Current Battles and the Future of Off-Reservation Indian Gaming

BY HEIDI McNEIL STAUDENMAIER AND BRIAN DALUISO

Indian Gaming has become a near 30 billion-dollar-a-year industry in the United States. Casinos like Foxwoods, Pechanga, and Morongo have become as well-known as any on the Las Vegas Strip. And while Indian Gaming is allowed, at least in some form, in all states with Indian or native tribal presence other than Hawaii and Utah, its benefits have not been distributed equally among tribes. Often this is because tribes have no land at all or because any land they do have is located far from lucrative gaming markets. These problems have led to more and more tribes seeking to acquire land for gaming that is not necessarily within the tribe's historic occupancy territory. This has generated much controversy and conflict between the tribes seeking to acquire new land, the communities where the land exists, and tribes with existing casinos in those areas.

Under the Obama Administration, the Department of the Interior advocated policies that generally favored the tribes seeking new land, and the disputes resulting from these policies are still playing out in federal and state courts. During the transition to the Trump Administration, the Department appears to be vigorously defending the decisions of the previous administration. It remains uncertain what new policies, if any, the Trump Administration will pursue on this topic.

GENERAL BACKGROUND OF OFF-RESERVATION GAMING

Indian gaming is governed by the Indian Gaming Regulatory Act of October 17, 1988 ("IGRA"), which permits gaming on Indian lands and defines gaming-eligible lands to include (1) all lands within the limits of any Indian reservation; (2) lands held in trust by the United States for the benefit of any Indian Tribe; or (3) lands held by an Indian tribe subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power. IGRA's definition of Indian lands eligible for gaming, however, must be understood in the context of other congressional acts that allow Indian tribes to acquire new land. The most significant of these acts is the Indian Reorganization Act of June 18, 1934 ("IRA"), which authorizes the Secretary of the Interior to acquire and hold new lands in trust for the benefit of Indian tribes.

Recognizing that the laws allowing tribes to acquire new lands could greatly expand the potential for casino gaming to occur off of traditionally defined reservations, Congress enacted a provision in IGRA that prohibits gaming on any lands acquired after October 7, 1988, unless the lands fall into one of a limited number of exceptions: (1) lands acquired as the initial reservation lands for a newly recognized tribe; (2) lands recovered by a tribe as part of land claims settlement; or (3) lands restored to a tribe that has been restored to federal recognition. These exceptions were enacted so that tribes without suitable land for gaming in 1988 would not be disadvantaged relative to other tribes.

If none of these so called "equal footing" exceptions apply, a tribe may still conduct gaming on newly acquired land if the Secretary of the Interior determines that gaming will be in the tribe's best interest and would not be detrimental to the surrounding community. This exception is known as the "two-part determination." The exception has an additional requirement that before gaming can occur on the land, the Governor of the state must concur in the Secretary's two-part determination. None of the other exceptions have this additional requirement.

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The Governor's concurrence requirement provides the state an outright veto to reject gaming under this exception.

The term "off-reservation gaming" generally refers to gaming under a two-part determination. Since IGRA's enactment, off-reservation gaming has been one of the more controversial aspects of Indian gaming. Senator John McCain, a proponent of Indian gaming, for instance, has called for the two-part determination's removal from IGRA. Opponents of land acquisitions for casinos have described the two-part determination as "reservation shopping" whereby a tribe, often funded by a casino development and management company, seeks to acquire land for gaming outside of its aboriginal territory based primarily on the land's proximity to urban markets or major highways.

CONTROVERSIAL OFF-RESERVATION CASINOS AND THE LEGAL LANDSCAPE

Despite any implication in the term "reservation shopping" that a two-part determination is easily obtained, between 1988 and 2008, the Department granted only five two-part determinations. During that period, the Department took a very narrow view of off-reservation gaming. Former Secretary of the Interior during the George W. Bush Administration, Gale Norton, once stated that she had serious concerns about lands being acquired into trust "solely based on economic potential," and while she did not believe there should be an "absolute bar on off-reservation gaming," she did believe that Congress did not intend to authorize these types of acquisitions. During the Obama years, however, the Department appeared to relax its approach and doubled the number of two-part determinations granted. All of these decisions have generated considerable controversy.

Legal challenges to off-reservation gaming have tended to focus on the Secretary's determinations that casino gaming would not be detrimental to the surrounding community. Federal regulations define "surrounding community" to be local governments and federally recognized Indian tribes within a 25-mile radius. Under that definition a recent two-part determination for the Spokane Tribe in Washington State has been particularly controversial. The Spokane Tribe already operates smaller casinos, but is now developing a much larger project in the flight path of an Air Force base and near another off-reservation casino operated by the Kalispel Tribe. Notwithstanding opposition from local governments concerned about the effects on the Air Force base and the Kalispel Tribe's concerns about competitive impacts on its casino, the Secretary granted the two-part determination, and Washington Governor Jay

The Kalispel Tribe of Indians opened the Northern Quest Casino in Spokane, Washington in 2000. On April 12, 2017, lawyers for the Kalispel Tribe of Indians filed a suit in federal court seeking an immediate halt to the construction of a rival casino being built in Airway Heights by the Spokane Tribe of Indians.

Artist rendering of the North Fork Rancheria Resort Hotel and Casino. The North Fork Rancheria of Mono Indians plans to build a casino, a 200-room resort hotel, restaurants, an entertainment lounge, retail space and banquet/meeting rooms near Madera, California.

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Inslee concurred. On April 12, 2017, the Kalispel Tribe filed suit in federal district court against the Department of the Interior, alleging the Department failed to consider detrimental impacts to the Kalispel tribal government that would result from development of the new casino.

Two other controversial off-reservation casino projects are in California. In 2011, the Secretary promulgated two-part determinations for the North Fork Rancheria of Mono Indians and the Enterprise Rancheria of Maidu Indians. Governor Jerry Brown concurred in both determinations, both of which were challenged in federal and state court. In the case of the North Fork Tribe, opponents successfully qualified a statewide referendum of the California Legislature's ratification of the Tribe's gaming compact, and in the November 2014 general election, the voters rejected the compact. While the federal court challenges to the two-part determinations focused on whether the Secretary properly determined that gaming on the selected parcels would not be detrimental to the surrounding communities, state court challenges have been directed at Governor Brown's concurrence.

Early challenges to IGRA's gubernatorial concurrence provision were generally brought in federal district court by tribes when a governor declined to concur and, consequently, in effect vetoed the tribe's project. In these cases, the tribes alleged that the concurrence provision violated the non-delegation doctrine and the appointments clause of the United States Constitution. The courts uniformly rejected these challenges, holding the Governor's concurrence provision is an example of "cooperative federalism" and the Governor does not exercise significant federal power. In reaching this conclusion, the courts recognized that though the Governor's concurrence must be given effect under federal law, when a Governor concurs or declines to concur, he or she does so as the state executive under the laws of the state. As a result, opponents of the North Fork and Enterprise projects raised the issue of whether California state law authorized Governor Brown to concur in a two-part determination.

The two California state superior courts to address the question found that Governor Brown had the authority to concur in order to effectuate his duty under the California Constitution to negotiate gaming compacts with Indian tribe – agreements between the State and the tribe that regulate how the gaming will be conducted. Both sets of plaintiffs appealed, and the two districts of the California Court of Appeal to hear these cases reached opposite conclusions.

In the *Enterprise* case, California's Third District Court of Appeal held that when the Governor concurs, he exercises his executive power pursuant to California's existing Indian gaming policy. The Fifth District Court of Appeal in the *North Fork* case disagreed. The three-judge panel in the Fifth District concluded that the Governor lacked the authority to concur, but each of the judges reached this conclusion for different reasons. Two judges ruled based on the particular facts of case to hold Governor Brown's concurrence invalid under the circumstances. The third judge, Judge Franson, in direct opposition to the Third District's holding, held that there could be no set of circumstances that would authorize the Governor to issue a concurrence under California law.

The California Supreme Court has granted review in both cases. If the Court affirms the Third District's holding, more tribes in California may seek to conduct gaming under a two-part determination. But if the Court determines that concurrences are not allowed under California law, the decision could negatively affect not only the *North Fork* and *Enterprise* projects, but also other pending and

Conceptual rendering of the Barstow Casino Resort. The Los Coyotes Band of Southern California is still waiting for a decision on its proposed off-reservation casino.

proposed gaming projects. The Los Coyotes Band of Southern California has an application for two-part determination pending for land near the City of Barstow approximately 118 miles away from its current reservation. The Tule River Tribe has plans to move its existing casino in Tulare County to new land under a two-part determination. And the Tejon Tribe plans on submitting an application for a two-part determination.

While the State of Arizona has enacted legislation prohibiting its Governor from concurring in two-part determinations, the California Legislature has yet to take any action to either prohibit or authorize concurrences through legislative enactment. But given the voters' rejection of the North Fork Tribe's off-reservation gaming project in the 2014 election, it seems unlikely that the Legislature will take up the cause of authorizing the Governor to concur. Additionally, there is conflict between established gaming tribes and new tribes that seek to acquire land and compete for their share of an increasingly saturated gaming market. A lobbying effort by established gaming tribes may be difficult to overcome. Finally, if the Legislature were to enact legislation authorizing concurrences, legal challenges would likely follow, particularly in light of Judge Franson's holding in *North Fork* that any such legislation would violate Article IV, section 19, of the California Constitution.

LAND ACQUISITION ISSUES

Another major topic in the area of Indian gaming on newly acquired land concerns the scope of tribes eligible for new land under the IRA. In order to acquire land for a tribe, the Secretary must determine that the Tribe qualifies as "Indian" as defined by the statute. While the statute has three separate definitions of "Indian," trust acquisitions have generally required the Secretary to find the applicant tribe comprises "members of any recognized tribe now under federal jurisdiction." In 2009, the Supreme Court in *Carcieri v. Salazar* held that the word "now" in the definition means as of June 18, 1934, the date of IRA's enactment. Therefore, the Secretary is limited to taking land into trust for tribes that were under federal jurisdiction on June 18, 1934. While this holding appeared to limit substantially the number of tribes that could acquire new land, the Court left at least two important questions unanswered: First, does the first definition also require tribes to have been federally recognized in June 1934? And Second, what does it mean for a tribe to have been "under federal jurisdiction" in 1934? These questions are currently being fought over in the federal courts.

Recently, the Court of Appeals for the District of Columbia Circuit became the first appellate court to wrestle with the first question in a case involving the Cowlitz Tribe of Washington State. Opponents argued that, because the Tribe had been federally recognized in 2000, it did not qualify as a recognized tribe under federal jurisdiction in 1934. The Court held the first definition of Indian does not, however, require a Tribe to have been federally recognized in 1934 as long as it was under federal jurisdiction in 1934. The Court reasoned that grammatically, the word "now" is limited to modifying the phrase "under federal jurisdiction" and it also relied on a concurring opinion in *Carcieri* from Justice Breyer who concluded a tribe could have been under federal jurisdiction without the government having at that time acknowledged a government-to-government relationship with the tribe. On April 3, 2017, the Supreme Court denied appellants' Petition for Writ of Certiorari.

At around the same time the Cowlitz case was decided, a district court in Massachusetts addressed a novel decision by the Department of the Interior to acquire land for the Mashpee Wampanoag Tribe under a different definition of Indian. The Tribe did not gain federal recognition until 2007. While it was unquestioned whether Mashpee Wampanoag was an Indian tribe in 1934, it was assumed the tribe had always been under state jurisdiction rather than federal jurisdiction. This had been the problem with the Narragansett Tribe of Rhode Island – the subject of *Carcieri*. But for the Mashpee Wampanoag Tribe, the Department took the unprecedented step of finding the Tribe eligible for a trust acquisition under another definition, which would circumvent both the recognition and federal jurisdiction requirements entirely. The district court struck the decision down and found the Secretary lacked the authority to acquire the land for the tribe. Some commenters viewed this decision as in tension with the D.C. Circuit's decision in the Cowlitz case. The case is currently on appeal in the First Circuit Court of Appeals.

Trust acquisitions for a number of California tribes have also generated controversy and litigation. Much of this centers on California Rancheria tribes. In the early 1900s, the federal government purchased many small plots of land in federal fee ownership for the homeless and penurious Indians of California. These plots were known as Rancherias. In the 1950s, the federal government terminated its supervisory duties over these Rancherias, and they ceased to exist as Indian Country. But beginning in the 1980s, individual Indians from these terminated Rancherias began suing the federal government for improper termination. The cases were resolved through Stipulated Judgments entered by federal district courts in which the government agreed to "restore" the Rancheria lands to their pre-Termination status (defined in the judgments as "Indian Country") and further agreed to place the Rancherias on the Bureau of Indian Affairs' list of federally recognized tribes.

The question for opponents of off-reservation gaming in California has become, *inter alia*, whether Rancheria tribes actually existed at all in 1934 and were, therefore, "under federal jurisdiction," or whether they are modern-day creations through these stipulated judgments. Another question is whether an Indian tribe can obtain federal recognition by stipulation. District courts in California and Washington D.C. have rejected the arguments that the Enterprise and North Fork tribes, respectively, did not qualify as Indian tribes because they did not exist in 1934. The North Fork case is currently on appeal in the D.C. Circuit. Plaintiffs in Enterprise also recently filed their appeal in the Ninth Circuit.

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Spotlight 29 Casino opened its doors in January 1995 under the National Indian Gaming Regulatory Act of 1988, allowing Native American Tribes to operate casinos. In March 2001, the Twenty-Nine Palms Band of Mission Indians teamed with Donald Trump and Spotlight 29 Casino became Trump 29 Casino. In 2006, the relationship with Donald Trump ended, and the casino returned to its original name.

THE FUTURE OUTLOOK

There is little question that, under the Obama administration, the Department of the Interior actively sought to increase the amount of land acquired for tribes and adopted policies that made such acquisitions easier and speedier. Some observers have felt that these policies have led directly to the decisions in North Fork, Enterprise, Cowlitz, Spokane, and Mashpee. Opponents have felt that the Department may have been straining to find ways to circumvent the Supreme Court's *Carcieri* decision, especially since Congress has not decided to lessen the severity of the decision through legislation.

How the Trump Administration will handle these issues is uncertain. On the one hand, in 1993, Trump testified before Congress in opposition to Indian gaming. On the other, he once partnered with the Twenty-Nine Palms Band of Mission Indians in California to develop their casino. At one time, Trump sought to partner with the Cowlitz Tribe in its proposed casino in Washington State. So while the Trump Administration has clearly distanced itself from the Obama Administration's policies in Indian Country on issues such as the Dakota Access Pipeline, its stance on Indian gaming has yet to take shape.

But whatever the President's stance on Indian gaming, the future will more likely be the result of policies adopted by the Department of the Interior and decisions of the federal courts. Newly-confirmed Interior Secretary Ryan Zinke initially appeared to have wide support in Indian Country, which hoped he would continue to foster polices similar to those of the previous administration. However, in an April 6, 2017, memorandum, Secretary Zinke stated that the authority to approve fee-to-trust applications for off-reservation gaming has been delegated to the Acting Deputy Secretary for the Department of the Interior. The current Acting Deputy Secretary, James Cason, served in the Department during the George W. Bush Administration, and is considered by some to have been one of the primary architects of policies limiting off-reservation gaming. Tribes are concerned that the Secretary's memorandum signals a reversal from Obama era policies and a return to the much more restrictive off-reservation gaming policies of the Bush years.

In addition to changes at the Department of the Interior, Justice Neil Gorsuch, recently confirmed to replace Justice Scalia on the Supreme Court, has a substantial history of adjudicating cases arising out of disputes in Indian Country and is widely praised by tribes for his rulings on Indian sovereignty. Justice Gorsuch's opposition to *Chevron* deference and his adherence to strict textual analysis could be relevant in disputes such as those described in this article. The Department of the Interior has relied on *Chevron* deference extensively to justify its decisions in two-part determinations and trust acquisitions.

As a result, the future of how the new administration will treat off-reservation gaming is unclear. What remains clear is that disputes over Indian gaming will continue now and for the foreseeable future. ❄

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