# Native American Gaming Insights

## Off-Reservation Gaming: Three Years into the Obama Administration

**Special Report**

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**Revenue Growth Slowdown:** Native American gaming revenues came to a standstill after growing at a 14% compounded annual rate (CAGR) from 1995–2007. That growth slowed to a less than 1% CAGR from 2007–2010, largely due to recession-driven national gaming trends and tougher underwriting standards for new construction. Regulatory roadblocks erected in 2008 (outlined in the Department of Interior's [DOI] "commutability" memo) and 2009 (the Salazar v. Carcieri Supreme Court ruling [Carcieri]) also played an important roll in curbing this growth.

**Upcoming Presidential Election:** The regulatory headwinds for off-reservation gaming seem to be reversing three years into the Obama administration, albeit at a slow pace. The reelection of President Obama would likely be a positive outcome for longer term Native American gaming growth due to the potential for stability within the DOI (see page 9 for analysis).

**The Commutability Issue:** In June 2011, the DOI's Bureau of Indian Affairs (BIA) rescinded the DOI's 2008 commutability memo. The 2008 memo provided guidance on assessing distance of the proposed gaming site from the reservation of a tribe applying for off-reservation exception (or "two-part determination"). This is one of the four exceptions in the Indian Gaming Regulatory Act (IGRA) of 1988 and permits gaming on parcels of land not in trust as of the time of the law's enactment. The 2008 guidance effectively limited the distance between the proposed site and the reservation to a distance deemed "commutable" and resulted in the DOI rejecting nine applications shortly after the memo was released.

**The Carcieri Ruling:** In December 2010, the DOI ruled favorably on a land-into-trust application for the benefit of the Cowlitz Tribe, establishing the tribe's initial reservation (the tribe was federally recognized in 2000). The DOI simultaneously ruled that the tribe may conduct gaming on this land. The DOI's actions are significant in that they could be considered an "administrative fix" to a setback for tribes recognized after the enactment of the Indian Reorganization Act of 1934 (IRA). The aforementioned 2009 Supreme Court ruling (Carcieri) interpreted that the DOI secretary has the authority, under the IRA, to take land into trust only for tribes "under federal jurisdiction" at the time the IRA was enacted.

**Credit Implications:** The current administration's more pragmatic approach to off-reservation gaming is a competitive concern for tribes (and commercial casino operators) with existing gaming enterprises. As an example, the BIA's recent favorable two-part determination rulings for the Enterprise Rancheria of Maidu Indians and the North Fork Rancheria of Mono Indians may negatively affect tribal casinos in California's Sacramento (e.g., Thunder Valley and Red Hawk) and Fresno (e.g., Chukchansi and Table Mountain) markets, respectively. The December 2010 Cowlitz decision may affect Washington and Oregon tribes operating casinos that serve the Portland, OR, market. The table on page 2 includes a comprehensive list of markets that can be affected by the apparent resurrection in off-reservation gaming.

**Outlook:** Additional factors influencing off-reservation gaming growth include the success of pending appeals, lawsuits, and legislative efforts aimed at curbing "off-reservation shopping" and capital markets' willingness to fund Native American greenfield casino projects. In the near term, newly recognized tribes (e.g., Shinnecock Tribe in New York and Mashpee Wampanoag in Massachusetts) and tribes seeking more economically advantageous sites for their gaming enterprises (e.g., Spokane Tribe in Washington) could potentially take advantage of the DOI's increasingly open stance to establish off-reservation gaming.

## Credit Implications

The apparent acceleration of the off-reservation application process under the Obama administration and the potential ability of the BIA to work around the Carcieri ruling is a credit negative for existing casino operators that may be adversely affected by competition. Notable potential openings that may have material competitive impacts are listed in the table below:

## Notable Off-Reservation or Initial Reservation Casino Projects

| | | | | | | Impact Analysis | | | |
|---|---|---|---|---|---|---|---|---|---|
| State/ Region | Tribe (Reservation Location) | Proposed Casino Location (Distance) | Project Scope | Application Status | Financial Partners | Markets Affected | Properties Affected | Owner | Approx. Distance from Proposed Location (Miles) |
| California | Enterprise Rancheria of Maidu Indians (Butte County) | Yuba County, CA (36 miles south of tribe's head-quarters and 40 miles north of Sacramento). | 1,700 slot machines and a 170-room hotel | Received favorable two-part determination from the BIA on Dec. 20, 2011, and now must get approval from the state governor and negotiate a compact. | Fitch is not aware of any. The tribe is purchasing 40 acres from Yuba County Entertainment LLC, a private company, for the site. | Sacramento | Thunder Valley | United Auburn Indian Community | 21 |
| | | | | | | | Cache Creek | Yocha Dehe Wintun Nation | 40 |
| | | | | | | | Red Hawk | Shingle Springs Tribal Gaming Authority | 80 |
| | North Fork Rancheria of Mono Indians (Madera County) | Madera County, CA (36 miles southwest of the tribe's headquarters and 30 miles north of Fresno). | 2,000–2,500 slot machines and a 200-room hotel | Received favorable two-part determination from the BIA and now must get approval from the state governor and negotiate a compact. | Project is being backed by Station Casinos LLC, which will develop and manage the property in exchange for 24% of net revenues. Station Casinos' filings place a 60%–70% probability on the project being successfully completed. | Fresno, CA | Chukchansi Gold | Picayune Rancheria | 30 |
| | | | | | | | Table Mountain | Table Mountain Rancheria Band of Indians | 25 |
| | | | | | | | Tachi Palace | Santa Rosa Rancheria | 60 |
| Washington | Cowlitz Tribe | Clark County, WA (trust land is part of initial reservation). | 134,150-square-foot casino and a 250-room hotel | The BIA made the determination to take land into trust and approve the land for gaming (subject to favorable resolution of appeals) in December 2010. The BIA's rulings are now being appealed by local municipalities. | Cowlitz Tribe entered into an agreement to have the casino resort developed and managed by a partnership between Salishan Company, LLC and the Mohegan Tribe in exchange for 24% of net revenues. | Portland, WA | Spirit Mountain | Confederated Tribes of Grand Ronde | 70 |
| | | | | | | | Chinook Winds Casino | Confederated Tribes of Siletz Indians | 95 |
| | | | | | | | Lucky Eagle | Chehalis Tribe | 95 |
| | Spokane Tribe | Airway Heights, WA (35 miles southeast of the tribe's head-quarters and 10 miles west of Spokane). | $400 million casino resort (phase 1 will cost $160 million) | Awaiting a two-part determination from the BIA to approve existing trust land in Airway Heights for gaming. Existing compact permits up to five gaming facilities. So, the new compact is not needed, but an approval from the governor will still be required per the two-part determination process. | Fitch is not aware of any. | Spokane, WA | Northern Quest | Kalispel Tribe | 3 |
| | | | | | | | Coeur D'Alene | Coeur d'Alene Tribe | 40 |

*Continued on next page.*

Source: Fitch Ratings, company releases, tribes' press releases, news articles, company filings.

## Notable Off-Reservation or Initial Reservation Casino Projects (Continued)

| State/ Region | Tribe (Reservation Location) | Proposed Casino Location (Distance) | Project Scope | Application Status | Financial Partners | Impact Analysis: Markets Affected | Impact Analysis: Properties Affected | Impact Analysis: Owner | Impact Analysis: Approx. Distance from Proposed Location (Miles) |
|---|---|---|---|---|---|---|---|---|---|
| Wisconsin | Menominee Indian Tribe (Menominee County in northeastern WI) | Kenosha, WI (about 200 miles south of tribe's headquarters, 40 miles south of Milwaukee and 60 miles north of Chicago). | $800 million project as originally contemplated | Original two-part determination was denied in January 2009 under Bush administration. Tribe plans to resubmit application in the "next few weeks."[a] | The tribe is reportedly finalizing an agreement with a private firm, KMD Consulting, to develop the project. The Mohegan Tribe, which was the original developer, will still manage the casino in exchange for receiving 13.4% of net revenues. | Southeastern WI/ Northwestern Chicagoland | Rivers Casino<br>Grand Victoria<br>Potawatomi Bingo Casino | Bluhm & Clairvest JV<br>MGM & Hyatt JV<br>Forest County Potawatomi | 45<br>60<br>40 |
| | Ho-Chunk Nation (Jackson County in northwestern WI) | Beloit, WI (175 miles southeast of tribe's headquarters; 50 miles south of Madison, WI; 75 miles southwest of Milwaukee and 100 miles northwest of Chicago). | The facility will have 2,200 slots and 50 tables. Anticipated cost is $150 million–$200 million.[b] | The tribe still needs to secure approval from local officials (there seems to be local support) and then apply to have the land taken into trust and approved for gaming per the two-part determination. | The tribe already operates six casinos throughout the state. So, it is possible the tribe has accumulated reserves. | Southeastern WI / Northwestern Chicagoland | Potawatomi Bingo Casino<br>Grand Victoria<br>Rivers Casino | Forest County Potawatomi<br>MGM & Hyatt JV<br>Bluhm & Clairvest JV | 75<br>60<br>80 |
| Northeast | Mashpee Wampanoag Tribe (Mashpee, MA in Cape Cod area) | Exact site is not yet chosen. Would be located in the portion of Massachusetts designated as the southeastern region (includes eastern counties south of Boston). | Category 1 license development requires a minimum $500 million investment. | The tribe was federally recognized in 2007 and has exclusivity to open a category 1 casino in the southeastern region of MA, assuming it can secure a compact by July 31, 2012, after which date the license can be rebid to commercial operators. The tribe must receive a land-into-trust determination from the BIA prior to entering a compact, which could be complicated by the Carcieri ruling. | The tribe reportedly has had numerous financial backers since late 1990s, including Kien Huat, a subsidiary of Genting Group. | Connecticut<br>Rhode Island | Foxwoods<br>Mohegan Sun<br>Twin River Casino<br>Newport Grand Slots | Mashantucket Pequot<br>Mohegan Tribe<br>BLB Investors<br>Private | 55 (from south-eastern MA)<br>60 (from south-eastern MA)<br>5 (from south-eastern MA)<br>10 (from south-eastern MA) |
| | Shinnecock Indian Nation (Southampton, NY) | Site not chosen yet. The tribe was considering Belmont Park, which is located in Nassau County, NY (five miles from Queens, NY and 80 miles from the tribe's reservation). | Unknown but would have to be a sizable investment to compete with Aqueduct. | The tribe received federal recognition in 2010 and must secure land-into-trust and a gaming determination before proceeding to negotiate a compact with the state. Land-into-trust and a gaming determination could be complicated by the Carcieri ruling and the commutability issue. | Not yet determined. | New York City casinos | Resorts World at Aqueduct<br>Empire City at Yonkers Raceway | Genting Group<br>Private | 10 (assuming Belmont location)<br>20 (assuming Belmont location) |

[a]According to a Jan. 15, 2012, article by Milwaukee Journal Sentinel. [b]According to an article dated Jan. 10, 2012 in the Janesville Gazette. JV – Joint venture.
Source: Fitch Ratings, company releases, tribes' press releases, news articles, company filings.

Fitch Ratings expects the process to remain lengthy, despite the current administration's efforts to speed up off-reservation applications. For instance, Federated Indians of Graton Rancheria was federally recognized in 2000 (the tribe's federal recognition was terminated in the 1950s), completed its environmental impact in 2009, and had land taken into trust in October 2010. The tribe is currently negotiating a compact with California Gov. Jerry Brown.

The lengthy nature of the process creates potential for external factors to tie up off-reservation gaming applications for indefinite periods of time at numerous stages of the process. Investors and other stakeholders should expect the outcome of the 2012 presidential election, Carcieri-related developments, and capital market conditions to guide the pace of new off-reservation projects getting off the ground.

## U.S. Supreme Court Decision: Carcieri v. Salazar

### Background

A tribe must secure two important approvals regarding land status in order to conduct gaming on a given parcel of land. The land must be taken into trust by the federal government for the benefit of the tribe, and that parcel of trust land must be approved to be used for gaming purposes. The DOI has the authority to make these decisions, and two separate pieces of legislation are involved: the IRA and the IGRA.

- The IRA gives the DOI the authority to take land into trust and outlines the considerations for doing so, but the legislation has nothing do to with Indian gaming specifically.
- A parcel of land taken into trust after 1988 must meet the requirements of the IGRA to be approved for gaming purposes. The DOI calls this step a "lands determination."
- The DOI has never formally specified a particular sequence for considering the approval of an off-reservation gaming proposal. The assessment of a land into trust application and the IGRA lands determination can happen simultaneously or separately if a tribe decides to convert a parcel previously taken into trust for gaming use at a later date.

***Federal Legislation Relevant to Off-Reservation Gaming Project Approvals***

- The IRA — The federal government derives its authority to take land into trust for the benefit of tribes from this legislation, specifically Part 151. A decision with respect to a land into trust application is sometimes referred to as a "Part 151 determination."
- The IGRA — When promulgated in 1988, the IGRA set the framework for the Native American gaming industry. Unless a parcel of off-reservation land taken in trust after 1988 meets IGRA requirements, it is not eligible for gaming.

A February 2009 U.S. Supreme Court ruling has affected the step of the approval process that involves having land taken into trust. In this case, Carcieri v. Salazar, the state of Rhode Island challenged a BIA decision to take land into trust for the Narragansett Indians for the purposes of developing a housing project. In its ruling, the U.S. Supreme Court effectively stated that the federal government cannot take land into trust for a Native American tribe that was not under federal jurisdiction as of 1934, when the IRA was enacted.

### Impact

The Carcieri ruling has no implication for the tribes that were federally recognized when the IRA was enacted, since federal recognition clearly confers "under federal jurisdiction" status. For tribes recognized after 1934, the ruling curbs the DOI secretary's ability to take land into trust. For these tribes, the secretary now must demonstrate that these tribes were indeed under federal jurisdiction as of 1934 (e.g., had treaties or meaningful exchanges with the federal government). The Cowlitz appeal (see Administrative Fix section on page 5) would be the first test case to determine the boundaries of what constitutes being under federal jurisdiction.

Legislators quickly recognized the unintended consequence of the ambiguous language in the IRA that led to the 2009 ruling. Three bills were drafted months after the ruling to amend the language in the IRA that references the date (June 18, 1934) as a qualifier for the DOI's land-into-trust authority. However, none of the bills have made it past committee hearings. There are three new bills currently pending on top of several that were introduced since the Carcieri ruling. Efforts to pass a "clean legislative fix" to the Carcieri ruling have been sidetracked by other

legislative priorities and by opponents of "reservation shopping," a term used to describe tribes seeking the most economically optimal land parcels for casino development.

Sen. Dianne Feinstein (D-CA) has been one of the more outspoken legislators against reservation shopping. Sen. Feinstein has insisted on provisions in any clean fix that would limit land into trust approvals to land that has both an aboriginal and modern connection to the tribe seeking the land. This would be a tall hurdle to overcome for many tribes interested in establishing gaming in more economically viable areas than those on or near a reservation.

The modern connection requirement is closely aligned with the issue of commutability that was brought to the forefront by the DOI's 2008 guidance for the maximum distance of the tribe's reservation to the proposed land-into-trust site. The issue of commutability is discussed at greater length on page 7.

### *Administrative Fix*

Under President Obama, the DOI reversed its antigaming expansion posture it adopted under the Bush administration and issued a number of press releases confirming this stance (a library of links with these releases and other relevant documents are available in the Appendix on page 12).

In December 2010, the DOI released its decision to place land into trust on behalf of the Cowlitz Tribe for its initial reservation and approved the land for gaming purposes. The Cowlitz Tribe was not officially recognized by the federal government until 2000. The DOI's news release stated that the agency "conducted a thorough review of the application and determined that it satisfied the requirements of Indian Reorganization Act and the Carcieri decision." The DOI further backed its decision with a 123-page Record of Decision, in which the BIA's Assistant Secretary Echo Hawk argued that the tribe was under federal jurisdiction before and up to 1934.

Local municipalities (including Clark County, WA, and city of Vancouver, WA) and several other interested groups appealed the DOI's decision in federal court, pointing to the Carcieri decision and environmental considerations as the basis for the appeal. The U.S. Department of Justice subsequently released a response siding with the DOI's decision, and the state of Washington's attorney general stated his decision not to intervene. Both actions weakened the plaintiffs' case. Ultimately, the DOI and the Cowlitz Tribe may prevail. However, the appeal illustrates the legal hurdles tribes recognized after 1934 may have to go through absent a clean legislative fix.

Further, the lack of a legislative fix may expose to litigation those tribes that were recognized after 1934 and had land taken into trust prior to the 2009 Carcieri ruling. A case in point is Salazar v. Patchak. In this case, David Patchak, an individual landowner, claims the DOI secretary had no authority to take land into trust for the Gun Lake Tribe based on the Carcieri ruling. The tribe was recognized in 1999 and had land taken into trust in January 2009, right before the Carcieri ruling.

Lower courts dismissed Patchak's suit largely based on the Quiet Title Act of 1972, which exempts the U.S. government from suits disputing "trust or restricted Indian lands," and on the principal that Patchak falls outside the IRA's "zone of interest." The U.S. Court of Appeals disagreed with the lower court's interpretation and recommended that the case go back to the district court. In December 2011, the Supreme Court, petitioned by the codefendants (Salazar and the Gun Lake Tribe) agreed to hear the case to determine if Patchak had standing. If

Patchak prevails, according to legal experts cited in various news reports, the case will go back to lower courts to determine the legality of the DOI taking the land into trust vis-à-vis Carcieri.

Several other cases cited the Carcieri ruling as the basis in the respective lawsuits. A comprehensive list of Carcieri-related suits and brief summaries of each can be found in the Native American Rights Fund's written Oct. 13, 2011, testimony to the U.S. Senate Committee on Indian Affairs (click here for link).

## Outlook

Fitch has a circumspect view with regard to a legislative fix being passed in the near future. This view reflects potent opposition in the U.S. legislature to off-reservation gaming expansion, namely by Sens. Dianne Feinstein and John McCain, and the low priority of the issue relative to other matters at hand (e.g., the deficit, economy, health care, etc.).

In the meantime, tribes like the Cowlitz may seek land-into-trust approvals based on evidence of being under federal jurisdiction as of 1934. This course is certain to be lengthy but could be shortened if the Cowlitz Tribe prevails against the appeals, which would set a powerful precedent for the DOI's more broad interpretation of the IRA's "under jurisdiction" language.

Currently, there are 50 tribes that were recognized after 1934, according to a DOI letter addressed to Sen. Feinstein (link available through standupca.org). More than half (26) of these have gaming operations. Those recognized after 1934 with gaming operations include names that are familiar to debt market participants, including the Mohegan Tribe, the Mashantucket Pequot Tribe (Foxwoods), the Snoqualmie Tribe, and the Nottawaseppi Huron Band of Potawatomi (FireKeepers).

Fitch does not expect the casino operations of these 26 tribes to be endangered by cases such as Patchak v. Salazar. Fitch believes it would practically be difficult to void existing land-into-trust grants and shut down the casinos. Tens of thousands of jobs would be at stake (Mohegan Sun and Foxwoods each have approximately 10,000 employees), as well as the decades-long movement toward Native American self determination.

In an event of an adverse court ruling, Fitch believes it would be politically unsavory for federal legislators to allow a reversal of the DOI's previous land-into-trust actions. Absent legislative action on the federal level, other potential stop measures may exist, such as state-specific laws authorizing tribes to continue operating their facilities on fee simple basis. That said, the outcomes of existing and potential suits against tribes/the DOI citing the Carcieri ruling are highly uncertain.

Of the 24 tribes recognized after 1934 with no existing gaming operations, Fitch is aware of three tribes actively looking to develop gaming facilities. Aside from the Cowlitz, these include the Mashpee Wampanoag in the Cape Cod area of Massachusetts and the Shinnecock Tribe in the Hamptons area of Long Island, NY. These two tribes are currently actively seeking land into trust after being recognized in 2007 and 2010, respectively.

Mashpee Wampanoag is one of the two tribes in Massachusetts that would have priority to build a category 1 resort (minimum investment of $500 million) in the southeastern region of Massachusetts under the state's recently passed legislation. However, the timeline for the tribe to have land taken into trust and secure a compact with the state (July 31, 2012 deadline) seems aggressive, and the state could hold an open-bidding process for the license if the timeline is not met.

The Shinnecock Tribe is exploring various locations for its off-reservation site. (Belmont Park near New York City was at one point mentioned in news sources.) The state of New York is

Per the IGRA, gaming is allowed on off-reservation land taken in trust after 1988 (sometimes referred to as "newly" or "after-acquired lands") only if it meets one of these exceptions:

- The land is taken in trust as a result of the settlement of a land claim.
- The land is the initial reservation of a newly federally recognized tribe.
- The land is restored to trust status for the benefit of a tribe that was stripped of and later restored to federal recognition.

If the land does not qualify under one of these exceptions, the tribe must pursue approval of a two-part determination (see the Appendix on page 13).

generally supportive of gaming expansion. However, a viable location closer to New York City would bring into question the issue of commutability. For instance, Belmont Park is almost 80 miles from the Shinnecock's reservation in Southampton (on the eastern edge of Long Island).

## The Commutability Issue

### Background

In May 2008, the DOI promulgated a rule under the IGRA that was specifically related to the sections of the legislation that describe the exceptions a parcel of off-reservation land acquired in trust after 1988 must meet in order to qualify for gaming purposes. The rule clarifies the standards the DOI will use when interpreting the various exceptions. The May 2008 rule followed guidance published by the DOI in January 2008, which addressed taking off-reservation land into trust for gaming purposes. The January 2008 guidance related specifically to the criteria used by the DOI when considering a land into trust application, which are stipulated by the IRA.

One of the most important parts of the IGRA is Section 20, which relates to gaming on lands acquired after Oct. 17, 1988, and allows for off-reservation gaming on these newly acquired lands under certain circumstances, which are called "exceptions." *(For a more complete explanation of the IGRA exceptions, see the side box to the left and Appendix on page 13.)* The May 2008 rule addresses three primary issues:

- It clarifies the interpretation of the exceptions by providing definitions for key terms in IGRA Section 20, the original language of which is vague.
- It clarifies what conditions a parcel of newly acquired land must meet in order to qualify under the settlement of a land claim, initial reservation, or restored lands exceptions.
- It clarifies the process the DOI will use when assessing a parcel under the two-part determination exception, including specifics on what information must be provided to the DOI during the application process.

***2008 DOI Guidance and Rules Are Interrelated but Address Different Issues***

The January 2008 guidance addressed the land-into-trust application process.

The May 2008 rule addressed the circumstances under which a parcel of off reservation land qualifies under one of the IGRA exceptions to allow gaming on lands taken into trust after 1988.

The most controversial aspect of the rule involves the requirement that a tribe demonstrates a modern connection to a parcel of off-reservation land that it is seeking to use for gaming purposes under the initial reservation or restored lands exceptions. For tribes seeking a two-part determination, the rule stipulates that the application provides information on the distance of the land from the location where the tribe has its core governmental functions. This information is part of assessing the potential benefits and adverse impacts of the project to the tribe and its members.

The modern connection requirement has been interpreted by many involved parties as a commutability standard. The rule does not specify an exact distance limitation. However, it stipulates the land be located within a "reasonable commuting distance of the tribe's existing reservation," "near where a significant number of tribal members reside," or "within a 25-mile radius of the tribe's headquarters or other tribal government facilities."

### Impact

Thirty tribes had land–into-trust applications pending for off-reservation gaming sites at the time the January 2008 guidance was published. The DOI immediately rejected 10 of these on the basis that the lands were further than a "reasonable commuting distance" from the reservation and returned the applications of another 11, citing incomplete information.

## DOI Actions on Trust Applications Following January 2008 Guidance

| Applications Returned Citing Incomplete Information | Applications Denied |
|---|---|
| Yseleta del Sur Pueblo of Texas (Dona Ana County, NM) | Stockbridge Munsee Community of WI, (NY Catskills) |
| Turtle Mountain Chippewa Tribe (Grand Forks, ND) | Big Lagoon Rancheria and Los Coyotes Band of Cahuilla and Cupeño Indians (Barstow, CA) |
| Muckleshoot Tribe of Washington (King and Pierce Counties, WA) | Hannahville Indian Community (Romulus, MI) |
| Lower Elwha Tribe (Clallam County, WA) | Chemehuevi Tribe (Barstow, CA) |
| Lac Vieux Desert Band of Lake Superior Chippewa Indians (Dickinson County, MI) | St Regis Mohawk (NY Catskills) |
| Kickapoo Tribe and the Sac and Fox Nation (Wyandotte County, KS) | Jemez Pueblo, NM (Anthony, NM) |
| Ho-Chunk Nation (Cook County, IL) | Lac du Flambeau Band of Lake Superior Chippewa (Shullsburg, WI) |
| Dry Creek Rancheria (Sonoma County, CA) | Mississippi Band of Choctaw Indians (Jackson County, MS) |
| Colorado River Tribes (Blythe, CA) | Seneca-Cayuga Tribe of Oklahoma (Montezuma, NY) |
| Confederated Tribes of Colville, WA (Wenatchee, WA) | — |
| Burns Paiute Tribe (Ontario, OR) | — |

Source: U.S. Department of the Interior.

Following the January 2008 guidelines, two tribes — the Fort Mojave Indian Tribe (located near the point where Nevada, Arizona, and California boundaries meet) and the Northern Cheyenne Tribe of Montana — received off reservation gaming designations per the two-part determination exception in the same year. However, for both tribes, the land in question had already been in trust for a number of years and the principal reservations were in close proximity (less than 25 miles) to the proposed gaming sites.

In mid-2010, the DOI's Secretary Ken Salazar (who took office in January 2009) released a letter addressed to the assistant secretary of Indian Affairs, urging to move forward with "processing applications and requests for gaming on Indian lands." One year later, Assistant Secretary Echo Hawk in a June 2011 release rescinded the DOI's 2008 guidance memo, calling it "unnecessary."

Shortly after, in September 2011, the BIA issued two favorable decisions approving off-reservation gaming based on two-part determination for the Enterprise Rancheria of Maidu Indians and the North Fork Rancheria of Mono Indians. The two tribes are located in California, and their reservations are both located 36 miles from their respective gaming sites. Another two-part determination application was approved for a Michigan tribe in December 2011. However, this latest approval is more technical in nature since the tribe is already operating an off-reservation casino and was seeking to build a replacement facility closer to its reservation.

### Outlook

The DOI's rescission of the 2008 commutability memo is encouraging for tribes seeking land-into-trust for gaming purposes. However, Fitch believes the process will remain a difficult endeavor with low probability of success for tribes that are separated by considerable distance from the proposed gaming sites.

In the same September 2011 release that approved off-reservation gaming for the two California tribes, the BIA also turned down applications for two other tribes seeking to have land taken into trust for gaming. The Guideville Band of Pomo Indians (Mendocino County, CA) was seeking gaming determination through the IGRA's restored lands exception and failed to meet the exception's modern connection criteria since its reservation was located 108 miles from the proposed gaming site. For the Pueblo of Jemez (northern-central New Mexico), the BIA rejected the tribe's two-part determination application on the grounds that the Pueblo could not exercise adequate control over the gaming enterprise, which would be located 293 miles from the reservation.

Fitch expects the BIA will remain sensitive to the commutability issue despite the rescission of the 2008 memo. Off-reservation gaming remains a hot-button topic for politicians. Shortly after the BIA rescinded the 2008 memo, Sen. John McCain (R-AZ) introduced a bill effectively reconfirming the commutability guidelines. As previously mentioned, Sen. Feinstein wants the modern connection requirement worked into Carcieri clean fix.

Aside from political considerations, the BIA still has to conform to criteria set by section 25 CFR 151.11 (recorded in the Federal Register). The Code of Federal Regulations section stipulates that, as the distance increases of the proposed land being taken into trust from the tribe's reservation, the secretary must apply greater scrutiny of the economic benefit for the tribe and adverse impact on the surrounding community. As illustrated by the Pueblo of Jemez, distance is also a consideration when the tribe's ability to exercise governmental powers over the off-reservation gaming site, a requirement set by the IGRA, is questionable.

## Other Considerations for Off-Reservation Gaming

### Capital Markets Access

Regulatory considerations are paramount for tribes seeking off-reservation gaming opportunities. However, Fitch believes financing will present another hurdle for tribes with regulatory approvals at hand. Fitch is aware of only two major project financings for Native American casinos since the onset of the 2008–2009 recession, with both financings done at rates some tribes may consider to be prohibitive. FireKeepers Development Authority issued $340 million of 13.875% notes in 2008 to fund its casino near Battle Creek, MI. More recently, the Gun Lake Tribe Gaming Authority took out a $160 million term loan to fund its Wayland, MI casino. The tribe pays LIBOR + 950 on the loan with a 2.5% LIBOR floor. Both transactions were issued at a discount.

The bond and loan markets eased up for financially stronger tribes looking to refinance, following the recession and the heightened level of concern over tribal sovereignty in default. However, investors still seem somewhat skittish about tribes with weaker financial profiles or those exposed to considerable competitive risks. River Rock Entertainment Authority, with leverage of less than 4x, defaulted in November 2011 after it failed to refinance the maturity of its 9.75% notes ($200 million).

Fitch believes certain deals with favorable economics will get done, despite the challenges to financing greenfield Native American casino projects. Projects that are more likely to successfully secure financing will be close to large population centers (Shinnecock Tribe in Long Island, Mashpee Wampanoag Tribe in southeastern Massachusetts, or Cowlitz Tribe near Portland, OR). Tribes may also look to get capital injections from partners seeking to enter into management contracts (e.g., Station Casinos with the North Fork Rancheria of Mono Indian Tribe).

Tribes have the option to build in stages if a meaningful capital raise proves allusive. For instance, a sprung structure could be raised as an interim measure until the depth of the market could be better assessed and the tribe starts to generate cash flows that can be pledged to finance a more permanent facility.

### Presidential Elections

The DOI under the Obama administration has thus far been pragmatic with respect to off-reservation gaming. A potential turnover in the DOI resulting from an election of a Republican

nominee, in November 2012 or the more distant future, may slow the application processes for off-reservation gaming determinations. A turnover at DOI may also mean a more rigid interpretation of the Carcieri ruling with respect to the meaning of the term “under federal jurisdiction” and of the “commutability” rule with respect to the permitted distance of the proposed gaming site from the tribe’s reservation.

Over a longer time, a Republican incumbent may seek to nominate conservative-leaning justices to the Supreme Court (President Bush’s nomination of Justices Roberts and Alito versus President Obama’s nomination of Justices Sotomayor and Kagan). This branch of the government has had meaningful sway over off-reservation gaming. It should be noted, though, that two out of three dissenting opinions in Carcieri were issued by justices nominated by Republican presidents (Justice Stevens by President Ford and Justice Souter by President Bush Sr.). As such, the correlation is far from perfect.

The Republican front-runner for the 2012 election is Mitt Romney, the former governor of Massachusetts. Romney has not expressed strong views either way on off-reservation gaming, to Fitch’s best knowledge. However, the candidate reportedly backed away from his support for gaming legalization during the latter part of his Massachusetts governorship. Romney has taken on a more socially conservative stance than his moderate track record would otherwise suggest since leaving his governor post in 2007 and entering his first bid for the 2008 Republican presidential nomination.

## Appendix

### Glossary of Terms

The following list is a selected group of terms that are often used in reference to trust land acquisitions and gaming land use approvals. The source of the definitions includes the relevant legislation and other federal government publications.

**Indian Reorganization Act of 1934 (IRA):** With respect to gaming land use approvals, the IRA governs the part of the process that involves the federal government taking the land into trust for the benefit of the tribe. The federal government derives this authority from part 151 of the IRA.

**Part 151 Determination:** The term is sometimes used to refer to the process of the DOI assessing a tribe's land-into-trust application.

**Indian Gaming Regulatory Act (IGRA):** This 1988 legislation set the framework for the Native American gaming industry.

**Indian Lands:** This term is important with respect to the IGRA. The IGRA defines "Indian Lands" as 1) all lands within the limits of any Indian reservation, and 2) any lands with trust or restricted fee status. All lands meeting the first part of the definition are eligible for gaming, and lands meeting the second part of the definition after 1988 are eligible if they meet the criteria of one of the IGRA section 20 exceptions.

**IGRA Section 20:** This section of the IGRA describes the criteria lands taken in trust after 1988 must meet to be eligible for gaming purposes.

**Newly or After-Acquired Lands:** This refers to lands acquired in trust after passage of the IGRA in 1988. These lands must meet one of the section 20 exceptions to qualify for gaming use.

**Modern Connection:** This term was introduced by the May 2008 DOI rule implementing section 20 of the IGRA. The rule states that a tribe can demonstrate a modern connection to a parcel of land through one of the following: 1) the land is located near where a significant number of tribal members live; 2) the land is within reasonable commuting distance of the tribe's reservation; 3) the land is within 25 miles of the tribe's governmental headquarters or facilities; or 4) other factors (left open ended).

**Commutable Distance:** The term is defined in the January 2008 DOI guidance on taking off-reservation land into trust for gaming purposes: "A commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off reservation."

**IGRA Lands Determination:** The term is sometimes used to refer to the process of assessing whether a parcel qualifies for gaming purposes per the language of the IGRA.

**IGRA Two-Part or Secretarial Determination:** A determination by the federal government that, for a parcel of off-reservation land taken in trust after 1988 and which does not meet one of the other section 20 exceptions, 1) a proposed gaming facility is in the best interest of the tribe and its members, and 2) it would not be detrimental to the surrounding community.

## Links Library

Below are links to government-issued releases, rules, and legislation that are relevant to the subject of off-reservation gaming.

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**BIA Releases/Documents**

| | |
|---|---|
| 12/20/2011 | Echo Hawk Issues Decisions on Two Tribal Gaming Applications |
| 12/23/2010 | Assistant Secretary–Indian Affairs Larry Echo Hawk Issues Tribal Gaming Determinations |
| 12/23/2010 | Record of Decision — Trust Acquisition for Cowlitz Indian Tribe |
| 09/02/2011 | Assistant Secretary Echo Hawk Issues Four Decisions on Tribal Gaming Applications |
| 06/14/2011 | Assistant Secretary Echo Hawk Charts Balanced Course for Off-Reservation Gaming Policy; Rescinds Guidance Memo |
| 11/10/2010 | Echo Hawk Issues Tribal Gaming Determinations (Navajo and Cherokee) |
| 08/31/2010 | Echo Hawk Announces Tribal Consultation on Indian Gaming Land into Trust Determinations |
| 06/28/2010 | Interior Details Path Forward on Indian Gaming Policy |
| 02/27/2009 | Interior Department Statement on Carcieri Court Decision |
| 09/21/2007 | Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations Under 20(b)(1)(A) of IGRA |

**DOI Releases/Documents**

| | |
|---|---|
| 06/18/2010 | Decisions on Indian Gaming Applications |
| 01/3/2008 | On Taking Off-Reservation Land Into Trust For Gaming Purposes (link via indianz.com) |

**Federal Register**

| | |
|---|---|
| 01/04/2011 | BIA Land Acquisition; Cowlitz Indian Tribe of Washington |
| 05/20/2008 | BIA 25 CFR Part 292 Gaming on Trust Lands Acquired After 10/17/1988; Final Rule |
| 09/21/1995 | BIA 25 CFR Part 151; Section 11 (Off-Reservation Acquisitions) |

**General Accounting Office**

| | |
|---|---|
| 11/01/2001 | Improvements Needed in Tribal Recognition Process (includes list of tribes recognized through 2001) |

**Pending Bills**

| | |
|---|---|
| 07/27/2011 | S.1424 — Off-Reservation Land Acquisition Guidance Act (McCain's Commutability Bill) |
| 03/29/2011 | H.R.1234 — To Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes. |
| 03/31/2011 | H.R.1291— To Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes, and Other Purposes. |
| 03/30/2011 | S.676 — To Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to take land into trust for Indian Tribe |
| 04/08/2011 | S.771 — Tribal Gaming Eligibility Act (Feinstein's Modern/Aboriginal Connection Bill) |

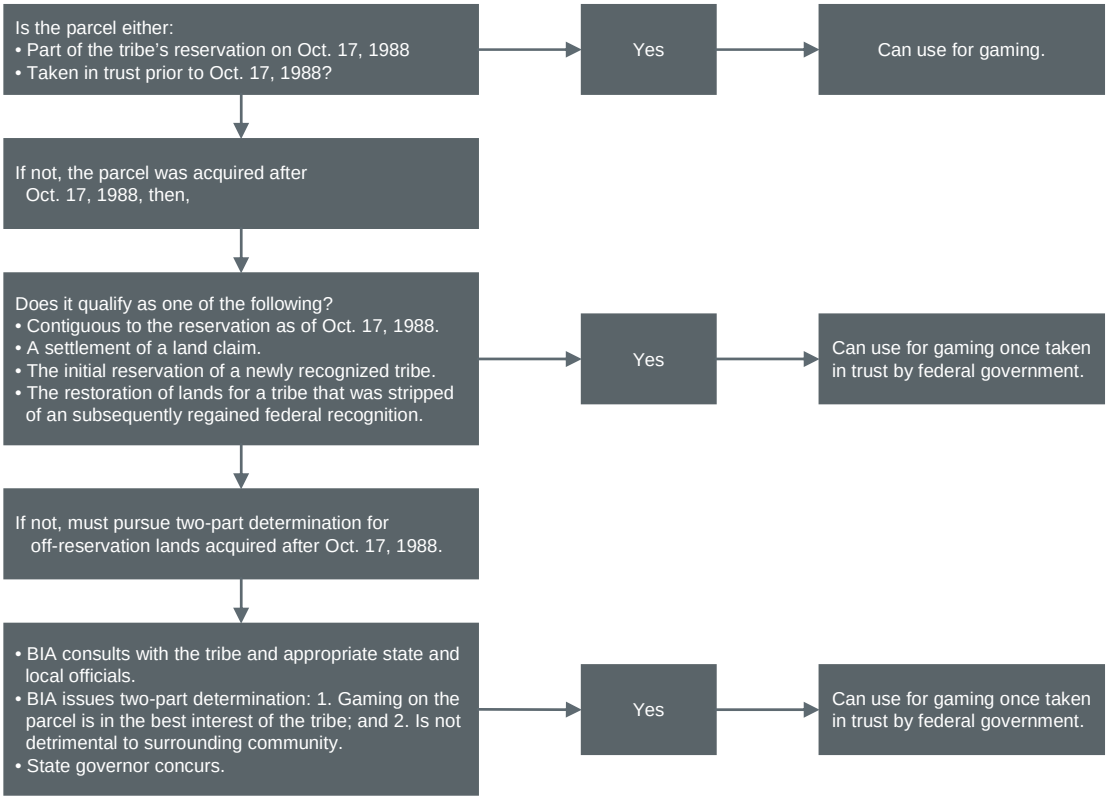
**Carcieri-Related Court Rulings and Documents**

| | |
|---|---|
| 10/13/2011 | United States Senate Committee on Indian Affairs Oversight Hearing Written Testimony by Richard A. Guest (summaries of Carcieri-related litigation on pages 16–22) |
| 4/15/2011 | *Appeal by Clark County et al Against Cowlitz Decision (link via turtletalk.wordpress.com)* |
| 01/21/2011 | Patchak v. Salazar Decision (United States Court of Appeals) |
| 02/24/2009 | Carcieri v. Salazar Supreme Court Opinion |

**Other Relevant Documents**

| | |
|---|---|
| 06/28/2010 (est.) | Approved Gaming Acquisitions Since Enactment of IGRA Oct. 17, 1988 (link via indianz.com) |
| 06/01/2011 | Pending Gaming Applications (link via standupca.org) |
| 12/15/2010 | Tribes Recognized Since the Passage of Indian Reorganization Act of 1934 (link via standupca.org) |
| 06/01/2011 | List of Applications as of June 2011 (link via standupca.org) |

**Regulatory Approval Process for Gaming on Land Acquired after Oct. 17, 1988**




Source: Fitch.