

Off-Reservation Gaming

Have the Floodgates Opened?

By Heidi McNeil Staudenmaier

As of late summer 2011, only five tribes had obtained approval for conducting “off-reservation gaming” since the passage of the Indian Gaming Regulatory Act (“IGRA”) nearly twenty-three years earlier. Yet in a span of just three months in late 2011, Assistant Secretary for Indian Affairs Larry Echohawk issued three favorable decisions for “off-reservation” gaming applications.

Have the floodgates truly opened, as certain opponents to tribal gaming feared with the announcement of Echohawk’s June of 2011 guidance memorandum? Or have these decisions simply been slow, yet justified, in coming as a result of the attendant political processes? First, a little refresher on the process involved.

LANDS MUST BE HELD IN TRUST FOR GAMING PURPOSES

The IGRA only permits gaming on “Indian lands” - which include (1) all lands within the limits of any Indian reservation; (2) lands held in trust by the United States for the benefit of any Indian Tribe; or (3) lands held by an Indian Tribe subject to restriction by the United States against alienation and over which an Indian Tribe exercises governmental power. Gaming is prohibited on any lands acquired after October 17, 1988, unless the lands either fall into

one of several exceptions - (1) initial reservation lands for newly recognized tribe; (2) land claim settlement; or (3) restored lands to tribe restored to federal recognition. If none of these exceptions apply, the tribe must obtain a favorable two-part determination from the Secretary of the Interior and the concurrence of the governor for the state where the land is located. The moniker “off-reservation gaming” has been used to describe the two-part determination/governor concurrence exception, although some have tried to broaden its definition.

Over the years, the land-into-trust process was generally guided by the rules and regulations contained in 25 C.F.R. Part 151 and the Office of Indian Gaming Management checklist for gaming and gaming-related acquisitions. Prior “off reservation” gaming applications were granted to the Forest County Potawatomi (Milwaukee, Wisconsin - July, 1990), Kalispel Tribe (Airway Heights, Washington - August 1997), Keweenaw Bay Indian Community (Marquette County, MI - May, 2000), Fort Mojave Indian Tribe (Needles, CA - February, 2008), and Northern Cheyenne Tribe (Big Horn County, MT - October 2008) - in each case, the governor of the state ultimately concurred in the favorable decision.

In January of 2008, the Depart-

ment of the Interior issued a guidance memorandum which required the application reviewers to ask specific questions where the lands at issue exceeded a “commutable distance” from the tribe’s existing reservation due to the impact such a distant acquisition may or may not have on life on the reservation. The guidance emphasized that, as the distance from the reservation increases, greater weight should be given to state and local concerns. Based on this memorandum, eleven pending applications were denied and eleven applications were rejected due to incomplete information.

Interestingly, the Department published final regulations a few months later which implemented the off-reservation exception. (25 C.F.R. Part 292, May, 2008.) The regulations outlined four general steps an applicant tribe must take prior to successfully receiving a positive determination:

1. The tribe must submit a written request to the Secretary for a determination that the proposed tribal casino is in the best interest of the tribe and is not detrimental to the surrounding community. In support of its application, the tribe is required to submit certain specific information to assist the Secretary in determining whether the casino is in

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the best interest of the tribe and whether the casino will not be detrimental to the surrounding community. The tribe also must advise the Secretary of the distance of the land from the tribe's reservation lands and the governmental headquarters. If there is a nearby Indian tribe with a significant historical connection to the land, any impact on that tribe's traditional cultural connection to the land must be addressed.

2. The Secretary is required to consult with the tribe and appropriate state and local officials, including officials of nearby Indian tribes.

3. Following the foregoing consultation, the Secretary will make the two-part determination.

4. If the Secretary makes a positive determination, the Secretary will notify the governor of the affected state. The governor must then determine whether to concur in the Secretary's determination. The governor has a final, non-reviewable right to concur - or not.

As a result of the January of 2008 guidance memorandum, the land into trust application process in essence went into a holding pattern - other than granting the Fort Mojave application - where the land was only two miles from the reservation, and the Northern Cheyenne application - where the land was only fifteen miles away from the reservation.

NEW ADMINISTRATION MOVES FORWARD WITH APPLICATIONS

It was not until the new Obama administration came on board in early 2009 that the land into trust process appeared to start moving again. In June of 2010, the new Secretary of

the Interior issued a directive which did not explicitly reverse the prior administration's January 2008 memorandum; however, the Secretary opined that the Department needed to provide "clarity" regarding how it will review and make decisions on (1) "off reservation" applications; and (2) reservation or "equal footing" applications. The Secretary recommended that the Assistant Secretary "undertake a thorough study of the ("off-reservation") issues and review current guidance and regulatory standards to guide the Department's decision-making in this important area." The Secretary concluded it is "important that we move forward with processing applications and requests for gaming on Indian lands within the context of objective statutory and regulatory criteria."

Thereafter, the Assistant Secretary held multiple tribal consultation sessions and "thoroughly reviewed issues and policies regarding off-reservation gaming." In June of 2011, the Assistant Secretary issued his own guidance memorandum wherein the January 2008 memorandum was officially withdrawn. He further specified how the Department would consider applications for gaming under the off-reservation gaming exception. Specifically, the Assistant Secretary determined that the Part 151 regulations already provided an opportunity to scrutinize off-reservation applications and that "no guidance beyond the regulations is necessary in guiding the Department's case-by-case analysis for each unique fee-to-trust application."

DEPARTMENT FINALLY ACTS UPON LAND INTO TRUST APPLICATIONS

At the time the Assistant Secretary issued his June of 2011 memorandum, there were ten "off-reservation" gam-

ing applications pending before the Department. The oldest application was filed in 2000, while the newest applications were filed in 2006. Using the foregoing guidance and regulations, in September of 2011, the Assistant Secretary issued positive determinations for the North Fork Rancheria (305 acres located in Madera County, California - 38 miles from the Rancheria) and the Enterprise Rancheria (40 acres located in Yuba County, California - 54 miles from the Rancheria). At the same time, the Assistant Secretary denied the Pueblo of Jemez' off-reservation application for land in Anthony, New Mexico, as well as an application for the Guidiville Band seeking land in Contra Costa County, California, pursuant to the "restored tribe" exception.

In late December, the Assistant Secretary granted the application of the Keweenaw Bay Indian Community of Michigan, whereby that tribe could move its existing casino operations in Chocolay Township to another township in Marquette County where the former airport was located. Although not technically deemed "off reservation" applications, in July of 2011, the Assistant Secretary granted three applications pending by the Osage Tribe under the "land in Oklahoma" exception of the IGRA.

The three favorable determinations issued in 2011 are not the end of the game. In each case, the governor for each state implicated must concur in the Assistant Secretary's determination. The governor has one year to make his decision. At this juncture, it is unknown whether the California governor will concur in the North Fork and Enterprise decisions. Indeed, it is likely the governor will take the full year to make his decision. Likewise, it is unknown what the Michigan governor will do

with the Keweenaw Bay decision. With the Keweenaw Bay's first favorable off-reservation gaming application in 2000, it took settlement of litigation to eventually obtain the governor's concurrence.

WHAT'S NEXT?

At present, there are six "off-reservation gaming" applications pending: (1) Confederated Tribes of Warm Springs of Oregon (Cascade Locks); (2) Los Coyotes Band of California; (3) Kaw Nation of Oklahoma; (4) Manzanita Band of Mission Indians of California; (5) Hannahville Indian Community, Michigan; and (6) Spokane Tribe, Washington (land is already in trust). There also are applications pending for the Wyandotte Tribe of Oklahoma for certain land in Kansas (land claim settlement exception) and the Mashpee Wampanoag Tribe of Massachusetts

(initial reservation exception). Restored tribe exception applications are pending for the Cloverdale Rancheria of California, Ione Band of Miwok Indians of California, Samish Indian Nation of Washington, and Scotts Valley Band of Pomo Indians of California. There are several pending applications for on/contiguous to reservation applications and applications under the Land in Oklahoma exception.

To add a further wrinkle, in January of this year, the Assistant Secretary reaffirmed the federal recognition status of the Tejon Indian Tribe of California. As a result, that Tribe is expected to submit a land-into-trust application pursuant to the initial reservation exception.

So, has there been a significant change in "off reservation gaming"? Not really. Granted, the list of approved off-reservation applications ex-

panded "dramatically" from five to eight in just a few months. However, there has been no "rush" by tribes to file off-reservation gaming applications. Notwithstanding the "new directive" from 2011, significant challenges still remain for tribes seeking a positive two-part eligibility determination for taking the land into trust for gaming purposes. ♣

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