



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands

Section 2719 of the Indian Gaming Regulatory Act (IGRA)¹ prohibits gaming by Indian tribes “on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988,” subject to certain exceptions. In the 25 C.F.R. Part 292 regulations that were published on May 20, 2008, the Department stated that the prohibition in section 2719 applies only to lands “acquired by the Secretary in trust” for Indian tribes, and not to lands owned by an Indian tribe and held in what is known as restricted fee. This statement was a departure from the position taken by the Department in 2002 in a letter from Secretary Norton to Governor Pataki. I have been asked to provide further information about the reasons for the Department’s interpretation of section 2719 in the Part 292 regulations.

I provide first a brief description of how section 2719 fits into the regulatory framework established by IGRA. Then I describe the differences between land held in trust by the Secretary for Indian tribes and land owned by Indian tribes in restricted fee. Against that background, I conclude with a discussion of the reasons for the Department’s change of position with respect to section 2719.

IGRA Framework

IGRA established a comprehensive regulatory scheme for gaming by Indian tribes on Indian lands. Congress enacted IGRA in the wake of the *Cabazon* decision.² In *Cabazon*, the Supreme Court authorized on-reservation gaming by holding that states lack civil regulatory authority on Indian reservations. Congress in enacting IGRA generally made a choice to regulate on-reservation gaming and restrict gaming on newly acquired lands

¹ 25 U.S.C. § 2701 *et seq.*

² *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

IGRA's core principle is that gaming may occur on "Indian lands," as defined by IGRA, subject to certain regulatory requirements. IGRA defined "Indian lands" as including two broad categories of land. The first category is "all lands within the limits of any Indian reservations," regardless of whether the lands are held by the Secretary in trust or owned in fee by the tribe. The second category deals with off-reservation lands. It includes "all lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." Thus, as a general rule, IGRA allows a tribe to game on all on-reservation lands. IGRA also authorizes gaming on off-reservation lands held in trust or restricted fee for a tribe or individual if the tribe exercise governmental power over those lands.

Congress in IGRA created a prohibition on gaming on some lands that would otherwise meet the definition of Indian lands. Section 2719 prohibits gaming on lands "acquired by the Secretary in trust" for a tribe after the date IGRA passed, which was October 17, 1988. Section 2719 then created exceptions to the prohibition. The two exceptions relevant to the discussion here are as follows:

- 1) all lands "located within or contiguous to the boundaries of the reservation of [an] Indian tribe" as those boundaries existed on the date IGRA passed; and
- 2) all off-reservation lands acquired by the Secretary in trust for an Indian tribe after the date IGRA passed, provided that the Secretary determines that gaming on those lands "would be in the best interest of the tribe" and "would not be detrimental to the surrounding community," and that "the Governor of the State in which the gaming activity would be located concurs in the Secretary's determination."³

Thus with section 2719, Congress created a scheme under which gaming could only occur on newly acquired off-reservation lands if the Secretary found that gaming on those lands would not be detrimental to the surrounding community and Governor of the State concurred.⁴ Congress was obviously concerned that, with the passage of IGRA, Indian tribes would acquire off-reservation lands and then have them taken into trust by the Secretary so that they would fit the definition of Indian lands and could be used to operate casinos. Accordingly, Congress prohibited gaming on such lands unless the Secretary made a determination that the proposed gaming was not detrimental to the surrounding community and in the best interest of the tribe and the Governor affirmatively concurred with the Secretary.

At first glance, it appears as if there might be a significant loophole in section 2719. It does not address newly acquired lands that are owned by an Indian tribe in restricted fee. Such lands, as noted above, fit within the definition of "Indian lands." The section 2719 prohibition against gaming on newly acquired lands only applies to lands "acquired by the Secretary in trust." This appears to leave open the possibility that Indian tribes could acquire off-reservation lands in

³ 25 USC 2719(a) and 2719(b).

⁴ Congress created the so-called two-part determination as the general exception to the prohibition on gaming on after-acquired lands. In addition, Congress created three more exceptions to the 2719 prohibition -- restored lands for a restored tribe, settlement of a land claim, and initial reservation of a tribe acknowledged under the process in 25 CFR Part 83. These exceptions are not relevant here.

restricted fee post-IGRA and operate casinos without the Secretarial determination and the Governor's concurrence. If this loophole were to exist, it would clearly have the potential to undermine the role that Congress intended the Secretary, the Governor and the surrounding communities to play in deciding whether gaming could occur on newly acquired off-reservation lands.

This was the apparent loophole that was of concern to Secretary Norton in 2002 and that led her ultimately to conclude that Congress "must have" intended to include restricted fee lands in the section 2719 prohibition against gaming on after-acquired lands, even though, by its terms that prohibition applies only to land "acquired by the Secretary in trust."

Restricted Fee Lands

The term "restricted fee" refers to real property whose title is held in fee by an Indian tribe (or individual Indian), but which cannot be alienated or encumbered without the consent of Congress. This restriction on alienation attaches to certain Indian lands by operation of law – *i.e.*, by the operation of certain treaties, some tribe-specific statutes and, more generally, the Trade and Intercourse Act, also known the Non-Intercourse Act. The Non-Intercourse Act was enacted by the first Congress in 1790 and remains the law today. Codified at 25 U.S.C. § 177, it provides in pertinent part:

No purchase, grant lease, or other conveyance of lands, or of any title or claims thereto, from any Indian nation or tribe of Indians, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the Constitution....

Typically, the Act is invoked today to invalidate a conveyance of tribal land made without the consent of the United States.⁵

The Secretary lacks any general authority to place restrictions on lands tribes acquire in fee. The Secretary can only do that when directed to do so by a statute. Since 1934, however, the Secretary has had broad authority under the Indian Reorganization Act (IRA) to acquire lands for Indian tribes and hold the land in trust and to accept into trust lands acquired by Indian tribes themselves. As trustee of the lands, the United States holds legal title to the lands and they thus cannot be alienated or encumbered without federal approval. Trust lands are, therefore, subject, in effect, to a restriction on alienation just like the lands held by the tribes in restricted fee. Other than the fact that the United States has no ownership interest in restricted fee lands, there may also be other differences between restricted fee lands and lands held in trust. Depending on the duties contained in statutes, regulations, treaties, or executive orders, with regards to trust lands, the Secretary or the United States may owe certain land management duties to the Indian

⁵The New York Indian land claims are among several Eastern Indian land claims that arise under the Non-Intercourse Act. *See, e.g., County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("*Oneida IP*") (Tribe has cause of action for lands conveyed to the state in violation of the Non-Intercourse Act); *Seneca Nation of Indians v. New York*, 26 F. Supp 2d 555 (W.D.N.Y. 1998), *aff'd on other grounds*, 178 F.3d 95 (2d Cir. 1999) (state condemnation of land of the Seneca Nation was held to violate the Non-Intercourse Act).

beneficiaries and may be responsible for managing any revenues generated from the use of the lands.

Secretary Norton's Letter

As explained above, Secretary Norton was concerned about the apparent loophole in section 2719 with respect to after-acquired fee restricted lands. She was faced with a situation where the Seneca Nation of Indians, by virtue of the specific terms of the Seneca Settlement Act, was authorized to acquire certain off-reservation lands in restricted fee. She was concerned that if she concluded that section 2719 did not apply to the Seneca's restricted fee lands, the Department would be inundated with applications to game on after-acquired restricted fee lands, and that tribes would be allowed to conduct gaming operations on such lands without meeting one of the exceptions to the prohibition on gaming on newly acquired lands. As she explained in her letter:

I cannot conclude that Congress intended to limit the restriction to gaming on after-acquired land to only *per se* trust acquisitions. The Settlement Act clearly contemplates the acquisition of Indian lands which would otherwise constitute after-acquired lands. To conclude otherwise would arguably create unintended exceptions to the Section [2719] prohibitions and undermine the regulatory scheme prescribed by IGRA. I believe that lands held in restricted fee status pursuant to an Act of Congress such as is presented within this Compact must be subject to the requirements of Section [2719] of IGRA.

In developing the Part 292 regulations, the Department had an opportunity to reconsider the meaning of section 2719 and to examine more closely the law governing the creation of restricted fee lands. Based on its review, the Department concluded that the language of section 2719 is plain and cannot be ignored and that Secretary Norton's concern about the potential loophole for restricted fee lands was based on an incorrect understanding of the law.

The Supreme Court has instructed that "[t]he starting point in every case involving construction of a statute is the language [of the statute] itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1982); *accord Duncan v. Walker*, 533 U.S. 167, 172 (2001). Where the meaning of the language in a statute is plain, that is normally the end of the inquiry. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). To determine the plain meaning, the words in a statutory provision that are not defined by the statute itself are customarily given their ordinary meaning. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

Because Congress's intent is clear on the face of the IGRA, our analysis can appropriately end there. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (inquiry ends if Congress's intent is clear).

Some, however, might nonetheless argue that the phrase “in trust” is ambiguous when used to refer to Indian lands. This is because, in common parlance, Indian lands, whether held in trust or in restricted fee, are sometimes referred to for ease of reference as trust lands.

Where there is ambiguity in a statute (which I do not believe is the case here), the official charged with administering the statute (in this case, the Secretary) has broad discretion to resolve the ambiguity and give meaning to the term. As the Supreme Court has stated:

In *Chevron*, this Court held that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.

Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (internal citations omitted).

Assuming, for the sake of argument, that the phrase “in trust” is ambiguous, it is readily apparent from the purposes and policies, language, structure and legislative history of IGRA that construing the phrase as was done in the Part 292 regulations is reasonable. To be upheld under step two of *Chevron*, a court need only find that an agency’s understanding of the statute “is a sufficiently rational one.” *Chemical Mfrs. Ass’n v. NRDC*, 470 U.S. 116, 125 (1985). As the discussion below makes clear, nothing in the language, structure, legislative history or purpose of IGRA extends an interpretation that section 2719 does not extend to restricted fee lands “over the edge of reasonable interpretation.” *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 485 (2001).

Based on its review of the language of the prohibition in section 2719, the Department in promulgating the Part 292 regulations has concluded for three reasons that the language is clear and cannot be ignored.⁶ First, the phrase “in trust” has a common and generally well-accepted meaning in Indian law. It refers to a form of ownership in which legal title is held by the United State or the Secretary as trustee, while beneficial title is held by the Indian owner of the land. It does not describe the way in which restricted fee lands are owned. Second, as explained above, lands held in restricted fee status are not “acquired by the Secretary.” Neither he nor the United States holds title to them, whether legal or otherwise. Restricted fee lands are acquired by Indian

⁶ The Department believes this is not one of those “rare” circumstances “where application of the statute as written will produce a result demonstrably at odds with its drafters’ intentions.” *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In reviewing a statute for the purpose of developing regulations, an agency will, just as a court must “start, as always, with the language of a statute,” *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Congress’s intent is best evidenced by the statutory language that it chooses. *United States v. Monsanto*, 491 U.S. 600, 610 (1989). When the statutory text is clear, legislative history is irrelevant. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history”).

tribes and are owned by them, subject to a restriction on alienation that attaches by operation of law. Third, lands held “in trust” by the Secretary, while similar to restricted fee lands in that they cannot be conveyed without approval by the United States, can also be different from restricted fee lands in other important respects. As noted above, depending the terms of specific statutes and implementing regulations, the Secretary as trustee may owe Indian owners of the lands certain management duties. Congress does not typically enact statutes imposing specific duties on the Secretary with respect to restricted fee lands. Accordingly, the Department has determined that there is no basis for reading the phrase “acquired by the Secretary in trust” to include lands acquired by tribes that then become subject to a restriction on alienation by operation of law.

In addition, the Department determined that Secretary Norton’s concern about a significant loophole in section 2719 was based on a misapprehension of the law. Secretary Norton was assuming that off reservation lands acquired by tribes post-IGRA would automatically be subject to the restriction on alienation imposed by the Non-Intercourse Act. The Department has since determined that the better view of the law is that when a tribe purchases new lands off-reservation and those lands are held by the tribe in fee, then the land is not, without more, automatically subject to restrictions against alienation. The Non-Intercourse Act was intended to apply to “Indian Country” and fee land outside a reservation is not Indian Country.

Since the enactment of the IRA, when the Secretary has acquired new lands for tribes, the lands are usually acquired in trust. Restricted fee lands continue to exist; especially tribal lands in what were the original Thirteen Colonies, some General Allotment Act individual allotments, and tribal lands subject to statutory restrictions. The Supreme Court, however, in *City of Sherrill v. Oneida Indian Nation of N.Y.*, reiterated that the authority in IRA provides the “proper avenue for [a tribe] to reestablish sovereignty over territory.”⁷

While the Department has not previously opined on this precise question, Federal restrictions under the Non-Intercourse Act do not automatically attach to off-reservation parcels acquired by a tribe in fee simple absolute. Participating as *amicus curiae* in *Cass County v. Leech Lake Band of Chippewa Indians*,⁸ the United States has argued that the Non-Intercourse Act applies to “all reservation lands held by a Tribe, including lands recently acquired in fee.”⁹ In doing so, the United States suggested that off-reservation lands are not protected under the Non-Intercourse Act and expanded on this premise by stating: “[t]his case is concerned only with tribally owned lands on a reservation, where the Act serves to protect the tribal land base.”¹⁰ The qualifying

⁷ *City of Sherrill v. Oneida Indian Nation of New York*, *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). At issue in that case was the taxability of on-reservation lands the Oneida Nation re-acquired beginning in 1987 through purchases on the open market, approximately two centuries after they were lost through unlawful conveyances to the State. The Court ruled that the Nation could not, after such a long hiatus, unilaterally assert sovereignty over the reacquired lands. The Court instructed that “Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land shall be exempt from State and local taxation,” and that this is “the proper avenue for [the Oneida Nation] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.” *City of Sherrill*, 544 U.S. at 220-221.

⁸ 524 U.S. 103 (1998).

⁹ *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), 1997 U.S. Briefs 174, 14-15.

¹⁰ *Id.* at 47, fn. 13; *See also Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W. 2d 685 (N.D. 2002) (holding that the Non-Intercourse Act does not apply to off-reservation tribal fee land).

language in the brief, "on a reservation, where the [Act] serves to protect the tribal land base," appears to signify that the litigating position of the United States is that the Non-Intercourse Act's Federal protections against alienation do not extend to off-reservation lands owned by a tribe in fee unless some extenuating circumstances exist.

This view was most recently reaffirmed in a letter from George Skibine, Acting Deputy Assistant Secretary - Policy and Economic Development, to the president of the Lac du Flambeau Band of Lake Superior Chippewa Indians, dated December 19, 2008. Mr. Skibine agreed with the Tribe that off-reservation land the Tribe acquired in 2000 which were never owned by the Tribe or its members in restricted status, and never held by the United States for the Tribe or its members in trust status were not subject to the Non-Intercourse Act and the Tribe was not required to obtain Federal approval to convey the property.¹¹

Based on the reasons explained above, that portion of Secretary Norton's letter that recites a legal conclusion about the application of section 2719 to restricted fee lands is superseded by this memorandum.



David Longly Bernhardt

¹¹ Letter to President Edwards from George Skibine (Dec. 19, 2008).