New BIA policy concerning "off-reservation" gaming lands acquisitions.

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On January 3, 2008, Carl Artman, the Assistant Secretary of the Interior of Indian Affairs, issued new "guidance" to the BIA regional directors and Office of Indian Gaming staff which is to be used in determining whether to take "off-reservation" land into trust for gaming purposes pursuant to IGRA (hereinafter "2008 off-reservation gaming lands acquisition policy"). The new 2008 off-reservation gaming lands acquisition policy has been highly anticipated by both the Indian gaming industry interested in getting some clarity to the manner the BIA uses to decide gaming lands acquisition applications; and by state, local and federal officials concerned about the alleged spread of "reservation shopping" by some Indian tribes which in the view of those officials is inconsistent with the intent of IGRA.

The BIA's manner of determining gaming lands acquisition applications has been under fire for many years because: (1) it has appeared to result in inconsistent determinations for "similar" requests, (2) has resulted in an informal "moratorium" on such requests while the BIA has tried to establish a policy it believes will satisfy certain political interests and Washington policy makers, and (3) been in the view of many in the Indian gaming industry devoid of any rationale basis or mooring in federal law.

To approve a gaming land acquisition application, the BIA must comply with both IGRA requirements for "post-1988" acquired gaming lands (commonly known as "Section 20 requirements"), and with requirements for trust land acquisitions contained in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §465. Under the Section 20 requirements, gaming can not be conducted on lands acquired in trust after October 17, 1988 unless it qualifies under one of four exceptions (i.e. "concurrence" to the acquisition by the state's governor, a land claim settlement, "initial" reservation of newly recognized tribe, or land restoration for "restored" tribe). Even if the Section 20 requirements are met, however, the Part 151 regulations implementing the trust land acquisition authority granted to the Secretary by the IRA must also be satisfied before the acquisition can be completed.

Under Section 151.11(b) of 25 CFR Part 151, when considering trust land acquisition applications for lands "located outside of and noncontiguous to the tribe's reservation," the Secretary is to give "greater scrutiny" to the tribe's justification of anticipated benefits for the acquisition and "greater weight" to state and local governments' concerns about the acquisition's potential impact on them. Note that these provisions only apply to acquisition requests for lands located outside of and noncontiguous to the tribe's reservation.

The problem in the past with the BIA's off-reservation land acquisition determinations is that there were no standards to guide the BIA staff when considering the "greater scrutiny" and

"greater weight" factors. The 2008 off-reservation gaming lands acquisition policy is designed to "clarify how those terms are to be interpreted and applied", particularly in connection with off-reservation land acquisition applications for gaming purposes. More specifically, the new guidance is directed primarily at applications "that exceed a daily commutable distance from the reservation."

Essentially, the 2008 off-reservation gaming lands acquisition policy flip-flopped the order in which the BIA will consider the Section 20 requirements and the Part 151 requirements for any "off-reservation" gaming land acquisition application. In the past, the BIA completed the Section 20 requirements (including any environmental review required by NEPA) before considering if the application met the Part 151 requirements. In addition, the 2008 off-reservation gaming lands acquisition policy now puts a heavier burden on applications which are considered to be in excess of the "distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation." If that is the case, then the 2008 off-reservation gaming lands acquisition policy provides specific questions which need to be addressed before the application will decided (i.e. impact on employment opportunities for reservation residents, whether the gaming facility is consistent with local land use and zoning, or if there are intergovernmental agreements with state/local governments for jurisdiction issues).

Applying the new guidance from the 2008 off-reservation gaming lands acquisition policy, the BIA Office of Indian Gaming denied 11 of the 30 pending "off-reservation" gaming land acquisition applications mostly on the grounds that the proposed casino location was not within a "reasonable commuting distance" (i.e. in excess of 100 miles). The BIA also notified an additional 11 tribes that their pending acquisition application was deficient because it lacked the necessary information now required under the new guidance and that these applications would not be acted upon until and unless the necessary information and analysis was submitted.

The BIA's new 2008 policy reflects the current Administration's animus towards gaming facilities being built "far away" from "established" reservations. Reaction to the new policy from tribes and others in the Indian gaming industry has been swift and highly critical. Some tribal leaders have declared the new policy to be "unlawful, arbitrary and capricious, and an abuse of authority", and federal court actions have been commenced to reverse or stop the denial of at least two "off-reservation" gaming lands applications. In addition, with the possibility of the election a new, more Indian gaming friendly Administration later this year, it is unclear how long the new BIA policy for off-reservation gaming lands acquisitions will last in its current form. Given the current political climate and the economic impact the new BIA policy could have on the sometimes joint interests of individual tribes and states in fostering new economic development which benefits both, expect to see additional developments in this area in the future; whether by judicial, administrative or congressional action.