# "RESERVATION SHOPPING": THE CONTROVERSY CONTINUES

By Heidi McNeil Staudenmaier

Location, location, location. So goes the well-worn mantra for those looking to succeed in the real estate business. And, for the Tribal Gaming industry, the mantra is no different. Case in point: Contrast the hugely profitable Foxwoods and Mohegan Sun tribal casinos located near New York City to Tribal Gaming operations situated in more rural, less populated areas.

As a result, "reservation shopping" has become more prevalent and certainly more controversial. This practice refers to those tribes that have sought to locate casinos near densely populated urban areas, which in some cases may be hundreds of miles away from the tribe's historical and ancestral roots.

In 2006 Congress made several attempts to amend the Indian Gaming Regulatory Act (IGRA) in an effort to curb off-reservation gaming. Each of the legislative attempts failed. In 2007 there were no major legislative campaigns; nevertheless, the "reservation shopping" issue remained at the forefront and will continue to be a volatile issue in 2008, particularly in light of the pending presidential election.

The whole issue can be quite thorny from both a political and a legal standpoint. Legally, the IGRA prohibits tribes from conducting gaming on any lands that were not deemed reservation lands or otherwise viewed as "Indian Lands" as of Oct. 17, 1988. However, there are several exceptions applicable. The most notable exceptions include where the tribe: (1) has obtained the land through a land claim settlement; (2) is newly "recognized" as a tribe and therefore permitted to have an "initial reservation" designated; or (3) has its recognition status restored and has lands "restored" to it. There also is an exception applicable only to Oklahoma tribes.

If the land sought for gaming does not fit within any of the above exceptions, then the tribe must apply to the secretary of the interior for a two-part determination. This determination requires the secretary to conclude that the land acquisition is in the "best interest" of the tribe and is "not detrimental" to the surrounding community.

Importantly, even if the secretary issues a favorable determination for the tribe, the governor of the state where the land is located must concur with the secretary's determination. Of note, there have only been three situations where the two-part determination and governor's concurrence have successfully happened in the nearly 20-year history of the IGRA. In short, it isn't a simple process to navigate and it is extremely politically charged.

At present, the secretary of the interior has approximately 60 pending applications seeking off-reservation gaming approval. Of this number, 34 fall under the two-part determination category and 15 fall under the restored tribe or initial reservation exceptions. Of those seeking a two-part determination, the distances from the applicant tribes' historical lands range from two miles to as far as 1,500 miles.

Secretary of the Interior Dirk Kempthorne, appointed in 2006, made his concerns about "reservation shopping" for gaming purposes known publicly early in 2007. Letters were sent to all or most of the tribes on the department's pending land acquisition list, warning that the review process would be particularly rigorous and restrictive, especially where the application involved land that was a considerable distance from the tribe's reservation or traditional lands.

The secretary has yet to issue regulations governing the acquisition of lands for Tribal Gaming, even though draft rules were circulated in the fall of 2006. The rules, for the first time, attempt to establish guidelines for the acquisition of land under Section 20 of the IGRA. Apparently, both internal and external political pressures at the Department of Interior have stalled revisions and issuance in final form. It is unlikely that any substantive movement will be seen on the proposed regulations prior to November's presidential election.

Many of the tribes have had their land acquisition applications pending for many years with the department. In frustration over the delays on any decisions over their applications, two tribes filed suit against the secretary late in

2007. In November, the St. Regis Mohawk Tribe of New York sued over the secretary's failure to approve its off-reservation casino in the Catskill Mountains, notwithstanding approval and support from both the governor of New York and the local community. Then in December, the St. Croix Band of Lake Superior Chippewa of Wisconsin sued the secretary over his refusal to approve a tribal casino in Beloit, which the Band would operate jointly with the Bad River Band of Lake Superior Chippewa. Both proposed casino sites are over 300 miles from the tribes' existing reservations.

The tribes contend that the department has an unofficial moratorium in place with respect to land-into-trust applications for gaming purposes. Department officials have vehemently denied such a claim and contend that they are working on developing a new policy on the whole issue, as well as awaiting official publication of the Section 20 regulations.

In the case of the St. Regis Mohawk, the secretary had previously issued a favorable two-part determination, which was followed by the New York governor's concurrence. The secretary, however, has refused to approve the land-into-trust application, even though the environmental review process has been successfully completed. The Mohawk lawsuit asks the federal court to compel the secretary to make a decision on the land-into-trust application for the 29 acres located in the Catskills.

One of the reasons for the delay is the shift in policy at the department since Kempthorne and Assistant Secretary of the Bureau of Indian Affairs (BIA) Carl Artman came on board. The policy requires the BIA to make the land-into-trust application decision first, rather than the two-part determination. That change, though seemingly minor, is viewed by many as giving the BIA more discretion to reject land-into-trust applications. However, in response to the St. Croix Band lawsuit, the secretary and BIA may be rethinking this policy.

At a court hearing in the St. Croix suit in December, the Department of Justice offered to delay the policy change. The BIA was expected to make a decision on the St. Croix casino by Jan. 31, 2008. The stipulation pertinent to the policy change apparently is intended to apply only to the St. Croix and Bad River application. Nevertheless, it could affect other tribes that have similar casino projects pending at the BIA. The St. Croix-Bad River application has been pending for over six years.

Kempthorne and Artman can at least claim one victory on their land-into-trust policies, although only in a procedural sense. Late in December, a California federal court judge dismissed a lawsuit against the two department officials concerning their legal opinion that the Ione Band of Miwok Indians could open a casino in Amador County, Calif. The county had filed suit, contending that the department was wrong in its opinion that the Ione Band was a "restored" tribe thereby qualified to have its land designated as "restored land" under the IGRA exception. The judge ruled that the county had filed suit prematurely and that its claim would not be "ripe" until the tribe's land was actually taken into trust by the BIA. Based on the foregoing delays experienced by the St. Croix and Mohawk tribes, the Ione victory may be a hollow one. There is no telling when and if the secretary will take action on the Ione's application.

With the Tribal Gaming industry increasing its revenues from $23 billion in 2006 to $25.7 billion in 2007, it is without question that "reservation shopping" will remain at the forefront of controversy in 2008. ○

### Update

On Jan. 4, 2008, the Department of the Interior (DOI) made public its new policy on "off-reservation" gaming land acquisitions and issued a guidance memorandum to the Bureau of Indian Affairs regional directors and the director of the Office of Indian Gaming. The guidance is intended to clarify how to interpret and apply the existing regulations for taking land into trust (25 CFR Part 151). The guidance requires that the reviewer ask specific questions for those applications with lands exceeding 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 emphasizes that, as the distance from the reservation increases, greater weight should be given to state and local concerns, including jurisdictional problems, potential conflicts of land use, and the removal of the land from the tax rolls.

As a result of the guidance, the DOI issued letters to 11 tribes advising that the DOI would not exercise its discretionary authority to take their respective properties into trust. Another 11 tribes were advised that their applications were lacking complete information and therefore could not be acted upon at this juncture.

The St. Regis Mohawk Tribe was among those receiving a rejection letter for its proposed Catskills casino, although the St. Croix Band of Lake Superior Chippewa did not receive any letter. Of the tribes receiving rejection letters, 14 had submitted applications to take land into trust situated more than 100 miles from their reservations, with some more than 1,000 miles from their reservation. These tribes included the Chemehuevi, Los Coyotes and Big Lagoon Tribes, all with respect to a Barstow, Calif., casino; the Mississippi Choctaw for Jackson County, Miss., lands; the Seneca-Cayuga of Oklahoma and the Stockbridge-Munsee of Wisconsin, both for New York lands; and the Hannahville Tribe for Romulus, Mich., lands.

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