIX OF AUTHORITIES

On Appeal from the United States District Court
for the Eastern District of California
The Honorable Troy L. Nunley, Presiding
District Court Case No. 2:12-cv-01710-TLN-CKD

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PLAINTIFF'S APPENDIX OF AUTHORITIES ("AA") FED. R. APP. PROC. 28(f)

COUNTY OF AMADOR, CALIFORNIA,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*

No. 15-17253

*** Current through PL 114-119, approved 2/8/16 ***

TITLE 25. INDIANS
CHAPTER 14. MISCELLANEOUS
PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

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25 USCS § 465

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $ 2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

HISTORY:
(June 18, 1934, ch 576, § 5, 48 Stat. 985; Nov. 1, 1988, P.L. 100-581, Title II, § 214, 102 Stat. 2941.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
"This Act", referred to in this section, is Act June 18, 1934, ch 576, 48 Stat. 984, which appears generally as 25 USCS §§ 461 et seq. For full classification of such Act, consult USCS Tables volumes.

Amendments:

1988. Act Nov. 1, 1988, in the fourth para., substituted "this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.)" for "this Act".

Other provisions:

Seminole Indian Reservation. Act July 20, 1956, ch 645, §§ 1-3, 70 Stat. 581, provided:

"Sec. 1. The equitable title to the lands and interests in lands together with the improvements thereon, acquired by the United States under authority of title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200) [for full classification, consult USCS Tables volumes], the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (49 Stat. 115) [for full classification, consult USCS Tables volumes], and section 55 of the Act entitled "An Act to amend the Agricultural Adjustment Act, and for other purposes," approved August 24, 1935 (49 Stat. 750, 781) [for full classification, consult USCS Tables volumes], administrative jurisdiction over which was transferred from the Secretary of Agriculture to the Secretary of the Interior by Executive Order Numbered 7868, dated April 15, 1938 [unclassified], for the use of the Seminole Tribe, is hereby conveyed to the Seminole Tribe of Indians in the State of Florida, and such lands and interests are hereby declared to be held by the United States in trust for the Seminole Tribe of Indians in the State of Florida in the same manner and to the same extent as other land held in trust for such tribe.

"Sec. 2. The lands declared to be held in trust for the Seminole Tribe of Indians in the State of Florida under the first section of this Act [this note] and all lands which have been acquired by the United States for the Seminole Tribe of Indians in the State of Florida under authority of the Act entitled 'An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes' approved June 18, 1934 (48 Stat. 984) [for full classification, consult USCS Tables volumes], are hereby declared to be a reservation for the use and benefit of such Seminole Tribe in Florida.

"Sec. 3. Nothing in this Act [this note] shall deprive any Indian of any individual right, ownership, right of possession, or contract right he may have in any land or interest in land referred to in this Act [this note].".

Rocky Boy's Indian Reservation. Act Aug. 27, 1958, P.L. 85-773, § 1, 72 Stat. 931, provided: "The land acquired by the United States pursuant to section 5 of the Act of June 18, 1934 (48 Stat. 984) [this section], title to which was conveyed to the United States of America in trust for the Chippewa, Cree, and other Indians of Montana, and thereafter added to the Rocky Boy's Indian Reservation, Montana, by proclamation signed by the Assistant Secretary of the Interior on November 26, 1947, is hereby designated for the exclusive use of the members of the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana.".

Village site for Payson Band of Yavapai-Apache Indians. Act Oct. 6, 1972, P.L. 92-470, 86 Stat. 783, provided:

"(a) a suitable site (of not to exceed eighty-five acres) for a village for the Payson Community of Yavapai-Apache Indians shall be selected in the Tonto National Forest within Gila County, Arizona, by the leaders of the community, subject to approval by the Secretary of the Interior and the Secretary of Agriculture. The site so selected is hereby declared to be held by the United States in trust as an Indian reservation for the use and benefit of the Payson Community of Yavapai-Apache Indians.

"(b) The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934, as amended (25 U.S.C. 461-479, relating to the protection of Indians and conservation of resources), and shall be subject to all of the provisions thereof.".

NOTES:

Code of Federal Regulations:

Bureau of Indian Affairs, Department of the Interior--Land acquisitions, 25 CFR 151.1 et seq.

Related Statutes & Rules:

Right-of-way grant, consent of tribal officials, 25 USCS § 324.

Umatilla Indian Reservation lands restored, 25 USCS § 463g.

Territories, colonies, or insular possessions of United States and certain Indian tribes, application to, 25 USCS §§ 473, 473a.

Reservations wherein a majority of the adult Indians vote against application of act of which this section is a part, 25 USCS § 478.

Conversion of exchange assignments of tribal lands on certain Sioux reservations into trust titles, 25 USCS §§ 484--486.

This section is referred to in 25 USCS §§ 463b, 463g, 473a, 608, 1041e, 1300b-14, 1300i-1, 1773c, 1779d, 2202, 2719.

*** Current through PL 114-119, approved 2/8/16 ***

TITLE 25. INDIANS
CHAPTER 14. MISCELLANEOUS
PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

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25 USCS § 479

§ 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

HISTORY:
(June 18, 1934, ch 576, § 19, 48 Stat. 988.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
"This Act", referred to in this section, is Act June 18, 1934, ch 576, 48 Stat. 984, which appears generally as 25 USCS §§ 461 et seq. For full classification of such Act, consult USCS Tables volumes.

Other provisions:
Admission of Alaska as State. Act July 7, 1958, P.L. 85-508, §§ 1-30, 72 Stat. 339 and Proc. No. 3269 of Jan. 3, 1959, which appear as notes preceding 48 USCS § 21, granted and proclaimed the admission of Alaska as a state to the Union.

NOTES:

Code of Federal Regulations:
Bureau of Indian Affairs, Department of the Interior--Preference in employment, 25 CFR 5.1 et seq.

Related Statutes & Rules:
Right-of-way grant, consent of tribal officials, 25 USCS § 324.

This section is referred to in 25 USCS §§ 473a, 450i, 2201.

Congress approved February 28, 1931, June 9, 1932, and June 13, 1933, are hereby extended one and three years, respectively, from June 13, 1934.

Amendment.

SEC. 2. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, June 18, 1934.

[CHAPTER 576.]

AN ACT

June 18, 1934.
[S. 3645.]
[Public, No. 383.]

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter

Indian affairs.
Future allotment in severalty prohibited.

no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Existing trust periods extended.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Restoration of lands to tribal ownership.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further*, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*,

Provisos.
Existing valid rights not affected.

Lands in reclamation projects.

Order temporarily withdrawing Papago Reservation lands from mineral entry, etc., revoked.

Resulting damages to be paid tribe; limitation.

Annual rental to be paid.

Applicant for mineral patent must first make deposit of rent.

That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Patentee to pay, to credit of Indians, damages, for loss of improvements.

Refund, if not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

Rights of way, etc., not restricted.

Vol. 46, p. 1202

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

No transfers of restricted Indian lands, etc.; exception.

Provisos.
Lands may descend only to Indian tribe or successor corporation.

Descent, etc., according to applicable laws.

Voluntary exchanges for proper consolidations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

Acquisitions, for providing lands for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

Appropriation authorized.

Proviso.
Not to be used outside boundary lines of Navajo reservation.

Ante, p. 960.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Balances available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Title vested in United States in trust. Lands exempt from taxation.

Indian forestry units
Regulations governing.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

New Indian reservations on lands acquired by proclamation.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

Proviso.
Additions, for exclusive use of Indians.

Holdings for homesteads outside of reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Sum for defraying expenses of tribal organization herein created.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Establishment of revolving fund, to make loans for economic development.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

Repayments to be credited to revolving fund
Report to Congress.

Vocational and trade school.
Annual appropriation for loans, to provide payment for tuition, etc.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Proviso.
Indian students in secondary, etc., schools

Reimbursable.

Standards of health, ability, etc., to be established.

Appointments.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Provisions dealing with Indian corporations, education, etc., applicable to Alaska.

Designated sections inapplicable to various tribes.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of

such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

Protecting treaty rights with Sioux Indians.
Continuation of allowances, etc.
Vol. 23, p. 894; Vol. 29, p. 334; Vol. 25, p. 451.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

No person to receive more than one allowance.

No Indian claim or suit impaired by this Act.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

Indians residing on same reservation may organize for common welfare.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

Effective, when ratified.

Revocation, amendments, etc.

Additional powers vested in tribe.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Secretary to advise tribe of contemplated appropriation estimates.

Charters.
Issue of, to each tribe, upon petition therefor.
Proviso.
Ratification condition precedent to operation.
Powers conferred.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Revocation.

Inapplicable to reservation rejecting proposition.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Term "Indian" defined.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

"Tribe."

"Adult Indians."

Approved, June 18, 1934.

[CHAPTER 577.]

June 18, 1934.
[S. 3742.]
[Public, No. 384.]

AN ACT

Granting the consent of Congress to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a toll bridge across Lake Champlain at or near West Swanton, Vermont.

Lake Champlain.
Vermont may bridge, at West Swanton.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby granted to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a bridge and approaches thereto across Lake Champlain, at a point suitable to the interests of navigation, between a point at or near East Alburg, Vermont, and a point at or near West Swanton, Vermont, in accordance with the provisions of an Act entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906, and subject to the conditions and limitations contained in this Act.

Construction.
Vol. 34, p. 84.

Toll rates to be adjusted to provide cost of operation and sinking fund.

SEC. 2. If tolls are charged for the use of such bridge, the rates of tolls may be so adjusted as to provide a fund sufficient to pay (a) the reasonable cost of maintenance, repair, and operation of the said bridge and its approaches, and (b) the amortization within a reasonable time, and not exceeding twenty-five years from the

*** Current through PL 114-119, approved 2/8/16 ***

TITLE 25. INDIANS
CHAPTER 29. INDIAN GAMING REGULATION

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25 USCS § 2719

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

(a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act [enacted Oct. 17, 1988]; or

(2) the Indian tribe has no reservation on the date of enactment of this Act [enacted Oct. 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) 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) 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 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), 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 Internal Revenue Code.

(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code [26 USCS §§ 1441, 3402(q), 6041, and 6050I, and 4401 et seq.]) 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 Act, or under a Tribal-State compact entered into under section 11(d)(3) [25 USCS § 2710(d)(3)] 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 the date of enactment of this Act [enacted Oct. 17, 1988] unless such other provision of law specifically cites this subsection.

HISTORY:

(Oct. 17, 1988, P.L. 100-497, § 20, 102 Stat. 2485.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in subsec. (a) and (d), is Act Oct. 17, 1988, P.L. 100-497, 102 Stat. 2467, popularly known as the Indian Gaming Regulatory Act, which appears generally as 25 USCS §§ 2701 et seq. For full classification of such Act, consult USCS Tables volumes.

*** This document is current through the March 28, 2016 issue of the Federal Register ***

TITLE 25 -- INDIANS
CHAPTER I -- BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR
SUBCHAPTER N -- ECONOMIC ENTERPRISES
PART 292 -- GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988
SUBPART B -- EXCEPTIONS TO PROHIBITIONS ON GAMING ON NEWLY ACQUIRED LANDS "RESTORED LANDS" EXCEPTION

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25 CFR 292.10

§ 292.10 How does a tribe qualify as having been restored to Federal recognition?

For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:

(a) Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe (required for tribes terminated by Congressional action);

(b) Recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter; or

(c) A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

HISTORY: [73 FR 29354, 29375, May 20, 2008, as corrected at 73 FR 35579, June 24, 2008]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

NOTES: [EFFECTIVE DATE NOTE: 73 FR 29354, 29375, May 20, 2008, added Part 292, effective June 19, 2008; 73 FR 35579, June 24, 2008, provides the effective date of the amendment appearing at 73 FR 29354 is stayed until Aug. 25, 2008.]
NOTES APPLICABLE TO ENTIRE TITLE:
CROSS REFERENCES: Regulations pertaining to migratory birds, applicable to Indians living on reservations: See Wildlife and Fisheries, 50 CFR chapter I.
Bureau of Land Management regulations pertaining to Indians: See Bureau of Land Management, 43 CFR part 2530.
Public Health regulations pertaining to contracts and health: See Public Health, 42 CFR chapter I.
Other regulations issued by the Department of the Interior appear in title 30, chapters II, III, IV, VI, VII; title 36, chapter I; title 41, chapter 114; title 48, chapter 14; title 43; and title 50, chapters I and IV, Code of Federal Regulations.

*** This document is current through the March 28, 2016 issue of the Federal Register ***

TITLE 25 -- INDIANS
CHAPTER I -- BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR
SUBCHAPTER N -- ECONOMIC ENTERPRISES
PART 292 -- GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988
SUBPART D -- EFFECT OF REGULATIONS

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25 CFR 292.26

§ 292.26 What effect do these regulations have on pending applications, final agency decisions, and opinions already issued?

These regulations apply to all requests pursuant to 25 U.S.C. 2719, except:

(a) These regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.

(b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

HISTORY: [73 FR 29354, 29375, May 20, 2008, as corrected at 73 FR 35579, June 24, 2008]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

NOTES: [EFFECTIVE DATE NOTE: 73 FR 29354, 29375, May 20, 2008, added Part 292, effective June 19, 2008; 73 FR 35579, June 24, 2008, provides the effective date of the amendment appearing at 73 FR 29354 is stayed until Aug. 25, 2008.]
NOTES APPLICABLE TO ENTIRE TITLE:
CROSS REFERENCES: Regulations pertaining to migratory birds, applicable to Indians living on reservations: See Wildlife and Fisheries, 50 CFR chapter I.
Bureau of Land Management regulations pertaining to Indians: See Bureau of Land Management, 43 CFR part 2530.
Public Health regulations pertaining to contracts and health: See Public Health, 42 CFR chapter I.
Other regulations issued by the Department of the Interior appear in title 30, chapters II, III, IV, VI, VII; title 36, chapter I; title 41, chapter 114; title 48, chapter 14; title 43; and title 50, chapters I and IV, Code of Federal Regulations.

FEDERAL REGISTER

Vol. 71, No. 193

Proposed Rules

DEPARTMENT OF THE INTERIOR (DOI)

Assistant Secretary for Indian Affairs

Bureau of Indian Affairs (BIA)

25 CFR Part 292

RIN 1076-AE81

Gaming on Trust Lands Acquired After October 17, 1988

71 FR 58769

DATE: Thursday, October 5, 2006

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Indian Affairs proposes to establish procedures that an Indian tribe must follow in seeking to conduct gaming on lands acquired after October 17, 1988. The Indian Gaming Regulatory Act allows Indian tribes to conduct class II and class III gaming activities on land acquired after October 17, 1988, only if the land meets certain exceptions. This proposed rule establishes a process for submitting and considering applications from Indian tribes seeking to conduct class II or class III gaming activities on lands acquired in trust after October 17, 1988.

DATES: Comments must be received on or before December 4, 2006.

ADDRESSES: You may submit comments, identified by the number 1076-AE-81, by any of the following methods:

. *Federal rulemaking portal: http://www.regulations.gov* Follow the instructions for submitting comments.

. *Fax:* 202-273-3153.

. *Mail:* Mr. George Skibine, Director, Office of Indian Gaming Management, Office of the Deputy Assistant Secretary--Policy and Economic Development, 1849 C Street, NW., Mail Stop 3657-MIB, Washington, DC 20240.

. *Hand delivery:* Office of Indian Gaming Management, Office of the Deputy Assistant Secretary--Policy and Economic Development, 1849 C Street, NW, Room 3657-MIB, Washington, DC, from 9 a.m. to 4 p.m., Monday through Friday.

Comments on the information collection in this rule are separate from comments on the rule. If you wish to comment on the information collection, you may send a facsimile to (202) 395-6566. You may also e-mail comments to: *OIRA-DOCKET@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: George Skibine, Director, Office of Indian Gaming Management, (202) 219-4066.

SUPPLEMENTARY INFORMATION: The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301 and 25 U.S.C. 2, 9, and 2710. The Secretary has delegated this authority to the Principal Deputy Assistant Secretary--Indian Affairs by part 209 of the Departmental Manual.

Background

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, was signed into law on October 17, 1988. Section 20 of IGRA, 25 U.S.C. 2719, prohibits gaming on lands that the Secretary of the Interior acquires in trust for an Indian tribe after October 17, 1988, unless the land qualifies under at least one of the exceptions contained in that section. If none of the exceptions in Section 20 applies, Section 20(b)(1)(A) of IGRA provides that gaming can still occur on the lands if:

(1) The Secretary consults with the Indian tribe and appropriate State and local officials, including officials of other nearby tribes;

(2) After consultation, the Secretary determines that a gaming establishment on newly acquired (trust) lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community; and

(3) The Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. **[*58770]**

On September 28, 1994, the Bureau of Indian Affairs (BIA) issued to all Regional Directors a Checklist for Gaming Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act. This Checklist was revised and replaced on February 18, 1997. On November 9, 2001, an October 2001 Checklist was issued revising the February 18, 1997 Checklist to include gaming related acquisitions. On March 7, 2005 a new Checklist was issued to all Regional Directors replacing the October 2001 Checklist.

The proposed regulations implement Section 20 of the Indian Gaming Regulatory Act (IGRA) by articulating standards that the Department will follow in interpreting the various exceptions to the gaming prohibition on after-acquired trust lands contained in Section 20 of IGRA. Subpart A of the draft proposed regulations define key terms contained in Section 20 or used in the regulation. Subpart B delineates how the Department will interpret the "settlement of a land claim" exception contained in Section 20(b)(1)(B)(i) of IGRA. This subpart clarifies that, in almost all instances, Congress must enact the settlement into law before the land can qualify under the exception. Subpart B also delineates what criteria must be met for a parcel of land to qualify under the "initial reservation" exception contained in Section 20 (b)(1)(B)(ii) of IGRA. The proposed regulation sets forth that the tribe must have present and historical connections to the land, and that the land must be proclaimed to be a new reservation pursuant to 25 U.S.C. 467 before the land can qualify under this exception. Finally, Subpart B articulates what criteria must be met for a parcel of land to qualify under the "restored land for a restored tribe" exception contained Section 20 (b)(1)(B)(iii) of IGRA. The proposed regulation sets forth the criteria for a tribe to qualify as a "restored tribe" and articulates the requirement for the parcel to qualify as "restored lands." Essentially, the regulation requires the tribe to have modern connections to the land, historical connections to the area where the land is located, and requires a temporal connection between the acquisition of the land and the tribe's restoration. Subpart C sets forth how the Department will evaluate tribal applications for a two-part Secretarial Determination under Section 20(b)(1) of IGRA. Under this exception, gaming can occur on off-reservation trust lands if the Secretary, after consultation with appropriate State and local officials, including officials of nearby tribes, makes a determination that a gaming establishment would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community. The Governor of the State must concur in any Secretarial two-part determination. The proposed regulation sets forth how consultation with local officials and nearby tribes will be conducted and articulates the factors the Department will consider in making the two-part determination. The proposed regulation also gives the State Governor up to one year to concur in a Secretarial two-part determination, with an additional 180 days extension at the request of either the Governor or the applicant tribe.

Previous Rulemaking Activity

On September 14, 2000, we published proposed regulations in the **Federal Register** (65 FR 55471) to establish procedures that an Indian tribe must follow in seeking a Secretarial Determination that a gaming establishment would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. The comment period closed on November 13, 2000. On December 27, 2001 (66 FR 66847), we reopened the comment period to allow consideration of comments received after November 13, 2000, and to allow additional time for comment on the proposed rule. The comment period ended on March 27, 2002. On January 28, 2002 we published a notice in the **Federal Register** (67 FR 3846) to correct the Effective Date section which incorrectly stated that the deadline for receipt of comments was February 25, 2002 and was corrected to read "Comments must be received on or before March 27, 2002." No further action was taken to publish the final rule.

We are publishing a new proposed rule because we have determined that the rule should address not only the exception contained in Section 20(b)(1)(A) of IGRA (Secretarial Determination), but also the other exceptions contained in Section 20, in order to explain to the public how the Department interprets these exceptions.

Procedural Requirements

Regulatory Planning and Review (Executive Order 12866)

This document has been determined not to be a significant regulatory action and is not subject to review by the Office of Management and Budget (OMB).

(a) This rule will not have an annual economic effect of $ 100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The annual number of requests and applications to conduct gaming on trust lands under the exceptions or two-part determination of IGRA have been small. Since IGRA was enacted, approximately two applications per year qualify and have been approved to operate a gaming establishment on trust land under the general exceptions and only three positive two-part determinations have successfully qualified to operate a gaming establishment on trust land under the exception to the gaming prohibition in Section 20 (b)(1)(A) of IGRA.

(b) This rule will not create serious inconsistencies or otherwise interfere with an action taken or planned by another Federal agency. The Department of the Interior (DOI), BIA is the only governmental agency that makes the determination whether to take land into trust for Indian tribes.

(c) This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This rule sets out the procedures and criteria for the submission of an application from an Indian tribe seeking to conduct class II or class III gaming activities on land acquired by the Secretary of the Interior under Section 20 of the IGRA.

(d) OMB has determined that this rule will not raise novel legal or policy issues. For this reason, OMB review is not required under Executive Order 12866.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Indian tribes are not considered to be small entities for the purposes of this Act.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $ 100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, **[*58771]** investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local or tribal governments or the private sector of more than $ 100 million per year. The rule does not have a significant or unique effect on State, local or tribal government or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required because only Indian tribes may conduct gaming activities on land acquired after October 17, 1988, only if the land meets the exceptions in Section 20 of IGRA.

Takings Implication Assessment (Executive Order 12630)

In accordance with Executive Order 12630, the Department has determined that this rule does not have significant takings implications. The rule does not pertain to the "taking" of private property interests, nor does it impact private property. A takings implication assessment is not required.

Federalism (Executive Order 13132)

In accordance with Executive Order 13121, the Department has determined that this rule does not have significant Federalism implications because it does not substantially and directly affect the relationship between the Federal and State governments and does not impose costs on States or localities. A Federalism Assessment is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards. The rule does not preempt any statute.

National Environmental Policy Act

The Department has determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969.

Paperwork Reduction Act

The information collection has been reviewed and cleared by the Office of Information and Regulatory Affairs, Office of Management and Budget under the Paperwork Reduction Act of 1995, as amended. The collection has been assigned the tracking number of OMB Control Number 1076-0158. The clearance expires November 30, 2006.

The collection of information is unique for each tribe even though each submission addresses the requirements found in § 292.16.

All information is collected in the tribe's application. Respondents submit information in order to obtain a benefit. Each response is estimated to take 1,000 hours to review instructions, search existing data sources, gather and maintain necessary data, and prepare in format for submission. We anticipate that two responses will be submitted annually for an annual burden of 2,000 hours.

Submit comments on the proposed information collection to Attention: Desk Officer for the Department of the Interior, Office of Information and Regulatory Affairs, OMB by facsimile at (202) 395-6566 or by e-mail to *OIRA-DOCKET@omb.eop.gov.* You should also send comments to the BIA official as found in the **ADDRESSES** section. The BIA solicits comments in order to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the BIA, including whether the information will have practical utility;

(2) Evaluate the BIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond.

OMB is required to make a decision between 30 and 60 days after publication of this document in the **Federal Register** . Therefore, your comment to OMB has the best chance of being considered if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to BIA on the proposed rule.

Consultation With Indian tribes (Executive Order 13175)

Under the criteria in Executive Order 13175, we have conducted consultation meetings with tribal leaders regarding the proposed regulations in the following locations: Uncasville, Connecticut on March 30, 2006; Albuquerque, New Mexico on April 5, 2006; Sacramento, California on April 18, 2006 and Minneapolis, Minnesota on April 20, 2006. A notice of the consultation meetings was published in the **Federal Register** on April 11, 2006 (71 FR 18350). In addition, a draft regulation was sent to all tribal leaders in the lower 48 states on March 15, 2006, seeking comments on the draft regulation. Numerous comments were received by the Department. The Department revised the draft regulation in response to written comments and oral comments received at the consultation meetings. No action is taken under this rule unless a tribe submits an application to acquire land under Section 20 of IGRA.

Effects on the Nation's Energy Supply (Executive Order 13211)

This rule does not have a significant effect on the nation's energy supply, distribution, or use as defined by Executive Order 13211.

Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106-554).

Clarity of This Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

. Be logically organized;

. Use the active voice to address readers directly;

. Use clear language rather than jargon;

. Be divided into short sections and sentences; and

. Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments as instructed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the specific sections that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Public Comment Solicitation

If you wish to comment on the rule, please see the different methods listed in the **ADDRESSES** section; we cannot accept comments via the Internet at this time. Our practice is to make comments, **[*58772]** including names and home addresses of respondents, available for public review during the hours listed in the **ADDRESSES** section. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

List of Subjects in 25 CFR Part 290

Indians--Business and finance, Indians--gaming.

Dated: September 18, 2006.

Michael D. Olsen,

Principal Deputy Assistant Secretary--Indian Affairs.

For reasons stated in the preamble, the Bureau of Indian Affairs proposes to add Part 292 to Chapter I of Title 25 of the Code of Federal Regulations as follows:

PART 292--GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988

Subpart A--General Provisions

Sec.

Authority: 5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

Subpart A--General Provisions

§ 292.1 What is the purpose of this part?

This part contains procedures that the Department of the Interior will use to determine whether class II or class III gaming can occur on land acquired in trust for an Indian tribe after October 17, 1988.

§ 292.2 How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and Local Officials means the Governor of the State and appropriate officials of units of local government within 25 miles of the site of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary. For example, it includes parcels divided by non-navigable waters or a public road or right-of-way.

Federal recognition or Federally recognized means the recognition by the Secretary that an Indian tribe has a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a-1.

Former Reservation means lands that are within the jurisdiction of an Oklahoma Indian tribe and that are within the boundaries of the last reservation for that tribe in Oklahoma established by treaty, Executive Order, or Secretarial Order.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701-2721.

Land claim means any claim by an Indian tribe:

(1) Arising from a Federal common law, statutory or treaty-based restraint against alienation of Indian land; and

(2) Made against an individual person or entity (either private, public, or governmental).

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe [and/or its members] access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands, as defined in 25 U.S.C. 2703(4) of IGRA, located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe is landless, within a 25-mile radius of its government headquarters.

Regional Director means the official in charge of the BIA Regional Office responsible for all BIA activities within the geographical area where the proposed gaming establishment is to be located.

Reservation means that area of land which has been set aside or which has been acknowledged as having been set aside by the United States for the use of the tribe, the exterior boundaries of which are more particularly defined in a final treaty, agreement, Executive Order, Federal statute, Secretarial Order or Proclamation, judicial determination, **[*58773]** or court-approved stipulated entry of judgment to which the United States is a party.

Secretary means the Secretary of the Interior or an authorized representative.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Surrounding community means local governments and nearby Indian tribes located within 25 miles of the site of the proposed gaming establishments.

Tribe means an Indian tribe.

§ 292.3 When can a tribe conduct gaming activities on trust lands?

This section implements Section 20 of IGRA (25 U.S.C. 2719). A tribe may conduct class II or class III gaming activities on land acquired by the Secretary in trust for the benefit of a tribe after October 17, 1988, only if:

(a) The land meets the criteria or exceptions in Subpart B; or

(b) The Secretary makes a determination under Subpart C of this part and the Governor of the State in which the gaming activity is to be conducted concurs in that determination.

Subpart B--Exceptions to Prohibition on Gaming on After-Acquired Trust Lands

§ 292.4 What criteria must trust land meet for gaming to be allowed under the exceptions listed in 25 U.S.C. 2719(a) of IGRA?

(a) For class II or class III gaming to be allowed on trust or restricted fee land under section 2719(a)(1) of IGRA, the land must either:

(1) Be located within or contiguous to the boundaries of the reservation of the tribe on October 17, 1988; or

(2) Meet the requirements of paragraph (b) of this section.

(b) For land to be eligible under this paragraph, it must belong to a tribe that had no reservation on October 17, 1988, and must be located:

(1) Within the boundaries of the tribe's former reservation;

(2) Contiguous to other land held in trust or restricted status by the United States for the tribe in Oklahoma; or

(3) In a state other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is now located.

"Settlement of a Land Claim" Exception

§ 292.5 What must be demonstrated to meet the "settlement of a land claim" exception?

This section contains criteria for meeting the requirements of IGRA Section 20(b)(1)(B)(i).

(a) Gaming may be conducted on lands covered by this section only when the land has been acquired in trust as part of the settlement of a land claim that either:

(1) Has been filed in Federal court and has not been dismissed on substantive grounds; or

(2) Is included on the Department's list of potential pre-1966 claims published under the Indian Claims Limitation Act of 1982 (Pub. L. 97-394, 28 U.S.C. 2415) and meets the criteria in paragraph (b) of this section.

(b) To be eligible under paragraph (a)(2) of this section, land must be covered by a settlement that either:

(1) States that the tribe is relinquishing its legal claim to some or all of the lands as part of the settlement, results in the alienation or transfer of title to tribal lands within the meaning of 25 U.S.C. 177, and has been enacted into law by the United States Congress; or,

(2) Returns to the tribe lands identical to the lands claimed by the tribe, does not involve an alienation or transfer of title to tribal lands that is prohibited under 25 U.S.C. 177, and is either:

(i) Duly executed by the parties and entered as a final order of a Federal court of competent jurisdiction; or

(ii) Settled by an agreement executed by the State in which the lands claimed by the tribe are located.

"Initial Reservation" Exception

§ 292.6 What must be demonstrated to meet the "initial reservation" exception?

This section contains criteria for meeting the requirements of IGRA Section 20(b)(1)(B)(ii). Under this section, gaming may be conducted only when all of the following conditions are met:

(a) The tribe has been acknowledged (Federally recognized) through the administrative process under 25 CFR Part 83;

(b) A majority of the tribe's members reside within 50 miles of the location of the land or the tribe's government headquarters are located within 25 miles of the location of the land;

(c) The land is located within an area where the tribe has significant historical and cultural connections;

(d) The land has been proclaimed to be a reservation under 25 U.S.C. 467; and

(e) This reservation is the first proclaimed reservation of the tribe following acknowledgment.

"Restored Lands" Exception

§ 292.7 What must be demonstrated to meet the "restored lands" exception?

This section contains criteria for meeting the requirements of IGRA Section 20(b)(1)(B)(iii), called the "restored lands" exception. The term "restored lands" is defined in § 292.11. Gaming may only occur under this section when all of the following criteria have been met:

(a) The tribe at one time was Federally recognized, as evidenced by its meeting the criteria in § 292.8;

(b) The tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9; and

(c) At a time after termination, the Tribe was restored to Federal recognition by one of the means specified in § 292.10.

§ 292.8 How does a tribe qualify as having been Federally recognized?

For a tribe to qualify as having been at one time Federally recognized for purposes of § 292.7, at least one of the following must be true:

(a) The United States at one time entered into treaty negotiations with the tribe;

(b) The Department determined that the tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act;

(c) Congress enacted legislation specific to, or including, the tribe indicating that a government-to-government relationship existed;

(d) The United States at one time acquired land for the tribe's benefit; or

(e) Some other evidence demonstrates the existence of a government-to-government relationship between the tribe and the Federal Government.

§ 292.9 How does a tribe show that it lost its government-to-government relationship?

For a tribe to qualify for purposes of § 292.7, it must have lost its government-to-government relationship by one of the following means:

(a) Legislative termination; or

(b) Termination demonstrated by historical written documentation from the Departments of the Interior or Justice. The documents must show that the Executive Branch no longer recognized the government-to-government relationship with the tribe or its members. **[*58774]**

§ 292.10 How does a tribe qualify as having been restored to Federal recognition?

For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:

(a) Congressional enactment of legislation recognizing, acknowledging, or restoring the government-to-government relationship between the United States and the tribal government (required for tribes terminated by Congressional action);

(b) Recognition through the administrative Federal Acknowledgment Process under 25 CFR 83.8; or

(c) A judicial determination or court-approved stipulated entry of judgment that:

(1) Was entered into by the United States; and

(2) Provides that the tribe's government-to-government relationship with the United States was never legally terminated despite action by the Executive Branch purporting to terminate the relationship with the tribe or its members.

§ 292.11 What are "restored lands?"

For lands to qualify as "restored lands" for purposes of § 292.7, it must be demonstrated that:

(a) The legislation restoring the government-to-government relationship between the United States and the tribe requires or authorizes the Secretary to take land into trust within a specific geographical area and the lands are within the specific geographical area; or

(b) If there is no restoration legislation, or if the restoration legislation does not provide geographic parameters for the restoration of lands, the tribe has a modern connection and a significant historical connection to the land and there is a temporal connection between the date of the acquisition of the land and the date of the Tribe's restoration; and

(c) If the tribe is acknowledged under 25 CFR 83.8, it does not already have an initial reservation proclaimed after October 17, 1988.

§ 292.12 How does a tribe establish its connection to the land?

To establish a connection to the land for purposes of § 292.11, the tribe must meet the criteria in paragraphs (a), (b), and (c) of this section.

(a) A modern connection is established if a majority of the tribe's members reside within 50 miles of the land or if the tribe's government headquarters are located within 25 miles of the land.

(b) A significant historical connection to the land can be established if:

(1) The land is located within the boundaries of the tribe's last reservation reserved to the tribe by a ratified or unratified treaty; or

(2) The land is located in an area to which the tribe has significant documented historical connections, significant weight being given to historical connections documented by official records of the Bureau of Indian Affairs or the Department of the Interior, or by the Indian Claims Commission, other Federal court, or congressional findings.

(c) A reasonable temporal connection between the date of the acquisition of the land and the date of the tribe's restoration is established if:

(1) The land is the first land that the tribe has acquired since the tribe was restored to Federal recognition; or

(2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition.

Subpart C--Secretarial Determination and Governor's Concurrence

§ 292.13 When can a tribe conduct gaming activities on lands that do not qualify under one of the exceptions?

A tribe can conduct gaming on land covered by this part that does not meet the criteria in Subpart B only after all of the following occur:

(a) The tribe asks the Secretary in writing to make a Secretarial Determination that a gaming establishment on land subject to this part is in the best interest of the tribe and its members and not detrimental to the surrounding community;

(b) The Secretary consults with the tribe and appropriate State and local officials, including officials of other nearby tribes;

(c) The Secretary makes a determination that a gaming establishment on newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and

(d) 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)).

§ 292.14 Where must a tribe file an application for a Secretarial Determination?

A tribe must file its application for a Secretarial Determination with the Regional Director of the BIA Regional Office having responsibility over the land where the gaming establishment is to be located.

§ 292.15 May a tribe apply for a Secretarial Determination for lands not yet held in trust?

Yes. A tribe can apply for a two-part Secretarial Determination under § 292.13 for land not yet held in trust. The tribe must file its application for a two-part Secretarial Determination at the same time that it applies under 25 CFR Part 151 to have the land taken into trust.

Application Contents

§ 292.16 What must an application for a Secretarial Determination contain?

An application requesting a Secretarial Determination under § 292.13 must include the following information:

(a) The full name, address, and telephone number of the tribe submitting the application;

(b) A description of the location of the land, including a legal description supported by a survey or other document;

(c) Proof of identity of present ownership and title status of the land;

(d) Distance of the land from the tribe's reservation or trust lands, if any, and tribal government headquarters;

(e) Information required by § 292.17 to assist the Secretary in determining whether the proposed gaming establishment will be in the best interest of the tribe and its members;

(f) Information required by § 292.18 to assist the Secretary in determining whether the proposed gaming establishment will not be detrimental to the surrounding community;

(g) The authorizing resolution from the tribe submitting the application;

(h) The tribe's gaming ordinance or resolution approved by the National Indian Gaming Commission in accordance with 25 U.S.C. 2710, if any;

(i) The tribe's organic documents, if any;

(j) The tribe's class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated; and

(k) Any existing or proposed management contract required to be approved by the National Indian Gaming Commission under 25 U.S.C. 2711 and 25 CFR Part 533.

§ 292.17 How must an application describe the benefits of a proposed gaming establishment to the tribe and its members?

To satisfy the requirements of § 292.16(e), an application must contain:

(a) Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe; **[*58775]**

(b) Projected tribal employment, job training, and career development;

(c) Projected benefits to the tribe and its members from tourism;

(d) Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;

(e) Projected benefits to the relationship between the tribe and non-Indian communities;

(f) Possible adverse impacts on the tribe and its members and plans for addressing those impacts;

(g) Distance of the land from the location where the tribe maintains core governmental functions;

(h) Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred directly to the United States;

(i) Evidence of historical connections, if any, to the land; and

(j) Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of any:

(1) Consulting agreements relating to the proposed gaming establishment;

(2) Financial and loan agreements relating to the proposed gaming establishment; and

(3) Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming facility, or the acquisition of the land where the facility will be located.

§ 292.18 What information must an application contain on detrimental impacts to the surrounding community?

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:

(a) Information regarding environmental impacts and plans for mitigating adverse impacts, including information that allows the Secretary to comply with the requirements of the National Environmental Policy Act (NEPA); e.g., an Environmental Assessment (EA) or an Environmental Impact Statement (EIS);

(b) Reasonably anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(c) Impacts on the economic development, income, and employment of the surrounding community;

(d) Costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(e) Proposed programs, if any, for compulsive gamblers and the sources of funding; and

(f) Any other information that may provide a basis for a Secretarial Determination that the gaming would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

Consultation

§ 292.19 How will the Regional Director conduct the consultation process?

(a) The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60-day period to each of the following:

(1) Appropriate State and local officials; and

(2) Officials of nearby tribes.

(b) Upon written request, the Regional Director may extend the 60-day comment period for an additional 30 days.

(c) After the close of the consultation period, the Regional Director must:

(1) Submit a copy of the consultation comments to the applicant tribe;

(2) Allow the tribe to address or resolve any issues raised in the responses to the consultation letters;

(d) The applicant tribe must submit written comments, if any, to the Regional Director within 60 days of receipt of the consultation comments; and

(e) On written request from the applicant tribe, the Regional Director may extend the 60-day comment period in paragraph (d) of this section for an additional 30 days.

§ 292.20 What information must the consultation letter include?

(a) The consultation letter required by § 292.19(a) must:

(1) Describe or show the location of the proposed gaming establishment;

(2) Provide information on the proposed scope of gaming; and

(3) Include other information that may be relevant to a specific proposal, such as the size of the proposed gaming establishment, if known.

(b) The consultation letter must request recipients to submit comments on the following areas within 60 days of receiving the letter:

(1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;

(2) Reasonably anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(3) Impact on the economic development, income, and employment of the surrounding community;

(4) Costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(5) Proposed programs, if any, for compulsive gamblers and the sources of funding; and

(6) Any other information that may provide a basis for a Secretarial Determination that the proposed gaming establishment is not detrimental to the surrounding community.

Evaluation and Concurrence

§ 292.21 How will the Secretary evaluate a proposed gaming establishment?

(a) The Secretary will consider all the information submitted under § 292.17 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members.

(b) The Secretary will consider all the information submitted or developed under § 292.18 and all the documentation received under § 292.19 in evaluating whether the proposed gaming establishment would not be detrimental to the surrounding community.

(c) If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its application has been disapproved, and set forth the reasons for the disapproval.

(d) If the Secretary makes a favorable Secretarial Determination, the Secretary will proceed under § 292.22.

§ 292.22 How does the Secretary request the Governor's concurrence?

(a) If the Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor of the State:

(1) A written notification of the Secretarial Determination and Findings of Fact supporting the determination;

(2) A copy of the entire application record; and

(3) A request for the Governor's concurrence in the Secretarial Determination.

(b) If the Governor does not affirmatively concur with the Secretarial Determination:

(1) The land may not be used for gaming;

(2) If the land is already held in trust, the applicant tribe may use it for other purposes; and

(3) If the land is proposed for trust status, it may be taken into trust for non-gaming uses after consideration of a revised application.

(c) If the Governor does not respond to the Secretary's request for **[*58776]** concurrence in the Secretarial Determination within one year of the date of the request, the Secretary may, at the request of the applicant tribe or the Governor, grant an extension of up to 180 days.

(d) If no extension is granted or if the Governor does not respond during the extension period, the applicant tribe will be notified in writing that the Secretarial Determination is no longer valid and that its application is no longer under consideration.

§ 292.23 Can the public review the application for a Secretarial Determination?

Subject to restrictions on disclosure required by the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), and the Trade Secrets Act (18 U.S.C. 1905), the tribe's application and all supporting documents will be available for review at the local BIA agency or Regional Office having administrative jurisdiction over the land.

Information Collection

§ 292.24 Do information collections in this part have Office of Management and Budget approval?

The information collection requirements in §§ 292.16, 292.17, and 292.18 have been approved by the Office of Management and Budget (OMB). The information collection control number is 1076-0158. A Federal agency may not collect or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control.

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 292

RIN 1076–AE81

Gaming on Trust Lands Acquired After October 17, 1988

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is publishing regulations implementing section 2719 of the Indian Gaming Regulatory Act (IGRA). IGRA allows Indian tribes to conduct class II and class III gaming activities on land acquired after October 17, 1988, only if the land meets certain exceptions. This rule articulates standards that the BIA will follow in interpreting the various exceptions to the gaming prohibitions contained in section 2719 of IGRA. It also establishes a process for submitting and considering applications from Indian tribes seeking to conduct class II or class III gaming activities on lands acquired in trust after October 17, 1988.

DATES: Effective Date: June 19, 2008.

FOR FURTHER INFORMATION CONTACT: *George Skibine*, Director, Office of Indian Gaming, (202) 219–4066.

SUPPLEMENTARY INFORMATION: The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301 and 25 U.S.C. 2, 9, and 2719. The Secretary has delegated this authority to the Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual.

Background

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701–2721, was signed into law on October 17, 1988. 25 U.S.C. 2719 (a/k/a section 20 of IGRA) prohibits gaming on lands that the Secretary of the Interior acquires in trust for an Indian tribe after October 17, 1988, unless the land qualifies under at least one of the exceptions contained in that section. If none of the exceptions in section 2719 applies, section 2719(b)(1)(A) of IGRA provides that gaming can still occur on the lands if:

(1) The Secretary consults with the Indian tribe and appropriate State and local officials, including officials of other nearby tribes;

(2) After consultation, the Secretary 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

(3) The Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

On September 28, 1994, the BIA issued to all Regional Directors a Checklist for Gaming Acquisitions and Two-Part Determinations under section 20 of IGRA. This Checklist was revised and replaced on February 18, 1997. On November 9, 2001, an October 2001 Checklist was issued revising the February 18, 1997 Checklist to include gaming related acquisitions. On March 7, 2005 a new Checklist was issued to all Regional Directors replacing the October 2001 Checklist. On September 21, 2007 the Checklist was revised and issued to all Regional Directors replacing the March 2005 Checklist.

The regulations implement section 2719 of IGRA by articulating standards that the Department will follow in interpreting the various exceptions to the gaming prohibition on after-acquired trust lands contained in section 2719 of IGRA. Subpart A of the regulations define key terms contained in section 2719 or used in the regulation. Subpart B delineates how the Department will interpret the "settlement of a land claim" exception contained in section 2719(b)(1)(B)(i) of IGRA. This subpart clarifies that, in almost all instances, Congress must enact the settlement into law before the land can qualify under the exception. Subpart B also delineates what criteria must be met for a parcel of land to qualify under the "initial reservation" exception contained in section 2719(b)(1)(B)(ii) of IGRA. The regulation sets forth that the tribe must have present and historical connections to the land, and that the land must be proclaimed to be a new reservation pursuant to 25 U.S.C. 467 before the land can qualify under this exception. Finally, subpart B articulates what criteria must be met for a parcel of land to qualify under the "restored land for a restored tribe" exception contained section 2719(b)(1)(B)(iii) of IGRA. The regulation sets forth the criteria for a tribe to qualify as a "restored tribe" and articulates the requirement for the parcel to qualify as "restored lands." Essentially, the regulation requires the tribe to have modern connections to the land, historical connections to the area where the land is located, and requires a temporal connection between the acquisition of the land and the tribe's restoration. Subpart C sets forth how the Department will evaluate tribal applications for a two-part Secretarial Determination under section 2719(b)(1)(A) of IGRA. Under this exception, gaming can occur on off-reservation trust lands if the Secretary, after consultation with appropriate State and local officials, including officials of nearby tribes, makes a determination that a gaming establishment would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community. The Governor of the State must concur in any Secretarial two-part determination. The regulation sets forth how consultation with local officials and nearby tribes will be conducted and articulates the factors the Department will consider in making the two-part determination. The regulation also gives the State Governor up to one year to concur in a Secretarial two-part determination, with an additional 180 days extension at the request of either the Governor or the applicant tribe. Subpart D clarifies that the regulations do not disturb existing decisions made by the BIA or the National Indian Gaming Commission (NIGC).

Previous Rulemaking Activity

On September 14, 2000, we published proposed regulations in the Federal Register (65 FR 55471) to establish procedures that an Indian tribe must follow in seeking a Secretarial Determination that a gaming establishment would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. The comment period closed on November 13, 2000. On December 27, 2001 (66 FR 66847), we reopened the comment period to allow consideration of comments received after November 13, 2000, and to allow additional time for comment on the proposed rule. The comment period ended on March 27, 2002. On January 28, 2002 we published a notice in the Federal Register (67 FR 3846) to correct the effective date section which incorrectly stated that the deadline for receipt of comments was February 25, 2002 and was corrected to read "Comments must be received on or before March 27, 2002." No further action was taken to publish the final rule.

On October 5, 2006, we published a new proposed rule in the Federal Register (71 FR 58769) because we have determined that the rule should address not only the exception contained in section 2719(b)(1)(A) of IGRA (Secretarial Determination), but also the other exceptions contained in section 2719, in order to explain to the public how the Department interprets these exceptions. The comment period ended on December 5, 2006. On December 4, 2006, we published a notice in the Federal Register (71 FR 70335) to extend the comment period and make

corrections. The comment period ended on December 19, 2006. On January 17, 2007, we published a notice in the Federal Register (72 FR 1954) to reopen the comment period to allow for consideration of comments received after December 19, 2006. Comments received during the comment period ending December 5, 2006, and February 1, 2007, were considered in the drafting of this final rule.

Review of Public Comments

Stylistic and conforming changes were made to the proposed regulations and are reflected throughout the final regulations. Substantive changes, if any, are addressed in the comments and responses below:

Subpart A—General Provisions

Section 292.1 What is the purpose of this part?

One comment regarded the applicability of section 2719 of IGRA to restricted fee lands and suggested a change in § 292.1. Another comment regarded the applicability of section 2719 to trust or restricted lands of individual Indians.

Response: The recommendation to modify § 292.1 was not adopted, because section 2719(a) refers only to lands acquired in trust after October 17, 1988. The omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including at sections 2719(a)(2)(A)(ii) and 2703(4)(B). Section 292.1 was not amended to include land taken in trust after October 17, 1988 for individual Indians, nor land acquired after October 17, 1988 in restricted fee by individual Indians, because the language in section 2719 of IGRA is limited to Indian tribes. Also, it is important to note that the final regulations do not address any restrictions on tribally owned fee land within reservation boundaries, because even though such lands are "Indian lands" pursuant to section 2703(4), they are not encompassed by the prohibition in section 2719. In addition, tribally owned fee land outside of reservation boundaries is not encompassed by section 2703(4) unless a Federal law, other than 25 U.S.C. 177, directly imposes such limitations on the land, and the Indian tribe exercises governmental power over them.

Several comments regarded whether the regulations for section 2719 should include the requirements of "governmental powers" referenced in section 2703(4), and "jurisdiction" referenced in section 2710.

Response: Section 2719 does not specifically reference the "governmental powers" and "jurisdictional" requirements that are referenced in other sections of IGRA. Therefore, the final regulations do not include references to these requirements. The governmental powers and jurisdictional analysis is not required for the specific purpose of determining whether newly acquired lands are otherwise exempt from the general prohibition for lands acquired after October 17, 1988. The governmental powers and jurisdictional requirements are, however, a necessary element for determining whether gaming may be conducted on newly acquired lands. Therefore, depending on the nature of the application or request, the governmental powers and jurisdictional elements may be part of the analysis.

Section 292.2 How are key terms defined in this part?

Appropriate State and Local Officials

Several comments suggested that the 25-mile radius is too narrow and either recommended that the regulation include a larger mile limit or no mile limit at all.

Response: These recommendations were not adopted. From the Department's prior experience implementing section 2719, the 25-mile radius allows for the adequate representation of local officials when conducting an analysis under section 2719(b)(1)(A). *See* discussion of the term "surrounding community" below.

A few comments suggested that the regulation is too broad as it applies to "local officials" and suggested that the regulation qualify the term "local officials" by using examples. A few other comments suggested that the term "local officials" was too vague and similarly suggested that the regulation qualify the term by using examples.

Response: These recommendations were not adopted. The term "local officials" is adequate. Because governmental organization varies from community to community, it is not practical to qualify the term "local officials" in either an effort to broaden or limit its applicability.

One comment suggested that the definition should be broadened to include other State officials or the Attorney General.

Response: This recommendation was not adopted. The only State official recognized under the definition is the Governor. However, the regulation does not limit the Governor from consulting with other State officials.

One comment suggested that the definition should apply to appropriate State and local officials in other States if within the 25-mile radius.

Response: The definition includes local officials from other States if they are within the 25-mile radius. However, the definition only recognizes the Governor of the State in which the proposed gaming establishment is located.

Section 292.2 How are key terms defined in this part?

Contiguous

Several comments related to the definition of contiguous. One comment suggested removing the definition from the section. A few other comments suggested keeping the definition, but removing the second sentence that specifies that contiguous includes parcels divided by non-navigable waters or a public road or right-of-way. A few comments suggested including both navigable and non-navigable waters in the definition. Many comments regarded the concept of "corner contiguity." Some comments suggested including the concept, which would allow parcels that only touch at one point, in the definition. Other comments suggested that the definition exclude parcels that only touch at a point.

Response: The recommendation to remove the definition was not adopted. Likewise, the recommendation to remove the qualifying language pertaining to non-navigable waters, public roads or right-of-ways was not adopted. Additionally, the suggestion to include navigable waters was not adopted. The concept of "corner contiguity" was included in the definition. However, to avoid confusion over this term of art, the definition uses the language "parcels that touch at a point."

Section 292.2 How are key terms defined in this part?

Federal recognition or federally recognized:

A few comments suggested modifying the definition to follow the Department of the Interior (DOI) and NIGC definitions of Indian tribe in 25 CFR 290.2 and 502.13.

Response: This recommendation was adopted in part. We maintained the reference to the list of recognized tribes as it provides notice to the public. In response to comments indicating confusion caused by separate definitions of "tribe" and "Federal recognition or federally recognized," the Department deleted the separate definitions and included a single definition of "Indian tribe or tribe."

Section 292.2 How are key terms defined in this part?

Former reservation:

One comment suggested deleting the word "last" in the definition.

Response: This recommendation was not adopted because the definition clarifies that the last reservation be in Oklahoma, which is consistent with the language of the statute.

Section 292.2 How are key terms defined in this part?

Land claim:

One comment suggested striking the words "any claim" and adding the words "a legal action seeking title or possession of land."

Response: This recommendation was not adopted because a land claim does not have to be filed in court in order to fall under the definition; the land claim does have to allege that the subject land was held in trust or subject to a prohibition against alienation on or before October 17, 1988. IGRA's date of enactment was added to clarify that claims accruing after its enactment are not included within its scope.

One comment suggested modifying paragraph (1) to read, "or a constitutional, common law, statutory or treaty-based right to be protected from government taking of Indian lands."

Response: This recommendation was adopted in part. The words "the Constitution" were added to paragraph (1), but the recommendation to qualify the cause of action to a takings claim was not adopted.

One comment suggested including State law claims in the definition.

Response: The recommendation was not adopted because the land claims within the meaning of IGRA arise under Federal statute, Federal common law, the U.S. Constitution or a treaty and jurisdiction lies in Federal, not State court.

One comment suggested adding language in paragraph (1) that reads, "for the determination of title to lands," and language in paragraph (2) that reads, "or the United States."

Response: The recommendation to modify paragraph (1) was not adopted because it is too narrow; not all claims brought under the definition are for the determination of title to lands—sometimes they are brought for compensation. The recommendation regarding adding the words "or the United States" was not adopted because the United States is included in the word "governmental."

A few comments suggested various modifications to paragraph (1) regarding the words "Indian" or "Indian lands" in order to remove confusion with the definition of Indian lands in IGRA.

Response: These recommendations were adopted and the references to Indian and Indian lands were removed.

Section 292.2 How are key terms defined in this part?

Legislative termination:

One comment suggested deleting the brackets around "and/or its members" in order to be consistent with § 292.9(b) and § 292.10(c).

Response: This recommendation was adopted.

Section 292.2 How are key terms defined in this part?

Nearby Indian tribe:

A number of comments regarded the 25-mile radius limitation. Some comments suggested the definition include no mile limitation while others offered various extensions of the mile limitation based on whether the area is urban or rural.

Response: These recommendations were not adopted. The 25-mile radius is consistent throughout the regulations and provides uniformity for all the parties involved in the Secretarial Determination process.

One comment suggested that the definition include a tribe's Federal agency service area.

Response: This recommendation was not adopted because a tribe's service area is too difficult to define for purposes of applying a limitation to nearby Indian tribes.

One comment suggested striking the reference to 25 U.S.C. 2703(4).

Response: This recommendation was adopted.

A few comments suggested that the definition should include any tribes with significant cultural or historical ties to the proposed site. One comment suggested that the definition include any tribe within the same county as the proposed gaming site, and another comment suggested that the definition include any tribe within the same State.

Response: These recommendations were not adopted because they are beyond the scope of the regulations and inconsistent with IGRA. The statute specifically uses the word nearby. Therefore, "any" tribe cannot be included in the definition.

One comment suggested that the definition should include tribes whose on-reservation economic interest may be detrimentally affected by the proposed gaming site. Another comment suggested creating a standard for "detrimental impact on nearby tribe."

Response: These recommendations were not adopted. The definition qualifies a "nearby tribe" in terms of distance to a proposed gaming establishment. Thus, if an Indian tribe qualifies as a nearby Indian tribe under the distance requirements of the definition, the detrimental effects to the tribe's on-reservation economic interests will be considered. If the tribe is outside of the definition, the effects will not be considered. The Department will consider detrimental impacts on a case-by-case basis, so it is unnecessary to include a standard. The definition of "nearby Indian tribe" is made consistent with the definition of "surrounding community" because we believe that the purpose of consulting with nearby Indian tribes is to determine whether a proposed gaming establishment will have detrimental impacts on a nearby Indian tribe that is part of the surrounding community under section 20(b)(1)(A) of IGRA. *See* discussion of the term "surrounding community" below.

Section 292.2 How are key terms defined in this part?

Newly acquired lands:

Several comments inquired as to the applicability of section 2719 to restricted fee lands, and to trust or restricted lands of individual Indians.

Response: In response to these inquiries, a definition of "newly acquired lands" was added to the regulations. It encompasses lands the Secretary takes in trust for the benefit of an Indian tribe after October 17, 1988. It does not encompass lands acquired by a tribe in restricted fee after October 17, 1988 as discussed above in a response in § 292.1. It does not include land taken in trust after October 17, 1988 for individual Indians, nor land acquired after October 17, 1988 in restricted fee by individual Indians, because the language in section 2719 of IGRA is limited to Indian tribes.

Section 292.2 How are key terms defined in this part?

Reservation:

In response to comments, the definition of reservation is clarified and amended to include four paragraphs. The definition now specifically includes land acquired by a tribe from a sovereign, such as pueblo grant lands, acknowledged by the United States. Such grants occurred prior to the land coming under the jurisdiction of the United States, and is a closed set. The definition also specifically includes land set aside by the United States for Indian colonies and rancherias for the permanent settlement of the tribe, which were encompassed in part by the prior reference to "judicial

determination, or court-approved stipulated entry of judgment to which the United States is a party." Both pueblo grant lands and rancherias are treated as reservations under existing Indian lands opinions.

One comment objected that land acquired under the Indian Reorganization Act (IRA), for purposes of reorganizing the half-bloods residing thereon, would not fall within the meaning of reservation as defined in the proposed rule.

Response: This recommendation was adopted and such land is now specifically included in the definition. If such land was proclaimed a reservation by the Secretary, it would be encompassed with the definition of reservation under both paragraphs (1) and (3). If that land was not proclaimed a reservation, it would nevertheless fall within paragraph (3) of the revised definition, as land acquired by the United States to reorganize adult Indians pursuant to statute.

One comment questioned whether the definition of reservation could be interpreted as including a disestablished reservation, or the area of a reservation that was ceded, leaving a diminished reservation.

Response: Reservation within these regulations does not include a disestablished reservation. Reservation does not include land ceded from the reservation that resulted in a diminished reservation. In addition, because the term "reservation" has different meanings under different statutes, the reference to "judicial determination, or court-approved stipulated entry of judgment to which the United States is a party" was deleted as overly broad and likely inconsistent with both the purposes of IGRA and the distinction in IGRA between "reservation" and "trust land."

One comment suggested that the term "reservation" in IGRA be the same as Indian Country in 25 U.S.C. 1151.

Response: We did not adopt this comment because Congress in enacting IGRA chose to use the concept of Indian lands instead of Indian Country. Moreover, Congress in IGRA distinguishes between trust lands and reservations in section 2719. Therefore for the purposes of these regulations that interpret section 2719 of IGRA, "reservation" for purposes of gaming on after acquired lands is limited to the four delineated categories in the definition of reservation and not lands that could be Indian Country for other purposes. Thus for the purposes of determining whether gaming can occur pursuant to section 2719, reservation does not include all property held in trust, as IGRA distinguishes reservation from trust lands in its definitions.

Section 292.2 How are key terms defined in this part?

Surrounding community:

Several comments related to the requirement that local governments and nearby Indian tribes be within 25 miles of the site of the proposed gaming establishment. Some comments suggested a greater distance, for example 50 miles; others urged no limit and instead recommended alternate factors, for example the community as defined by the National Environmental Policy Act (NEPA). One comment suggested that the surrounding community include any tribe in the State where the gaming facility is located.

Response: These recommendations were not adopted. The definition was modified so it is consistent with the rest of the regulations and the word radius was added. The 25-mile radius is consistent throughout the regulations and provides uniformity for all parties involved in the Secretarial Determination process. There is no legislative history informing Congressional intent in defining how the term "surrounding community" in section 20(b)(1)(A) of IGRA should be interpreted. However, it is reasonable to assume that Congress did not intend that all possible communities be consulted, no matter how distant, because Congress was concerned with how a proposed gaming establishment would affect those individuals and entities living in close proximity to the gaming establishment, or those located within commuting distance of the gaming establishment. The "surrounding community" is defined in order for the Secretary to determine whether a proposed gaming establishment would be detrimental to the "surrounding community." Since 1994, the BIA has published a "Checklist" to guide agency officials in implementing section 20 of IGRA. The "surrounding community" was first defined to include local governments within 30 miles of the proposed gaming establishment, and nearby Indian tribes within 100 miles of the proposed gaming establishment. The Checklist was subsequently modified in 1997 to include only those local governments whose jurisdiction includes or borders the land, and nearby Indian tribes located within 50 miles of the proposed gaming establishment because our experience with the 1994 standard was that it included communities that were not impacted by the gaming establishment. In addition, this modification was made so that the term "surrounding community" would be similar to the consulted community under 25 CFR part 151. In 2005 the Checklist modified the term "surrounding community" to include local governments within ten miles of the proposed gaming establishment. The 2005 modification was made because the purpose of the consultation with State and local officials is to assess detriment to the surrounding community, and our experience in limiting the consultation to those local governments with jurisdiction over the land or adjacent to the land was too narrow. Ultimately, our objective in the regulation is to identify a reasonable and consistent standard to define the term "surrounding community" and we believe that it is reasonable to define the surrounding community as the geographical area located within a 25-mile radius from the proposed gaming establishment. Based on our experience, a 25-mile radius best reflects those communities whose governmental functions, infrastructure or services may be affected by the potential impacts of a gaming establishment. The 25-mile radius provides a uniform standard that is necessary for the term "surrounding community" to be defined in a consistent manner. We have, however, included a rebuttable presumption to the 25-mile radius. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

One comment suggested changing the definition to "surrounding governmental entities" because it would limit the consultation process to a government-to-government basis.

Response: This recommendation was not adopted because IGRA uses "surrounding community."

One comment suggested that the definition be limited to local governments and nearby Indian tribes within the State of the applicant tribe's jurisdiction.

Response: This recommendation was not adopted. The definition includes local governments and nearby tribes located in other States if they are within a 25-mile radius.

Section 292.2 How are key terms defined in this part?

Tribe:

Several comments requested a more elaborate definition of tribe. One comment suggested that all references of "Indian tribe" be changed to "tribe."

Response: The comments recommending a more elaborate definition of Indian tribe were adopted. The definition was renamed "Indian tribe or tribe." It is unnecessary to change all references of "Indian tribe" to "tribe" because they are now both defined.

Section 292.2 How are key terms defined in this part?

General comments regarding § 292.2:

One comment suggested adding a definition of trust land.

Response: This recommendation was adopted in part and is addressed in the definition of "newly acquired lands."

One comment suggested adding a definition of "gaming" that includes ancillary structures such as hotels and parking.

Response: This recommendation was not adopted because it is outside the scope of the regulations and inconsistent with IGRA.

One comment suggested adding a definition of "State or States."

Response: This recommendation was adopted in part. The statutory term "State or States" along with some defining language was inserted in §§ 292.4, 292.6 and 292.12 in order to add clarity.

Subpart B—Exceptions to Prohibitions on Gaming on Newly Acquired Lands

Section 292.3 When can a tribe conduct gaming activities on trust lands?

The Department received a few comments on this section; mostly related to structure. Additionally, a few comments suggested that this section is an appropriate section to add a paragraph discussing the applicability of these regulations to applications for Secretarial Determinations and requests for lands opinions that tribes submitted before the effective date of these regulations; for those both acted upon and those that are pending.

Response: The recommendation regarding pending and acted upon Secretarial Determinations and requests for lands opinions was adopted and addressed in new § 292.26. The comments related to structure were not adopted because the section was deleted in its entirety and replaced with new § 292.3: "How does a tribe seek an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in this subpart?" The former section did not offer anything that is not covered in other parts of the regulation. Therefore, in response to comments requesting guidance on the process for seeking opinions under section 2719, the Department added the new section. Paragraph (a) allows a tribe to submit a request for an Indian lands opinion to either the NIGC or to the Office of Indian Gaming (OIG). As a general matter under this paragraph, a tribe should submit the request to NIGC when newly acquired lands are already in trust and, for example, there is a pending gaming ordinance or management contract before the NIGC Chairman or there is a question whether NIGC has, or would have, regulatory jurisdiction under IGRA. The tribe should submit the request to OIG if the request concerns reservation boundaries or reservation status. Paragraph (b) requires the tribe to submit a request for an Indian lands opinion to the OIG if the tribe must also request a land-into-trust application in order to game on the newly acquired lands or the request concerns whether a specific area of land is a reservation. An opinion provided in response to a request under paragraphs (a) or (b) is not, per se, a final agency action under the Administrative Procedures Act (APA). Final agency action only occurs when agency officials act on a determination pursuant to powers granted them by Congress. Communications from administrative agencies thus range "from obvious agency action, such as adjudications and regulation, to informal pronouncements, such as opinion letters," which are not final agency actions. *See, e.g., Sabella* v. *United States,* 863 F. Supp. 1, 4 (D.D.C. 1994). *Cheyenne-Arapaho Gaming Commission* v. *NIGC,* 214 F. Supp. 2d 1155, 1158 (N.D. Okla. 2002); *Sabella,* 863 F. Supp. at 5.

Section 292.4 What criteria must trust land meet for gaming to be allowed under the exceptions listed in 25 U.S.C. 2719(a) of IGRA?

This section was renamed "What criteria must newly acquired lands meet under the exceptions regarding tribes with and without a reservation?"

For clarity, the references to "trust lands" in this subpart were changed to "newly acquired lands."

One comment suggested a rule in this section that precludes structures and activities that support or are ancillary to gaming operations on contiguous lands.

Response: This recommendation was not adopted because section 2719 of IGRA is concerned with lands on which gaming will occur. Support or ancillary operations to gaming facilities do not play a part in the analysis as to whether gaming will be permitted under this section.

One comment objected to any requirement that would limit a tribe to acquiring new lands for gaming that are "adjacent" to their original reservation.

Response: The requirement that limits a tribe to contiguous lands for gaming purposes is already written into law and these regulations cannot make a substantive change to that law.

A few comments suggested a substantial revision of this section so that it would eliminate inaccuracies, conform to the statute and add clarity.

Response: The suggestions were adopted in part and the section was revised in order to address the concerns and more closely mirror the statute.

"Settlement of a Land Claim" Exception

Section 292.5 What must be demonstrated to meet the "settlement of a land claim" exception?

This section was renamed "When can gaming occur on newly acquired lands under a settlement of a land claim?"

Comments on paragraph (a):

One comment suggested that the rule should require that, along with the State, the affected local governments also must approve a settlement if it is to qualify for the exception.

Response: This recommendation was not adopted because the regulations can neither dictate the language of Congressional legislation nor the parties to a particular settlement agreement; whether it is a final order or some other enforceable agreement. If a local government is a party in a matter concerning a settlement of a land claim, then its approval would be necessary.

One comment suggested that the rule should require that a tribe have a demonstrable historical connection to the site chosen.

Response: This recommendation was not adopted because the regulations can neither dictate the requirements of Congressional legislation nor the terms to a particular settlement agreement; whether it is a final order or some other enforceable agreement.

One comment suggested the following insertion at paragraph (a)(2): "Has been resolved by congressional enactment; or."

Response: This recommendation was addressed through the changes to paragraph (a).

One comment suggested adding a new paragraph (a)(3) as follows: "Relates to the acquisition, transfer or exchange of land to compensate for or replace land within a reservation that is damaged or otherwise rendered uninhabitable by a natural disaster, catastrophic event, or other action."

Response: This recommendation was not adopted because it is unnecessary to either include or exclude, in the

regulations, claims based on particular sets of facts and circumstances.

A few comments suggested that under paragraph (a)(1), the rule should state that land would not be eligible for gaming if the claim is dismissed on procedural grounds.

Response: This recommendation was not adopted because a dismissal on procedural grounds, i.e., laches, does not necessarily mean that a claim lacks merit and may not resolve other issues related to impairment of title or loss of possession.

One comment was concerned that under paragraph (a)(1), the language "has not been dismissed on substantive grounds" is vague and another comment suggested dropping the clause altogether.

Response: This recommendation was adopted.

One comment suggested that paragraph (a)(1) should include actions filed in State court.

Response: The recommendation was not adopted because the land claims within the meaning of IGRA arise under Federal statute, Federal common law, the U.S. Constitution or a treaty and jurisdiction lies in Federal, not State court.

One comment suggested that under paragraph (a)(1), language be added as follows: "wherein the relief sought is (A) return of land, (B) conveyance of replacement land, or (C) monetary and Congress enacts legislation to mandate that a portion of the monetary recovery (i.e., the judgment funds) be used to purchase real property."

Response: The recommendation was not adopted because the regulations cannot dictate the terms of a settlement or the relief a tribe may seek. While the language of the regulation does not specifically address the scenarios addressed in the comment, when a particular land claim otherwise meets the definition, whether for example the legal basis involves the impairment of title or other real property interest such as a lease, and the relief includes the return of land, conveyance of replacement land, or money for the purchase of other real property, the land claim may meet the requirements of this section as long as it is either subject to Congressional enactment or returns to the tribe all of the lands claimed by the tribe.

One comment suggested paragraph (a)(2) be replaced with the following language: "Is a legal claim of a tribe that has not been filed in Federal or State court."

Response: The recommendation was not adopted; however, the definition and regulation allow for a land claim that is not filed in court.

One comment suggested adding a new paragraph (a)(3) to read: "Has been the subject of Federal legislation which allows for acquisition of land."

Response: The recommendation was adopted in part and is in included in paragraph (a) of the reorganized section.

One comment suggested replacing in paragraph (a)(2) "included" with "identified."

Response: Due to a reorganization of this section, the suggestion is no longer relevant.

Comments on paragraph (b):

One comment suggested replacing in paragraph (b) "must be covered by" with "must have been acquired pursuant to."

Response: Due to a reorganization of this section, the suggestion is no longer relevant.

One comment suggested the following edits in paragraph (b)(1): "States that the tribe is relinquishing its legal land claim to some or all of the lands claimed by the tribe as part of the settlement, results in the alienation or transfer of title to tribal some or all of the lands claimed by the tribe within the meaning of 25 U.S.C. 177, and has been enacted into law by the United States Congress; or"

Response: Due to reorganization of this section, the suggestion is no longer relevant, but the concepts behind the edits were adopted in part, and incorporated into the reorganized section.

One comment suggested the following edits in paragraph (b)(2): "Returns to the tribe lands identical to the entirety of the exact lands claimed by the tribe, does not involve an alienation or transfer of title to tribal lands claimed by the tribe that is prohibited under 25 U.S.C. 177, and is either:"

Response: Due to a reorganization of this section, the suggestion is no longer relevant.

One comment suggested deleting the following language under paragraph (b)(1): "results in the alienation or transfer of title to tribal lands within the meaning of 25 U.S.C. 177, and has been enacted into law by the United States Congress."

Response: This recommendation was adopted in part as it pertains to 25 U.S.C. 177.

One comment suggested replacing paragraph (b)(2) with "Returns to the tribe lands or allows acquisition of lands that the tribe has a historical connection to and is either * * *"

Response: This recommendation was not adopted because the regulations cannot dictate the terms of the settlement.

One comment suggested modifying the language in paragraph (b)(2)(i) to include both Federal and [S]tate court."

Response: This recommendation was not adopted. The definition precludes actions filed in State court because land claims, within the meaning of IGRA, are based on Federal law. In addition, comments revealed that the proposed regulations could be read to identify settlements between a tribe and State without the involvement of the Federal Government. The final regulations clarify that the U.S. must be a party to the settlement.

One comment suggested adding a new paragraph (b)(2)(iii) that reads: "Acquired pursuant to Federal legislation."

Response: This recommendation was adopted in part and reflected in the reorganized section.

One comment suggested that the exception should be amended to apply to an out-of-court settlement that is approved by the United States and that only requires the non-Indian party to voluntarily vacate the premises, pay damages, or allows the settlement agreement to be implemented through Secretarial approval of some form of conveyance of interest in Indian land under existing law.

Response: The recommendation to amend the exception to apply under the exact scenario described by the comment was not adopted; however, to the extent that the United States is a party, the scenario would fit under the exception.

One comment suggested replacing the introduction with "Under this section, class II or class III gaming may be conducted on trust lands only if the criteria of both (a) and (b) are met."

Response: This recommendation was not adopted. The section was reorganized and the recommendation is no longer relevant.

A few comments suggested that the rule should require a settlement to be ratified either by Congress or consented to by the affected local government.

Response: This recommendation was adopted to the extent that it relates to Congressionally enacted settlements and to the extent an affected local government is a party to a particular settlement agreement, whether it is a final order or some other enforceable agreement.

"Initial Reservation" Exception

Section 292.6 What must be demonstrated to meet the "initial reservation" exception?

One comment suggested that § 292.6(a) inappropriately restricts the scope of the "Federal acknowledgment process" to the regulatory procedures in 25 CFR part 83.

Response: The Department does not accept the recommendation to apply these regulations more broadly to recognition by means other than that through 25 CFR part 83. The plain meaning of the statute suggests that it applies to tribes acknowledged by this process and no others.

Comments on paragraph (b):

Several comments suggested deleting paragraph (b). One comment stated that there is no mention of location with respect to tribal members or tribal government in IGRA and that it is unfair to tribes with widely dispersed populations due to allotment and termination. One comment fundamentally disagreed with and recommended eliminating the 50-mile majority membership requirement.

Response: These recommendations were adopted in part. While a so-called "modern connections" requirement was not eliminated entirely, the paragraph was modified in response to a number of comments that suggested that the requirement encompass a wider range of criteria. The 50-mile majority requirement was eliminated and the paragraph was amended to reference a significant number of tribal members or other factors that demonstrate the tribe's current connection to the land. The inclusion of a modern connections requirement provides an element of notice to the surrounding community yet the elimination of the 50-mile majority requirement recognizes that the standard is too difficult to apply in today's mobile work related environment.

A few comments suggested reducing the 50-mile majority requirement to 25 miles so the mileage requirements are the same for both the "tribal majority test" and the "headquarters test" in paragraph (b). Another comment suggested making the "50-mile majority test" and the "headquarters test" conjunctive instead of disjunctive, for example; making the "or" an "and."

Response: These recommendations were not adopted because the purpose of the exception is to assist newly recognized tribes in economic development. As long as the tribe has a modern connection to the land, the surrounding community has notice of the tribal presence.

Several comments suggested that the "headquarters test" is easily manipulated and should not be included. Some comments suggested increasing the 25-mile limit.

Response: The recommendations to remove the headquarters test and to alter the 25-mile radius were not adopted because the headquarters test is a useful means of determining whether a tribe has a modern connection to the newly acquired land and the 25-mile radius is both useful and consistent. (The word radius was added to the regulation to provide clarity.) Nonetheless, the concerns raised by these comments are legitimate because the version of the headquarters test in the proposed regulations could be construed as being open to manipulation. Therefore, the qualifier was added in the final regulations that the tribe's headquarters or other tribal governmental facilities be in existence at that location for at least two years at the time of the application for land-into-trust. The addition of "other tribal governmental facilities" was necessary due to concerns that tribes often operate out of more than one headquarters or facility.

One comment suggested that the "headquarters test" is not in the best interest of the tribe because it may separate a headquarters from a tribal population center.

Response: This concern was addressed through the modification of paragraph (b). A tribe may show a modern connection through not only a nearby headquarters but also through other tribal governmental facilities.

Comments on paragraph (c):

A few comments suggested deleting the reference to "cultural connection" because it is essentially a subset of historical connections and adds redundancy and confusion to the regulation.

Response: This recommendation was adopted.

One comment suggested adding specific examples of significant historical and cultural connections in paragraph (c), for example, "designated in a treaty, whether ratified or not." Another comment stated that the term "significant historical connection" is too vague to offer any protection to tribes or citizens and that the regulation should not allow gaming on lands to which a tribe has only a transient connection. Several comments specifically suggested a definition for "significant historical connections."

Response: This recommendation was adopted in part through the addition of the new definition "significant historical connections."

One comment suggested deleting (c).

Response: This recommendation was not adopted. The significant historical connection requirement insures that the tribe has a preexisting connection to the newly acquired lands proposed to be its initial reservation. Furthermore, the Department does not believe it is good policy to create an initial reservation in an area where the tribe has no preexisting connection.

One comment suggested that the word "area," as it relates to the term "significant historical connection," is too broad. The comment suggested that gaming should be limited to ancestral homelands and that language should be inserted to reference 25 CFR 151.11(b) so that as distance from homeland increases—nearby local officials, State officials and tribe's input gains greater weight.

Response: This recommendation was not adopted because the actual land to which a tribe has significant historical connection may not be available. Additionally, input from nearby local officials, State officials and other tribes is not part of the Initial Reservation analysis in section 2719.

One comment suggested that the significant historical connection requirement should be uninterrupted connection. Another comment suggested that the requirement should show historically exclusive use.

Response: These recommendations were not adopted. They would create too large a barrier to tribes in acquiring lands and they are beyond the scope of the regulations and inconsistent with IGRA.

General comments on § 292.6:

One comment noted that there is nothing in the "Initial reservation" section of the regulations regarding process so the public has an opportunity to comment.

Response: Unlike the exception in IGRA section 2719(b)(1)(A), the exceptions in section 2719(b)(1)(B) do not reference an opportunity for public comment. Because the section 2719(b)(1)(B) exceptions do not require public comment and since they present a fact-based inquiry, it is unnecessary to include a requirement for public comment in the regulations. Nonetheless, there are opportunities for public comment in other parts of the administrative process—for example, in the process to take the land in trust and during the NEPA review process. Although the regulations do not provide a formal opportunity for public comment under subpart B of these regulations, the public may submit written comments that are specific to a particular lands opinion. Submissions

may be sent to the appropriate agency that is identified in § 292.3.

One comment suggested that the regulations include the process by which the BIA will make their decisions. Another comment suggested that the regulations need to include standards by which the Secretary will make a decision.

Response: These recommendations were adopted in part. If the tribe does not have a proclaimed reservation on the effective date of these regulations, § 292.6(d) provides standards that the tribe must demonstrate in order to be proclaimed a reservation under the initial reservation exception.

One comment suggested that the regulations add a section that provides that lands far removed from historical territory shall not be taken into trust for gaming.

Response: This recommendation was not adopted because the comment raises issues pertaining to 25 CFR part 151—Land Acquisitions.

One comment suggested that the tribes should be required to analyze sites that are close to aboriginal homelands.

Response: This recommendation was not adopted. Newly acquired lands with significant historical and cultural connections may or may not include those that are close to aboriginal homelands.

A few comments suggested striking all of paragraphs (b) and (d) along with a large amount of (c) and (e) so that this paragraph would limit "initial reservation" to a tribe acknowledged under part 83 and the condition that "the land is located within the external boundaries of the first reservation of lands set aside for the tribe."

Response: This recommendation was not adopted, as it does not take into account the present circumstances of the tribe's location.

One comment suggested cross-referencing "significant historical connections" in the section to § 292.12(b).

Response: The intent of this recommendation was adopted through adding a definition of significant historical connections to the definition section.

One comment suggested that the request for an opinion should include the distance of the land from the location where the tribe maintains core governmental functions.

Response: The recommendation was not adopted because the distance from the tribal headquarters or other governmental facility is just one of three methods by which a tribe can meet the modern connections requirement and is therefore not always necessary. Additionally, it is not within the scope of IGRA to restrict such analysis to locations with "core" governmental functions.

One comment suggested that the regulations require a tribe to provide information about the tribe's ancestral ties to the land.

Response: The recommendation was not adopted; however, ancestral ties would be part of the significant historical connection analysis.

One comment suggested that the regulations use only one test for both the "initial reservation" exception and the "restored lands" exception; the test being that a majority of tribal members live within 50 miles of the proposed gaming site.

Response: This recommendation was not adopted. The regulations articulate a "modern connections" test for both the "initial reservation" and "restored lands" exceptions but the 50-mile majority requirement was eliminated from each for the reasons discussed under the comments for paragraph (b).

One comment noted that the BIA does not define what uses can be made of an initial reservation. The commenter was concerned about an initial reservation established solely for casino development.

Response: An initial reservation may be used solely for the establishment of a casino.

One comment suggested a "contemporary ties" test instead of using the "modern connections test" as set forth in the proposed regulations.

Response: This recommendation was adopted in part. The term "contemporary ties" was not used, but the modern connections test as set forth in the proposed regulations was modified using some of the suggestions that were given in relation to the "contemporary ties" test.

One comment suggested striking (e) and replacing it with "the tribe has not conducted gaming on any other lands proclaimed to be a reservation under 25 U.S.C. 467."

Response: This recommendation was not adopted. Gaming is allowed on the initial reservation under this exception. If other newly acquired land is declared a reservation, gaming can occur on it under a two part determination without precluding gaming on the initial reservation. To preclude gaming on the initial reservation would be contrary to the congressional intent in providing this exception.

"Restored Lands" Exception

Section 292.7 What must be demonstrated to meet the "restored lands" exception?

A few comments noted that there are no opportunities for public comment on restored lands decisions.

Response: Unlike the exception in IGRA section 2719(b)(1)(A), the exceptions in section 2719(b)(1)(B) do not reference an opportunity for public comment. Because the section 2719(b)(1)(B) exceptions do not require public comment and since they present a fact-based inquiry, it is unnecessary to include a requirement for public comment in the regulations. Nonetheless, there are opportunities for pubic comment in other parts of the administrative process—for example, in the process to take the land in trust and during the NEPA review process. Although the regulations do not provide a formal opportunity for public comment under subpart B of these regulations, the public may submit written comments that are specific to a particular lands opinion. Submissions may be sent to the appropriate agency that is identified in § 292.3.

One comment suggested that the tests for significant historic connections and modern connections are deficient because they allow tribes without true historic ties and with inadequate modern ties to game on lands under the restored lands exception.

Response: The Department received comments suggesting the opposite of this argument as well; suggesting that the historical and modern tests were too restrictive. The final regulations consider both sides of this issue and modifications were made accordingly.

One comment suggested using the term "recognized by the United States" instead of the term "federally recognized" because of a concern of confusion arising from the defined term "federally recognized" in the proposed regulations.

Response: This recommendation was not adopted; however, the potential confusion was remedied through the omission of a defined term "federally recognized" in the final regulation in favor of a modification of the term "Indian tribe or tribe."

One comment suggested adding a paragraph to § 292.7 that the lands acquired in trust for the tribe meet the requirements of § 292.11.

Response: This recommendation was adopted for purposes of clarity.

Section 292.8 How does a tribe qualify as having been federally recognized?

One comment suggested that paragraph (a) include more details regarding the treaty negotiations with the tribe. For example, the comment suggested including the following requirements: Detailing who negotiated with a tribe; that the negotiations be authorized by the Department; that the facts and subject matter of the negotiations be memorialized; that the tribe be organized at the time of the negotiation; and that a definition of "negotiates" be included to mean a goal-oriented government-to-government discussion.

Response: These recommendations were not adopted. Paragraph (a) will be applied on a case by case basis.

One comment suggested that paragraph (b) should require that the Department make the opinion formally, in writing, and according to governing regulations.

Response: This recommendation was not adopted. While the opinions are always going to be in writing, in the past they were made with varying degrees of formality depending on the situation presented. Regulatory guidance making these requirements mandatory is not feasible and is unnecessary.

One comment suggested paragraph (b) should not use the word "could" because there is a difference between tribes that could and tribes that actually did organize under the Acts.

Response: This recommendation was not adopted because a Departmental opinion that a tribe could organize is evidence of Federal recognition, regardless of whether the tribe actually organized under the Acts.

One comment suggested that the word "including" in paragraph (c) be removed and that the paragraph be modified to require the legislation to specifically name the tribe in question and to describe the substance of the relationship.

Response: This recommendation was adopted in part. The word "including" was removed and replaced with the word "naming."

A few comments suggested paragraph (d) needs modification. One comment suggested differentiating between land acquired for organized and land acquired for landless Indians without "ethno historic coherence." Another comment argued that the section is too permissive because it qualifies a tribe as having been recognized if the United States acquires land in trust for a tribe's benefit.

Response: These recommendations were not adopted. Paragraph (d), as written, provides sound guidance to the Department in issuing its opinion regarding whether a tribe was once federally recognized.

One comment suggested paragraph (e) should require certain standards regarding the tribe, the relationship with the Federal Government, and what constitutes evidence.

Response: These recommendations were not adopted because the regulation needs no further elaboration and is clear on its face.

One comment suggested striking the word "federally" from the introduction sentence and the word "Federal Government" from paragraph (e).

Response: These recommendations were not adopted because IGRA is a Federal statute concerning federally recognized tribes, 25 U.S.C. 2703(5).

One comment suggested that the section include a paragraph (f) that requires the tribe seeking a lands opinion to be the political and genealogical successor to the tribe identified through paragraphs (a) through (e).

Response: This recommendation was not adopted because it is unnecessary. These concerns are addressed and inherent in the restored lands analysis under §§ 292.9–12.

One comment suggested using Professor Cohen's test for Federal recognition, which it characterized as Congressional or Executive action and a continuing relationship with the group, and that restored lands opinion should be made by the BIA's Branch of Acknowledgment and Research (BAR), now the Office of Federal Acknowledgment (OFA).

Response: These recommendations were not adopted because OFA's expertise is in analyzing a petitioner under other criteria, such as community, political influence, and genealogy, not land matters. The section already requires Executive or Congressional action. The continuing relationship can be evaluated under (e), but is not required when any of factors (a) through (d) are demonstrated.

Section 292.9 How does a tribe show that it lost its government-to-government relationship?

A comment questioned how old a document must be to be considered "historical" and another comment wanted to include as acceptable evidence, documentation from sources other than the Federal Government, including oral histories, to show that the Federal Government either affirmatively terminated its relationship or that the relationship ceased to exist, such as through inaction.

Response: These recommendations were not adopted. Although "historical" is somewhat imprecise, it adds clarity to the type of documentation that is acceptable evidence under this section. Modern documents about events in the past are not acceptable evidence. Acceptable documentation is written documentation from the Federal Government specifically terminating the relationship, or indicating consistently that there is no longer a government-to-government relationship with the tribe or its members. Historical or modern accounts that conclude or assume that there is no government-to-government relationship, or that the relationship has lapsed through inaction of the tribe or the government, are secondary evidence and are not acceptable evidence within the meaning of this section. Similarly, historical or modern accounts that the Federal Government did not or does not acknowledge a specific responsibility with the group because there is no longer a trust asset to protect or disburse, or because the Federal Government did not or does not know who the group is, are not acceptable evidence, even if the account is from the Federal Government.

One comment stated that in paragraph (a), the Congressional action must be clear that the relationship was terminated and that the tribe be identified by name.

Response: This recommendation was not adopted because the commenter did not suggest how to clarify the paragraph. The paragraph, as written, is sufficient to address the commenter's concerns.

One comment suggested adding the phrase "clearly and affirmatively acted to" after "Executive Branch," in paragraph (b), in order to preclude tribes from asserting that administrative errors constitute deliberate acts of termination.

Response: This recommendation was not adopted because the words "show" and "no longer" are adequate.

A few comments argued that the paragraph (b) should give no excessive deference to the Department of the Interior or the Department of Justice and that all branches of the Federal Government should be given equal weight. One comment suggested adding "Federal Government" at the end of the first sentence. In addition to adding "Federal Government," another comment suggested striking everything but the first sentence.

Response: This recommendation was adopted in part and the paragraph was modified by using the words "Federal Government." The second sentence was retained because it is necessary.

One comment stated that in paragraph (b) the rule should make clear that the

documentation include evidence that the tribal government existed at the time of the termination, that the acts constituting the termination were unambiguous, and that the subsequent acts by the Government were consistent with the tribe's termination.

Response: This recommendation was not adopted. Tribe is a defined term and the definition is adequate to address the commenter's concern. The language pertaining to government action requires that the action be unambiguous. When termination is unambiguous, then it is not necessary to review whether subsequent acts are consistent with the termination.

One comment suggested striking the language "or its members" in paragraph (b) because the comment stated that there cannot be a government-to-government relationship with members apart from a tribal government.

Response: This recommendation was not adopted. The language was kept in order to accommodate a wide variety of circumstances.

One comment suggested modifying the preamble of this section with the following: "as having at some later time lost its government-to-government relationship with the United States." The comment stated that the change makes the preamble consistent with the language of § 292.7(b) and the introductions to §§ 292.8 and 292.10.

Response: This recommendation was adopted in general and the section was modified accordingly. The specific words "with the U.S." were not added as they are understood in light of § 292.8.

One comment questioned whether California rancherias should be allowed to qualify as restored lands under IGRA.

Response: While the California tribes indeed share a unique path towards restoration, if the newly acquired lands otherwise meet the requirements of the statute and regulations, the exception pertains to them.

Section 292.10 How does a tribe qualify as having been restored to Federal recognition?

One comment suggested changing the term "tribal government" to "tribe," in paragraph (a), in order to be consistent.

Response: This recommendation was adopted.

One comment stated that paragraph (a) should make clear that the statute must be unambiguous as to its intent and identify the tribe being restored.

Response: This recommendation was not adopted because the present language anticipates this clarity and specificity.

One comment stated that 25 U.S.C. 2719(b)(1)(B)(iii) unambiguously restricts application of the restored lands exception to "an Indian tribe that is restored to Federal recognition." Thus, it argues, paragraph (a) is overly broad and should be modified because it allows recognition, acknowledgment or restoration through legislative enactment, including a tribe's initial recognition.

Response: This recommendation was not adopted because Congress has not been clear in using a single term in restoration bills. Additionally, the addition of "(required for tribes terminated by Congressional action)" in paragraph (a) addresses this issue. To the extent this comment concerned "initial" recognition by Congress where no prior relationship existed, legislation would not be encompassed by § 292.9.

Several comments suggested that this section needs to include administrative actions of restoration, recognition, and reaffirmation that are outside the Federal acknowledgment process. For example, one comment suggested modifying paragraph (b) to read; "[r]ecognition through administrative action," and another suggested "recognition through other official action of the Secretary or his/her designee."

Response: This recommendation was not adopted. Neither the express language of IGRA nor its legislative history defines restored tribe for the purposes of section 2719(b)(1)(B)(iii). When Congress enacted IGRA in 1988, it authorized gaming by existing federally recognized tribes on newly acquired lands if those lands were within or contiguous to the boundaries of an existing reservation. If the tribe had no reservation, Congress authorized gaming on newly acquired lands within the boundaries of its former reservation. We can safely infer that Congress understood that a list of federally recognized tribes existed and authorized on-reservation, or on former reservation, gaming for those tribes. We must, therefore, provide meaning to Congress's creation of an exception for gaming on lands acquired into trust "as part of the restoration of lands for an Indian tribe restored to Federal recognition." We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations.

In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process. The part 83 regulations were adopted in 1978. These regulations govern the determination of which groups of Indian descendants were entitled to be acknowledged as continuing to exist as Indian tribes. The regulations were adopted because prior to their adoption the Department had made *ad hoc* determinations of tribal status and it needed to have a uniform process for making such determinations in the future. We believe that in 1988 Congress did not intend to include within the restored tribe exception these pre-1979 *ad hoc* determination. Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified only the part 83 procedures as the process for administrative recognition. *See* Notes following 25 U.S.C. 479a.

The only acceptable means under the regulations for qualifying as a restored tribe under IGRA are by Congressional enactment, recognition through the Federal acknowledgment process under 25 CFR 83.8, or Federal court determination in which the United States is a party and concerning actions by the U.S. purporting to terminate the relationship or a court-approved settlement agreement entered into by the United States concerning the effect of purported termination actions. While past reaffirmations were administered under this section, they were done to correct particular errors. Omitting any other avenues of administrative acknowledgment is consistent with the notes accompanying the List Act that reference only the part 83 regulatory process as the applicable administrative process.

One comment stated that paragraph (c) is contrary to the Federally Recognized Indian Tribe List Act of 1994, which it stated controls the analysis of this rule. The comment argues that a "court-approved stipulated entry of judgment" is not a "decision" on the merits as specified in the Act.

Response: According to Department's analysis, paragraph (c) is not inconsistent with the List Act. The litigation encompassed by § 292.10 concerns challenges to specific actions taken by the Federal Government terminating, or purporting to terminate a relationship, such as the Tillie Hardwick litigation in California. There is no reason under IGRA or the List Act to preclude a settlement concerning challenged termination actions from "restoring" a government-to-government relationship if the U.S. is a party and the court approves it.

One comment suggested adding the following language to paragraph (c):

"Was entered into by the United States which:" and striking paragraph (1).

Response: This recommendation was adopted in part and the paragraph was modified accordingly.

One comment suggested separating (c) into two parts as follows: "(c) Recognition through a judicial determination; or (d) Recognition through a court-approved stipulated entry of judgment or other settlement agreement." The comment stated that recognition through a judicial determination should be sufficient, whether or not the judicial determination satisfies the criteria set forth in paragraphs (1) and (2).

Response: This recommendation was not adopted. While the structure of the paragraph was changed, the criteria set forth in (1) and (2) are still necessary. At issue is the government-to-government relationship between the U.S. and the tribe, and the U.S. must be a party in order to be bound by the court's decision.

One comment suggested that a court-approved "settlement agreement" should be sufficient, whether or not it is styled a "stipulated entry of judgment."

Response: This recommendation was adopted.

One comment suggests striking the word "Provides," in paragraph (2), and replacing it with "Settles claims" in order to remedy a potential scenario where the settlement agreement omits pertinent language but, nonetheless, settles the tribe's claim that it was never legally terminated.

Response: This recommendation was adopted, consistent with prior administrative practice concerning the Tillie Hardwick litigation.

One comment stated that since there are no judicial findings in a court-approved stipulated entry of judgment, such means provide an inadequate basis to restore a tribe.

Response: This concern was addressed through the revision to paragraph (c). The relevant operative language in the Federal court determination or court-approved settlement agreement must include language pertaining to termination rather than restoration.

One comment noted that parties do not enter into judicial determinations. Thus, it argued, paragraph (1) does not make sense as it pertains to paragraph (c).

Response: This concern was addressed and the paragraph was amended accordingly.

One comment suggested that the regulations should provide a mechanism to give notice of any action to affected local communities. Furthermore, the comment suggested that the rule should make clear that the party has standing to intervene if it can demonstrate that it is affected and that the tribe should not be able to raise sovereign immunity as a bar.

Response: These recommendations were not adopted because they are beyond the scope of the regulations and inconsistent with IGRA.

One comment suggested inserting language requiring the applicant group to clearly establish by documented evidence that its current members are directly descended from members of the terminated tribe.

Response: This recommendation was not adopted because requiring genealogies of tribal members is beyond the scope of the regulations, inconsistent with IGRA and not necessary in order to decide whether the applicant tribe is a restored tribe.

Section 292.11 What are "restored lands?"

One comment suggested striking the word "specific" in paragraph (a). A few comments suggested striking any language in paragraph (a) and § 292.11 pertaining to a geographical area or parameters.

Response: These recommendations were not adopted. The regulations include a contingency for legislation that requires or authorizes the Secretary to take land into trust for the benefit of a tribe within a specific geographic area because in such scenarios, Congress has made a determination which lands are restored. Because the inclusion or exclusion of specific geographical areas in restoration legislation is beyond the control of the Department, the regulations must address both contingencies.

One comment suggested that language in paragraph (b) should provide expert administrative guidance to Congress when it drafts restoration legislation.

Response: This recommendation was not adopted because it is outside the scope of the regulations and inconsistent with IGRA.

One comment suggested that the criteria in paragraph (b) should apply to land acquired by a tribe that is recognized through 25 CFR 83.8 as well.

Response: This recommendation was adopted and the paragraph was modified accordingly. In order to adopt this and other recommendations, the section was re-organized.

One comment suggested that paragraph (b) and all related paragraphs in § 292.12 should be revised with the requirement that the tribe's modern and historical connection to the land must have been continuous since at least before October 17, 1988.

Response: This recommendation was not adopted because it is inconsistent with the purposes of this provision of IGRA and is thus beyond the scope of the regulations.

One comment suggested inserting the words "recognized, acknowledged or" into both paragraph (a) and (b) because the broader language is consistent with § 292.10(a). Also, the comment suggested adding the words "for the benefit of the tribe" in paragraph (a) and replacing the words "the restoration" with the word "such" in paragraph (b).

Response: These recommendations were adopted in part and the paragraphs were modified accordingly.

One comment suggested modifying paragraph (b) by replacing "modern connection" with "contemporary ties." The comment also suggested striking the word "significant" and removing the temporal requirement.

Response: These recommendations were not adopted. However, the modern connections test as set forth in the proposed regulations was modified using some of the suggestions that were given in relation to the "contemporary ties" test. Striking the word "significant" and removing the temporal requirement would so broaden the benefit to restored tribes that it would be detrimental to other recognized tribes, contrary to Congressional intent.

One comment suggested striking the words "the restoration" from paragraph (b) and striking the language pertaining to the modern, historical and temporal requirements in § 292.12. Instead, the comment suggested replacing the reference to the requirements with: "The land is located within an area where the tribe has connections to the lands that meet the requirements of § 292.12."

Response: These recommendations were adopted in part. The phrase "the restoration" is necessary and therefore retained in the regulations. The recommendation pertaining to referencing § 292.12, instead of listing the requirements, was adopted.

One comment stated that there is a structural ambiguity in § 292.11 because the conjunctions are not clear and that the section needs clarified. For example, the paragraph could be read as requiring (a or b) and c, or it could be read as requiring a or (b and c).

Response: This recommendation was adopted and the section was modified in order to clarify that "the tribe must show at least one of the following" in order for the newly acquired lands to qualify as restored lands.

One comment suggested adding a number of paragraphs in order to address Oklahoma tribes in this section.

Response: This recommendation was not adopted because it in unnecessary to single them out. Limitations on the Oklahoma tribes are specifically addressed in other parts of section 2719 and the regulations.

One comment stated that the rule should conform more closely to applicable law and suggested adding a paragraph (d) to require that the land be the first trust acquisition following restoration.

Response: This recommendation to add a paragraph (d) was not adopted; however, temporal limitations are addressed in § 292.12 of the regulations.

Section 292.12 How does a tribe establish its connection to the land?

This section was renamed, "How does a tribe establish its connection to newly acquired lands for the purposes of the 'restored lands' exception?"

Paragraph (a):

Several comments concerned the "headquarters test" in paragraph (a). Comments ranged from support to requests to eliminate the test all together. For example, some comments requested that the rule be excluded because it is arbitrary and potentially subject to abuse or manipulation; some suggested removing the test without explanation—one comment suggests that the headquarters test was designed specifically to accommodate a particular tribe. Some comments suggested that if the headquarters test is included, there should be a temporal requirement that requires the headquarters to be located within 25 miles of the proposed lands since before the enactment of IGRA. Another comment suggested the temporal requirement be 30 years. One comment stated that 25 miles is too great a distance, while another comment suggested it should be extended to 50 miles.

Response: The recommendations to remove the headquarters test and to alter the 25-mile radius were not adopted because the headquarters test is a useful means of determining whether a tribe has a modern connection to the newly acquired land and the 25-mile radius is both useful and consistent. (The word radius was added to the regulation to provide clarity). Nonetheless, the concerns raised by these comments are legitimate because the version of the headquarters test in the proposed rule could be construed as being open to manipulation. Therefore, the qualifier was added in the final rule that the tribe's headquarters or other tribal governmental facilities be in existence at that location for at least two years at the time of the application for land-into-trust. The language of "other tribal governmental facilities" was added to address concerns that tribes often operate out of more than one headquarters or facility.

A few comments suggested adding a paragraph to the modern connection test that allows land that is located within the tribe's service area—as designated by legislation restoring the government-to-government relationship with the tribe, or by the BIA, Department of Health and Human Services or by the Department of Housing and Urban Development. Similarly, one comment suggested including the following language at the end of paragraph (a): "or the land has been designated by the BIA as included within the [t]ribe's service population area."

Response: These recommendations were not adopted because the service area is not necessarily defined by the DOI and would thus add complication to the analysis due to the added necessity of collaboration with other agencies. Furthermore, the tribe's service area is often based on factors not connected with the DOI's section 2719 analysis and is often ill-defined, overlapping and potentially inconsistent.

Several comments suggest removing the "modern connections" test because, for example, the test is not in the plain language of IGRA, and the test is contradicted by case law (e.g., *Grand Traverse Band of Ottawa and Chippewa Indians* v. *United States Attorney*, 198 F.Supp. 2d 920 (W.D. Mich. 2002), aff'd 369 F.3d 960 (6th Cir. 2004); *Confederated Tribes of the Coos, Lower Umpqua, and Suislaw Indians* v. *Babbitt*, 116 F.Supp. 2d 155 (D.C. Cir. 2000)) that focuses on whether the lands were historically occupied by the tribe.

Response: This recommendation was not adopted. Though the "modern connections" test is not in the plain language of IGRA, nor is the test for a historical connection. The cases cited by the commenter do not limit the Department from considering a modern connection and only discuss the historical connection in relation to the process by which the Department made its decision. Additionally, the cases cited by the commenter provide guidance for the interpretation of section 2719(b)(1)(B)(iii); lands that are taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition. The Secretary has discretion to require a modern connection as part of the restoration of lands. The modern connection test remains in the final regulations because it offers a mechanism to balance legitimate local concerns with the goals of promoting tribal economic development and tribal self-sufficiency, both of which are reflected in IGRA.

Several comments addressed concerns about the "modern connection test" and suggested modifying it. For example, a few comments stated that the test for a modern connection to the land is too permissive and suggested that the casino site must be in the immediate vicinity of the tribe's current population or that the 50-mile majority requirement be narrowed. Several comments suggested that the modern connection test is too narrow and should be broadened to allow the Department to consider a greater degree of facts and circumstances or to expand or eliminate the 50-mile majority requirement. A few comments noted that a hard-line 50-mile majority requirement presents practical difficulties when it comes to implementation.

Response: The recommendations to narrow the modern connection test were not adopted. Given the potential difficulty and confusion in administering the 50-mile majority requirement, the recommendations to eliminate the requirement were adopted in favor of a test that allows for the consideration of a number of different factors. Additionally, in balancing these concerns, the Department added the following language in paragraph (a): "The land is located within the State or States where the Indian tribe is presently located, as evidenced by the tribe's governmental presence and tribal population, and the tribe can demonstrate one or more of the following modern connections to the land."

One comment suggested requiring both a majority population test and a headquarters test.

Response: This recommendation was not adopted. As noted, the 50-mile majority requirement was eliminated. Nonetheless, the purpose of the exception is to assist restored tribes in economic development. As long as the tribe has a modern connection to the land, the surrounding community has notice of the tribal presence.

One comment suggested adding a requirement for a culturally significant modern connection.

Response: This recommendation was not adopted because it is not clear what the commenter intended by "culturally significant." Assuming the commenter suggested a more narrow interpretation of modern connections, the recommendation is not adopted because, while the modern connections

requirement was not eliminated entirely, the paragraph was modified in response to a number of comments that suggested that the requirement encompass a wider range of criteria. As discussed above, the 50-mile majority requirement was eliminated and the paragraph was amended to reference a significant number of tribal members or other factors that demonstrate the tribe's current connection to the land. The inclusion of a modern connections requirement provides an element of notice to the surrounding community yet the elimination of the 50-mile majority requirement recognizes that the standard is too difficult to apply in today's mobile work related environment.

One comment suggested striking (a) and replacing it with the following: "Contemporary ties to the area in which the land is located."

Response: This recommendation was not adopted; however, the modern connections test as set forth in the proposed regulations was modified using some of the suggestions that were given in relation to the "contemporary ties" test.

Paragraph (b):

One comment requested a definition of "tribe" that states that an unconnected group of Indians, with no common ethno historic affiliation, does not constitute a tribe for the purpose of paragraph (b).

Response: This recommendation was not adopted. Tribe is defined in the definition section and applies throughout the regulations.

One comment stated that the phrase "significant historical connection" in (b) is interpreted too broadly, and that it should only be found when a tribe has had exclusive use and occupancy of an area. Additionally, the comment suggested that an Indian Claims Commission determination on restored lands should be binding.

Response: This recommendation was not adopted. In response to numerous comments, the term "significant historic connection" is now defined in the definition section of these regulations. While not limited to the tribe's exclusive use and occupancy area, the definition specifies certain criteria that a tribe must show in order to meet the definition, e.g., "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land."

One comment suggested that a tribe should not be able to establish a historical connection if they are a disparate group of traveling Indians traveling through territory at some point in their distant history.

Response: We received comments pertaining to the issue raised by this comment that argue both in favor of and against a tribe's ability to establish a connection to the land when their past contacts were transitory or brief in nature. The definition of "significant historical connection" establishes criteria which require something more than evidence that a tribe merely passed through a particular area.

One comment suggested (b)(2) should reflect advisories in case law that support the general idea that there are limits to what can be included as restored lands. Another comment suggested that the term "significant" in paragraph (b) is too vague.

Response: These recommendations were addressed through the addition of a definition for "significant historical connection."

A few comments suggested modifying (b)(2) by striking the word "documented" and one comment suggested adding "whether evidenced by documentation or oral history."

Response: This recommendation was not adopted because the paragraph was restructured. The definition of "significant historical connection" calls for "historical documentation." Because a significant historical connection would be documented there is no need to include oral history as acceptable evidence. Such oral history is unnecessary when documentation is available; it would be insufficient alone.

One comment suggested adding the words "or by other means" in paragraph (b)(1) because there are other valid means by which a reservation may have been established other than by treaty for purposes of § 292.12(b).

Response: This recommendation was not adopted because it is unnecessary. The reference to reservation under a ratified or unratified treaty is only one manner in which a significant historical connection can be demonstrated according to the definition. There is no need to broaden this portion of the definition because the evidence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land will identify the historical connections without raising the ambiguity that "other means" may create.

One comment suggested modifying the language in the introduction to § 292.12 to read "§ 292.11(b)."

Response: This recommendation was rendered unnecessary by the rewriting of § 292.11.

One comment suggested changing the word "court" to "courts" in paragraph (b)(2).

Response: This recommendation was not adopted because the paragraph was restructured and the reference to specific evidence deleted as unnecessarily restrictive.

One comment stated that the word "significant" in paragraph (b) is insufficient because it is ambiguous and provides little guidance as to temporal requirements. Some comments suggested deleting the word "significant" in paragraph (b) because it seems to create a higher standard for historical ties in comparison to modern ties. A few comments also suggested deleting the language pertaining to giving Federal Government documents significant weight. One comment suggested modifying the language to read, "the land is located in an area to which the tribe has significant documented historical connections; or the tribe can establish any other evidence that demonstrates the existence of a significant historical connection to the land or area in which the land is located."

Response: These recommendations were adopted in part and addressed by the changes to the definition of significant historical connection. The suggestion to delete "significant" was not adopted because the word reinforces the notion that the connection must be something more than "any" connection. The definition does not include a temporal requirement because such inquiry is highly dependant of the facts and circumstances of each tribe's historical connection to the land. The suggestion regarding the weight given to Federal Government documents was adopted as unnecessarily restrictive.

One comment suggested adding aboriginal language in paragraph (b).

Response: This recommendation was not adopted because it is unclear what the comment was meant to accomplish.

Paragraph (c):

One comment requested that the rules put all restored tribes on an even playing field by incorporating the, so called, *Grand Traverse* standard into the rule.

Response: This recommendation was adopted in so far as we followed the Grand Traverse standard that if the tribe is acknowledged under 25 CFR 83.8, and already has an initial reservation proclaimed after October 17, 1988, the tribe may game on newly acquired lands under the restored lands exception provided that it is not gaming on any other land.

One comment suggested that the rule further define "temporal connection"

because the degree of temporal connection to the land varies among tribes, especially since their post-termination relations with State and local governments likewise varies, depending on the level of hostilities.

Response: This recommendation was not adopted. The paragraph, as written, takes into account a wide range of variables.

One comment suggested change the temporal limit from 25 to 20 years.

Response: This recommendation was not adopted. The Department received numerous comments arguing for both less than and more than 25 years. The 25 year number is both a practical and reasonable number based on the Department's experience under section 2719.

One comment stated that (c) is inadequate because (c)(1) allows anywhere from a 6 minute to a 100 year span and (c)(2) gives a 25 year period. One comment suggested changing the conjunction between paragraph (1) and (2) under (c) from an "or" to an "and" because the commenter suggested that this would make the section consistent with court decisions.

Response: These recommendations were not adopted. Paragraph (c)(1) considers that there are often a number of impediments involved in a tribe's efforts to acquire restored lands after the event officially restoring the tribe. Also, placing a time cap on the ability of a tribe to acquire land for gaming, when it is their first attempt to acquire a site for gaming, is contrary to Federal Indian policy as stated in IGRA. However, a cap of 25 years, as discussed in (c)(2), addresses the concerns about a tribe's open ended ability to acquire lands for gaming. If a tribe already has newly acquired lands, then a time cap and its limiting effect to acquire a site for gaming does not undermine IGRA's stated policy goals.

One comment suggested modifying paragraph (c)(1) by striking "tribe has" and adding "United States * * * in trust status for the tribe."

Response: This recommendation was addressed by the addition of the definition for "newly acquired lands."

One comment suggested striking (c)(1)&(2). One comment suggested striking (c)(2) and replacing it with the following: "if a tribe has acquired no other land for gaming purposes since its restoration without regard to how much time has passed since the tribe's restoration."

Response: These recommendations were not adopted because the temporal limitation effectuates IGRA's balancing of the gaming interests of newly acknowledged and/or restored tribes with the interests of nearby tribes and the surrounding community.

One comment suggested modifying paragraph (c)(1) to read, "The land is the first land that the tribe has acquired pursuant to the Department of the Interior's regulations or procedures for gaming acquisitions since the tribe was restored to Federal recognition and the tribe is not gaming on any other trust lands; or." The comment stated that the phrase "trust land" should be added because § 292.12(c)(1) should only apply to land which has been acquired in trust; not to land which a tribe has acquired in fee. The phrase "pursuant to the Department's * * *" should be added because a tribe should not lose its chance to satisfy the criteria in § 292.12(c)(1) if it acquires land in trust for housing which is not intended for gaming and had not been acquired pursuant to the procedures for gaming acquisitions. The phrase "and the tribe * * *" is added to ensure that this paragraph in not used by a tribe which is already gaming.

Response: The recommendation regarding the phrase "trust land" was adopted in part through use of the term "newly acquired lands," clarifying the type of land contemplated under (c). The recommendation to exclude trust land used for housing was unnecessary because paragraph (c)(2) allows a tribe that already has newly acquired lands, to acquire a site for gaming as long as the tribe submits an application within 25 years of its restoration. The recommendation to qualify (c)(1) with the phrase "the tribe is not gaming on any other trust lands" was adopted in part and added to (c)(2). The definition of newly acquired lands includes tribal land acquired in trust but does not include tribal fee land.

General Comments on § 292.12:

One comment suggested that the rule specify what role the NIGC plays in the restored lands opinion. One comment stated that there is nothing in the rule that discusses the process the BIA will use to make restored lands opinions.

Response: These comments are addressed with the addition of § 292.3 discussing the application process.

One comment suggested adding a geographical nexus requirement to § 292.12 in addition to the historical and temporal requirements.

Response: This recommendation was not adopted as the regulation's requirement of a modern, historical and temporal connection adequately implements the policy goals of IGRA.

One comment suggested that the regulations should require a tribe to acquire their former reservation land if it is available. One comment suggested that tribes should not be permitted to acquire restored lands if they were already compensated for such lands by some other means.

Response: These recommendations were not adopted because they do not have a basis in IGRA.

One comment suggested making the language in §§ 292.11 & 292.12 consistent with § 292.6.

Response: This recommendation was adopted. The Department made efforts to make these sections consistent where uniformity is necessary.

Subpart C—Secretarial Determinations and Governor's Concurrence

Section 292.13 When can a tribe conduct gaming activities on lands that do not qualify under one of the exceptions?

This section was renamed "When can a tribe conduct gaming activities on newly acquired lands that do not qualify under one of the exceptions in subpart B of this part?"

Several comments suggested restricting the scope of consultation required under paragraph (b) by deleting "local officials, including officials of nearby tribes" thereby preventing excessive complication of the application process and promoting tribal self-determination.

Response: This recommendation was not adopted because the statute requires consultation with nearby tribes and local officials, 25 U.S.C. 2718(b)(1)(A).

One comment recommended that no land be taken into trust without the consent of the State and the affected county.

Response: This recommendation was not adopted because the comment raises issues pertaining to 25 CFR part 151—Land Acquisitions. Nonetheless, section 2719 of IRGA only requires the Governor's concurrence. Since this section of IGRA requires consultation with the Governor, local officials and nearby tribes, but only specifies the concurrence of the Governor, Congress has implicitly rejected the need for concurrence by other officials.

One comment suggested that citizen input and State legislative participation should be included in the Secretary's determination that the casino will not be detrimental to the community. One comment, on behalf of a concerned citizen, opposed the Secretary's authority to permit gambling in communities without her input.

Response: These recommendations were not adopted because the regulations already require consultation with appropriate State and local officials, consistent with the statutory

language. Further, there are various opportunities for local input in the process, depending on which exception is at issue.

One comment suggested that the regulations impose additional restrictions on gaming on lands acquired after October 17, 1988.

Response: The regulations were designed to conform to and interpret section 2719 of IGRA; every effort was made to stay consistent in that regard. Additional restrictions are inconsistent with 25 U.S.C. 2719.

One comment suggested that paragraph (b) use the phrase "nearby Indian tribes" and paragraph (d) read "The Governor of the [S]tate in which the gaming establishment is to be located concurs in the Secretary's Determination" in order to conform to IGRA.

Response: This recommendation was adopted and language was modified accordingly.

One comment stated that the two-part Secretarial Determination exception cannot be interpreted as requiring a tribe to have an ancestral tie to the lands they seek to acquire.

Response: The two-part Secretarial Determination does not require a tribe to have an ancestral tie to the lands they seek to acquire.

Section 292.14 Where must a tribe file an application for a Secretarial Determination?

The Department did not receive any comments regarding this section.

Section 292.15 May a tribe apply for a Secretarial Determination for lands not yet held in trust?

One comment stated that requiring a tribe to file its application for a two-part Secretarial Determination at the same time as its land-into-trust application precludes the tribe from using the land they have placed into trust for economic development. Accordingly, the comment suggested modifying § 292.15 in light of this concern.

Response: This recommendation was not adopted. The requirements in § 292.15 address land that is not yet held in trust. The section does not address a tribe's existing trust land.

Application Contents

Section 292.16 What must an application for a Secretarial Determination contain?

Several comments suggested that a tribe be required to submit only the information required under § 292.16, paragraphs (a) through (d) at the time it submits its land-into-trust application. The information required by § 292.16 paragraphs (e) and (f) could be submitted as the information becomes available.

Response: This recommendation was not adopted because the application for a Secretarial Determination must include all of the information in § 292.16 for the application to be complete.

One comment suggested that an additional requirement in paragraph (d) be added to require the tribe to submit "evidence of an aboriginal or significant historical connection to the land, including cultural ties based upon actual inhabitance." This would, according to the commenter, bring the regulation into conformance with section 2719.

Response: This recommendation was not adopted because it is beyond the scope of the regulations and inconsistent with IGRA.

One comment observed that, throughout the regulations, "application" is used to refer both to the tribe's initial written request and to the subsequent application package developed by the BIA Regional Office for submission to the Secretary, creating confusion.

Response: In consideration of the comment, changes were made throughout the regulations accordingly.

Several comments suggested striking paragraphs (d) and (k).

Response: These recommendations were not adopted because paragraphs (d) and (k) inform the decision making process.

One comment suggested striking paragraphs (j) and (k) because these documents are not site specific and are either already on file with the BIA or do not apply.

Response: These recommendations were not adopted because paragraphs (j) and (k) inform the analysis. The word "Any" was deleted from the beginning of former paragraph (k) and the words "if any" were added to modified paragraph (l) for clarification.

Several comments noted that, while the Regional Director is required by § 292.20(a)(2) to provide officials with information regarding the proposed scope of the gaming, §§ 292.16–292.18 do not require the applicant tribe to submit this information.

Response: In response to these comments, language was added in (j) regarding the proposed scope of gaming and the size of the proposed gaming establishment.

Section 292.17 How must an application describe the benefits of a proposed gaming establishment to the tribe and its members?

Several comments suggested changing "benefits" in the title of § 292.17 to "impacts."

Response: This recommendation was adopted in part. The words "and impacts" were added to the title of § 292.17. The section was renamed "How must an application describe the benefits and impacts of a proposed gaming establishment to the tribe and its members?"

Several comments suggested that paragraph (f) require a more specific identification of adverse impacts.

Response: This recommendation was not adopted because an adverse impacts analysis is fact specific and will vary depending on the given facts and circumstances.

One comment suggested that § 292.17 require consideration of land use, development alternatives to gaming, whether the proposed project is consistent with the tribe's economic needs (if any), and how fulfillment of such needs will be balanced against off-reservation environmental impacts.

Response: This recommendation was not adopted because development alternatives and environmental impact are addressed in the National Environmental Policy Act (NEPA) process.

One comment noted that paragraph (i) is a new requirement not previously contained in the discussion draft circulated prior to the publication of the proposed regulation.

Response: The concern raised by the commenter does not violate any standards or procedures.

Several comments suggested that paragraph (h) be amended to read "* * * or holds other contractual rights to cause the land to be transferred to the United States, or to the [t]ribe."

Response: This recommendation was not adopted because it is unnecessary. The first clause of paragraph (h) covers the commenter's concern.

One comment suggested that "if any" be stricken from paragraph (i) to require the applicant tribe to establish that it "aboriginally" used and occupied the land where it wishes to build a gaming establishment.

Response: This recommendation was not adopted because historical connections are not mandatory under IGRA for purposes of this subpart of the regulations.

Several comments suggested striking, in their entirety, paragraphs (a), (e), (g), and (j), and striking "from the proposed

uses of the increased tribal income" from paragraph (d).

Response: These recommendations were not adopted because all of the paragraphs are necessary in order to determine what is in the tribe's best interest.

One comment suggested striking "and the tribe" from paragraph (a), as it would be "voluminous and time consuming."

Response: This recommendation was not adopted because the words "and the tribe" must be included in the paragraph in order to conduct a thorough analysis under the two-part determination.

Several comments suggested replacing "facility" in paragraph (j), subparagraph (3) with "establishment."

Response: This recommendation was adopted, and the word "facility" was replaced with the word "establishment."

One comment suggested adding "Any information provided within the application that is of a commercial or financial nature shall be protected from release to the public pursuant to the exemptions of the Freedom of Information Act [("FOIA")], 5 U.S.C. 522(b)(4)."

Response: This recommendation was not adopted because the FOIA provisions that protect commercial and financial information and the corresponding procedures stand on their own and need not be specifically referenced in these regulations.

One comment suggested requiring the information provided under § 292.17 be shared with State and local governments, who should be accorded the opportunity to respond to the information supplied by the tribe.

Response: This recommendation was not adopted because the Secretary can evaluate the financial information without having comments or analysis by the State or local governments. Nevertheless, the Department will provide financial information to the Governor under § 292.22 if there is a favorable Secretarial Determination.

Section 292.18 What information must an application contain on detrimental impacts to the surrounding community?

Several comments argued that tribal gaming by an out-of-State tribe is *per se* detrimental to the community.

Response: This recommendation was not adopted. While the regulations allow for a finding that gaming by an out-of-State tribe is detrimental to the community, such a finding will be made on a case-by-case basis.

Several comments suggested that "detrimental to the surrounding community" in paragraph (c) should be defined to consider the adverse impacts on self-sufficiency and economic development of other tribes in the State.

Response: This recommendation was not adopted because the definition of "surrounding community" already includes Indian tribes. Extending consideration to other tribes in the State goes beyond the Department's interpretation of the statute.

One comment raised the concern that § 292.18 did not limit the Secretary's discretion to consider "detrimental information" regarding non-Indian gaming interests.

Response: The Secretary can consider detrimental information regarding non-Indian gaming interests; it is considered within paragraph (c). While such interests can be considered, they are limited to surrounding community consistent with section 2719.

One comment suggested it was premature to require an environmental assessment (EA) or environmental impact statement (EIS) before the Secretary makes his decision.

Response: An EA or EIS are products of the NEPA process. The Secretary must have the results of the NEPA analysis in order to consider whether or not there is detriment to the surrounding community.

Several comments proposed the following subsection: "An analysis by a qualified traffic engineer of the traffic impacts on the surrounding community and the mitigation measures necessary to alleviate the traffic impacts which would be caused by the proposed gaming establishment."

Response: This recommendation was not adopted because it is unnecessary; it is implicit in (a) and (b).

One comment recommended that the regulation specify that "surrounding community" includes communities across State lines.

Response: This recommendation was not adopted because it is not necessary. The definition of surrounding community is defined by mileage, and is not limited by State boundaries.

Several comments suggested that paragraph (e) implied that the treatment program rather than compulsive gambling is a detrimental impact, and that there are no detrimental impacts to the surrounding community from compulsive gamblers who are not enrolled in treatment programs. It was suggested that paragraph (e) be changed to read, "Costs of compulsive gambling attributable to the proposed gaming establishment, including the cost of treatment programs and the primary and secondary social costs attributable to compulsive gamblers enrolled and not enrolled in treatment programs."

Response: This recommendation was adopted in part, and (e) was revised in order to clarify that the potential detrimental impact is any anticipated costs of treatment programs.

One comment suggested striking "if any" from paragraph (d).

Response: This recommendation was not adopted because the words "if any" do not appear in paragraph (d) of this section.

Several comments suggested amending paragraph (c) to read, "Impacts on the economic development, income, and employment of the surrounding community, including any significant impacts on the income and employment generated by Indian gaming of nearby Indian tribes."

Response: This recommendation was not adopted because tribes are already included in "surrounding community."

Several comments suggested adding further specificity to the information that is required in the application and set forth in paragraphs (a) through (f) of § 292.18.

Response: These recommendations were not adopted because the regulations, as written, provide sufficient specificity.

Several comments suggested striking paragraphs (d) and (e).

Response: The recommendation was not adopted because paragraphs (d) and (e) are required, according to the Department's definition and understanding of detriment.

Several comments suggested amending paragraph (a) to add a proviso "if required pursuant to NEPA" following the reference to an EA or an EIS.

Response: This recommendation was adopted and paragraph (a) was modified accordingly.

One comment suggested striking from paragraph (a) " e.g. an Environmental Assessment * * * Statement (EIS)."

Response: This recommendation was not adopted because the examples provide useful guidance.

One comment suggested striking paragraph (f) to give tribes discretion to include, rather than the Secretary discretion to mandate, any additional information.

Response: This recommendation was not adopted because a well informed Secretary will promote sound decision making.

One comment suggested amending paragraph (a) to read, "Information regarding environmental impacts and plans for mitigating detrimental impacts on the surrounding community * * *" to conform to statutory language.

Response: This recommendation was not adopted because the NEPA uses "adverse."

One comment noted that "social structure" in paragraph (b) is vague and undefined.

Response: This recommendation was not adopted because the term "social structure" is necessary in order to interpret the statute.

Consultation

Section 292.19 How will the Regional Director conduct the consultation process?

Several comments suggested that 60 days was not a sufficient time for State and local officials to collect the necessary information to prepare a consultation letter.

Response: The State and local officials are not being asked to prepare a consultation letter, they respond to the Regional Director's letter. The relevant information is available at the time when the regulations require a consultation letter and therefore 60 days is adequate time for State and local officials to comment.

Several comments recommended that the Regional Director be required to notify appropriate officials if the tribe addresses or resolves any issue pursuant to paragraph (c)(2), and that such officials should be accorded a reasonable time to respond.

Response: This recommendation was not adopted because such a procedure would inject unnecessary delay into the process.

One comment requested that the Department exempt from the requirements of § 292.19 pending applications that have already completed the required consultations with the surrounding community under the current checklist procedures.

Response: This recommendation was not adopted. We are not including a general exemption in the regulations, but the Department will make a case-by-case determination whether pending applications have completed the necessary consultation.

One comment suggested the 25-mile radius for tribes to be included in the consultation process be expanded to 100 miles.

Response: This recommendation was not adopted as the focus on section 2719 is the surrounding community.

One comment suggested including the applicant tribe in the § 292.19 consultation process.

Response: This comment was not adopted because the tribe is already included in the process in paragraph (c) where the tribe can respond to issues raised in the responses.

Several comments suggested that, "Citizens within a 50-mile radius (Public notices posted)" be added to the requirements of paragraph (a) so as to solicit comments from the community. One comment suggested rewriting paragraph (b), in its entirety, with a focus on notice requirements.

Response: These recommendations were not adopted. The Department consults with appropriate State and local officials and nearby tribes. Therefore, the Department is not amending the regulations to solicit citizen comments directly. It is most appropriate that citizen comments funnel through appropriate State, local and tribal officials. Also, public comments are provided for in the NEPA process.

One comment suggested that 30 days was a sufficient comment period.

Response: This recommendation was not adopted because the 60-day comment period provides a balance between those wanting a longer period and those wanting a shorter time for comment.

One comment suggested changing "nearby tribes" in paragraph (a)(2) to the previously-defined "nearby Indian tribes."

Response: This recommendation was adopted and the paragraph was modified accordingly.

Several comments suggested that the BIA be required to meet with local officials throughout the acquisition process and that the comment period was not a legitimate consultation process.

Response: This recommendation was not adopted because the Secretarial Determination in section 2719 is not a negotiation process. Creating additional opportunities for back-and-forth is unnecessary, causes delay and is inconsistent with IGRA.

One comment suggested that the term "consultation comments" in paragraph (c)(1) was unclear and should be defined to include any comments received from residents and businesses.

Response: This recommendation was adopted and corresponding edits were made in order to clarify the paragraph.

Several comments suggested that officials of whom consultation is requested have access to information provided by the applicant pursuant to § 292.17.

Response: Consistent with the protection Congress affords financial, commercial or proprietary information under the FOIA, this recommendation was not adopted.

Several comments suggested requiring the information provided under § 292.18 be shared with State and local governments, who should be accorded the opportunity to respond to the information supplied by the tribe.

Response: This recommendation was not adopted because the requested process would add unnecessary delay at this stage of the process.

Section 292.20 What information must the consultation letter include?

One comment considered it "absurd" to require local communities and nearby tribes, rather than the applicant tribe, to provide funding to mitigate problems that might emerge from the proposed casino and to propose programs to address compulsive gambling (paragraph (b)).

Response: This comment misconstrues paragraph (b)(5). In order to clarify the paragraph, it was modified to make clear that the consultation letter is only requesting information regarding the anticipated costs, if any, of treatment programs. The paragraph does not consider the issue of who will bear such costs.

One comment suggested that paragraph (b)(4) be changed to, "Reasonable estimates of costs of impacts * * *" to eliminate the implication that all costs will be reimbursed by the applicant tribe.

Response: This recommendation was adopted in part. The word "anticipated" was inserted wherever necessary.

Several comments suggested that paragraph (b)(4) be changed to, "Costs of impacts to the surrounding community, including nearby Indian tribes* * *" and that the tribes be consulted in this determination.

Response: This recommendation was not adopted because "nearby Indian tribes" are included in the definition of surrounding community.

One comment suggested amending paragraph (b)(6) to read, "Any other information that may assist the Secretary in determining whether gaming is or is not detrimental to the surrounding community" to avoid sounding conclusory.

Response: This recommendation was adopted.

One comment suggested adding, "such as the size of the proposed gaming establishment" to paragraph (a)(3).

Response: This recommendation was not adopted because the proposed language is already included in the paragraph.

One comment suggested striking paragraph (b)(4) and (5).

Response: This recommendation was not adopted because the paragraphs are necessary to the evaluation.

One comment suggested that paragraph (b) should not apply to entities that do not intend to file a protest against the proposed establishment.

Response: This recommendation was not adopted because it is not necessary. The paragraph does not compel recipients to comment.

One comment suggested that the consultation letter and the published notice should specify the studies (including one on crime and one on impacts on existing gaming) and provide the Web site where these studies can be viewed.

Response: This recommendation was not adopted because it is unnecessary. The information is routinely available should an individual decide that they want such data.

Evaluation and Concurrence

Section 292.21 How will the Secretary evaluate a proposed gaming establishment?

Several comments suggested that the regulations should provide that lands "far from the tribe's existing reservation will be disfavored for taking into trust for the purposes of gaming."

Response: This recommendation was not adopted because it refers to an issue that is considered when the Secretary takes lands into trust under 25 CFR part 151.

Several comments suggested that the Secretary, when making his determination pursuant to paragraph (b), must not consider the financial effects of competition on other Indian or non-Indian gaming establishments, in accordance with the Congressional intent of IGRA.

Response: This recommendation was not adopted because the Secretary does not necessarily include in the analysis the financial effects of competition on other gaming establishments; however, the Secretary does examine detrimental effect on the surrounding community and nearby tribes, including detrimental financial effects.

Several comments suggested that all appropriate State, local, and nearby tribal officials should also be notified of a disapproval pursuant to paragraph (c).

Response: Because of restructuring, this comment addresses § 292.21(b). This recommendation was not adopted because it is unnecessary. Interested parties can make individual inquiries if there is a need.

One comment suggested that community disapproval of a casino should require the Secretary to disapprove an application.

Response: This recommendation was not adopted because it is not consistent with IGRA.

One comment suggested rewriting § 292.21 to read:

(b) The Secretary will consider all the information submitted or developed under § 292.18 and all the documentation received under § 292.19 in evaluating the proposed gaming establishment's detrimental impacts on the host-community and surrounding counties. (c) If the Secretary disapproves of the gaming proposal, the Secretary will inform the tribe and set forth the reasons for the disapproval. (d) If the Secretary approves of the gaming proposal, the Secretary will proceed under § 292.22.

Response: This recommendation was not adopted because the changes are unnecessary. The paragraph, as amended, is sufficient to address the commenter's concerns.

One comment suggested adding a new paragraph:

The Secretary will make a presumption that the proposed project will have a detrimental effect on the surrounding community if the proposal negatively impacts the stewardship, economic development, or cultural preservation plans of a federally recognized tribe that does have a strong ancestral or cultural nexus to the lands in question. That presumption may be overcome only by compelling evidence.

Response: This recommendation was not adopted because it is beyond the scope of the regulations and inconsistent with IGRA.

One comment recommended that the regulation establish specific standards by which the Secretary must abide in making his two-part determination.

Response: This recommendation was not adopted because the regulations provide the necessary procedures and standards for the Secretary to make a decision.

One comment suggested that any findings must be supported by substantial evidence in the record and that the findings include the evidence that is contained in the record.

Response: This recommendation was not adopted because it is unnecessary. Including a standard of proof adds a layer of potential ambiguity to the analysis.

Section 292.22 How does the Secretary request the Governor's concurrence?

Several comments suggested that the Governor's retention of a silent veto power over the proposal (paragraph (d)) is inconsistent with the Congressional intent of IGRA, and that the State must therefore be required to respond to the tribe's proposal.

Response: This recommendation was not adopted because the Governor's silent veto is consistent with IGRA.

Several comments suggested that a lack of response from the Governor should be interpreted as a concurrence.

Response: This recommendation was not adopted because there is no statutory basis on which to create a regulation that says a Governor's silence means concurrence.

One comment recommended that the Governor and the State legislature must concur in the decision.

Response: This recommendation was not adopted because IGRA specifically identifies the Governor and not the State; this provision is distinguished from other sections of IGRA that specifically mention the State.

One comment suggested that, if the Governor does not respond to a request for concurrence within the established period, the tribe should be permitted to reinstate the findings of fact within a reasonable period of time or, in the alternative, the tribe can provide information to supplement the material provided under §§ 292.16–292.18.

Response: This recommendation was not adopted. As a courtesy, however, the Department will notify the tribe when the time period has passed without a response from the Governor.

One comment disapproved of the Governor's power to approve or veto the proposal.

Response: The power is specifically detailed in IGRA.

One comment suggested replacing, "makes a favorable Secretarial Determination" in paragraph (a) with, "approves the tribal gaming proposal."

Response: This recommendation was not adopted because it is an unnecessary change.

One comment suggested striking paragraph (b), subparagraph (2), because the regulations do not require that the Governor be given notice of the intent to place a gaming facility on land already held in trust.

Response: This recommendation was not adopted because it is premised on a misreading of the statute and it is no longer applicable because the section was reorganized.

One comment suggested amending paragraph (b), subparagraph (1), to read, "The land is not eligible for gaming pursuant to 25 U.S.C. 2719(b)(1)(A)" so as to not preclude gaming pursuant to the exceptions set forth in 25 U.S.C. 2719(b)(1)(B).

Response: This recommendation was adopted in part. An additional section, now § 292.23, was added to the regulations in order to clarify what happens if the Governor does not affirmatively concur with the Secretarial Determination.

Several comments suggested that the 18-month period is too long.

Response: This recommendation was not adopted because the one-year time period with a possibility of a six-month extension is reasonable.

Section 292.23 Can the public review the application for a Secretarial Determination?

This section was renamed "What happens if the Governor does not affirmatively concur with the Secretarial Determination?" and reorganized.

One comment suggested clarifying former § 292.23 by indicating whether a formal FOIA request must be filed to review the application or if the application is immediately available, subject to the limitations on disclosure in the FOIA, the Privacy Act, and the Trade Secrets Act, upon request.

Response: This recommendation was not adopted because it is implicit that the application is available for review.

One comment suggested replacing, "the tribe's application * * * over the land" with the following:

The local BIA agency or Regional Office will provide a minimum of two copies of the tribe's application and all supporting documents for public review to: (1) Governor of the [S]tate's office; (2) Public County Office within the proposed host-community; and (3) the tribe's application and all material will also be available at the local BIA agency or Regional Office having administrative jurisdiction over the land.

Response: This recommendation was not adopted because the modification is unnecessary.

Several comments suggested that § 292.23 explicitly provide that the BIA will consult with the applicant tribe regarding what information should be protected from disclosure.

Response: This recommendation was not adopted; however, it will be suggested that the tribe submit a suggested redacted version of its documentation along with the full application, in order to speed the Department's identification and review of the material the tribe considers protected from disclosure.

One comment stated that § 292.23's public review provisions are, "inadequate in the digital age."

Response: This recommendation was not adopted because the provisions set forth in this section are adequate to provide public review.

Section 292.24 Do information collections in this part have Office of Management and Budget approval?

This section was renamed—"Can the public review the Secretarial Determination?" and reorganized.

One comment suggested that former § 292.24 is in violation of the Paperwork Reduction Act (PRA), which requires the agency to include in its burden estimate all collections of information that will be solicited (even if voluntary) by "ignoring" the financial burden imposed on State and local governments and private entities.

Response: This recommendation was not adopted because this section is compliant with the PRA. The information collection requirements, along with a corresponding comment period, were published in the **Federal Register** on January 19, 2007. The requirements were approved by the OMB on February 27, 2007 and expire on February 28, 2010.

General Comments on the Section 2719 Regulations

Several comments suggested adding a so-called, "grandfather clause" in the regulations. For example, one comment suggested adding the following language: "This regulation shall apply prospectively and existing Indian gaming on Indian lands recognized as eligible for gaming by the Secretary, the National Indian Gaming Commission, Congress or a Federal court shall not be disturbed." Some comments suggested waiving the regulations for complete applications that have been actively reviewed. Other comments suggested the regulations only apply to applications received after a certain date. Finally, several comments suggested that the regulations should apply to all pending applications with an opportunity to amend.

Response: This recommendation was adopted in part. A new § 292.26 was added in order to address these issues. During the course of implementing IGRA section 20, the Department and the NIGC have issued a number of legal opinions to address the ambiguities left by Congress and provide legal advice for agency decisionmakers, or in some cases, for the interested parties facing an unresolved legal issue. These legal opinions typically have been issued by the Department's Office of the Solicitor or the NIGC's Office of General Counsel. In some cases, the Department or the NIGC subsequently relied on the legal opinion to take some final agency action. In those cases, section 292.26(a) makes clear that these regulations will have no retroactive effect to alter any final agency decision made prior to the effective date of these regulations. In other cases, however, the Department or the NIGC may have issued a legal opinion without any subsequent final agency action. It is expected that in those cases, the tribe and perhaps other parties may have relied on the legal opinion to make investments into the subject property or taken some other actions that were based on their understanding that the land was eligible for gaming. Therefore, section 292.26(b) states that these regulations also shall not apply to applicable agency actions taken after the effective date of these regulations when the Department or the NIGC has issued a written opinion regarding the applicability of 25 U.S.C. 2719 before the effective date of these regulations. In this way, the Federal Government may be able to follow through with its prior legal opinions and take final agency actions consistent with those opinions, even if these regulations now have created a conflict. However, these regulations will not affect the Department's or the NIGC's ability to qualify, modify or withdraw its prior legal opinions. In addition, these regulations do not alter the fact that the legal opinions are advisory in nature and thus do not legally bind the persons vested with the authority to make final agency decisions.

One comment suggested including the Checklist for Gaming Acquisitions Gaming-Related Acquisitions and IGRA Section 2719 Determinations, in the regulations.

Response: This recommendation was not adopted. To the extent that the Checklist is inconsistent with the regulations, the regulations control. Matters in the Checklist that are not covered by the regulations, and are not otherwise inconsistent with the regulations, remain in effect.

One comment suggested that the regulations include a provision that says an application is still eligible for consideration even if a tribe is unable to include all the itemized information in the application.

Response: In order to promote informed decisionmaking, this recommendation was not adopted.

One comment suggested that the regulations clearly define the role of NIGC.

Response: Other than the changes to § 292.3, this recommendation was not adopted. The roles and responsibilities of the NIGC cannot be addressed by the Department of the Interior regulations and instead must be defined by that agency's own regulations.

One comment suggested adding an evidentiary standard to subpart B stating that the burden rests on the applicant tribe to demonstrate that a section 2719 exception applies.

Response: This recommendation was not adopted. It is understood that the burden is on the applicant tribe to establish its eligibility for an exception.

These regulations establish the standards that the applicant must meet.

One comment suggested that subpart B be revised to provide clarity and consistency by specifying which agency or official will issue opinions covered by § 292.4.

Response: This recommendation was adopted in the revised § 292.3.

One comment suggested that the regulations indicate what constitutes final agency action and that the regulations specify what constitutes a record and what is the appeals process, if any.

Response: This recommendation was not adopted. The standard provisions of the Administrative Procedure Act apply.

Several comments suggested that the regulations be rejected in their entirety because they promote "casino shopping."

Response: This recommendation was not adopted. The standards included in these regulations will limit the concerns addressed by the commenter consistent with the existing provisions of IGRA.

One comment suggested that if the local community does not want a casino, that should be the end of the inquiry.

Response: This recommendation was not adopted because IGRA requires only a Governor's concurrence, not a local community concurrence.

Several comments suggested that there be a role for public comment and participation in the initial reservation and restored lands to restored tribes processes.

Response: Unlike the exception in IGRA section 2719(b)(1)(A), the exceptions in section 2719(b)(1)(B) do not reference an opportunity for public comment. Because section 2719(b)(1)(B) presents a fact-based inquiry, it is unnecessary to include a requirement for public comment in the regulations. Nonetheless, there are opportunities for public comment in other parts of the administrative process—for example, in the process to take the land in trust and during the NEPA review process. Although the regulations do not provide a formal opportunity for public comment under subpart B of these regulations, the public may submit written comments that are specific to a particular lands opinion. Submissions may be sent to the appropriate agency that is identified in § 292.3.

One comment suggested including a "fair-play" clause to ensure that speculators do not use tribes and that there are no misrepresentations in the process.

Response: This recommendation was not adopted because it is beyond the scope of the regulations and inconsistent with IGRA.

One comment suggested that cities be given advance notice of gaming related trust land requests and that there be a good faith requirement that the parties negotiate the issues before the application is accepted.

Response: This recommendation was not adopted because it is beyond the scope of the regulations and inconsistent with IGRA.

One comment suggested that the Department should consult with any other tribe that can show historical ties to a particular site.

Response: This recommendation was not adopted. The Department will consult with a nearby Indian tribe at which time it can explain its significant historical connection to the land, and show any detrimental impact on that tribe's traditional cultural connection to the land.

One comment suggested that tribes be required to submit development agreements.

Response: This recommendation was not adopted because it is beyond the scope of the regulations and inconsistent with IGRA.

One comment suggested that the regulations comply with the mandates of *Adams* v. *U.S.*, 319 U.S. 3212 (1943) and *U.S.* v. *Fox*, 94 U.S. 315 (1876) regarding State cession of jurisdiction. The comment argues that State legislatures must give permission to cede jurisdiction to the Federal Government.

Response: This recommendation was not adopted because the comment raises issues pertaining to 25 CFR part 151—Land Acquisitions, not IGRA.

Several comments suggested that the regulations define "gaming" and the scope of gaming, i.e., the range of proposals to which the regulations would apply.

Response: This recommendation was not adopted as outside the scope of these regulations.

Several comments suggested adding a definition for "detrimental to the surrounding community" and including the standards by which the Department will make its decision regarding detrimental to the surrounding community.

Response: This recommendation was not adopted because the Department will evaluate detriment on a case-by-case basis based on the information developed in the application and consultation process.

One comment suggested that the Department of the Interior is without authority to issue these regulations since IGRA grants NIGC rule making authority and that only the NIGC has authority to make decisions regarding what constitutes Indian lands under IGRA.

Response: The NIGC's rule making authority is not to the exclusion of the Department of the Interior. Section 2719 specifically references the Secretary of the Interior.

Procedural Requirements

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is significant. OMB's guidance on Executive Order 12866 requires that a cost-benefit analysis be done for significant rules and that it contain three elements. These elements are a statement of record, an examination of alternative approaches, and an analysis of costs and benefits.

The anticipated expenses or costs to the public or to the tribes who submit applications for gaming on land acquired after October 17, 1988 will be more than $100 million, therefore the rule is an economically significant regulatory action.

The intent of Executive Order 12866 is to provide decision makers with appropriate information to determine that a regulatory action imposing costs and yielding benefits, or otherwise having the effects sought by authorizing legislation, is both needed and is economically justified.

The Indian Gaming Regulatory Act of 1988 (IGRA) generally prohibits gaming on land acquired in trust after October 17, 1988, but provides several exceptions. Executive Order 12866 applies only to gaming on land under the general exception, which requires a two-part determination by the Secretary that gaming on the land would be in the best interest of the tribe and its members, and not detrimental to the surrounding community.

No cost-benefit analysis is necessary for gaming on newly acquired trust land under the exceptions for lands located within or contiguous to the boundaries of the reservation (former reservation in Oklahoma, or last recognized reservation for tribes outside Oklahoma that have no reservation) of the Indian tribe on October 17, 1988; or lands that are taken into trust as part of a settlement of a land claim, the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or the restoration of lands for an Indian tribe that is restored to Federal recognition. Tribes eligible under these exceptions are permitted to game on

lands acquired in trust after October 17, 1988. For these exceptions the rule establishes regulations for the Secretary in establishing eligibility. Establishing eligibility is a factual analysis and decision that incurs no cost or benefits.

This rule establishes regulations that will impose costs on the tribe, the Bureau of Indian Affairs, State and local governments, and the public in the expectation that gaming revenues will increase for the benefit of the tribe, employees, and the surrounding community.

Tribes wishing to game on land acquired in trust after October 17, 1988 that are not excepted will need to make an application to the Secretary for a two-part determination. The Secretary of the Interior and Federal employees to whom the Secretary's authorities under IGRA are or will be delegated will incur costs for preparing and reviewing the application.

These regulations establish requirements for the submission, review and approval of a land acquisition application and a two-part determination in a timely manner. The anticipated expenses or costs to the public or to the tribes who submit applications will be substantial. Tribes will be required to gather and submit information to the Secretary that substantiates both parts of the two-part determination. The cost of application will vary widely for gaming projects of different size and complexity from two man-years to five man-years, or more for each application.

IGRA requires the Secretary to consult with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes in making a two-part determination. Responding to the consultation will impose costs on State, local, and other tribal governments. In aggregate the cost is estimated at one to two man-years for each application.

Compliance with the National Environmental Policy Act ("NEPA") will be required. While NEPA documents are Federal documents to be used by decision makers in taking major Federal actions, the cost associated with preparing the studies will be primarily a cost of the tribe. Depending on the NEPA document required, preparation is expected to cost between 4 and 20 man-years, or more, and the BIA will expend from one to three man-years reviewing and supplementing the studies for each application.

NEPA requires the consideration of input from all parties on the expected impact on the human environment of the proposed major Federal action. The cost to the public and interested parties will vary widely. For controversial actions interested parties may prepare parallel studies that are nearly equal in scope to the NEPA document, so the average estimated cost may be one-half the cost of NEPA compliance, therefore from 2 man-years to 10 man-years for each application.

A determination that results in a gaming facility on after-acquired land will result in costs to the surrounding community for roads, police and fire services, reduction of property tax rolls, government services, education, housing, and problem gambling. The NEPA document will address the mitigation of significant impacts. The cost of impacts that are not significant will be borne by the surrounding community at an unknown level.

On September 21, 2007, the Assistant Secretary—Indian Affairs issued a *Checklist for Gaming Acquisitions, Gaming-related Acquisitions, and IGRA Section 20 Determinations.* The Checklist provides a systematic format for Regional Directors to evaluate specified factors for a two-part determination.

The benefits of gaming on newly acquired land will be for the tribe, employees, State and local government, nearby businesses, and local economic conditions. Jobs created by a gaming establishment generally vary from 500 to 5,000. According to economic studies, the new employee payroll spent locally creates secondary jobs at nearby businesses from 75 to 750. Housing demand by new employees increases local property tax collections by amounts that vary widely depending on the existing stock of dwellings and the tax rate. Income tax collections on the new jobs increase depending on State income tax rates. Studies have shown that unemployment and welfare rolls decrease in the counties surrounding new gaming facilities, with the benefit variable depending on existing unemployment and welfare rates. The net gaming revenue that is available to the tribe will vary depending on the location and size of the new gaming facility, and is expected to be from $5,000,000 to $200,000,000.

Currently, there are approximately 225 Indian tribes engaged in class II (bingo) and class III (casino) gaming. Although IGRA permits a tribe to acquire off-reservation land for gaming, it does not require tribes to do so. The cost of an application is completely optional and avoidable for a tribe. Each applicant tribe may evaluate the high cost of applying to game on off-reservation after-acquired trust land against the expected net gaming revenue to determine whether to incur the cost of complying with this rule.

The alternative considered was continuing to review applications using the *Checklist.* The costs and benefits using the Checklist are essentially the same as under the rule. The alternative was rejected in favor of establishing mandatory factors to be used in making a two-part determination.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Indian tribes are not considered to be small entities for the purposes of this Act.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal government or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required because only Indian tribes may conduct gaming activities on land acquired after October 17, 1988, only if the land meets the exceptions in section 2719 of IGRA.

Takings Implication Assessment (Executive Order 12630)

In accordance with Executive Order 12630, the Department has determined that this rule does not have significant takings implications. The rule does not pertain to the "taking" of private property interests, nor does it impact private property. A takings implication assessment is not required.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the Department has determined that this rule does not have significant Federalism implications because it does not substantially and directly affect the relationship between the Federal and State governments and does not impose costs on States or localities. A Federalism Assessment is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards. The rule does not preempt any statute.

National Environmental Policy Act

The Department has determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969.

Paperwork Reduction Act

The information collection has been reviewed and cleared by the Office of Information and Regulatory Affairs, Office of Management and Budget under the Paperwork Reduction Act of 1995, as amended. The collection has been assigned the tracking number of OMB Control Number 1076–0158. The collection of information is unique for each tribe even though each submission addresses the requirements found in § 292.16.

All information is collected in the tribe's application. Respondents submit information in order to obtain a benefit. Each response is estimated to take 1,000 hours to review instructions, search existing data sources, gather and maintain necessary data, and prepare in format for submission. We anticipate that two responses will be submitted annually for an annual burden of 2,000 hours.

Consultation With Indian Tribes (Executive Order 13175)

Under the criteria in Executive Order 13175, we have conducted consultation meetings with tribal leaders regarding the proposed regulations in the following locations: Uncasville, Connecticut on March 30, 2006; Albuquerque, New Mexico on April 5, 2006; Sacramento, California on April 18, 2006 and Minneapolis, Minnesota on April 20, 2006. A notice of the consultation meetings was published in the **Federal Register** on April 11, 2006 (71 FR 18350). In addition, a draft regulation was sent to all tribal leaders in the lower 48 States on March 15, 2006, seeking comments on the draft regulation. Numerous comments were received by the Department. The Department revised the draft regulation in response to written comments and oral comments received at the consultation meetings. No action is taken under this rule unless a tribe submits an application to acquire land under section 2719 of IGRA.

Effects on the Nation's Energy Supply (Executive Order 13211)

This rule does not have a significant effect on the nation's energy supply, distribution, or use as defined by Executive Order 13211.

Information Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

List of Subjects in 25 CFR Part 292

Indians—business and finance, Indians—gaming.

■ For reasons stated in the preamble, the Bureau of Indian Affairs amends subchapter N, chapter I of title 25 of the Code of Federal Regulations to add part 292 to read as follows:

PART 292—GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988

Subpart A—General Provisions

Sec.

Subpart B—Exceptions to Prohibition on Gaming on Newly Acquired Lands

"Settlement of a Land Claim" Exception

"Initial Reservation" Exception

"Restored Lands" Exception

Subpart C—Secretarial Determination and Governor's Concurrence

Application Contents

Consultation

Evaluation and Concurrence

Information Collection

Subpart D—Effect of Regulations

Authority: 5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

Subpart A—General Provisions

§ 292.1 What is the purpose of this part?

The Indian Gaming Regulatory Act of 1988 (IGRA) contains several exceptions under which class II or class III gaming may occur on lands acquired by the United States in trust for an Indian tribe after October 17, 1988, if other applicable requirements of IGRA are met. This part contains procedures that the Department of the Interior will use to determine whether these exceptions apply.

§ 292.2 How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and local officials means the Governor of the State and local government officials within a 25-mile radius of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Former reservation means lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701–2721.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a–1.

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe, or its members, access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988.

Office of Indian Gaming means the office within the Office of the Assistant Secretary-Indian Affairs, within the Department of the Interior.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed gaming establishment is to be located.

Reservation means:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.

Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

Subpart B—Exceptions to Prohibitions on Gaming on Newly Acquired Lands

§ 292.3 How does a tribe seek an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in this subpart?

(a) If the newly acquired lands are already in trust and the request does not concern whether a specific area of land is a "reservation," the tribe may submit a request for an opinion to either the National Indian Gaming Commission or the Office of Indian Gaming.

(b) If the tribe seeks to game on newly acquired lands that require a land-into-trust application or the request concerns whether a specific area of land is a "reservation," the tribe must submit a request for an opinion to the Office of Indian Gaming.

§ 292.4 What criteria must newly acquired lands meet under the exceptions regarding tribes with and without a reservation?

For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.

(a) If the tribe had a reservation on October 17, 1988, the lands must be located within or contiguous to the boundaries of the reservation.

(b) If the tribe had no reservation on October 17, 1988, the lands must be either:

(1) Located in Oklahoma and within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status for the tribe in Oklahoma; or

(2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.

"Settlement of a Land Claim" Exception

§ 292.5 When can gaming occur on newly acquired lands under a settlement of a land claim?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(i), known as the "settlement of a land claim" exception.

Gaming may occur on newly acquired lands if the land at issue is either:

(a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or

(b) Acquired under a settlement of a land claim that:

(1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or

(2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.

"Initial Reservation" Exception

§ 292.6 What must be demonstrated to meet the "initial reservation" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(ii), known as the "initial reservation" exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe has been acknowledged (federally recognized) through the administrative process under part 83 of this chapter.

(b) The tribe has no gaming facility on newly acquired lands under the restored land exception of these regulations.

(c) The land has been proclaimed to be a reservation under 25 U.S.C. 467 and is the first proclaimed reservation of the tribe following acknowledgment.

(d) If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and within an area where the tribe has significant historical connections and one or more of the following modern connections to the land:

(1) The land is near where a significant number of tribal members reside; or

(2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.

"Restored Lands" Exception

§ 292.7 What must be demonstrated to meet the "restored lands" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(iii), known as the "restored lands" exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe at one time was federally recognized, as evidenced by its meeting the criteria in § 292.8;

(b) The tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;

(c) At a time after the tribe lost its government-to-government relationship, the tribe was restored to Federal recognition by one of the means specified in § 292.10; and

(d) The newly acquired lands meet the criteria of "restored lands" in § 292.11.

§ 292.8 How does a tribe qualify as having been federally recognized?

For a tribe to qualify as having been at one time federally recognized for purposes of § 292.7, one of the following must be true:

(a) The United States at one time entered into treaty negotiations with the tribe;

(b) The Department determined that the tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act;

(c) Congress enacted legislation specific to, or naming, the tribe indicating that a government-to-government relationship existed;

(d) The United States at one time acquired land for the tribe's benefit; or

(e) Some other evidence demonstrates the existence of a government-to-government relationship between the tribe and the United States.

§ 292.9 How does a tribe show that it lost its government-to-government relationship?

For a tribe to qualify as having lost its government-to-government relationship for purposes of § 292.7, it must show that its government-to-government relationship was terminated by one of the following means:

(a) Legislative termination;

(b) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship; or

(c) Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship.

§ 292.10 How does a tribe qualify as having been restored to Federal recognition?

For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:

(a) Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe (required for tribes terminated by Congressional action);

(b) Recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter; or

(c) A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

§ 292.11 What are "restored lands"?

For newly acquired lands to qualify as "restored lands" for purposes of § 292.7, the tribe acquiring the lands must meet the requirements of paragraph (a), (b), or (c) of this section.

(a) If the tribe was restored by a Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe, the tribe must show that either:

(1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or

(2) If the legislation does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of § 292.12.

(b) If the tribe is acknowledged under § 83.8 of this chapter, it must show that it:

(1) Meets the requirements of § 292.12; and

(2) Does not already have an initial reservation proclaimed after October 17, 1988.

(c) If the tribe was restored by a Federal court determination in which the United States is a party or by a court-approved settlement agreement entered into by the United States, it must meet the requirements of § 292.12.

§ 292.12 How does a tribe establish connections to newly acquired lands for the purposes of the "restored lands" exception?

To establish a connection to the newly acquired lands for purposes of § 292.11, the tribe must meet the criteria in this section.

(a) The newly acquired lands must be located within the State or States where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

(1) The land is within reasonable commuting distance of the tribe's existing reservation;

(2) If the tribe has no reservation, the land is near where a significant number of tribal members reside;

(3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(4) Other factors demonstrate the tribe's current connection to the land.

(b) The tribe must demonstrate a significant historical connection to the land.

(c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:

(1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or

(2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

Subpart C—Secretarial Determination and Governor's Concurrence

§ 292.13 When can a tribe conduct gaming activities on newly acquired lands that do not qualify under one of the exceptions in subpart B of this part?

A tribe may conduct gaming on newly acquired lands that do not meet the criteria in subpart B of this part only after all of the following occur:

(a) The tribe asks the Secretary in writing to make a Secretarial Determination that a gaming establishment on land subject to this part is in the best interest of the tribe and its members and not detrimental to the surrounding community;

(b) The Secretary consults with the tribe and appropriate State and local officials, including officials of other nearby Indian tribes;

(c) The Secretary makes a determination that a gaming establishment on newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and

(d) The Governor of the State in which the gaming establishment is located concurs in the Secretary's Determination (25 U.S.C. 2719(b)(1)(A)).

§ 292.14 Where must a tribe file an application for a Secretarial Determination?

A tribe must file its application for a Secretarial Determination with the Regional Director of the BIA Regional Office having responsibility over the land where the gaming establishment is to be located.

§ 292.15 May a tribe apply for a Secretarial Determination for lands not yet held in trust?

Yes. A tribe can apply for a Secretarial Determination under § 292.13 for land not yet held in trust at the same time that it applies under part 151 of this chapter to have the land taken into trust.

Application Contents

§ 292.16 What must an application for a Secretarial Determination contain?

A tribe's application requesting a Secretarial Determination under § 292.13 must include the following information:

(a) The full name, address, and telephone number of the tribe submitting the application;

(b) A description of the location of the land, including a legal description supported by a survey or other document;

(c) Proof of identity of present ownership and title status of the land;

(d) Distance of the land from the tribe's reservation or trust lands, if any, and tribal government headquarters;

(e) Information required by § 292.17 to assist the Secretary in determining whether the proposed gaming establishment will be in the best interest of the tribe and its members;

(f) Information required by § 292.18 to assist the Secretary in determining whether the proposed gaming establishment will not be detrimental to the surrounding community;

(g) The authorizing resolution from the tribe submitting the application;

(h) The tribe's gaming ordinance or resolution approved by the National Indian Gaming Commission in accordance with 25 U.S.C. 2710, if any;

(i) The tribe's organic documents, if any;

(j) The tribe's class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated;

(k) If the tribe has not negotiated a class III gaming compact with the State where the gaming establishment is to be located, the tribe's proposed scope of gaming, including the size of the proposed gaming establishment; and

(l) A copy of the existing or proposed management contract required to be approved by the National Indian Gaming Commission under 25 U.S.C. 2711 and part 533 of this title, if any.

§ 292.17 How must an application describe the benefits and impacts of the proposed gaming establishment to the tribe and its members?

To satisfy the requirements of § 292.16(e), an application must contain:

(a) Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe;

(b) Projected tribal employment, job training, and career development;

(c) Projected benefits to the tribe and its members from tourism;

(d) Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;

(e) Projected benefits to the relationship between the tribe and non-Indian communities;

(f) Possible adverse impacts on the tribe and its members and plans for addressing those impacts;

(g) Distance of the land from the location where the tribe maintains core governmental functions;

(h) Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred from a third party to the tribe or directly to the United States;

(i) Evidence of significant historical connections, if any, to the land; and

(j) Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of any:

(1) Consulting agreements relating to the proposed gaming establishment;

(2) Financial and loan agreements relating to the proposed gaming establishment; and

(3) Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming establishment, or the acquisition of the land where the gaming establishment will be located.

§ 292.18 What information must an application contain on detrimental impacts to the surrounding community?

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:

(a) Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA);

(b) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(c) Anticipated impacts on the economic development, income, and employment of the surrounding community;

(d) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(e) Anticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment;

(f) If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land; and

(g) Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

Consultation

§ 292.19 How will the Regional Director conduct the consultation process?

(a) The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60-day period from:

(1) Appropriate State and local officials; and

(2) Officials of nearby Indian tribes.

(b) Upon written request, the Regional Director may extend the 60-day comment period for an additional 30 days.

(c) After the close of the consultation period, the Regional Director must:

(1) Provide a copy of all comments received during the consultation process to the applicant tribe; and

(2) Allow the tribe to address or resolve any issues raised in the comments.

(d) The applicant tribe must submit written responses, if any, to the Regional Director within 60 days of receipt of the consultation comments.

(e) On written request from the applicant tribe, the Regional Director may extend the 60-day comment period in paragraph (d) of this section for an additional 30 days.

§ 292.20 What information must the consultation letter include?

(a) The consultation letter required by § 292.19(a) must:

(1) Describe or show the location of the proposed gaming establishment;

(2) Provide information on the proposed scope of gaming; and

(3) Include other information that may be relevant to a specific proposal, such as the size of the proposed gaming establishment, if known.

(b) The consultation letter must include a request to the recipients to submit comments, if any, on the following areas within 60 days of receiving the letter:

(1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;

(2) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(3) Anticipated impact on the economic development, income, and employment of the surrounding community;

(4) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(5) Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and

(6) Any other information that may assist the Secretary in determining whether the proposed gaming establishment would or would not be detrimental to the surrounding community.

Evaluation and Concurrence

§ 292.21 How will the Secretary evaluate a proposed gaming establishment?

(a) The Secretary will consider all the information submitted under §§ 292.16–292.19 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members and whether it would or would not be detrimental to the surrounding community.

(b) If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its application has been disapproved, and set forth the reasons for the disapproval.

(c) If the Secretary makes a favorable Secretarial Determination, the Secretary will proceed under § 292.22.

§ 292.22 How does the Secretary request the Governor's concurrence?

If the Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor of the State:

(a) A written notification of the Secretarial Determination and Findings of Fact supporting the determination;

(b) A copy of the entire application record; and

(c) A request for the Governor's concurrence in the Secretarial Determination.

§ 292.23 What happens if the Governor does not affirmatively concur with the Secretarial Determination?

(a) If the Governor provides a written non-concurrence with the Secretarial Determination:

(1) The applicant tribe may use the newly acquired lands only for non-gaming purposes; and

(2) If a notice of intent to take the land into trust has been issued, then the Secretary will withdraw that notice pending a revised application for a non-gaming purpose.

(b) If the Governor does not affirmatively concur in the Secretarial Determination within one year of the date of the request, the Secretary may, at the request of the applicant tribe or the Governor, grant an extension of up to 180 days.

(c) If no extension is granted or if the Governor does not respond during the extension period, the Secretarial Determination will no longer be valid.

§ 292.24 Can the public review the Secretarial Determination?

Subject to restrictions on disclosure required by the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), and the Trade Secrets Act (18 U.S.C. 1905), the Secretarial Determination and the supporting documents will be available for review at the local BIA agency or Regional Office having administrative jurisdiction over the land.

Information Collection

§ 292.25 Do information collections in this part have Office of Management and Budget approval?

The information collection requirements in §§ 292.16, 292.17, and 292.18 have been approved by the Office of Management and Budget (OMB). The information collection control number is 1076–0158. A Federal agency may not collect or sponsor and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control.

Subpart D—Effect of Regulations

§ 292.26 What effect do these regulations have on pending applications, final agency decisions, and opinions already issued?

These regulations apply to all requests pursuant to 25 U.S.C. 2719, except:

(a) These regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.

(b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

Dated: May 12, 2008.

Carl J. Artman,

Assistant Secretary—Indian Affairs.

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TITLE 25--INDIANS

CHAPTER I--BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

PART 83 PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

Sec.

§ 83.1 Definitions.

As used in this part:

Area Office means a Bureau of Indian Affairs Area Office.

Assistant Secretary means the Assistant Secretary--Indian Affairs, or that officer's authorized representative.

Autonomous means the exercise of political influence or authority independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the history, geography, culture and social organization of the petitioning group.

Board means the Interior Board of Indian Appeals.

Bureau means the Bureau of Indian Affairs.

Community means any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. Community must be understood in the context of the history, geography, culture and social organization of the group.

Continental United States means the contiguous 48 states and Alaska.

Continuously or *continuous* means extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption.

Department means the Department of the Interior.

Documented petition means the detailed arguments made by a petitioner to substantiate its claim to continuous existence as an Indian tribe, together with the factual exposition and all documentary evidence necessary to demonstrate that these arguments address the mandatory criteria in § 83.7(a) through (g).

Historically, historical or *history* means dating from first sustained contact with non-Indians.

Indian group or *group* means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

Indian tribe, also referred to herein as *tribe*, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe.

Indigenous means native to the continental United States in that at least part of the petitioner's territory at the time of sustained contact extended into what is now the continental United States.

Informed party means any person or organization, other than an interested party, who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.

Interested party means any person, organization or other entity who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. ``Interested party'' includes the governor and attorney general of the state in which a petitioner is located, and may include, but is not limited to, local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.

Letter of intent means an undocumented letter or resolution by which an Indian group requests Federal acknowledgment as an Indian tribe and expresses its intent to submit a documented petition.

Member of an Indian group means an individual who is recognized by an Indian group as meeting its membership criteria and who consents to being listed as a member of that group.

Member of an Indian tribe means an individual who meets the membership requirements of the tribe as set forth in its governing document or, absent such a document, has been recognized as a member collectively by those persons comprising the tribal governing body, and has consistently maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

Petitioner means any entity that has submitted a letter of intent to the Secretary requesting acknowledgment that it is an Indian tribe.

Political influence or authority means a tribal council, leadership, internal process or other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence. This process is to be understood in the context of the history, culture and social organization of the group.

Previous Federal acknowledgment means action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.

Secretary means the Secretary of the Interior or that officer's authorized representative.

Sustained contact means the period of earliest sustained non-Indian settlement and/or governmental presence in the local area in which the historical tribe or tribes from which the petitioner descends was located historically.

Tribal relations means participation by an individual in a political and social relationship with an Indian tribe.

Tribal roll, for purposes of these regulations, means a list exclusively of those individuals who have been determined by the tribe to meet the tribe's membership requirements as set forth in its governing document. In the absence of such a document, a tribal roll means a list of those recognized as members by the tribe's governing body. In either case, those individuals on a tribal roll must have affirmatively demonstrated consent to being listed as members.

§ 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

§ 83.3 Scope.

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in § 83.7 (a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which a determination is not final and effective. Such petitioners may request a suspension of consideration under § 83.10(g) of not more than 180 days in order to provide additional information or argument.

§ 83.4 Filing a letter of intent.

(a) Any Indian group in the continental United States that believes it should be acknowledged as an Indian tribe and that it can satisfy the criteria in § 83.7 may submit a letter of intent.

(b) Letters of intent requesting acknowledgment that an Indian group exists as an Indian tribe shall be filed with the Assistant Secretary--Indian Affairs, Department of the Interior, 1849 C Street, NW., Washington, DC 20240. Attention: Branch of Acknowledgment and Research, Mail Stop 2611-MIB. A letter of intent may be filed in advance of, or at the same time as, a group's documented petition.

(c) A letter of intent must be produced, dated and signed by the governing body of an Indian group and submitted to the Assistant Secretary.

§ 83.5 Duties of the Department.

(a) The Department shall publish in the Federal Register, no less frequently than every three years, a list of all Indian tribes entitled to receive services from the Bureau by virtue of their status as Indian tribes. The list may be published more frequently, if the Assistant Secretary deems it necessary.

(b) The Assistant Secretary shall make available revised and expanded guidelines for the preparation of documented petitions by September 23, 1994. These guidelines will include an explanation of the criteria and other provisions of the regulations, a discussion of the types of evidence which may be used to demonstrate particular criteria or other provisions of the regulations, and general suggestions and guidelines on how and where to conduct research. The guidelines may be supplemented or updated as necessary. The Department's example of a documented petition format, while preferable, shall not preclude the use of any other format.

(c) The Department shall, upon request, provide petitioners with suggestions and advice regarding preparation of the documented petition. The Department shall not be responsible for the actual research on behalf of the petitioner.

(d) Any notice which by the terms of these regulations must be published in the Federal Register, shall also be mailed to the petitioner, the governor of the state where the group is located, and to other interested parties.

(e) After an Indian group has filed a letter of intent requesting Federal acknowledgment as an Indian tribe and until that group has actually submitted a documented petition, the Assistant Secretary may contact the group periodically and request clarification, in writing, of its intent to continue with the petitioning process.

(f) All petitioners under active consideration shall be notified, by April 16, 1994, of the opportunity under § 83.3(g) to choose whether to complete their petitioning process under the provisions of these revised regulations or the previous regulations as published, on September 5, 1978, at 43 FR 39361.

(g) All other groups that have submitted documented petitions or letters of intent shall be notified of and provided with a copy of these regulations by July 25, 1994.

§ 83.6 General provisions for the documented petition.

(a) The documented petition may be in any readable form that contains detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence.

(b) The documented petition must include a certification, signed and dated by members of the group's governing body, stating that it is the group's official documented petition.

(c) A petitioner must satisfy all of the criteria in paragraphs (a) through (g) of § 83.7 in order for tribal existence to be acknowledged. Therefore, the documented petition must include thorough explanations and supporting documentation in response to all of the criteria. The definitions in § 83.1 are an integral part of the regulations, and the criteria should be read carefully together with these definitions.

(d) A petitioner may be denied acknowledgment if the evidence available demonstrates that it does not meet one or more criteria. A petitioner may also be denied if there is insufficient evidence that it meets one or more of the criteria. A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.

(e) Evaluation of petitions shall take into account historical situations and time periods for which evidence is demonstrably limited or not available. The limitations inherent in demonstrating the historical existence of community and political influence or authority shall

also be taken into account. Existence of community and political influence or authority shall be demonstrated on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment under these criteria.

(f) The criteria in § 83.7 (a) through (g) shall be interpreted as applying to tribes or groups that have historically combined and functioned as a single autonomous political entity.

(g) The specific forms of evidence stated in the criteria in § 83.7 (a) through (c) and § 83.7(e) are not mandatory requirements. The criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criterion statement and related definitions.

§ 83.7 Mandatory criteria for Federal acknowledgment.

The mandatory criteria are:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members.

(1) Identification as an Indian entity by Federal authorities.
(2) Relationships with State governments based on identification of the group as Indian.
(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.
(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.
(5) Identification as an Indian entity in newspapers and books.
(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(1) This criterion may be demonstrated by some combination of the following evidence and/or other evidence that the petitioner meets the definition of community set forth in § 83.1:

(i) Significant rates of marriage within the group, and/or, as may be culturally required, patterned out-marriages with other Indian populations.
(ii) Significant social relationships connecting individual members.
(iii) Significant rates of informal social interaction which exist broadly among the members of a group.
(iv) A significant degree of shared or cooperative labor or other economic activity among the membership.

(v) Evidence of strong patterns of discrimination or other social distinctions by non-members.

(vi) Shared sacred or secular ritual activity encompassing most of the group.

(vii) Cultural patterns shared among a significant portion of the group that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization, or religious beliefs and practices.

(viii) The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.

(ix) A demonstration of historical political influence under the criterion in § 83.7(c) shall be evidence for demonstrating historical community.

(2) A petitioner shall be considered to have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any one of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community;

(ii) At least 50 percent of the marriages in the group are between members of the group;

(iii) At least 50 percent of the group members maintain distinct cultural patterns such as, but not limited to, language, kinship organization, or religious beliefs and practices;

(iv) There are distinct community social institutions encompassing most of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The group has met the criterion in § 83.7(c) using evidence described in § 83.7(c)(2).

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(1) This criterion may be demonstrated by some combination of the evidence listed below and/or by other evidence that the petitioner meets the definition of political influence or authority in § 83.1.

(i) The group is able to mobilize significant numbers of members and significant resources from its members for group purposes.

(ii) Most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication and involvement in political processes by most of the group's members.

(iv) The group meets the criterion in § 83.7(b) at more than a minimal level.

(v) There are internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions.

(2) A petitioning group shall be considered to have provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders and/or other mechanisms exist or existed which:

(i) Allocate group resources such as land, residence rights and the like on a consistent basis.
(ii) Settle disputes between members or subgroups by mediation or other means on a regular basis;
(iii) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior;
(iv) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(3) A group that has met the requirements in paragraph 83.7(b)(2) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time.

(d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

(1) Evidence acceptable to the Secretary which can be used for this purpose includes but is not limited to:
(i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes;
(ii) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
(iii) Church, school, and other similar enrollment records identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
(v) Other records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(2) The petitioner must provide an official membership list, separately certified by the group's governing body, of all known current members of the group. This list must include each member's full name (including maiden name), date of birth, and current residential address. The petitioner must also provide a copy of each available former list of members based on the group's own defined criteria, as well as a statement describing the circumstances surrounding the preparation of the current list and, insofar as possible, the circumstances surrounding the preparation of former lists.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

§ 83.8 Previous Federal acknowledgment.

(a) Unambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment. If a petitioner provides substantial evidence of unambiguous Federal acknowledgment, the petitioner will then only be required to demonstrate that it meets the requirements of § 83.7 to the extent required by this section.

(b) A determination of the adequacy of the evidence of previous Federal action acknowledging tribal status shall be made during the technical assistance review of the documented petition conducted pursuant to § 83.10(b). If a petition is awaiting active consideration at the time of adoption of these regulations, this review will be conducted while the petition is under active consideration unless the petitioner requests in writing that this review be made in advance.

(c) Evidence to demonstrate previous Federal acknowledgment includes, but is not limited to:

(1) Evidence that the group has had treaty relations with the United States.

(2) Evidence that the group has been denominated a tribe by act of Congress or Executive Order.

(3) Evidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds.

(d) To be acknowledged, a petitioner that can demonstrate previous Federal acknowledgment must show that:

(1) The group meets the requirements of the criterion in § 83.7(a), except that such identification shall be demonstrated since the point of last Federal acknowledgment. The group must further have been identified by such sources as the same tribal entity that was previously acknowledged or as a portion that has evolved from that entity.

(2) The group meets the requirements of the criterion in § 83.7(b) to demonstrate that it comprises a distinct community at present. However, it need not provide evidence to demonstrate existence as a community historically.

(3) The group meets the requirements of the criterion in § 83.7(c) to demonstrate that political influence or authority is exercised within the group at present. Sufficient

evidence to meet the criterion in § 83.7(c) from the point of last Federal acknowledgment to the present may be provided by demonstration of substantially continuous historical identification, by authoritative, knowledgeable external sources, of leaders and/or a governing body who exercise political influence or authority, together with demonstration of one form of evidence listed in § 83.7(c).
(4) The group meets the requirements of the criteria in paragraphs 83.7 (d) through (g).
(5) If a petitioner which has demonstrated previous Federal acknowledgment cannot meet the requirements in paragraphs (d) (1) and (3), the petitioner may demonstrate alternatively that it meets the requirements of the criteria in § 83.7 (a) through (c) from last Federal acknowledgment until the present.

§ 83.9 Notice of receipt of a petition.

(a) Within 30 days after receiving a letter of intent, or a documented petition if a letter of intent has not previously been received and noticed, the Assistant Secretary shall acknowledge such receipt in writing and shall have published within 60 days in the Federal Register a notice of such receipt. This notice must include the name, location, and mailing address of the petitioner and such other information as will identify the entity submitting the letter of intent or documented petition and the date it was received. This notice shall also serve to announce the opportunity for interested parties and informed parties to submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment and/or to request to be kept informed of all general actions affecting the petition. The notice shall also indicate where a copy of the letter of intent and the documented petition may be examined.

(b) The Assistant Secretary shall notify, in writing, the governor and attorney general of the state in which a petitioner is located. The Assistant Secretary shall also notify any recognized tribe and any other petitioner which appears to have a historical or present relationship with the petitioner or which may otherwise be considered to have a potential interest in the acknowledgment determination.

(c) The Assistant Secretary shall also publish the notice of receipt of the letter of intent, or documented petition if a letter of intent has not been previously received, in a major newspaper or newspapers of general circulation in the town or city nearest to the petitioner. The notice will include all of the information in paragraph (a) of this section.

§ 83.10 Processing of the documented petition.

(a) Upon receipt of a documented petition, the Assistant Secretary shall cause a review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe. The review shall include consideration of the documented petition and the factual statements contained therein. The Assistant Secretary may also initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status. The Assistant Secretary may likewise consider any evidence which may be submitted by interested parties or informed parties.

(b) Prior to active consideration of the documented petition, the Assistant Secretary shall conduct a preliminary review of the petition for purposes of technical assistance.

(1) This technical assistance review does not constitute the Assistant Secretary's review to determine if the petitioner is entitled to be acknowledged as an Indian tribe. It is a preliminary review for the purpose of providing the petitioner an opportunity to supplement or revise the documented petition prior to active consideration. Insofar as possible, technical assistance reviews under this paragraph will be conducted in the order of receipt of documented petitions. However, technical assistance reviews will not have priority over active consideration of documented petitions.

(2) After the technical assistance review, the Assistant Secretary shall notify the petitioner by letter of any obvious deficiencies or significant omissions apparent in the documented petition and provide the petitioner with an opportunity to withdraw the documented petition for further work or to submit additional information and/or clarification.

(3) If a petitioner's documented petition claims previous Federal acknowledgment and/or includes evidence of previous Federal acknowledgment, the technical assistance review will also include a review to determine whether that evidence is sufficient to meet the requirements of previous Federal acknowledgment as defined in § 83.1.

(c) Petitioners have the option of responding in part or in full to the technical assistance review letter or of requesting, in writing, that the Assistant Secretary proceed with the active consideration of the documented petition using the materials already submitted.

(1) If the petitioner requests that the materials submitted in response to the technical assistance review letter be again reviewed for adequacy, the Assistant Secretary will provide the additional review. However, this additional review will not be automatic and will be conducted only at the request of the petitioner.

(2) If the assertion of previous Federal acknowledgment under § 83.8 cannot be substantiated during the technical assistance review, the petitioner must respond by providing additional evidence. A petitioner claiming previous Federal acknowledgment who fails to respond to a technical assistance review letter under this paragraph, or whose response fails to establish the claim, shall have its documented petition considered on the same basis as documented petitions submitted by groups not claiming previous Federal acknowledgment. Petitioners that fail to demonstrate previous Federal acknowledgment after a review of materials submitted in response to the technical assistance review shall be so notified. Such petitioners may submit additional materials concerning previous acknowledgment during the course of active consideration.

(d) The order of consideration of documented petitions shall be determined by the date of the Bureau's notification to the petitioner that it considers that the documented petition is ready to be placed on active consideration. The Assistant Secretary shall establish and maintain a numbered register of documented petitions which have been determined ready for active consideration. The Assistant Secretary shall also maintain a numbered register of letters of intent or incomplete petitions based on the original date of filing with the Bureau. In the event that two or more documented petitions are determined ready for active consideration on the same date, the register

of letters of intent or incomplete petitions shall determine the order of consideration by the Assistant Secretary.

(e) Prior to active consideration, the Assistant Secretary shall investigate any petitioner whose documented petition and response to the technical assistance review letter indicates that there is little or no evidence that establishes that the group can meet the mandatory criteria in paragraph (e), (f) or (g) of § 83.7.

(1) If this review finds that the evidence clearly establishes that the group does not meet the mandatory criteria in paragraph (e), (f) or (g) of § 83.7, a full consideration of the documented petition under all seven of the mandatory criteria will not be undertaken pursuant to paragraph (a) of this section. Rather, the Assistant Secretary shall instead decline to acknowledge that the petitioner is an Indian tribe and publish a proposed finding to that effect in the Federal Register. The periods for receipt of comments on the proposed finding from petitioners, interested parties and informed parties, for consideration of comments received, and for publication of a final determination regarding the petitioner's status shall follow the timetables established in paragraphs (h) through (l) of this section.

(2) If the review cannot clearly demonstrate that the group does not meet one or more of the mandatory criteria in paragraph (e), (f) or (g) of § 83.7, a full evaluation of the documented petition under all seven of the mandatory criteria shall be undertaken during active consideration of the documented petition pursuant to paragraph (g) of this section.

(f) The petitioner and interested parties shall be notified when the documented petition comes under active consideration.

(1) They shall also be provided with the name, office address, and telephone number of the staff member with primary administrative responsibility for the petition; the names of the researchers conducting the evaluation of the petition; and the name of their supervisor.

(2) The petitioner shall be notified of any substantive comment on its petition received prior to the beginning of active consideration or during the preparation of the proposed finding, and shall be provided an opportunity to respond to such comments.

(g) Once active consideration of the documented petition has begun, the Assistant Secretary shall continue the review and publish proposed findings and a final determination in the Federal Register pursuant to these regulations, notwithstanding any requests by the petitioner or interested parties to cease consideration. The Assistant Secretary has the discretion, however, to suspend active consideration of a documented petition, either conditionally or for a stated period of time, upon a showing to the petitioner that there are technical problems with the documented petition or administrative problems that temporarily preclude continuing active consideration. The Assistant Secretary shall also consider requests by petitioners for suspension of consideration and has the discretion to grant such requests for good cause. Upon resolution of the technical or administrative problems that are the basis for the suspension, the documented petition will have priority on the numbered register of documented petitions insofar as possible. The Assistant Secretary shall notify the petitioner and interested parties when active

consideration of the documented petition is resumed. The timetables in succeeding paragraphs shall begin anew upon the resumption of active consideration.

(h) Within one year after notifying the petitioner that active consideration of the documented petition has begun, the Assistant Secretary shall publish proposed findings in the Federal Register. The Assistant Secretary has the discretion to extend that period up to an additional 180 days. The petitioner and interested parties shall be notified of the time extension. In addition to the proposed findings, the Assistant Secretary shall prepare a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision. Copies of the report shall be provided to the petitioner, interested parties, and informed parties and made available to others upon written request.

(i) Upon publication of the proposed findings, the petitioner or any individual or organization wishing to challenge or support the proposed findings shall have 180 days to submit arguments and evidence to the Assistant Secretary to rebut or support the proposed finding. The period for comment on a proposed finding may be extended for up to an additional 180 days at the Assistant Secretary's discretion upon a finding of good cause. The petitioner and interested parties shall be notified of the time extension. Interested and informed parties who submit arguments and evidence to the Assistant Secretary must provide copies of their submissions to the petitioner.

(j)(1) During the response period, the Assistant Secretary shall provide technical advice concerning the factual basis for the proposed finding, the reasoning used in preparing it, and suggestions regarding the preparation of materials in response to the proposed finding. The Assistant Secretary shall make available to the petitioner in a timely fashion any records used for the proposed finding not already held by the petitioner, to the extent allowable by Federal law.

(2) In addition, the Assistant Secretary shall, if requested by the petitioner or any interested party, hold a formal meeting for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding. The proceedings of this meeting shall be on the record. The meeting record shall be available to any participating party and become part of the record considered by the Assistant Secretary in reaching a final determination.

(k) The petitioner shall have a minimum of 60 days to respond to any submissions by interested and informed parties during the response period. This may be extended at the Assistant Secretary's discretion if warranted by the extent and nature of the comments. The petitioner and interested parties shall be notified by letter of any extension. No further comments from interested or informed parties will be accepted after the end of the regular response period.

(l) At the end of the period for comment on a proposed finding, the Assistant Secretary shall consult with the petitioner and interested parties to determine an equitable timeframe for consideration of written arguments and evidence submitted during the response period. The petitioner and interested parties shall be notified of the date such consideration begins.

(1) Unsolicited comments submitted after the close of the response period established in § 83.10(i) and § 83.10(k), will not be considered in preparation of a final determination.

The Assistant Secretary has the discretion during the preparation of the proposed finding, however, to request additional explanations and information from the petitioner or from commenting parties to support or supplement their comments on a proposed finding. The Assistant Secretary may also conduct such additional research as is necessary to evaluate and supplement the record. In either case, the additional materials will become part of the petition record.

(2) After consideration of the written arguments and evidence rebutting or supporting the proposed finding and the petitioner's response to the comments of interested parties and informed parties, the Assistant Secretary shall make a final determination regarding the petitioner's status. A summary of this determination shall be published in the Federal Register within 60 days from the date on which the consideration of the written arguments and evidence rebutting or supporting the proposed finding begins.

(3) The Assistant Secretary has the discretion to extend the period for the preparation of a final determination if warranted by the extent and nature of evidence and arguments received during the response period. The petitioner and interested parties shall be notified of the time extension.

(4) The determination will become effective 90 days from publication unless a request for reconsideration is filed pursuant to § 83.11.

(m) The Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies all of the criteria in § 83.7. The Assistant Secretary shall decline to acknowledge that a petitioner is an Indian tribe if it fails to satisfy any one of the criteria in § 83.7.

(n) If the Assistant Secretary declines to acknowledge that a petitioner is an Indian tribe, the petitioner shall be informed of alternatives, if any, to acknowledgment under these procedures. These alternatives may include other means through which the petitioning group may achieve the status of an acknowledged Indian tribe or through which any of its members may become eligible for services and benefits from the Department as Indians, or become members of an acknowledged Indian tribe.

(o) The determination to decline to acknowledge that the petitioner is an Indian tribe shall be final for the Department.

(p) A petitioner that has petitioned under this part or under the acknowledgment regulations previously effective and that has been denied Federal acknowledgment may not re-petition under this part. The term ``petitioner'' here includes previously denied petitioners that have reorganized or been renamed or that are wholly or primarily portions of groups that have previously been denied under these or previous acknowledgment regulations.

§ 83.11 Independent review, reconsideration and final action.

(a)(1) Upon publication of the Assistant Secretary's determination in the Federal Register, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals. Petitioners which choose under § 83.3(g) to be considered under previously

effective acknowledgment regulations may nonetheless request reconsideration under this section.

(2) A petitioner's or interested party's request for reconsideration must be received by the Board no later than 90 days after the date of publication of the Assistant Secretary's determination in the Federal Register. If no request for reconsideration has been received, the Assistant Secretary's decision shall be final for the Department 90 days after publication of the final determination in the Federal Register.

(b) The petitioner's or interested party's request for reconsideration shall contain a detailed statement of the grounds for the request, and shall include any new evidence to be considered.

(1) The detailed statement of grounds for reconsideration filed by a petitioner or interested parties shall be considered the appellant's opening brief provided for in 43 CFR 4.311(a).

(2) The party or parties requesting the reconsideration shall mail copies of the request to the petitioner and all other interested parties.

(c)(1) The Board shall dismiss a request for reconsideration that is not filed by the deadline specified in paragraph (a) of this section.

(2) If a petitioner's or interested party's request for reconsideration is filed on time, the Board shall determine, within 120 days after publication of the Assistant Secretary's final determination in the Federal Register, whether the request alleges any of the grounds in paragraph (d) of this section and shall notify the petitioner and interested parties of this determination.

(d) The Board shall have the authority to review all requests for reconsideration that are timely and that allege any of the following:

(1) That there is new evidence that could affect the determination; or

(2) That a substantial portion of the evidence relied upon in the Assistant Secretary's determination was unreliable or was of little probative value; or

(3) That petitioner's or the Bureau's research appears inadequate or incomplete in some material respect; or

(4) That there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria in § 83.7 (a) through (g).

(e) The Board shall have administrative authority to review determinations of the Assistant Secretary made pursuant to § 83.10(m) to the extent authorized by this section.

(1) The regulations at 43 CFR 4.310-4.318 and 4.331-4.340 shall apply to proceedings before the Board except when they are inconsistent with these regulations.

(2) The Board may establish such procedures as it deems appropriate to provide a full and fair evaluation of a request for reconsideration under this section to the extent they are not inconsistent with these regulations.

(3) The Board, at its discretion, may request experts not associated with the Bureau, the petitioner, or interested parties to provide comments, recommendations, or technical

advice concerning the determination, the administrative record, or materials filed by the petitioner or interested parties. The Board may also request, at its discretion, comments or technical assistance from the Assistant Secretary concerning the final determination or, pursuant to paragraph (e)(8) of this section, the record used for the determination.

(4) Pursuant to 43 CFR 4.337(a), the Board may require, at its discretion, a hearing conducted by an administrative law judge of the Office of Hearings and Appeals if the Board determines that further inquiry is necessary to resolve a genuine issue of material fact or to otherwise augment the record before it concerning the grounds for reconsideration.

(5) The detailed statement of grounds for reconsideration filed by a petitioner or interested parties pursuant to paragraph (b)(1) of this section shall be considered the appellant's opening brief provided for in 43 CFR 4.311(a).

(6) An appellant's reply to an opposing party's answer brief, provided for in 43 CFR 4.311(b), shall not apply to proceedings under this section, except that a petitioner shall have the opportunity to reply to an answer brief filed by any party that opposes a petitioner's request for reconsideration.

(7) The opportunity for reconsideration of a Board decision provided for in 43 CFR 4.315 shall not apply to proceedings under this section.

(8) For purposes of review by the Board, the administrative record shall consist of all appropriate documents in the Branch of Acknowledgment and Research relevant to the determination involved in the request for reconsideration. The Assistant Secretary shall designate and transmit to the Board copies of critical documents central to the portions of the determination under a request for reconsideration. The Branch of Acknowledgment and Research shall retain custody of the remainder of the administrative record, to which the Board shall have unrestricted access.

(9) The Board shall affirm the Assistant Secretary's determination if the Board finds that the petitioner or interested party has failed to establish, by a preponderance of the evidence, at least one of the grounds under paragraphs (d)(1)--(d)(4) of this section.

(10) The Board shall vacate the Assistant Secretary's determination and remand it to the Assistant Secretary for further work and reconsideration if the Board finds that the petitioner or an interested party has established, by a preponderance of the evidence, one or more of the grounds under paragraphs (d)(1)--(d)(4) of this section.

(f)(1) The Board, in addition to making its determination to affirm or remand, shall describe in its decision any grounds for reconsideration other than those in paragraphs (d)(1)--(d)(4) of this section alleged by a petitioner's or interested party's request for reconsideration.

(2) If the Board affirms the Assistant Secretary's decision under § 83.11(e)(9) but finds that the petitioner or interested parties have alleged other grounds for reconsideration, the Board shall send the requests for reconsideration to the Secretary. The Secretary shall have the discretion to request that the Assistant Secretary reconsider the final determination on those grounds.

(3) The Secretary, in reviewing the Assistant Secretary's decision, may review any information available, whether formally part of the record or not. Where the Secretary's review relies upon information that is not formally part of the record, the Secretary shall

insert the information relied upon into the record, together with an identification of its source and nature.

(4) Where the Board has sent the Secretary a request for reconsideration under paragraph (f)(2), the petitioner and interested parties shall have 30 days from receiving notice of the Board's decision to submit comments to the Secretary. Where materials are submitted to the Secretary opposing a petitioner's request for reconsideration, the interested party shall provide copies to the petitioner and the petitioner shall have 15 days from their receipt of the information to file a response with the Secretary.

(5) The Secretary shall make a determination whether to request a reconsideration of the Assistant Secretary's determination within 60 days of receipt of all comments and shall notify all parties of the decision.

(g)(1) The Assistant Secretary shall issue a reconsidered determination within 120 days of receipt of the Board's decision to remand a determination or the Secretary's request for reconsideration.

(2) The Assistant Secretary's reconsideration shall address all grounds determined to be valid grounds for reconsideration in a remand by the Board, other grounds described by the Board pursuant to paragraph (f)(1), and all grounds specified in any Secretarial request. The Assistant Secretary's reconsideration may address any issues and evidence consistent with the Board's decision or the Secretary's request.

(h)(1) If the Board finds that no petitioner's or interested party's request for reconsideration is timely, the Assistant Secretary's determination shall become effective and final for the Department 120 days from the publication of the final determination in the Federal Register.

(2) If the Secretary declines to request reconsideration under paragraph (f)(2) of this section, the Assistant Secretary's decision shall become effective and final for the Department as of the date of notification to all parties of the Secretary's decision.

(3) If a determination is reconsidered by the Assistant Secretary because of action by the Board remanding a decision or because the Secretary has requested reconsideration, the reconsidered determination shall be final and effective upon publication of the notice of this reconsidered determination in the Federal Register.

§ 83.12 Implementation of decisions.

(a) Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

(b) Upon acknowledgment as an Indian tribe, the list of members submitted as part of the petitioners documented petition shall be the tribe's complete base roll for purposes of Federal

funding and other administrative purposes. For Bureau purposes, any additions made to the roll, other than individuals who are descendants of those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of § 83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition).

(c) While the newly acknowledged tribe shall be considered eligible for benefits and services available to federally recognized tribes because of their status as Indian tribes, acknowledgment of tribal existence shall not create immediate access to existing programs. The tribe may participate in existing programs after it meets the specific program requirements, if any, and upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly acknowledged tribe.

(d) Within six months after acknowledgment, the appropriate Area Office shall consult with the newly acknowledged tribe and develop, in cooperation with the tribe, a determination of needs and a recommended budget. These shall be forwarded to the Assistant Secretary. The recommended budget will then be considered along with other recommendations by the Assistant Secretary in the usual budget request process.

§ 83.13 Information collection.

(a) The collections of information contained in § 83.7 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1076-0104. The information will be used to establish historical existence as a tribe, verify family relationships and the group's claim that its members are Indian and descend from a historical tribe or tribes which combined, that members are not substantially enrolled in other Indian tribes, and that they have not individually or as a group been terminated or otherwise forbidden the Federal relationship. Response is required to obtain a benefit in accordance with 25 U.S.C. 2.

(b) Public reporting burden for this information is estimated to average 1,968 hours per petition, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this collection of information, including suggestions for reducing the burden, to both the Information Collection Clearance Officer, Bureau of Indian Affairs, Mail Stop 336-SIB, 1849 C Street, NW., Washington, DC 20240; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

U.S GENERAL ACCOUNTING OFFICE

DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

VOLUME 5

JULY 1, 1925 TO JUNE 30, 1926

J. R. McCARL
Comptroller General

LURTIN R. GINN
Assistant Comptroller General

WASHINGTON
GOVERNMENT PRINTING OFFICE
1926

qualified he is entitled to take rank in accordance with his seniority in the grade from which promoted. Clearly the practice of the department, necessitated by the provisions of law herein cited, was known to and considered by the Congress in this legislation of 1916.

Decisions of the former accounting officers so far as inconsistent with the conclusion herein reached will not be hereafter followed. On review the settlement is modified and allowance will be made of the pay of a captain from June 30, 1919, the date of rank stated in Captain Stevenson's commission, he having been promoted pursuant to law.

(A–10549)

APPROPRIATIONS—RELIEF OF INDIGENT INDIANS

There exists no relation of guardian and ward between the Federal Government and Indians who have no property held in trust by the United States, have never lived on an Indian reservation, belong to no tribe with which there is an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress. The duty of relieving the indigency of such Indians devolves upon the local authorities the same as in the case of any other indigent citizens of the State and county in which they reside.

Acting Comptroller General Ginn to the Secretary of the Interior, August 3, 1925:

I have your letter of July 18, 1925, forwarding communication from the Commissioner of Indian Affairs dated July 17, 1925, and requesting decision whether either of two appropriations made by the act of March 3, 1925, 43 Stat. 1158, 1159, is available for the relief and care of certain old and indigent Indians described in the commissioner's letter as follows:

> The Board of Commissioners of White Pine County, Nevada, has presented to this office the matter of aid for twenty old and indigent Indians unable to provide for themselves. It is stated that these Indians do not belong to any named tribe, but appear to be a mixture of Shoshone and Paiute, and that, having been raised around the ranches of the white people, they have never belonged to or resided upon a reservation. In other words, they have the status of many other Indians of Nevada and may be termed "scattered non-reservation Indians." They have no property held in trust for them by the Federal Government.

The two appropriations mentioned in the submission are, "Relieving distress and prevention, etc., of diseases among Indians, 1926," and "Support and civilization of Indians, 1926." The first of these provides $700,000 "for the relief and care of destitute Indians not otherwise provided for, and for the prevention and treatment of tuberculosis, trachoma, smallpox, and other contagious and infectious diseases, including transportation of patients to and from hospitals and sanatoria." The appropriation "Support and civilization of Indians, 1926," provides for an amount not to exceed

$25,000 "for general support and civilization of Indians, including pay of employees," in Nevada.

In connection with the determination of the availability of either of these two funds for use in relieving the distress of indigent Indians there is for consideration the matter of guardian and ward relationship between the Federal Government and the Indians and the matter of State responsibility since the enactment of the act of June 2, 1924, 43 Stat. 253, in which all noncitizen Indians born within the territorial limits of the United States were given citizenship in the United States with the proviso that "the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

It may be stated as a general rule that the granting of citizenship to Indians does not alter the relationship of guardian and ward between such Indians and the Federal Government in a case where property is held in trust for them, or they are living on a reservation set aside for their use, or are members of a tribe or nation accorded certain rights and privileges by treaty or by Federal statutes. But where the Indian has no property held in trust, has never lived on an Indian reservation, belongs to no tribe with which there is an existing treaty, has adopted the habits of civilized life and has become a citizen of the United States by virtue of an act of Congress, there would appear to be no relation of guardian and ward existing between him and the Government. *United States* v. *Senfert Bros. Co.*, 233 Fed. Rep. 579.

From the facts submitted it does not appear that there is any obligation on the part of the Federal Government to furnish relief to the Indians referred to, the duty to care for them devolving upon the local authorities just as in the case of any other indigent citizens of the State and county in which they reside.

Accordingly, it must be held that upon the facts appearing neither of the appropriations referred to may be used for the proposed relief.

(A–10292)

CONTRACTS—LIQUIDATED DAMAGES

Where contracts for the furnishing of envelopes, entered into pursuant to the act of June 26, 1906, 34 Stat. 476, require the delivery of the envelopes within a specified number of "working days" after receipt of the order and contain a provision for the deduction of liquidated damages for "each day's delay" in delivery, working days only should be counted in computing the amount to be deducted, Sundays and holidays being excluded.

Decision by Acting Comptroller General Ginn, August 4, 1925:

There is before this office for consideration in connection with the audit of the accounts of disbursing officers making payments under

Apparently, the Shell Petroleum Company wishes to purchase this lease, but wants to be as-

sured that the court had authority to award it to Westheimer and that proper procedural steps were taken in that action.

I have refused to render a formal opinion, but have indicated that the Department is not disposed to question the authority of the court to award a lease to a higher bidder. A copy of my letter to Mr. Haraway is attached. I took that position principally because of the fact that if the Department formally passes on this transaction, it may be called upon to pass on all conveyances of interest in land owned by full-blood Indians heirs, which have been approved by the Oklahoma county courts under the act of January 27, 1933, supra.

A brief review of the act of January 27, 1933, suggests, however, that the department should know what procedure is not being followed by the United States tribal attorneys under this act. The statute presents some new problems as to the authority of the court and as to the procedure that is to be followed by that court in approving these conveyances. The act provides:

> "That it shall be the duty of the attorneys provided for under the Act of May 27, 1908 (35 Stat. L. 312), to appear and represent any restricted member of the Five Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court thereof, in any matter in which said restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any county court approving the sale of any interest in land, to the district court of the district of which the county is a part."

Heretofore, the Department has taken the position that it was not disposed to question leases or conveyances of lands inherited by full-blood Indians, accepting the rule laid down in the case of United States v. *Gypsy Oil Company* (10 Fed. (2d) 487), where it was held that the want of approval of such a lease by the Secretary of the Interior was immaterial to its validity. Under the new act, it appears that conveyances of these interests in land are only valid if approved in the manner prescribed in the statute. It would seem to follow that if, in a given instance, the correct procedure were not followed, the validity of the lease might be questioned in a collateral proceeding. For this reason, the Department should know what procedure is being followed, and it may be interested in making some uniform regulations with respect to this procedure.

I suggest that you instruct the superintendent of the Five Civilized Tribes to make an investigation of this matter and submit a report to you. When such report is received by you, if any problems are presented which call for my further consideration, you can then make a formal request for an opinion on those points.

Solicitor.

IRA INTERPRETATION REGARDING DEVISEE QUESTIONS-TRIBAL ORGANIZATION AND

JURISDICTION-DEFINITION OF TRIBE AS POLITICAL ENTITY

M-27796 *November 7,* 1934.

The Honorable,
The Secretary of the Interior.

MY DEAR MR. SECRETARY:

My opinion has been requested on the question of whether, under the provisions of the Wheeler Howard Act (act of June 18, 1934, Public No. 383, 73d Congress), devisees other than heirs at law under wills of restricted Indians must be confined to the Indians of the same reservation without regard to original tribal blood or affiliation.

Section 4 of the Wheeler-Howard Act prohibits all transfers of restricted Indian lands except such as are specifically sanctioned by the terms of the section. The only such provision relevant to the present question declares that:

> "restricted Indian lands may * * * be sold, devised or otherwise transferred to the Indian tribe in which the lands * * * are located * * * to a successor corporation; and in all instances such lands * * * shall descend or be devised * * * to any member of such tribe or of such corporation or any heirs of such member."

The phrase "any member of such tribe or of such corporation" clearly refers to the earlier phrase "to the Indian tribe in which the lands * * * are located * * * or to a successor corporation." It is upon the ambiguity of this phrase that the question proposed turns.

Strictly speaking, this phrase involves a misuse of language. Indian lands cannot properly be said to be located in a tribe. A tribe is not a geographical but a political entity. What may be located in

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the tribe is a certain legal authority or jurisdiction with respect to the lands in question. I think it fair to infer, in the light of the general scheme of Indian community control which the Wheeler Howard Act contemplates, that the phrase "the Indian tribe in which the lands are located" was used to designate that tribe which has some sort of jurisdiction over the lands in question.

It is contemplated that this matter will eventually be dealt with in the constitutions and bylaws of the various tribes, authorized by section 16 of the Wheeler-Howard Act. If a given tribe, so organized, is granted jurisdiction over an entire reservation, then any lands of the reservation may be devised to any member of the tribe, as such tribe may be defined by its own constitution, approved by the Secretary of the Interior. If, on the other hand, two organized tribes exercise authority within a single reservation, then the constitution of the two tribes will presumably define the lands over which each political entity may exercise control, and devises of such land must conform to this separation. Finally, if a given tribe, organized as a unit, exercises authority over lands in more than one reservation, then any such lands may be devised to any of the members of the tribe, regardless of their reservational affiliations.

The question of how Indian tribes should be organized, under section 16 of the Wheeler-Howard Act, is an administrative question.

Section 19 of the Wheeler-Howard Act provides:

> "The term 'tribe' wherever used in this act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."

It is clearly the purport of this definition that any one of these groupings may be recognized as entitled to tribal status.

In my opinion the Wheeler-Howard Act permits the organization as a tribe of any of the following groups:

(a) A band or tribe which has only a partial interest in the lands of a single reservation;

(b) A band or tribe which has rights coextensive with a single reservation;

(c) A group of Indians residing on a single reservation, who may be recognized as a "tribe" for purposes of the Wheeler-Howard Act regardless of former affiliations;

(d) A tribe whose members are scattered over two or more reservations in which they have property rights as members of such tribe.

In many reservations a choice must be made among the foregoing possibilities. This choice, according to section 18 of the Wheeler-Howard Act, will be made by the vote of the Indians, subject to the approval of the Secretary of the Interior.

The foregoing considerations do not throw any light on the situation prior to tribal organization under section 16. Prior to such organization the question of what tribal organization has any jurisdiction over restricted allotted lands of individual Indians is a matter of some uncertainty.

I am of the opinion that the most significant criterion of jurisdiction, where no constitution, has been adopted, is the historical test to what band, tribe, or group of tribes did the land in question belong at the time when it was allotted? As a general rule, the owner of restricted land will have the right to devise such land to any members of that band, tribe, or group of tribes.

Thus, if the land of a given reservation was owned at the time of its allotment by a single tribe, any member of that tribe will be a qualified devisee of any allotment of such land. If the land was owned jointly by a group of tribes, any member of any of these tribes will be a qualified devisee of any allotment. If the land of the reservation was owned by a single band of some larger tribe or nation, then only members of that band will be qualified devisees. If the land was owned jointly by a group of bands, any member of any such band will be a qualified devisee. If part of the reservation was owned by one group of Indians and part of the reservation was owned by another group of Indians, land within each part of the reservation may be devised to members of the proper group.

The general rule above propounded may prove inadequate where tribes have been divided up or consolidated after the allotment of some or all of the tribal lands, e.g., where certain land was owned by tribe A until allotment and was then allotted to Band X of Tribe A, or vice versa, or where land was owned by Tribe A when allotment began and later came under the tribal ownership of some smaller band of Tribe A or of some larger nation or confederacy, or where a tribe that existed at the time of allotment has ceased to exist or become merged with other tribes. Questions of jurisdiction that may arise in these

peculiar circumstances will be considered on their merits when they are presented.

It should be noted that the tribal affiliation of the testator is immaterial. Restricted land formerly occupied by Tribe A may have passed by inheritance or otherwise to a member of Tribe B. In accordance with the principles land down above, such land can be devised only to members of Tribe A. This is required by the language of section 4

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and is in conformity with the purpose of consolidating Indian Lands.

Furthermore, the residence of the devisee is immaterial. All that need be shown is his continuing membership in the tribe which has jurisdiction over the lands in question.

I am of the opinion that your basic question is to be answered by an unqualified negative. Restricted lands may be devised to Indians who are members of a tribe having recognized jurisdiction over the lands in question. This may be done even though such members do not reside upon (or have any other official connection with) the reservation in which such land is included.

NATHAN R. MARGOLD,

Solicitor.

Approved: November 7, 1934.
OSCAR L. CHAPMAN, *Assistant Secretary*.

SHOSHONE--OIL LEASE--OPERATIONS

November 12, 1934.

Memorandum for the Commissioner of Indian Affairs.

I am returning your letter of October 27 regarding the application of the Hudson Oil Company for an order *nunc pro tunc* entered as of February 21, 1928, authorizing the discontinuance of the operation of the .producing wells on two oil and gas leases (Nos. 850M and 2461M) covering lands allotted to Shoshone Indians, the discontinuance or suspension of operations to continue until the Secretary of the Interior shall require that the lessee resume operations, or until the lessee shall voluntarily resume operations.

You recommend approval of the application subject to the payment of rentals from February 1, 1928.

Lease No. 850M was approved September 18, 1916, for a term of ten years from the date of approval and as much longer thereafter as oil or gas shall be found in paying quantities. Lease No. 2461M was approved on November 10, 1923, for a like period. Neither lease contains any provision for extension of the fixed or primary period of ten years by mere money payment and hence the payment of rentals alone cannot operate to extend that period. *United States* v. *Br*own, 15 Fed. 2d. 565. The ten-year period on lease No. 850M expired in 1926 and on lease No. 2461M the period expired in 1933. If the leases have continued in force since then it is by reason of the provision, "and as much longer thereafter as oil or gas shall be found in paying quantities." This provision is a familiar one in oil and gas leases and is

CHAPTER 6

THE SCOPE OF STATE POWER OVER INDIAN-AFFAIRS

TABLE OF CONTENTS

SECTION 1. INTRODUCTION

That state la&s^1 have no force within the territory of an Indian tribe in matters affecting Indians. is a general proposition. that has not been successfully challenged, at least in the United States Supreme Court, since that Court decided, in *Worcester* v. *Georgia*,[2] that the State of Georgia had no right to imprison a white man residing on an Indian reservation, with the consent of tribal and federal authorities, who refused to conform to state laws governing Indian affairs. In that case the court declared, *per* Marshall, *C. J.:*

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. (P.560.)

The State of Georgia never did carry out the mandate of the Supreme Court in this case,[3] and many other state courts and state legislatures since the decision in this case have likewise refused to acknowledge the implications of the decision. Nevertheless, when critical cases have been presented to the United States Supreme Court, the principles laid down in *Worcester v. Georgia* have been repeatedly reaffirmed.[4]

The reasons judicially advanced for this incapacity of the states to legislate on Indian affairs have been variously formulated in different cases, although the actual decisions of the Supreme Court have followed a consistent pattern. 'One of the most persuasive considerations as to the lack of state power is the inclusion in enabling acts and state constitutions of express disclaimers of state jurisdiction over Indian lpds.^5 One of the most famous statements explanatory of the' limitations upon State power in this field is the statement *in United States* v. *Kagama*,[6] a case which upheld the constitutionality of congressional legislation on offenses between Indians committed on an Indian reservation:

> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them;' and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
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> * * * * *

[1] Specific bodies of state law are dealt with in other chapters of this work. Thus. state laws involving questions of discrimination against Indians, in the matter of franchise or in other respects. are dealt with in Chapter 8. State laws of inheritance are Considered in Chapters 10 and 11. State laws on taxation are analyzed in Chapter 13. Those state laws which deal with Indian hunting and fishing rights are treated in Chapter 14. sec. 7. *Chapter* 15 touches upon state laws relating to recognition or protection of tribal property. Chapters 18 and 19 deal respectively with criminal and civil jurisdiction of state courts as well as federal and tribal courts.

[2] 6 Pet. 515 (1532).

[3] See Chapter 7, sec. 2. *Cf.* Report and Remonstrance of the Legislature of Georgia, Sen. Doc. No. 98, 21st Cong., 1st sess. (March 8, 1830).

[4] For au analysis of these cases, sea F. S. Cohen, Indian Rights and the Federal Courts (1940). *24* Minn. L. Rev. 145.

[5] "* * * said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." Act of July 16. 1894, sec. 3. 28 Stat. 107, 108 (Utah). Accord: Act of June 20. 1910. secs. 2, 20, 36 Stat. 557 (New Mexico and Arizona). And cf. Act of June 16. 1906, sec. 28. 34 Stat 267. 281 (Oklahoma).

[6] 118 U. S. 375 (1896).

[7] The omission of this comma in the official United States Report has created some confusion as to the meaning of this sentence. Without the comma, the sentence seems to suggest that the weakness and helplessness of the Indians is due in part to treaties and that it is because of the weakness and helplessness of the Indians that the Federal Government may exercise the power of protection. With the comma, the sentence suggests rather that the factual situation of weakness and helplessness is only part of the basis of legal power, the other, and legally more important. basis being the obligations assumed by the United States towards Indian tribes by treaty. This comma is found in the Supreme Court Reporter edition of the opinion (6 Sup. Ct. 1109).

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes. (Pp. 383–385.)

Insofar as this argument relies upon treaties it is legally unassailable, for the treaties made between the Federal Government and the Indian tribes are part of the supreme law of the land[8] and, as we have already noted, these treaties quite generally promised the tribes, either expressly or by implication, that they would not be subject to the sovereignty of the individual states, but would be subject only to the Federal Government.

On the other hand, insofar as the opinion in the *Kagama* case relies upon the factual helplessness of the Indians, the enmity of the state populations, and the impossibility of state control, serious questions may be raised both as to the validity of the argument and as to its scope and application, when the factual premises noted no longer correspond to the facts. It would, however, be a digression at this point to analyze the various doctrines advanced in support of the conclusion that, within the Indian country in matters affecting Indians, federal law applies to the exclusion of state law.[9]

It is enough for the present to note that the domain of Power of the Federal Government over Indian affairs marked out by the federal decisions is so complete that, as a practical matter, the federal courts and federal administrative officials now generally proceed from the assumption that Indian affairs are matters of federal, rather than state, concern, unless the contrary is shown by act of Congress or special circumstance. Thus, without questioning the constitutional doctrine that states possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism must compel the conclusion that control of Indian affairs has been delegated; under the Constitution, to the Federal Government and that state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government. Of these two situations, the former is undoubtedly more definite and therefore simpler to analyze. Such an analysis requires a listing of the acts of Congress which confer upon the states, or recognize in the states, specific powers of government with respect to Indians.

[8] *United States v. Forty-Three Gallons of Whiskey*, 93 U. S. 188 (1876); *Worcester v. Georgia*, 6 Pet. 515 (1832); *Fellows v. Blacksmith*, 19 How. 366 (1856); United *States v. New York Indians*, 173 U. S. 464 (1899). See *United States v. Winans*, 198 U. S. 371, 379, 384 (1905). *Cf.* *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 703 (1899); *United States v. Rickert*, 188 U. S. 432, 437, 438 (1903); *United States v. Seminole Nation*, 299 U. S. 417, 428 (1937), *cert.* granted 299 U. S. 526; *Wallace v. Adams*, 204 U. S. 415 (1907). See chapter 3, sec. 3.

[9] For further discussion of these doctrines see Chapter 4, sec. 2, and Chapter 5.

SECTION 2. FEDERAL STATUTES ON STATE POWER

It will be convenient to group the federal statutes which grant or recognize state power over Indian affairs into two categories: (a) those that apply throughout the United States; and (b) those that apply only to particular tribes or areas.

A. GENERAL STATUTES

The most important field in which State laws have been applied to Indians by congressional fiat is the field of inheritance. In the absence of federal legislation, it is established that all questions relating to descent and distribution of the property of individual Indians are governed by the laws and customs of the tribe to which the Indians belong.[10] A given tribe may, of course, adopt such state laws as it considers suitable, and it may do this either by ordinance,[11] or, in conjunction with the Federal Government, by treaty.[12] Without such action of the tribal or the Federal Government, state laws of inheritance have no application to Indians residing on an Indian reservation.

This situation, however, has been greatly changed by congressional legislation affecting Indians to whom reservation lands have been allotted in severalty. The most important portion of this congressional legislation is contained in Section 5 the General Allotment Act,[13] providing:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allot-

[10] See Chapter 7. sec. 6 and Chapter 11. sec. 6.

[11] See 55 I. D. 14, 42 (1934). See also Chapter 7. sec. 6.

[12] Thus, e. *g.*, Article 8 of the Treaty of February 27, 1867. with the Pottawatomie Indians. 15 Stat. 531; 533 provides:

> Where allottees under the treaty of eighteen hundred and sixty-two shall have died, or shall hereafter decease, if any dispute shall *arise* in regard to heirship to their property, it shall be competent *for* the business committee to decide such question, taking for their rule of action the laws of inheritance of the State of Kansas * * .

[13] 24 Stat. 388. 389; amended Act of March 3, 1901, sec. 9, 31 Stat. 1058, 1085; 25 U. S. C. 348.

This section as originally enacted, also provided:

> That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act.

The General Allotment Act expressly exempted from its operation the territory occupied by the Five Civilized Tribes and the Miamies and Peorias, and Sacs and Foxes in the Indian Territory, now a part of the State of Oklahoma. and also the reservation of the Seneca Nation of New York Indians in the State of New York. as to which see *United States ex rel. Kennedy v. Tyler*, 269 U. S. 13 (1925), aff'g. *United States ex rel. Pierce v. Waldow*, 294 Fed. 111 (D. C. W. D. N. Y. 1923). See also *New York v. Dibble*, 21 How. 366 (1858).

The Confederated Wea, Kaskaskia, Peoria. Piankeshaw, and Western Miamies were allotted under the Act of March 2, 1889. 25 Stat. 1013. but by that Act, the provisions of the General Allotment Art were extended to these tribes. The same is true as to other tribes allotted under special acts of Congress. such for instance as the Chippewas of Minnesota, who were allotted under the Act of January 14. 1889. 25 Stat. 642. in accordance with the provisions of the General Allotment Act. The Quapaw Indians were allotted under the Act of March 2, 1895. 28 Stat. 876, 907, without reference to the General Allotment Act. and would seem to have been excluded from the provisions of that Act, so that the laws of Kansas did not apply to them.

The Sacs and Foxes were allotted under the Act of February 13. 1891, 26 Stat. 749. and under the provisions of that Act they became subject

tees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom allotment shall have been made, *or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located,* and that at the expiration of said period the United States will convey the same by patent to said Indian, *or his heirs as aforesaid,* in fee, discharged of said trust and free of all charge or incumbrance whatsoever. [Italics supplied.]

As will be readily perceived, these provisions entirely withdraw from the operation of tribal laws and customs all matters of descent and partition concerning allotments made to Indians under the General Allotment Act, and the laws of the state in which the land is situated must govern such matters, except insofar as these matters are otherwise covered by federal statutes.

The scope of state power in the matter of inheritance of allotments has been considerably limited however, by legislation which confers upon the Secretary of the Interior full power to determine heirs and to partition allotments.[14] Thus, for example, the Supreme Court has held [15] that a will made by an Indian woman in accordance with departmental regulations, and approved by the Secretary of the Interior, devising her restricted land to others than her husband, was valid, notwithstanding a provision in the Oklahoma law prohibiting a married woman from bequeathing more than two-thirds of her property away from her husband.

The Court said:

> The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him and the execution of the act of Congress, and it would seem that no comment is necessary to show that § 8341 [Oklahoma Code] is excluded from pertinence or operation. (P. 324.)
>
> * * * * *
>
> In a word, the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. (P. 326.)

In a later case approving this decision,[16] the Court sustained the validity of a lease made by an Indian on his family homestead, which violated an Oklahoma statute requiring execution by both spouses. The Court said:

> Nor is the validity of the extension lease affected by the provision in the Oklahoma constitution that nothing in the laws of the United States shall deprive any Indian or other allottee of the benefit of the homestead laws of the State. Whether or not this provision was intended to do more than to protect the allottees from the enforced seizure of their homesteads, it is sufficient to say that, whatever its purpose, it can have no more effect than the Oklahoma statute in giving validity to laws of the State repugnant to the reserved power of the United States in legislating in respect to the lands of Indians. Neither the constitution of a State nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority. *United States* v. *Holliday*, 3 Wall. 407, 419. (P. 497.)

A second field in which state law has been extended to Indian reservations by congressional flat is the realm of laws covering "inspection of health and educational conditions" and the enforcement of "sanitation and quarantine regulations" as well as "compulsory school attendance." By the Act of February 15, 1929,[17] Congress authorized the enforcement of such laws upon Indian reservations by state officials "under such rules, regulations, and conditions as the Secretary of the Interior may prescribe."

A third body of state laws is extended over Indian reservations by section 289 of the Criminal Code [18] which makes offenses by non-Indians against Indians and by Indians against non-Indians punishable in the federal courts in accordance with state laws existing at the time of the federal enactment in question.[19]

It will be noted that the foregoing statute is expressly made inapplicable to any offense committed by and against an Indian, by the terms of section 218 of title 25 of the U. S. Code.[20]

Apart from these three fields there has been no general congressional legislation authorizing the extension of state laws to Indians on Indian reservations."

Within those three fields it is probable that any devolution of authority from Congress to the states may be revoked at such time as Congress sees fit.[22]

B. SPECIAL STATUTES

Apart from the general statutes noted in the preceding section, a number of acts of Congress dealing with particular tribes or areas confer various powers upon state courts, state legislatures, and state administrative officials. These statutes deal most commonly with such subjects as crimes,[23] taxation,[24] pro-

to the laws of the Territory of Oklahoma. And the Osages were allotted under the Act of June 28, 1906, 34 Stat. 539, and under the provisions of that Act became subject to the laws of that Territory. See, however, sec. 6 of the Act of 1906, *supra.* See also sec. 3 of the Act of April 18, 1912, 37 Stat. 86, subjecting the persons and property of Osage Indians to the jurisdiction of the county courts of Oklahoma in probate matters. As to the Five Civilized Tribes of Oklahoma, see *Stewart* v. *Keyes,* 295 U. S. 403 (1935), pat. for rehearing den., 296 U. S. 661 (1935).

[14] Act of June 23, 1910, 36 Stat. 855, 25 U. S. C. 371; Act of May 18, 1916, 39 Stat. 123, 127, 25 U. S. C. 321. See Chapter 10, sec. 10; Chapter 11, sec. 6; Chapter 5, sec. 10.

[15] *Blanset* v. *Cardin,* 256 U. S. 319 (1921).

[16] *Sperry Oil Co.* v. *Chisholm,* 264 U. S. 488 (1924).

[17] 45 Stat. 1185, 25 U. S. C. 231. And see Taylor Grazing Act of June 28, 1934; 48 Stat. 1269, amended June 26, 1936, 49 Stat. 1976, discussed in 56 I. D. 38 (1936).

[18] 18 U. S. C. 468; derived from: R. S. § 5391; Act of July 7, 1898, sec. 2, 30 Stat. 717; Act of June 15, 1933, '48 Stat. 152.

[19] Congress has not attempted to give force to state laws later enacted, apparently having in mind the possibility that such legislation might be considered an unconstitutional delegation of power or a violation of Constitutional requirements of certainty in penal legislation. *Cf. Wayman* v. *Southard,* 10 Wheat. 1 (1825); *Field* v. *Clark,* 143 U. S. 649 (1891); *Wichita Railroad* v. *Public Utilities Com.,* 260 U. S. 48 (1922); *Hampton & Co.* v. *United States,* 276 U. S. 394 (1928); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935).

[20] R. S. § 2146, amended by Act of February 18, 1875, 18 Stat. 316, 318. See Chapter 7, sec. 9; Chapter 18, sec. 3.

[21] Note, however, the legalization of state-federal administrative cooperation by the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, amended Act of June 4, 1936, 49 Stat. 1458, 23 U. S. C. 452 et *seq.* And see Chapter 4, sec. 15; Chapter 12, sec. 1.

[22] See *Truskett* v. *Closser,* 236 U. S. 223 (1915); *Rice* v. *Maybee,* 2 F. Supp. 669 (D. C. W. D. N. Y. 1933); *People ex rel. Cusick* v. *Daly,* 212 N. Y. 183, 196–197, 105 N. E. 1048 (1914).

[23] Act of February 21, 1863, sec. 5, 12 Stat 658, 660 (Winnebago); Act of June 8, 1940 (Pub. No. 565, 76th Cong.) (State of Kansas).

[24] Act of March 3, 1921, 41 Stat. 1249, 1251, authorizing State of Oklahoma to tax oil and gas production from Indian lands (upheld in 33 Op. A. G. 60 (1921) discussed in Op. Sol. I. D., M.26672, September 22, 1931); Act of May 10, 1928, 45 Stat. 495, 496 (subjecting mineral production from Five Civilized Tribes' lands in Oklahoma to state taxes). *Cf.* Act of June 26, 1936, sec. 1, 49 Stat. 1967. See Chapter 13, secs 2, 5; Chapter 23, sec. 9.

bate,[25] acquisition of water rights,[26] recording laws,[27] and liens upon cut timber.[28]

In Oklahoma there has been a particularly broad devolution of powers to the state government.[29] The organs of the state government however, in exercising such powers have been considered federal agencies. Thus in *Parker* v. *Richard* [30] the Supreme Court, in referring to the authority of the county courts of Oklahoma under section 9 of the Act of May 27, 1908,[31] said:

> * * * That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency; and this is recognized by the Supreme Court of the State. *Marcy* v. *Board of Commissioners*, 45 Oklahoma 1. (P. 239.)

[25] Act of April 30, 1888, 25 Stat. 94, 98 (Sioux); Act of March 2, 1889, 25 Stat. 888, 891 (Sioux); Act of January 12, 1891, 26 Stat. 712 (Mission); Act of February 13, 1891, 26 Stat. 749, 751 (Sac and Fox); Act of June 28, 1906, 34 Stat. 539 (Osage); Act of April 18, 1912, 37 Stat. 86 (Osage); Act of June 14, 1918, 40 Stat. 606 (Five Civilized Tribes); Act of February 27, 1925, 43 Stat. 1011 (Osage). For a discussion of the provisions of these acts see Op. Sol. I. D., M.18008, December 18, 1925; Op. Sol. I. D., October 4, 1926; Op. Sol. I. D., D-46929, September 30, 1922; Op. Sol. I. D., M.24293, June 19, 1928.

[26] Act of March 3, 1905, 33 Stat. 1016, 1017 (Shoshone) discussed *In re Parkins*, 18 F. 2d, 642, 643 (D. C. D. Wyo. 1926).

[27] Act of February 19, 1875, 18 Stat. 330, 331 (Seneca).

[28] Act of March 31, 1882, 22 Stat. 36, 37 (Wisconsin).

[29] See Chapter 23, secs. 3–10.

[30] 250 U. S. 235 (1919).

[31] 35 Stat. 312, 315.

SECTION 3. RESERVED STATE POWERS OVER INDIAN AFFAIRS

While the general rule, as we have noted, is that plenary authority over Indian affairs rests in the Federal Government to the exclusion of state governments, we have likewise noted two major exceptions to this general rule: First, where Congress has expressly declared that certain powers over Indian affairs shall be exercised by the states, and second, where the matter involves non-Indian questions sufficient to ground state jurisdiction.

In proceeding to analyze this latter exception to the general rule, we may note that in point of constitutional doctrine, the sovereignty of a state over its own territory [32] is plenary, and therefore the fact that Indians are involved in a situation, directly or indirectly, does not *ipso* facto terminate state power. State power is terminated only if the matter is one that falls within the constitutional scope of exclusive federal authority.^33

A case in which the factors of situs, person and subject matter all point to exclusive federal jurisdiction, as, for example, in a transaction involving a transfer of restricted property between Indians on an Indian reservation, the basis of exclusive federal power is clear. On the other hand, where all three factors point away from federal jurisdiction, the power of the state is clear. There exists, however, a broad twilight zone in which one or two of the three elements noted—situs, person and subject matter—point to federal power and the remainder to state power. These are the situations which require analysis and the various combinations of these factors present six situations for consideration.

(A) Indian outside Indian country engaged in non-federal transaction.

(B) Indian outside Indian country engaged in federal transaction.

(C) Indian within Indian country engaged in non-federal transaction.

(D) Non-Indian outside Indian country engaged in federal transaction.

(E) Non-Indian in Indian country engaged in federal transaction.

(F) Non-Indian in Indian country engaged in non-federal transaction.

A brief discussion of these six type-situations is in order.

A. INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION

It is undoubtedly true, as a general rule, that an Indian who is "off the reservation" is subject to the laws of the state or territory in which he finds himself, to the same extent that a non-Indian citizen or alien would be subject to those laws.[34]

B. INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

To the general rule set forth in the preceding paragraph, an exception must be noted; If the subject matter of the transaction is a subject matter over which Congress has asserted its constitutional-power, the state must yield to the superior power of the nation.^35 For example, Congress has taken the position that its constitutional concern with Indian tribes requires a prohibition of sales of liquor to all "ward" Indians, even outside of Indian reservations, and the courts have upheld this exercise of power.^36 Under the circumstances, any state interference with this prohibition would undoubtedly be held invalid.

A second example may be found in the realm of restricted personal property of Indians. Where, for example, a herd of cattle is held by an Indian or an Indian tribe subject to federal restrictions upon alienation,^37 it seems clear that the removal of the property from the reservation would not free it from such federal restrictions, and any state laws or proceedings inconsistent with federal control would be clearly unconstitutional.[38]

The line between federal transactions which are of such concern to the Federal Government that the state cannot legislate in the matter and other transactions on which the state is permitted to legislate, is not always easy to draw. Where, for

[32] Ordinarily an Indian reservation is considered part of the territory of the state. Utah *and Northern Railway* v. *Fisher*, 116 U. S. 28 (1885) But in some cases, the enabling net or other congressional legislation or the state constitution itself, declares that Indian reservations shall not be deemed part of the territory of the state. See, for example *The Kansas Indians*, 5 Wall. 737 (1866); *Harkness* v. *Hyde*, 98 U. S 476 (1878), qualified in *Langford* v. *Monteith*, 102 U. S. 145 (1880).

[33] See sec. 1, *supra*; and see Chapter 5.

[34] *Hunt* v. *State*, 4 Kan. 60 (1866) (murder of Indian by Indian); *In re Wolf*, 27 Fed. 606, 610 (D. C. Ark. 1886) (conspiracy by Indians to obtain money by false pretences from Indian nation In D. C.); State v. *Williams*, 13 Mont. 335, 43 Pac. 15 (1895) (murder of Indian *by* Indian); *Pablo v. People*, *23* Colo. 134, 46 Pac. 636 (1896) (murder of Indian by Indian); *State* v. *Spotted Hawk*, *22* Mont. *33*. 55 Pac. 1026 (1899) (murder of white man by Indian); State v. *Little Whirlwind*, 22 Mont. 425. 56 Pac. 820 (1899) (murder of white man by Indian); *Ex parte* Moore, 28 S. D. 339. 133 N. W. 817 (1911) (murder of Indian by Indian on public domain allotment). commented on In Ann. Cas. 1914 B, 648, 652 And see state cases collected in Note 13. Ann. Cas. 192.

[35] See Chapter 7, sec. 9. fn. 213; and see Chapter 18. sec. 2. *Cf.* The Kansas Indians, 5 Wall. *737*. 755, 756 (1866), "If under the control of Congress, from necessity there can be no divided authority. • • • There can be no question of State sovereignty In the case, • • • ."

[36] See Chapter 17. sec. 3.

[37] See Chapter 10. see. 12.

[38] *Cf.* United *States* v. *Cook*. 19 Wall. 591 (1873); *Pine River Logging Co. v. United States*, 186 U. S. 279 (1902) (tribal timber illegally alienated); discussed in Chapter 15, sec. 15.

example, hunting or fishing rights off the reservation have been promised to Indians, the question has arisen whether such rights may be controlled by state conservation statutes. In the present state of the law, no simple answer can be given to the question^39 Likewise, the question of whether taxable land purchased for Indians, outside 'of a reservation, and held subject to federal restrictions upon alienation, is immune from the tax laws of the state, has given rise to considerable litigation.^40 In this situation it seems that, despite the federal concern in the subject matter, the state may levy property taxes if Congress is silent, but may not do so if Congress prohibits such legislation.^41

C. INDIAN WITHIN INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION

It is well settled that the state has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the Federal Government.[42] Thus Indian marriage and divorce, offenses between Indians, and sales of personal property between Indians are matters over which the state cannot exercise control, so long as the Indians concerned remain within the reservation.^43 This disability has generally 'been explained in terms of tribal sovereignty and a federal policy of protecting such tribal sovereignty against state invasion. Thus, in denying state jurisdiction over adultery among Indians on an Indian reservation, the Supreme Churt declared in *United States* v. *Quiver*,[44] per Van Devanter, *J.*:

> At an early period It became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with. according to their tribal customs and laws • . * • (Pp. 603–604.)

Whether the local state laws may be applied to the Indians of a tribe with their consent, expressed through agreement or otherwise, is a question which the Supreme Court does not seem to have passed upon squarely." There is no doubt that many tribes in the past have accepted state laws.[46] Indeed, in the early years of the Republic, it appears that various treatles were made between Indian tribes and, the various states.^47 The validity, however, of such formal or informal arrangements, has not been definitely established. It would seem that if state laws are adopted by Indian tribes, they have effect as tribal laws and not simply as exercises of state sovereignty.[48]

[39] See Chapter 14. sec. 7 ; and Chapter 15, sec. 21.

^40 See Chapter 13.

[41] *Ibid.*

[42] See Chapter 7.

[43] *Ibid.*, and see Chapter 13, sec. 5. And see Memo. Sol. I. D.. April 26, 1939. holding that the State of California is without jurisdiction to compel Indians residing on rancherias within the state to take out licenses for dogs owned by them.

[44] 241 U. S. 602 (1916).

[45] *Cf. United States ex rel. Kennedy* v. *Tyler.* 269 U. S. *13 (1925).*

[46] See, for example, the discussion of New York Indians in Chapter 22. and the comments on the Eastern Cherokee of North Carolina in Chapter 14. sec. 2.

[47] See *Cherokee Nation* v. *Georgia*, 5 Pet. 1. (1831) ; *Seneca Nation* v. *Christy*, 126 N. Y. 122. 27 N. E 275 (1891) ; 2 Op. A. G. 110 (1828) Rice, The Position of the American Indian in the Law of the United States (1934). 16 J. Comp. Leg. 78, 85. While the Constitution forbids 'a state's entering into any treaty. alliance. or confederation (Art. 1 sec. 10, discussed in *Worcester* v. *Georgia*, 6 Pet. 515, 579 (1832)). the position has been taken by at least one state court that this did not Prevent treaties Or compacts for the extinguishment of Indian title between states and Indian tribes. *Seneca Nation* v. *Christy, supra.*

[48] "An Indian tribe may, if it so chooses, adopt as its own the laws of the State in which it is situated and may make such modifications in these laws as it deems suitable to its peculiar conditions." 55 I. D. 14. 42 (1934).

D. NON-INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

Although ordinarily a non-Indian outside of Indian country is in no way subject to federal law governing Indian affairs, and is wholly subject to state law, there are certain subject matters in which the federal interest is so strong that even with respect to non-Indians outside the Indian country, federal law will supersede state law. Such a matter, for instance, is the transfer from one non-Indian to another of restricted property unlawfully taken from 'an Indian reservation.[49] Another example may be found in the realm of transactions between an employee of the Indian Bureau and a third party, consummated outside of the Indian country, which involve a personal interest in Indian trade.^50 This class of transactions in which non-Indians outside of the Indian country must take account of federal Indian law, is extremely limited in scope, applying primarily to matters involving 'property in which the Federal Government has an interest," and to the personnel of the Indian Service itself.[50]

E. NON-INDIAN IN INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

If, where the subject matter is of federal concern, 'a non-Indian is subject to federal. rather than state jurisdiction, even for acts occurring outside of an Indian reservation. *a fortiori* he is subject to federal jurisdiction for acts of federal concern committed within an Indian reservation. Indeed, there is a very broad realm of conduct in which non-Indians on an Indian reservation are subject to federal rather than state power. With respect to ail offenses committed by whites against Indians on an Indian reservation, state jurisdiction yields to federal jurisdiction,[52] although in fact the Federal Government has adopted state laws in providing for the punishment of such offenses by the federal courts.[54] Likewise, there are various reservation, offenses for which Congress has prescribed penalties enforceable in federal courts, which are applicable to non-Indians, and in some instances to Indians as well.[55] It has been administratively held that even a state officer cannot claim the protection of state law if he enters an Indian reservation without congressional authorization for the purpose of searching an Indian's home for property thought to be in the unlawful possession of the Indian."

Although the federal. constitutional jurisdiction *over* matters affecting Indian affairs on an Indian' reservation has generally been viewed as an exclusive jurisdiction, excluding all state legislation. an exception to the general rule has been recognized where the state legislation supplements the protection of Indians provided by federal law. Such state legislation, which may be termed "ancillary" to federal law, is upheld in *State* of

[49] See fn. 38. *supra.*

[50] See Chapter 2. sec. 3B.

[51] *See Oregon* v. *Hitchcock*, *202 U. S.* 60, 68–69 (1906) : *Naganab* v. *Hitchcock. 202* U. *S. 473* (1906) ; *Winters* v. *United States*, *207* U. S. 564 (1908) : *United States* v. *Winans*, 198 U. S. 371 (1905) ; *Morrison* v. *Work*, *266* U. S. 481. 487-488 (1925) ; *Unfted States* v. *Morrison*, *203* Fed. 364 (C. C. Colo. 1901).

[52] See Chapter 2. sec. 3B. and Chapter 16.

[53] See Chapter 18. sec. 5. There may be situations. however, in which a concurrent Jurisdiction may be exercised by the state to protect Indians against non-Indians. *State of New York* v. *Dibble*, 62 U. S. 366 (1858), discussed in Chapter 15, sec. 10C. .

[54] *See* sec. *2A, supra.*

[55] See Chapter 18. sec. 3.

[56] 56 I. D. 38 (1936).

New York v. Dibble,[57] where the Supreme Court, in upholding a state prohibition against trespass upon, Indian lands, declared:

> The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and 'protect these feeble and helpless bands from Imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is therefore not contrary to the Constitution of the United States. (P. 370.)

Other cases have applied this rule to state laws forbidding sale of liquor to Indians,[58] and to other protective and ancillary legislation.[59]

F. NON-INDIAN IN INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION.

The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not of federal concern. Thus, it has been held that murder of a non-Indian by a non-Indian on an Indian reservation in the absence of express federal legislation to the contrary, is a matter of exclusive state jurisdiction.[60] Likewise the validity of state taxation of personally of a non-Indian within Indian country has been sustained^61

G. SUMMARY

The rules applicable to each of the foregoing types of situations are not established beyond the possibility of doubt, and they leave much room for debate in defining the three factors in terms of which these rules have been formulated: "Indian:"[62] "Indian country,"[63] and "transaction of federal concern."[64] But these are questions elsewhere treated,^65 and the views above expressed on the various combinations of factors necessary to support state jurisdiction on Indian matters are probably as close to the actual decisions as any simple scheme can come. The foregoing sections may be summarized in two propositions:

(1) *In matters involving only Indians on an Indian reservation, the state has no jurisdiction in the absence of specific* legislation *by Congress.*

(2) *In all other cases, the state has* jurisdiction *unless there is involved a subject matter of special federal concern.*

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[57] 21 How. 366 (1858). See Chapter 15. sec. 10C.

[58] *State* v. *Kenney*, 145 Pac. 450 (Wash. 1915); *State* v. *Mamlock*, 58 Wash. 631, 109 Pac. 47 (1910).

[59] See *State* v. *Wolf*, 145 N. C. 440, 59 S. E. 40 (1907) (upholding state law requiring school attendance of Eastern Cherokee Indians), commented on In Note, Ann. Cas. 1915D, 371.'

[60] *United States* v. *McBratney*, 104 U. S. 621 (1881); *Draper* v. *United States*, 164 U. S. 240 (1896); and see Chapter 7, sec. 9 and Chapter 18, sec. 6.

[61] *Thomas* v. *Gay*, 169 U. S. 264 (1898). And see Chapter 13. sec. 4.

[62] The definition of "Indian" is considered in Chapter 1, sec. 2. On the question of the' applicability of state laws, special importance should be assigned to the cases which suggest that when tribal existence ceases, Indians cease to be under federal jurisdiction and become subject to' state control.

See opinion of Mr. Justice Johnson in *Fletcher, v. Peck*, 6 Cranch. 87. 146 (1810). and opinion *of* Mr. Justice McLean in *Worcester* v. *Georgia*, 6 Pet. 515, 580 (1832). See also *Scott* v. *Sanford*, 19 How. 393 (1857), where the Supreme Court, with reference to the Indians, said:

> . . . and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people. (P. 404.)

See also dicta in *The Cherokee Trust Funds*. 117 U. S. 288, 309 (1886) to the effect that the so-called Eastern Band of Cherokee Indians who separated themselves from the main body of the Cherokee Nation in its migration to the West, became "bound" to the state laws of North Carolina. See also and *cf. United States* v. *Boyd*, 83 Fed. 547 (C. C. A. 4, 1897); United *States* v. *Wright*, 53 F. 2d 300 (C. C. A. 4, 1931); and *United States* v. *Colvard*, 89 F. 2d 312 (C. C. A. 4, 1937), to the effect that these Indians having been recognized and treated by the Federal Government as a tribe must be regarded as such. For a more extended discussion of tribal existence and its termination see Chapter 14, secs. 1 and 2. On the right of expatriation see Chapter 8, sec. 10B(1).

Also *see Ex parte Kenyon*, 14 Fed. Cas. No. 7720 (C. C. W. D. Ark., 1878):

> . . . When the members of a tribe of Indians scatter themselves among the citizens of the United States and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States and of the states where they may reside, and equally with the citizens of the United States and of the several states, subject to the jurisdiction of the courts thereof. *Ex parte Reynolds* [Case No. 11718]; *United States* v. *Elm* [Id. 15048]; . . . opinion by Wallace, J. (Senate Report 268, 41st Cong. 3d sess.) p. 11; 2 Story Const. § 1933, *Dred Scott* v. *Sandford*, 19 How. [60 U. S.] 404.

And see cases collected in Note 13, Ann. Cas. 192,193.

A unique situation exists with respect to the Sac and Fox Indians of Iowa. The State of Iowa, which had exercised jurisdiction over these Indians and which held title to their land in trust for them, transferred to the Federal Government "exclusive jurisdiction of the, Sac and Fox Indians residing in Iowa and retaining the tribal relation, and of all other Indians dwelling with them . . .". (Act of February 14, 1896. Acts 26th General Assembly; p. '114:) The state, however, reserved from such transfer. jurisdiction of crimes against the state laws committed within the reservation by Indians or others. In *Peters* v. *Malin*, 111 Fed. 244 (C. C. Iowa, 1901) it was held that this reservation of authority in the state did not affect the exclusive jurisdiction of the Federal. Government over the relation of the Indians among themselves. See, on this question, Memo. Sol., I. D. June 15, 1940.

Also see *In re Now-ge-zhuck*, 69 Kans. 410, 76 Pac. 877 (1904); *State* v. *Big* Sheep, 75 Mont. 219, 243 Pac. 1067 (1926); *State* v. *Williams*, 13 Wash. 335, 43. Pac. 15 (1895): *State* v. *Howard*, 33 Wash. 250, 74 Pac. 382 (1903); *State* v. *Nimrod*, 30 S. D. 239, 138 N. W. 377 (1912).

Indians residing in Maine, while they have a communal organization for tenure of property and local affairs, are deemed by the courts of the state to be without political organization and to be subject. like other individuals, to game laws of the state. *State* v. *Newell*, 84 Maine 465, 24 Atl. 943 (1892).

It was believed at one time that the grant of citizenship to individual Indians, whether by an act of Congress or by the provisions of a treaty, had the effect of terminating tribal relations, placing the Indians beyond the power of Congress. and subjecting them to state jurisdiction. This view was taken by the United States Supreme Court in the famous case, *Matter of Heff*, 197 U. S. 488 (1905). Later. however, this ruling was ignored in *Hallowell* v. United *States*, 221 U. S. 317 (1911) and *United States* v. *Sandoval*, 231 U. S. 28 (1913). and finally expressly overruled in *United States* v. Nice, 241 U. S. 591 (1916). See, in this connection. Chapter 8, sees. 2C and 10B(1).

[63] See Chapter 1, sec. 3; Chapter 18, sec. 2.

[64] See Chapter 13, sec. 1A; Chapter 14, sec. 7. As noted in the discussion above, the term "transactions of federal concern*" Is used to cover matters. over which the power of the Federal Government has been exercised. whether through legislation. through authorized administrative action, or in any other valid manner. The content of the term is therefore to be found in the materials discussed in various other chapters, particularly Chapters 5. 9, 10, 11, 12, 13, 14, 15, 16. 17. 18, and 19.

[65] See fns. 62. 63, and 64. *supra*.