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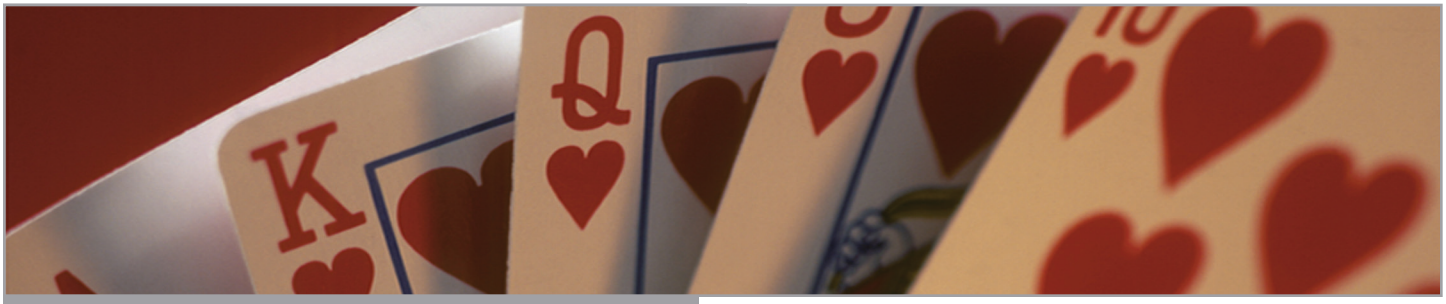

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OFF-RESERVATION GAMING – WHAT DOES THE NEW POLICY MEAN?

by Dennis J. Whittlesey

On June 14, the Department of the Interior publicly announced a new policy governing the Department's acceptance of off-reservation land into trust for gaming pursuant to Section 20(b)(1)A) of the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. § 2719(b)(1)(A). The announcement has been widely declared as a dramatic loosening of the standards to be considered in trust applications on gaming on newly acquired land.

The significance of the policy change may be less than has been reported, which is that it opens the door to an avalanche of off-reservation applications from tribes across the country.

This new policy is established through a Guidance Memorandum promulgated by Assistant Secretary of the Interior for Indian Affairs Larry Echo Hawk on June 13 and announced the following day. With it, Echo Hawk reversed a three-year-old Bush Administration Guidance Memorandum imposing restrictions on trust acceptance of off-reservation land acquisition for gaming that exceeded the provisions of both IGRA and the federal regulations then in effect.

The 2008 Guidance Memorandum was promulgated by former Assistant Secretary Carl Artman without consulting with any tribes. Rather, Artman unilaterally created a requirement that any off-reservation gaming sites be within a "commutable distance" from the applicant tribe's existing reservation; significantly, that term is neither found in the law or regulations nor defined in the Policy Guidance. The essence of the 2008 policy was to preclude the development of any tribal casino at any site more than a few hours driving time from an existing reservation. There was no exception for historic connection to land beyond Artman's view of a tribe's "real world" – either through occupancy or cultural ties.

Artman's "commutable distance" standard not only was neither in the law nor then-current regulations, but also was curiously absent from

a new formal regulation governing gaming on newly acquired lands published only 125 days after issuance of his Guidance Memorandum. *See* 25 C.F.R. Part 292. And it appears to have been imposed on the trust process for the purpose of stopping the perceived proliferation of tribal casinos on off-reservation lands that otherwise did not qualify for statutory exceptions in IGRA. If that really was the intent, it addressed a problem that did not exist: which was a proliferation of *"pure" off-reservation* casino development carefully restricted by IGRA Section 20(b)(1)(A). To this date, only five such approvals have been issued in the some 22 years since the law was enacted, a number that hardly qualifies as a "proliferation" of much of anything.

Many in Indian Country saw the real Artman target as casino projects proposed for tribal land taken into trust for gaming pursuant to one of the *statutory exceptions* of IGRA Section 20(b)(1)(B)(i)-(iii): (i) settlement of a tribal land claim, (ii) the "initial reservation" of a tribe newly acknowledged by the Secretary pursuant to the administrative Federal Acknowledgement process, or (iii) historic tribal lands that are "restored" to a tribe that lost, and subsequently regained, federal recognition. It is a fact that a number of tribes have successfully petitioned for approval under exceptions (ii) and (iii), and some of them have been controversial and even legally challenged. Still, the applicable provisions of IGRA and implementing regulations have established clear objective standards to apply.

In contrast, gaming approval for "off-reservation" lands pursuant to Section 20(b)(1)(A) has been rare, in part because of both the fact that such an approval can authorize gaming on lands for which the applicant tribe has no prior connection, but also because of the statutory standards. Section 20(b)(1)(A) allows "pure" off-reservation on newly acquired land *only if:*

> (1) The Secretary of the Interior, after consultation with the applicant 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;" and
>
> (2) The Governor of the state in which the gaming activity is to be conducted concurs in the Secretary's determination.

This process is commonly known as the "Two-Part Determination."

Echo Hawk noted that Artman took his action without conducting any tribal consultations. Yet, he was simultaneously presiding over finalization and publication of the Gaming on Off-Reservation Lands regulations that formally defined four general steps in seeking any off-reservation approval, whether for gaming on "pure" off-reservation lands or those satisfying one of the statutory exceptions. As noted above, these regulations do not include a "commutable distance" standard.

The May 2008 regulations – which currently are in effect – follow IGRA as to applications for "pure" off-reservation approvals under Subsection (A) by requiring that an application demonstrate that the acquisition would be (a) in the tribe's best interests and (b) not detrimental to the surrounding community. Among the considerations to be applied are (a) the site's distance from the tribe's current reservation and an assessment of both positive and negative impacts of the proposed project on tribal members. As for the "not detrimental to the surrounding community" issue, the tribe must address a broad range of identified impacts (including impact on social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding area), as well as whether any traditional cultural impact on any other tribe with a significant historical connection to the land. The Secretary then must consult with all affected tribe(s) and local and state officials about the project. If the Secretary makes a positive determination, the final step is securing "concurrence" by the Governor, and it is no small significance that the Governor has an absolute right to veto an off-reservation project whether or not it is either fair or reasonable. Finally, a gubernatorial veto is not subject to judicial review because the Governor has an *unqualified and discretionary right to kill a "pure" off-reservation project.*

While the "commutable distance" standard has been eliminated, the law and regulations remain in place, and they require Secretarial review of impacts directly associated with the distance between the existing reservation and the off-reservation site, without dictating a limit to the maximum distance between the two. Over the years, the threshold issue for pursuing a "pure" off-reservation approval has been whether a Governor would veto an off-reservation proposal, a question easily addressed with the Governor in advance of application. Most such projects have been abandoned prior to application precisely because tribes have been advised that a veto would be exercised. The fact that only five off-reservation gaming approvals have been granted is testament to the difficulty in gaining such approvals. Moreover, strong opposition from any tribe with historical connections to the land would likely result in a negative determination by the Secretary.

Essentially, Echo Hawk made only one substantive change in federal policy, and that was elimination of the murky "commutable distance" standard. Indeed, Artman's own regulations even dealt with the issue of "distance," and ostensibly making his Guidance Memorandum irrelevant. And, unlike Artman, Echo Hawk conducted extensive tribal consultations prior to taking action.

With the law and regulations in place, there really may be less than meets the eye to last week's "policy change."

TRIBAL CASINO AND THE ASIAN GLOBAL GIANT: A MODERN DAVID VS. GOLIATH?

by Dennis J. Whittlesey

Genting is the Malaysian global gaming juggernaut that has been working on gaming projects within the United States for several years and finally appears to be on the verge of opening its first domestic casino before the end of the year. Yet, one of its top executives has just suggested that a tribal casino proposed for Long Island could wreck its plans for a major racino development at Aqueduct in New York City.

Colin Au is a senior executive of Genting New York LLC, the company that was selected to develop the Aqueduct facility which will operate under the name "Resorts World New York." He also has been publicly identified for other company projects in the United States, including a sidetracked casino in Fall River, Massachusetts, in partnership with the Mashpee Wampanoag Tribe, after leading that tribe out of an agreement with the Town of Middleborough for a major casino resort development. But Mr. Au now is expressing serious corporate concerns that the Aqueduct project could be put out of business if the newly recognized Shinnecock Nation of New York opens a casino in Long Island's Nassau County.

The Mashpee project seems to have been something of a diversion for Genting, since its most serious efforts to gain a foothold in the Unites States have been in the state of New York. Its latest and largest effort is the proposed development at Aqueduct which would include both the racino and a major convention center nearby under plans publicly announced by the company. Upon winning the competition for the Aqueduct contract, Genting made a $380 million upfront payment to the State for a 30-year contract period and an option for an additional 10 years. The racino component is already under construction.

Only last Monday, Genting Chief Financial Officer Christian Goode made a detailed presentation of his plans to the state Franchise Oversight Board at the State Capitol in Albany. In addition to major renovations to the existing facility, Goode unveiled plans to initially open the racino with 2,500 machines; earlier statements indicated an ultimate installation of 5,000 gaming machines producing some $380 per machine per day. That level of play would generate a drop of $1.9 million daily, or approximately $700 million annually. These estimates are based on the facility's location, a glitzy resort-type development plan, and an affluent customer base in Long Island, Queens, and Brooklyn. The proposed convention center would only add to the total attraction.

Also addressing the Franchise Board on Monday, Mr. Au said, "Here is a place where many conventioneers can fly in for a day. Of course, this will be done with private money that is our money, not bonds."

But Mr. Au then ominously warned the Board that Genting could be bankrupted by a Shinnecock casino on Long Island, expressing emphatic opposition to the proposed Long Island Indian casino. If such a casino is opened, he said, "It would be disastrous. We probably would have to close shop." The implication was that the state would be the big loser in that case since the taxable revenues generated at Aqueduct would be permanently lost, as well as a commitment to pay 7 percent of revenues to the New York Racing Association and 1.5 percent to the breeding industry.

While Messrs. Goode and Au painted a rosy scenario for the state with development of a competition-free project, they then stated the bottom line to their message, which is that the State must refuse to negotiate a Tribal State Class III Gaming Compact with Shinnecock. Since such a compact is required under the federal Indian gaming law, a State refusal to enter into the agreement would foreclose the competition that Genting seems to fear.

It is a fact that a tribal casino could offer full casino games not permitted at the Aqueduct site, including blackjack, poker, and roulette – all are games that are extremely popular with the gaming public. In the face of that potential competition, Mr. Au flatly warned the Board to prevent it from becoming reality, "We are absolutely on a very different level playing field. It's important for the Governor's office to recognize they should enter into a compact [pursuant to the Indian Gaming Regulatory Act]."

Genting claimed to have been a great fan of Indian gaming a couple of years ago when it pried the Mashpee casino project away from that tribe's original development partners – a project that appears to be in a state of permanent paralysis. Conversely, the company currently is telling Governor Andrew Cuomo that he must block any Indian gaming in New York. There might be some consistency to Genting's attitude about Indian gaming, but the corporate spokesmen have not yet explained it.