

## Turf War Erupts Between Interior and the NIGC over a Major Indian Gaming Issue

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A rare and surprising battle over Indian Gaming jurisdictional issues has surfaced between the National Indian Gaming Commission and the Department of the Interior. It just came to light with the release of a letter written a week ago by Interior Solicitor David L. Bernhardt to NIGC Chairman Philip N. Hogen. The conflict involves the legal right to determine whether newly-acquired land can be used by Indian tribes for casino development. The NIGC has been the principal actor in this area of the law since Indian gaming was legalized in 1988, but the Secretary of the Interior has stated his intention to bring that authority into the Department and away from the Commission.

Writing for Interior Secretary Dirk A. Kempthorne, Solicitor Bernhardt has directed the NIGC to back away from a major decision rendered only a month ago, in which the the NIGC concluded that an Alabama Indian tribe has the right to conduct casino operations on land which was taken into trust status seven years after enactment of the federal Indian gaming law under a special exception for certain categories of newly-acquired land. That decision, which was released on May 19, ruled in favor of the Poarch Band of Creek Indians of Alabama. The decision was rendered by Chairman Hogen acting alone without concurrence by Interior. In fact, Hogen himself characterized the decision as "a bit unusual" in that it was coming from him and not Interior.

In his June 13 rebuke to Hogen and the NIGC, Solicitor Bernhardt disclosed publicly for the first time that the Department had opposed a positive ruling in the Poarch Band case for a considerable period of time, and he expressed deep concerns about the NIGC action. With that, he invoked authority given the Secretary by federal regulation to conduct his own review of the matter, and directed the NIGC to forward to the Department its entire administrative record upon which the decision was based. Moreover, Bernhardt cautioned the NIGC to take no further action to implement its decision until the Department's review has been concluded.

The depth of the ongoing contention was made clear by the Bernhardt letter, as was the fact that serious disputes continue as to the extent of NIGC jurisdiction. At one point, Bernhardt suggested that a cooperative effort to resolve land eligibility issues has been contentious in the past while simultaneously declaring that he does not intend to review other previously issued NIGC lands opinions. Yet, he made a point of declaring that he has sole responsibility for supervising Interior's legal work. With that declaration, he closed his letter with two admonitions which essentially question any role of the NIGC to decide whether land can be used for tribal gaming. First, he stated that the Secretary alone has authority to decide issues concerning Indian lands and tribal jurisdiction. And, second, he closed with the abject warning that the Solicitor's Office and not the NIGC has the legal authority to resolve all Indian issues.