OFF-RESERVATION GAMING: TO SHOP OR NOT TO SHOP

By Heidi McNeil Staudenmaier

Real estate marketeers uniformly agree that the key to success in their business is "location, location, location." The same can be said about the $18.5 billion Indian gaming industry. Which is why one of the most controversial issues to emerge in recent years concerns tribes seeking to acquire land into trust for "gaming purposes". This has also been dubbed by some critics as "reservation shopping." This article will examine the "Post-IGRA" land acquisition process and current issues.

Almost all of the existing tribal casinos are being operated on traditional reservation, rancheria or other restricted lands. However, the Indian Gaming Regulatory Act ("IGRA"), enacted on October 17, 1988, permits Indian tribes to develop, construct and run casinos on land acquired after the passage of the IGRA where such land is located outside the tribe's reservation or other trust lands.

Before a tribe may conduct gaming on such "off-reservation" lands, the subject land must fall within certain narrow exceptions set forth at Section 20 of the IGRA, 25 U.S.C. § 2719(a) and (b). The exceptions are:

(1) Lands are located within or contiguous to the boundaries of a reservation of the tribe in existence on October 17, 1988;

(2) Lands are located within the tribe's last recognized reservation within the state within which the tribe is presently located;

(3) Lands are taken into trust as part of a settlement of a land claim;

(4) Tribe has been newly acknowledged by the Secretary of the Interior ("Secretary") under the federal acknowledgment process and has had land taken into trust as a result of its new acknowledgment; or

(5) Lands are taken into trust as part of the restoration of lands for the tribe and the tribe has been restored to federal recognition.

The IGRA also specifies certain exceptions applicable only to tribes located in Oklahoma who had no reservation lands at the time the IGRA was passed.

Barring an applicable exception outlined above, the tribe also can petition the Secretary to take the land into trust for the benefit of the tribe. Before the Secretary may approve such a request, the Secretary is required to make a two-part determination that the acquisition: (1) is in the "best interest" of the tribe and its members; and (2) is "not detrimental" to the surrounding community. The Governor of the state where such lands are located also must concur in the Secretary's two-part determination.

The processing of land-into-trust for gaming purposes applications must be viewed with Section 20 considerations in mind. Specifically, the Office of Indian Gaming Management, within the Secretary of the Interior structure, has prepared a checklist governing gaming acquisitions ("OIGM Checklist"). The checklist very carefully and in great detail delineates the Bureau of Indian Affairs' ("BIA") requirements for completing a gaming land acquisition package and recommending final action to the Secretary. When the two-part Secretary determination is required, the BIA is mandated to consult with local communities, nearby tribes and state officials on the proposed acquisition to consider the "detrimental" component.

When a tribe claims that one of the narrow exceptions applies and, therefore, the two-part Secretarial determination process is not necessary, the OIGM Checklist requires a "conclusive factual and legal finding" to support the applicability of a particular exception. The BIA also must obtain a legal opinion from the Office of the Solicitor concluding that the proposed acquisition comes within one of the exceptions.

Since 1988, only three land acquisitions have been approved under the two-part Secretarial determination. As such, creativity abounds where tribes are looking to "restore" their traditional land base through land acquisitions for gaming purposes under the IGRA's "restoration" exception.

The restoration exception is not intended to permit the acquisition of *any and all* aboriginal land that the restored tribe may have once occupied. The legal precedent requires that the land to be considered part of any restoration shall be limited by: (1) the factual circumstance of the acquisition; (2) the location of the acquisition; and (3) the temporal relationship of the acquisition to the restoration.

The factual circumstance must provide indicia of "restoration". For example, do the lands to be acquired put the tribe back in its former position (*i.e.*, land "restores" to the tribe what it previously had)?

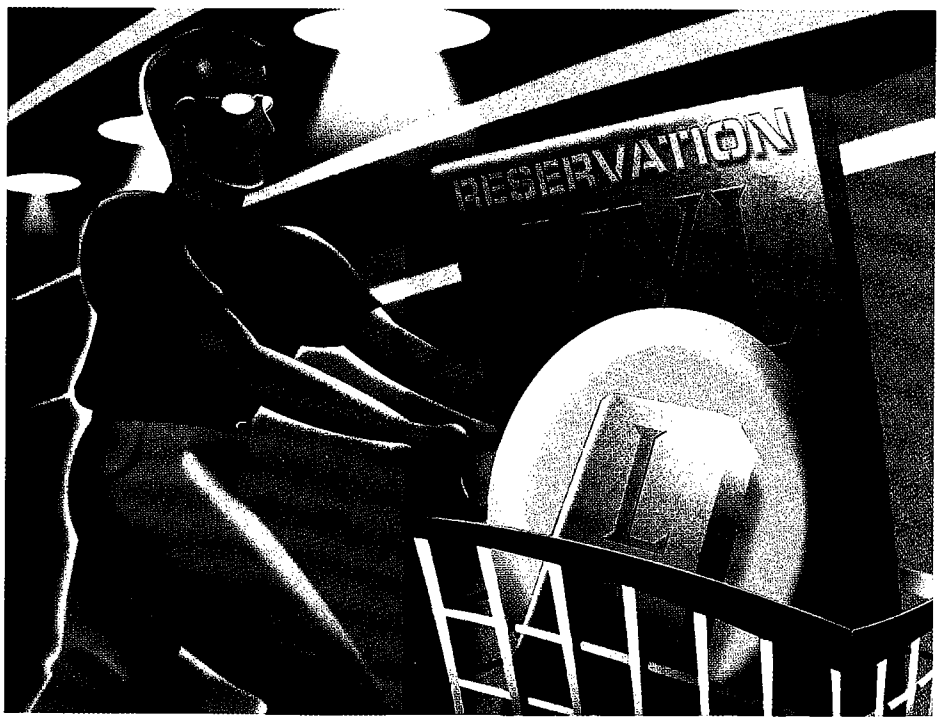
Regarding the location element, the restored lands may include "off reservation" parcels; however, there must be indicia that the land has been in some respect recognized as having "significant relation" to the tribe. The location factor has been deemed particularly critical in obtaining a finding of restoration.

Specifically, the evidence must be conclusive that the tribe has a historical, geographical and cultural nexus to the land. Further, the tribe's historical connection to the land must be "longstanding" and "ancient". And, the land must have been "important" to the tribe throughout its history. This can pose a difficult hurdle to tribes seeking to take land into trust many miles from their ancestral land base.

Even if the tribe can satisfy the stringent historical/cultural location element, the tribe must still meet the "temporal relationship" element. Here, the tribe must be able to show that the land to be acquired is part of the same transaction restoring the tribe to federal recognition, and not a separate and independent transaction. This requires a factual inquiry and depends on the length of time that has passed between the tribe regaining federal recognition status and when the land is acquired. In the applicable legal decisions, 18 years and 22

years were found to be too long in duration. However, another case held that a 14-year gap was acceptable under the specific circumstances.

While the restoration exception has been generating considerable attention and controversy in California, the exceptions for land claim settlements and newly-recognized tribes have also drawn fire. The Seneca Tribe in New York commenced operating a highly successful casino in the City of Niagara convention center pursuant to a land claim settlement with the State. The State of New York continues to explore land claim settlements with other New York Tribes, including the Oneida and Mohawk. The State also has made controversial deals with out-of-state tribes claiming historical ties to certain New York lands.



In the State of Michigan, the Gun Lake Band and Pokagon Band earned federal recognition and then sought lands designated as their initial reservations. Considerable litigation emanated from the process in trying to determine where to permit the new reservation lands, because the new reservation lands would be eligible for gaming under the newly-recognized tribe exception of the IGRA.

In California, the Lytton Rancheria of Indians secured Congressional legislation mandating the acquisition of certain land as the newly-recognized tribe's initial reservation lands. The situation has become extremely heated based on the fact that the land is located near the heavily-populated San Francisco Bay area and already had a card club operating on the parcel.

Some tribes, who already have existing casinos on their traditional and historical lands, oppose these "reservation shopping" situations. These tribes believe that the other tribes are trying to get an unfair advantage by establishing casinos in urban areas where the tribes have no historical roots or other significant connections. These tribes do not begrudge the others from having land provided for economic development purposes. However, the opposing tribes believe the land should be *comparable* to what the tribe previously had—they should not obtain land that elevates their position light years beyond what they once had.

The "off-reservation" gaming situation has given rise to many imaginative concepts. For instance, in Kansas, several tribes have offered to close their current reservation casinos in exchange for being permitted to open casinos in more lucrative urban locales. In Michigan, one of the tribes has been seeking to exchange—as part of a land claim settlement—remote reservation land for a more urban location where it can operate a casino. The Minnesota Governor has proposed that certain tribes located in remote areas in Northern Minnesota form a consortium for a casino in Minneapolis.

In response to these various "reservation shopping" efforts, Congress has taken up the battle cry. Several highly-charged Congressional hearings have already been held in 2005, with proponents and opponents debating proposed legislation seeking to amend these so-called IGRA land-into-trust "loopholes". Whether any of the IGRA amendments or other proposed legislation becomes reality during the 2005 Congressional session remains unknown.

One thing is known for sure. Indian gaming will continue to be a thriving market, at least for the near term. In turn, this means that the quest to "shop" for urban casino settings will remain a contentious issue at the local, state and federal level.

Heidi McNeil Staudenmaier is the Partner Coordinator of the Snell & Wilmer Indian and Gaming Law Practice Group, based in Phoenix, Arizona. She is a Founding Member and Immediate Past President of the International Masters of Gaming Law. She is Associate Editor of "Gaming Law Review". Heidi represents tribes and tribal entities, as well as entities and individuals doing business with tribes and tribal entities. She can be contacted at hstaudenmaier@swlaw.com or 602-382-6366.