



Indian Gaming: The Road Ahead

by Knute Knudson

Crystal balls, tea leaves, Ouija Boards - we'll need these and more to predict the future growth of Indian gaming. What will the scope of tribal government gaming look like in 12 months, 24 months? Five years? It's impossible to know for sure. But, we do know enough to discuss the keys to opening up new Indian gaming opportunities.

We are in a relatively quiet period for growth in tribal gaming in this economy. But, growth will come - it will be driven by market expansion at existing locations through economic turnaround and through improved games and amenities. And, it will come through regulatory and statutory changes that allow new opportunities to develop.

Existing tribal casinos are updating their game selection to better compete for the top share of their market. Tribal casinos have also added or improved hotel capacity and other non-gaming amenities to grow market share. And, by some accounts, we are starting to see signs of an economic "spring" that may lead to better economic seasons for all gaming.

Pulling the lens back to look at the broad tribal gaming picture, new tribal gaming markets can develop apart from economic considerations as regulatory and legal challenges to tribal gaming growth are solved.

Two regulatory and legal barriers to development are blocking or stalling tribal gaming developments from the East Coast to the West - those are a 2008 change in Bureau of Indian Affairs (BIA) policy regarding taking land in trust for gaming purposes and the U.S. Supreme Court's "Carcieri" decision.

"Off-Reservation" Gaming

A policy change implemented without tribal consultation by the Bureau of Indian Affairs in January 2008 restricted the use of trust land for tribal government casinos based on the distance of such land from the tribe's traditional lands and restricted such use by giving greater weight to state and local concerns about the intended use. It also flipped the order in which the BIA considered gaming issues and land-in-trust issues.

In January 2008, the Interior Department issued a "Guidance on Taking Off-Reservation Land into Trust for Gaming Purposes," which states that the Indian Gaming Regulatory Act (IGRA) "was not intended to encourage the establishment of Indian gaming facilities far from existing reservations." On its face, this conclusion seems at odds with Congress' stated purpose in the IGRA to "provide a

statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."

Congress may or may not have intended to encourage the establishment of Indian gaming facilities far from existing reservations, but it did allow for such cases.

IGRA forbids gaming on lands acquired after October 17, 1988, yet also provides several clear exceptions to that ban. One of those exceptions allows gaming on land acquired after the cutoff date when "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines 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, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." Thus, it's evident that Congress did intend sovereign tribes have the ability to develop gaming on lands apart from their established lands.

Immediately following the guidance on off-reservation land, the BIA denied fee-to-trust applications for eleven tribes based on the new policy. One of the applications denied was for the St. Regis Mohawk Tribe. That application was supported by local and state officials (consistent with Congress' direction in IGRA), but was denied because the land was located 350 miles from the tribe's existing reservation. This denial was issued despite the fact IGRA places no limits on the location of newly acquired lands eligible for gaming. At that time the BIA also denied fee-to-trust applications for another twelve tribes deemed incomplete or for other reasons.

Tribes have been pressing the Interior Department to reverse this policy. However, other interests opposed to tribal gaming expansion are urging Interior to maintain current policy in this area.

Carcieri Decision

In February of last year the U.S. Supreme Court decided the case *Carcieri, et al. v. Salazar, et al.* The Court decided that the Secretary of Interior does not have authority to take land in trust for tribes not "under federal jurisdiction" in 1934 at the time the Indian Reorganization Act was passed. That decision creates another impediment for the growth and development of tribal government gaming.

It's worth noting here the court did not require that tribes

be federally recognized in 1934 to be eligible for land in trust. Yet, the court's decision is often misreported just so. In fact, a tribe could be under federal jurisdiction without being on the list of federally recognized tribes. As Justice Breyer noted in his dissent "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." In any event, the Carciari decision is a serious impediment to tribal gaming development.

Tribal advocates are working to reverse the impact of the Carciari decision through regulation and legislation. Three bills are pending that would reverse the Carciari decision and put in statute what has been the practice at the BIA for the past 70 years. That is, the federal government would have authority to place land in trust for all currently recognized tribes. But again, as with the "off-reservation" policy change above, there are those, including members of Congress, who are resisting a reversal of the Carciari ruling.

What and When?

What will be done to remove these barriers to the growth of tribal gaming and when will these barriers be lifted? That's

crystal ball material. The answers to those questions require tea leaves, Ouija Boards, and fortune tellers to divine.

In November of last year, after speaking with Interior Secretary Ken Salazar about the 2008 Interior Department guidance on taking off-reservation land in trust, it was reported that New York Senator Schumer said a decision on whether to overturn the 2008 guidance memo was "tantalizingly close," yet now, five months later, there still is no decision.

No one I know is a fan of the cliché "remains to be seen." Yet in this case, the fact is, it remains to be seen what (and when) Congress or the Interior Department will do to address the guidance memo of January, 2008 and the Carciari decision.

Supporters of tribal gaming development are hopeful these issues will be resolved equitably for all tribes involved so tribes will be better able to serve the needs of their members. ♣

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