

## **Expert: Fate of Glendale casino hinges on one legal interpretation**

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The law has been on the side of the Tohono O’odham Nation so far this year, but the core legal issue the tribe is relying on to build a casino on a plot of land in unincorporated Maricopa County near Glendale is still unsettled by the courts.

And an expert on Indian law and gaming law believes that the issue will eventually put an end to the planned casino.

“I’m not a betting man, but if I were, I’d think the odds were against this casino opening,” said Professor Robert Clinton of Arizona State University’s Sandra Day O’Connor College of Law. “Stranger things have happened, but the odds are against it.”

Clinton said there is a strong argument that the land near Glendale doesn’t meet any of the exceptions defined in federal gaming regulations that allow a tribe to open a casino on land purchased after the 1988 Indian Gaming Regulatory Act became law.

The tribe argues that it can open a casino on its land at 91st and Northern avenues – hundreds of miles from its reservation – because it falls under an exception to prohibitions from operating gaming on lands acquired after 1988.

The southern Arizona tribe argues that the exception – a “land settlement claim” – is met through the Gila Bend Indian Reservation Lands Replacement Act, a 1986 federal law that allowed the tribe to replace nearly 10,000 acres of land that was destroyed by flooding from the federally-built Painted Rock Dam.

“They wronged my people, and the government is attempting to correct that wrong by promising us the ability to replace the land they destroyed,” Tohono O’odham Chairman Ned Norris Jr., said during a Dec. 6 Peoria Chamber of Commerce luncheon, where he was working to gather support for the casino.

Chief opponents of the casino are Glendale and the Gila River tribe, which currently operates the only casino in the West Valley. Eleven other Indian tribes also oppose the Tohono O’odham casino.

U.S. District Court Judge David Campbell has put on hold litigation of the land claim issue until after other legal issues have been resolved in other cases relating to the project.

Two other cases are now before the 9th U.S. Circuit Court of Appeals. The appellate court agreed Dec. 2 to expedite one case in which Glendale and the Gila River tribe are asking for reversal of a trial court

decision that found the U.S. Department of Interior properly put the land into trust, which essentially deems it a reservation. No hearing date has been set.

The 9th Circuit will also hear an appeal of a lower court decision that found federal law preempts an Arizona law that would have allowed Glendale to annex the land without permission from the Tohono O'odham.

Clinton said he believes the land claim issue before Campbell will ultimately decide the fate of the casino.

Federal regulations define a land claim as a tribe's claim to title when it "is in conflict with the right, or title or other real property interest claimed" by a government, a person or private interest, or involves lands deemed a reservation before Oct. 17, 1988.

The Tohono O'odham tribe secretly bought the land near Glendale in 2003, but didn't announce its casino project until early 2009.

Clinton said he believes the regulations are clear that a land claim settlement has to be one in which the underlying title of the land was in dispute.

"They didn't get this land because title to their land was in dispute," Clinton said. "There's a difference between damage to land and disputing title to land."

Clinton said he also believes a casino won't be allowed on the land until one of two federal agencies that regulate Indian gaming issues a formal approval for gaming.

The tribe applied for gaming approval at the same time it asked the Office of Indian Gaming to take the land into trust, but later withdrew its request for the gaming approval.

Clinton said the National Indian Gaming Commission also makes gaming approvals, but only after a piece of land is taken into trust.

Sam Daughety, assistant attorney general for the Tohono O'odham Nation, said the tribe withdrew its application because the Obama administration was undergoing a wide-ranging review of its gaming policies and was delaying the approval process for the tribe.

But Daughety insists that gaming approval by either agency isn't required because the Department of Interior determined in 1992 that any land acquired under the Gila Bend Act wasn't subject to gaming prohibitions under the Indian Gaming Regulatory Act.

He says a one-page, Feb. 10, 1992, memo from a Department of Interior attorney stating that legal opinion to the Bureau of Indian Affairs area director backs up his claim.

“That’s actually one of the reasons why the other side has been scrambling to try to litigate this issue and, when they’re failing in the litigation, try to change the law at the congressional level,” Daughety said. “They’ve been actually trying to avoid that question.”

Daughety was referring to a bill introduced in September by Rep. Trent Franks, a Peoria Republican, which would prohibit a casino on any land acquired under the Gila Bend Act.

The proposed casino is 160 miles from the tribe’s headquarters in Sells, leading critics to accuse the Tohono O’odham of “reservation shopping,” or trying to find a favorable location far from its reservation to build a casino.

Heidi McNeil Staudenmaier, an attorney with Snell & Wilmer in Phoenix who practices Indian law and gaming law, said tribes rarely get approval for casinos off their reservations.

Since the enactment of the Indian Gaming Regulatory Act in 1988, only five tribes have won approval of off reservation casinos, and each case had its own unique set of facts, much like this one, Staudenmaier said.

“To my knowledge, there aren’t any other tribes out there that have a similar federal statute that specifically identified lands that they can purchase and specifically identified under what specific conditions they could purchase that land,” she said.

Staudenmaier said there isn’t any precedent to rely on to determine if the tribe is correct in arguing that the Gila Bend Act serves as a land claim.

“What I will say is the tribe seems to be doing well so far in all of the legal battles,” she said.