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Tribes Face Daunting Control Test After Mass. Casino Loss

By **Andrew Westney**

Law360, New York (November 24, 2015, 5:53 PM ET) -- In a recent decision rejecting a Native American tribe's plans to build a casino on Martha's Vineyard, a Massachusetts federal judge applied a standard for showing governmental control over potential gaming lands that could be impossible for some tribes to meet, attorneys say.

U.S. District Judge F. Dennis Saylor **ruled on Nov. 13** that the Wampanoag tribe of Gay Head had some jurisdiction over lands held in trust for it on the island by the federal government, but hadn't shown enough governmental authority for the Indian Gaming Regulatory Act to be triggered and allow the tribe to build a casino without state permission.

The judge's insistence that the tribe show "concrete manifestations" of its governmental power for IGRA to apply may put the cart before the horse, attorneys say, as trying to make enough money to provide governmental services is often the very reason tribes pursue gaming in the first place.

"If you don't have a tax base and the ability to generate revenue, how can you exercise governmental authority?" asked Jennifer Carleton of Brownstein Hyatt Farber Schreck LLP. "It becomes a sort of legal fallacy."

The case emerged out of land settlement agreements between Massachusetts, Rhode Island, Maine and tribes in those states that were reached in the mid- to late 1980s, according to Clyde W. Barrow, a public policy and political science professor at the University of Texas-Rio Grande Valley.

In those agreements, tribes gave up their land claims in exchange for specific land parcels and funding. In the Massachusetts agreement, the Wampanoag tribe agreed to be bound by state law on its lands, including state laws prohibiting gambling.

The New England tribes saw their agreements with the states in a different light after IGRA was passed in 1988, Barrow said.

"Essentially, what looked like a good deal at the time turned out a year or two later to be not such a good deal, because now tribes had the right to operate gaming on their lands, so long as it was also legal in that state," Barrow said.

The Commonwealth of Massachusetts sued the tribe in December 2013 to prevent it from converting an unfinished community center on the western edge of Martha's Vineyard into a Class II gambling facility, saying that the tribe must first obtain a license from the state, per a 1983

agreement that conveyed the settlement lands to the tribe.

The Wampanoag tribe, which had earlier failed in its efforts to negotiate a gambling compact with the state, argued that it should be allowed to forge ahead with the construction, arguing that IGRA gives it the go-ahead to do so without permission from local or state governments and that revenue from the proposed casino was meant to provide essential tribal government services that are "desperately underfunded."

However, Judge Saylor ruled that the tribe failed to show that it has authority over 485 acres of land held in trust by the federal government by providing services such as a full-fledged police department, public schools, housing and health services. He also ruled that the tribe does not have a tax system in place to fund future governmental services.

Relying heavily on a 1994 First Circuit ruling in *Rhode Island v. Narragansett Indian Tribe* that involved another land settlement act, the judge said that a tribe must be able to demonstrate jurisdiction, as well as the exercise of governmental power, to invoke IGRA, and that mere assertions of power or theoretical authority aren't enough.

Though the judge said that the 1983 Massachusetts Settlement Act prevented the Wampanoag tribe from pursuing gaming and wasn't impliedly repealed by the IGRA, that aspect of the ruling is likely to be confined to the New England states that have such agreements in place, attorneys say.

But the judge's analysis that found IGRA didn't even apply to the lands could pose a problem for other tribes with gambling projects, including ones already in place or under construction, Carleton said.

"This provides yet another avenue for anti-gaming opponents to collaterally attack a facility, arguing the tribe didn't have historical governmental oversight over the trust lands," Carleton said. "That's never good news."

Many tribes in the East could struggle to satisfy the judge's test as they often have more recently reasserted authority over tribal lands and are located closer to nontribal areas compared to tribes in the West, making jurisdiction more complicated, according to Anthony S. Broadman of Galanda Broadman PLLC.

And it's very common for tribes everywhere to sign contracts with cities, counties and other governments to provide services, which isn't a ceding of authority or sovereignty to those other governments, Broadman said.

"The very fact there is an intergovernmental agreement proves tribes are exercising authority over their own jurisdictions," he said.

The judge's decision is "naive on how all government works" since many small nontribal governments also engage other governments to perform essential governmental services, Broadman said.

"Doing that doesn't decrease the jurisdiction's authority over its own lands," he said. "To me, this seems like a double standard being applied to tribal governments."

The judge's ruling that the tribe failed to provide law enforcement and public safety services is inconsistent with how existing tribal casinos are run and the normal expectations for tribes under IGRA, Carleton added.

"Some of the most sophisticated tribes operating gaming for 25 years don't provide those services themselves," she said.

And tribes aren't even allowed to assert jurisdiction over certain matters, including most criminal cases against non-Indians on tribal lands under the U.S. Supreme Court's 1978 decision in *Oliphant v. Suquamish Tribe of Indians*, Broadman noted. So they often are forced to rely on outside law enforcement that can enforce tribal and nontribal laws, he said.

"What the court really fails to appreciate is this is a function of what law enforcement looks like in Indian Country because of federal law," Broadman said. "It's not a choice tribes have made to enforce less than 100 percent of jurisdiction."

The Massachusetts court's analysis was very fact-specific, but other tribes might have more to prove to a federal court, Carleton said.

"I guess the takeaway is if you have trust land you'd like to eventually have gaming on, you'd better start providing governmental services immediately, whether or not you have a revenue base," she said.

The Wampanoag tribe is reportedly planning to appeal the district court's ruling to the First Circuit.

The case is *Commonwealth of Massachusetts et al. v. The Wampanoag Tribe of Gay Head (Aquinnah) et al.*, case number 1:13-cv-13286, in the U.S. District Court for the District of Massachusetts.

--Editing by Christine Chun and Philip Shea.

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