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RESERVATION OF RIGHTS
A look at Indian land claims in Ohio for gaming purposes

By Keith H. Raker

INTRODUCTION

This article examines the basis of Indian[1] land claims generally, their applicability to Ohio property and the required process for Indians to develop gaming operations on those lands. It is intended to provide the basic framework currently in place to address Indian land claims, with an emphasis on claims made to establish gaming operations. It does not evaluate the likelihood of success of current Indian claims to property in Ohio, nor does it comment on the advisability or predict the viability of Indian casinos in this State.[2]

RECOGNITION AS A TRIBE

To be successful in its land claim, a group of Indians must first be recognized as a tribe. There are a number of different types of recognition for Indian tribes, but the most significant type is formal recognition by the federal government.[3] There are currently more than 562 federally recognized Indian tribes in the United States.[4]

INDIAN LAND CLAIMS GENERALLY

Aboriginal Title

There are generally two primary bases for Indian land claims, "aboriginal title" and "recognized title."

In 1823, the U.S. Supreme Court addressed the characteristics of Indian interests in land in *Johnson v. McIntosh*.[5] In that case, the Court held that while Indian tribes were incapable of conveying their land directly to individuals, they did retain a right of occupancy over their lands. The Court concluded that the United States government was free to grant land held by Indian tribes to others, but the grantee took title subject to the Indian "right of occupancy." In other words, the United States government, and only the United States government, could extinguish the Indian right of occupancy "either by purchase or conquest."[6] The ruling in *McIntosh*, as well as in subsequent cases,[7] characterizes the relationship between Indians and the United States government as that of ward to guardian, a characterization that continues to be reflected in government policy today.

It is this right of occupancy which is generally considered as "aboriginal title." Since aboriginal title cannot be extinguished absent government action, a conveyance by an Indian tribe of a fee interest in property transfers no more than a reversion in the transferee that matures only when aboriginal title ends.[8] However, the government may extinguish aboriginal title through a taking of the subject lands, and such a taking does not give rise to a right of compensation under the Fifth Amendment.[9]

A prima facie case for an aboriginal land claim requires proof of the following elements: (1) that the claimant is an Indian tribe, (2) that the land is tribal land, (3) that the United States has not consented to its alienation, and (4) that the trust relationship between the tribe and the United States has not been terminated or abandoned. [10]

Recognized Title

"Recognized title" stands in stark contrast to aboriginal title. Recognized title is title to Indian property that has been created, or *recognized*, by action of the federal government, typically by federal treaty or statute.[11] Indian property with recognized title may or may not have been part of the aboriginal territory of the tribe. In fact, the federal government has in the past designated certain lands as Indian property even though a tribe has no aboriginal claim to these lands whatsoever. This often occurs in settlement of an aboriginal land claim to other lands.[12]

The primary advantage of recognized title is its relative permanence. It is more difficult for the federal government to extinguish claims to lands to which Indians have recognized title. In contrast to aboriginal title, a taking of lands to which an Indian tribe has recognized title is compensable under the Fifth Amendment.[13]

Today, the U.S. Secretary of the Interior is authorized to acquire lands in trust for the benefit of Indians,[14] whereby the United States government holds naked legal title and the Indian tribe enjoys the beneficial interest.[15] Such "land-into-trust" acquisitions vest recognized title in the Indian tribe.

INDIAN LANDS FOR GAMING

Indian Gaming Regulatory Act

In response to a ruling of the U.S. Supreme Court recognizing Indian tribes' inherent right to conduct gaming operations on their reservation property,[16] the states pressured Congress to enact the Indian Gaming Regulatory Act in 1988 ("IGRA").[17] IGRA gives the states the power to regulate certain aspects of Indian gaming but also allows substantial tribal autonomy. In enacting IGRA, Congress adopted a structured regulatory scheme designed to offer states a limited role in casino-type gaming, but very little authority to restrict or regulate less serious forms of gambling.[18]

Gambling Permitted on Indian Lands

IGRA permits a federally recognized Indian tribe to establish gaming facilities on "Indian lands" within the tribe's control. "Indian lands" are (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.

The land cannot simply be held in fee by the tribe, but must be viewed as "Indian lands" as defined by IGRA.[19]

Off-Reservation Gambling

It is gaming operations conducted on lands outside of the borders of an Indian reservation which create the most controversy. IGRA expressly permits Indian tribes to conduct gaming on Indian lands acquired outside of the tribe's traditional reservation on other trust lands. A law passed in 1934 authorizes the U.S. Secretary of the Interior to convert into trust status any land privately owned by an Indian tribe and to also purchase land with federal funds and place the land in trust status for a tribe. Under IGRA, land taken into trust in such a manner prior to October 17, 1988 can be used by the Indian tribe for gaming operations.

IGRA, though, *prohibits* the Secretary from allowing gaming to occur on any land placed in trust for an Indian tribe after October 17, 1988, except in limited situations. For example, if the tribe had no reservation on October 17, 1988, or if the newly acquired lands are part of the tribe's "last recognized reservation," or if the Secretary, after consulting with state and local officials and with officials of nearby Indian tribes, finds that a gaming facility would be in the tribe's best interest and the Governor of the state gives express consent,[20] such lands taken into trust post-IGRA may be used for gaming operations.

There are additional exceptions to this prohibition which may have applicability to Ohio. If (A) 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 (and the Governor concurs in the Secretary's determination); or (B) lands are taken into trust as part of (i) a settlement of a land claim, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition,"[21] then the prohibition against taking post-IGRA land into trust for gaming purposes will not apply.

SHAWNEE LAND CLAIMS IN OHIO

On June 27, 2005, an action was filed in United States Federal Court by the Eastern Shawnee Tribe of Oklahoma,[22] making land claims in Ohio to over 92,000 acres of former reservation property, over 1200 acres of other property, and claiming hunting, fishing and gathering rights to over 11,000 square miles of the State. The action seeks declaratory relief with respect to title to the subject property, as well as money damages for the value of the parcels taken and all taxes, rents, issues and profits derived therefrom, and rights to any and all subsurface resources.

The complaint describes the creation, and later cessation, of the former Wapaghkonnetta and Hog Creek reservations near present day Lima, Ohio (and alleges improper, and legally void, attempts to convey that property). Further, the complaint discusses certain transfers of property to private individuals in violation of certain federal

laws. Finally, the complaint alleges that hunting, fishing and gathering rights are reserved in favor of the Shawnee tribe over a significant part of the State. The claims set forth in the Shawnee's complaint are based upon aboriginal title, as well as recognized title.

CONCLUSION

In order for Indian casinos to be developed in Ohio, a federally recognized tribe must be successful in a land claim and establish Indian lands for gaming purposes. The requirements of the U.S. Department of the Interior, IGRA and various other federal laws must be met. Included in those requirements are likely the agreement of the Governor of Ohio and the negotiation of a compact between the tribe and the State.

Certainly a framework exists where it is possible for Indian casinos to be developed in Ohio. However, the process will require considerable time and resources. One thing seems certain - Ohio residents shouldn't expect to be rolling the dice anytime soon!

[1] The term "Indian" is generally used throughout this article, rather than other words of like meaning because virtually all federal Indian laws, such as the Indian Reorganization Act and the Indian Gaming Regulatory Act, as well as federal agencies such as the Bureau of Indian Affairs and the National Indian Gaming Commission use "Indian." See, Stephen L. Pevar, The Rights of Indians and Tribes 1 (Southern Illinois University Press 2002).

[2] A detailed discussion of the history and development of the law with respect to Indians and their property holdings is helpful in analyzing these types of claims, but is omitted here due to space constraints.

[3] The procedure for federal recognition is set forth in 25 C.F.R. § 83, which sets forth seven criteria that tribes must meet in order to obtain federal recognition and the concomitant treatment under federal law. A detailed discussion of the federal recognition process is beyond the scope of this article.

[4] National Indian Gaming Association, *N.I.G.A. Library and Resource Center, Indian Gaming Facts*, available at http://www.indiangaming.org/info/pr/presskit/history.shtml.

[5] Johnson v. McIntosh, 21 U.S. 543 (1823).

[6] *Id*. at 587. See also discussion at William C. Canby, Jr., American Indian Law in a Nutshell 368 (4th ed. 2004). The "purchase or conquest" language was later modified to remove the concept of "conquest."

[7] See Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[8] Catawba Indian Tribe v. South Carolina, 865 F.2d 1444, 1448 (4th Cir.1989).

[9] Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

[10] Golden Hill Paugussett Tribe v. Weicker, 39 F.3d 51, 56 (2d Cir.1994).

[11] William C. Canby, Jr., American Indian Law in a Nutshell 367 (4th ed. 2004).

[12] See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir.1975)

[13] United States v. Creek Nation, 295 U.S. 103 (1935).

[14] 25 U.S.C. § 465; 25 C.F.R. §§151.10-151.12.

[15] See generally, Canby, *supra* note 11 at 382.

[16] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[17] 25 U.S.C. §2701 (1998). IGRA makes a distinction between different forms of gambling. For purposes of this Article, only so-called "Class III" gaming is considered. Class III gaming constitutes the types of banked card games, slot machines and other games of chance normally associated with commercial casinos. Class I and Class II gaming operations have less stringent requirements than those discussed in this Article.

[18] Kevin K. Washburn, *Indian Gaming: A Primer on the Development of Indian Gaming, the NIGC and Several Important Unresolved Issues*, American Bar Association Center for Continuing Legal Education (February 7-8, 2002).

[19] Heidi McNeil Staudenmaier, *Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles*, 4 Nev. L.J. 301 (2004). See also 25 U.S.C. 2703(4).

[20] Stephen L. Pevar, The Rights of Indians and Tribes 2 (Southern Illinois University Press 2002).

[21] 25 U.S.C. § 2719(b)(1)(B)(i)-(iii).

[22] Eastern Shawnee Tribe of Oklahoma vs. State of Ohio et. al., No.3:05CV7267 (N.D.OH. June 27, 2005).