Federal Indian Gaming Update – 5-12-08

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The following sections provide an update on federal Indian gaming-related legislation currently pending before the 110th Congress. As 2008 progresses, it is difficult to predict whether there will be definitive action on the legislative efforts described herein. Nevertheless, many observers are predicting that bills related to tribal gaming will be left on the cutting room floor as lawmakers prepare for a final legislative push prior to adjourning for the November elections.

Earlier this year, Department of Interior (DOI) Assistant Secretary Carl Artman issued an internal memorandum to Bureau of Indian Affairs' (BIA) regional directors regarding the agency's policy related to taking off-reservation land into trust for purposes of gaming. Since that time, DOI's January 3, 2008 guidance has been scrutinized on Capitol Hill and by various stakeholders nationwide.

In general, the new guidance seeks to clarify the conditions that must be met in order for the Secretary of DOI to approve land-into-trust acquisitions that are located outside of and noncontiguous to a tribe's reservation. The guidance focuses on the following two key factors that the agency is required to consider under Section 151.11 of 25 CFR Part 151 when approving such trust land acquisitions:

- The tribe's justification of anticipated benefits from the acquisition.

- Concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments.

According to DOI, as the distance between a tribe's reservation and the land to be acquired increases, Part 151 requires the agency to give "greater scrutiny" to

the tribe's justification of anticipated benefits from the acquisition. Similarly, DOI must give "greater weight" to state and local government concerns.

With respect to anticipated tribal benefits resulting from trust land acquisitions, DOI's guidance requires that potential new land not exceed a "commutable distance" from the tribe's reservation. Among other things, the agency notes that as distance increases, there is less likelihood for positive consequences (economic or otherwise) for reservation life. As an example, DOI notes that tribal members are unlikely to be able to take advantage of job opportunities at a gaming facility if the facility is not within a commutable distance of the reservation.

As for the issue of granting greater weight to the concerns of state and local governments, DOI's guidance provides a number of examples of problems associated with off-reservation land acquisitions, including local concerns related to "checkerboard patterns of jurisdiction" and various land use/zoning issues. The guidance also explicitly notes the importance of intergovernmental agreements, and indicates that the failure to achieve such agreements should weigh heavily against the approval of land-into-trust applications.

It should be noted that the release of DOI's January 3 guidance coincided with the agency sending letters to 22 tribes regarding their land-into-trust applications. Of those 22 tribes, 11 were notified that DOI would not be exercising its discretion to take property into trust; the other 11 tribes were told that their applications could not be acted upon due to incomplete information. According to DOI, 14 of the 22 tribes applied to obtain trust status for land more than 100 miles from their reservation land.

Not surprisingly, a number of tribes are in the process of initiating legal action against DOI in response to the agency's new land-into-trust policy. For one, the St. Regis Mohawk Tribe (NY) – whose trust application was denied by DOI – has indicated that it will file a lawsuit against Secretary Kempthorne for the "arbitrary and capricious nature" of DOI's decision.

As expected, lawmakers on Capitol Hill began the process of reviewing DOI's commutable distance test shortly after the agency released its guidance. In late February, the House Natural Resources Committee held a hearing during

which time the committee's chairman – Representative Nick Rahall (D-WV) – registered his concern that the agency's guidance was developed without proper consultation with tribes. Since that time, Mr. Rahall has introduced legislation (HR 5608) that would require the federal government to consult with tribal governments prior to developing or modifying policies, rules, or regulations that could affect tribes.

Notably, HR 5608 would essentially codify Executive Order (EO) 13175, which was signed by President Clinton back in 2000 and requires federal agencies to consult with Indian tribes on a government-to-government basis. According to Rahall, the legislation is necessary in light of the Bush administration's repeated failure to adhere to the EO, with the latest example being DOI's January 3 guidance.

For its part, CSAC has sent letters to chairman Rahall and members of the California congressional delegation urging that HR 5608 include provisions that would require DOI and the National Indian Gaming Commission to consult with local governments when formulating, amending, implementing, or rescinding policies that have tribal-local governmental implications. CSAC also is urging Members of Congress to include language in the legislation that would require the aforementioned agencies to provide local governments with notification of any federal administrative or tribal actions that occur under existing regulatory authority that would impact local communities.

In addition to HR 5608, there are several other pieces of legislation currently pending before Congress that would impact federal Indian gaming policy. For one, legislation (HR 2837) introduced by Representative Eni F.H. Faleomavaega (D-AS) would remove the federal tribal acknowledgment process from the BIA and transfer that responsibility to an independent Commission on Indian Recognition. Among other things, the bill would set forth procedures for an Indian group to submit letters of intent and a petition to the commission requesting federal recognition as an Indian tribe. The measure also would authorize a petitioner to seek judicial review of a final determination with respect to a petition in the United States District Court for the District of Columbia.

There have been several hearings on HR 2837, but no legislative action has occurred to date. With regard to CSAC, the association is on record having

expressed several concerns with the bill. Primarily, CSAC is concerned that the legislation would remove important public notice and participation opportunities, which would result in adverse consequences for affected communities.

There also are several bills pending before Congress that would directly amend the Indian Gaming Regulatory Act (IGRA). For one, Representative Dan Lungren (R-CA) has sponsored legislation (HR 1654) that would make it more difficult for tribes to build casinos under IGRA's restored lands exception. Under the measure, the Secretary of DOI – after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes – would need to make the determination 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.

The Lungren bill was referred to the House Committee on Natural Resources, but is not expected to see action in the near future.

In addition, Representative John Campbell (R-CA) has sponsored a bill (HR 3752) that would ban any Indian tribe from building a casino for 25 years after it has been federally recognized.

Across Capitol Hill, Senator Dianne Feinstein's (D-CA) Lytton Gaming Oversight Act of 2007 (S 1347) was approved by the full Senate late last year. The legislation would amend the Omnibus Indian Advancement Act to repeal the declaration that land accepted by the Secretary of Interior for the benefit of the Lytton Rancheria shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988. Instead, the bill specifies that the land shall be treated as if it was acquired on October 9, 2003 (the date on which the Secretary took it into trust). This provision would have the effect of requiring the Lytton tribe to undertake the two-part determination test under IGRA if the tribe wishes to pursue class III gaming.

Additionally, under the legislation, the Lytton Rancheria would be allowed to continue to conduct activities for class II gaming on the land taken into trust. The measure also would prohibit the tribe from expanding the exterior physical measurements of the tribe's facilities that are in use for class II gaming.

After passage by the Senate, S 1347 was sent to the House Natural Resources Committee. To date, the committee has not taken any action on the legislation.