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Not Confined to the Reservation

Shinnecock case could set national precedent

By Ann Givens
STAFF WRITER

When the Shinnecock Indian Nation began constructing a 65,000-square-foot casino in Hampton Bays last summer, tribal leaders knew they were in for a fight. That's because, according to the U.S. government, it is not officially a tribe at all.

They had applied for federal recognition, a prerequisite for opening a casino, almost 25 years earlier, and were still waiting for a decision.

But soon after New York State and Southampton Town sued the tribe to make it stop construction, something unusual happened: In an unprecedented move, U.S. District Judge Thomas Platt announced that he would bypass the federal Bureau of Indian Affairs and decide for himself whether the Shinnecock should be recognized. When he did that, he effectively threw out several decades of U.S. Indian legal tradition.

At Platt's encouraging, the parties in the case will meet this week to see whether they can resolve their differences. If the case goes forward, it could change not only the face of the Hamptons, but also the issues of federal rec-

ognition and Indian gaming for the entire country. Until now, there has been nowhere for tribes to go after their applications get backlogged with the bureau, except in rare cases when they can get Congress to rule on their status. Now such tribes could look to the courts for relief, a development that could fast-track American Indian casino projects across the country and possibly change the tribal recognition process nationwide.

"It would be huge," said Eric Eberhard, whose Seattle-based law firm, Dorsey and Whitney, represents about 55 tribes around the country. "It would mean that for tribes in the recognition process [with the bureau] there would now be a precedent that would suggest they could go to the judiciary and be recognized. That's never happened before."

At least one Shinnecock tribe member said he was hopeful that the meeting ordered by Platt this week could lead to a settlement in the case. Town and state attorneys, however, assert that they will not negotiate as long as a casino is on the table.

If they don't settle, the trial is set to begin April 24. Once the proceedings begin, it's anybody's guess what will

happen, but there are a few possibilities.

The first thing Platt must decide, experts agree, is whether the 500-member tribe can be sued at all. The tribe's lawyers have argued from the start that the state cannot sue the Shinnecock Nation, much as the state could not sue a foreign nation like Canada. Platt could theoretically dismiss the case on those grounds, and the casino project could go forward unregulated. Legal experts agree, however, that such a decision by Platt would almost certainly be appealed by the town, state or federal government to the Second Circuit Court of Appeals. To get around the rule against suing tribes, town and state leaders could try to refile the case naming tribal leaders rather than the tribe as a whole, allowing them to proceed with the case, legal experts said. Right now, both the Shinnecock Nation and tribal leaders are named as defendants in the case.

If the trial does move forward, Platt may decide whether the tribe meets the criteria for federal recognition. While the tribe has been recognized by New York State for centuries, federal

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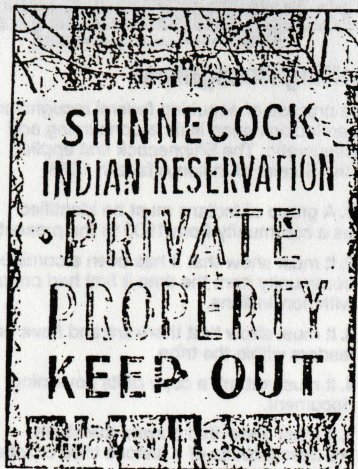


Photo by Doug Kuntz

A sign in Hampton Bays on land where the Shinnecock tribe wants to build a casino.

**A judicial question:
Can the Shinnecock
Nation be recognized
as a tribe?**

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Meaning For Other Tribes

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recognition is the first step toward opening a casino under the Indian Gaming Regulatory Act. To be recognized, a tribe must show it has been a continuous community from the time it first had contact with non-Indians, with a continuous government and a criteria for determining who is a tribe member. For Platt to make such a determination, he may have to pore over reams of genealogical and historical documents, and hear from experts on both sides.

John Strong, a historian at Southampton College of Long Island University who has written extensively about the Shinnecock, said the nearly 5,500 pages of genealogical and historical records supporting the Shinnecock petition for federal recognition, and now backing up their court case, are extremely convincing. He said the process has taken decades for the Shinnecock both because the Bureau of Indian Affairs has been slow to respond to their application, and because it's taken years to get permission from every tribe member to access their families' birth, death and marriage records for submission.

"I've seen much weaker petitions than theirs get federal recognition," said Strong, who has been notified by the Shinnecock that he could be a witness in the case. The Shinnecock have asked that their genealogical documents be sealed to the public because they consider them private.

To avoid barring the federal government from the case entirely, Platt recently ordered the U.S. attorney's office to take part in the case as an "involuntary plaintiff." Forcing the U.S. attorney's office into the case, Platt said in court, would prevent the federal government from objecting to his decision down the road.

"What if the government says this suit has no validity because they were never a party?" said Platt just before ordering them into the case. "That's the nightmare that I wake up to when I think about this problem."

Assistant U.S. Attorney Kevin Mulry asked Platt to put the case on hold while his office appealed that decision. It has yet to file an appeal. Mulry declined to comment for this story.

Even with the U.S. attorney's office as a party to the case, however, some legal experts wonder whether Platt's decision will stand up.

"These are extremely aggressive and novel steps to

Casino Gamesmanship

U.S. government and Shinnecock Indian officials have toyed with each other for more than a decade over Shinnecock efforts to open a casino on its property in Hampton Bays. Those efforts have intensified over the past year.

April 1992: A proposal to build a bingo hall in Hampton Bays is first presented to Shinnecock Tribal Trustees.

January 2003: Tribe reportedly signs a contract with an Oklahoma-based investment company that will give the tribe money to pursue federal recognition in exchange for shares in a future casino.

June 29, 2003: State Attorney General Eliot Spitzer's office serves a temporary restraining order on the Shinnecock nation forbidding it to begin work on a casino.

June 30, 2003: Tribe ignores the restraining order and breaks ground on a 65,000-square-foot casino in Hampton Bays.

July 1, 2003: Shinnecock petition to have the state's case against them moved to federal court.

July 15, 2003: Town of Southampton files a lawsuit against the tribe after a contractor clears about five acres on Shinnecock land in Hampton Bays.

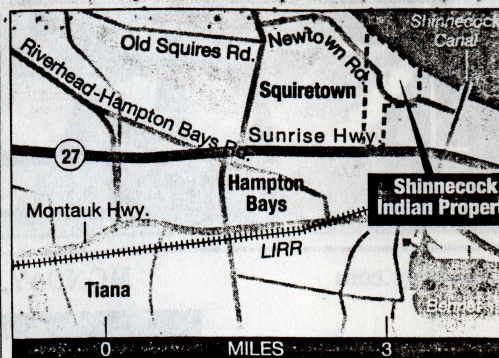
July 30, 2003: U.S. District Judge Thomas Platt agrees to hear the Shinnecock case in federal court in Central Islip.

Aug. 29, 2003: Platt rules the tribe cannot begin construction for at least 18 months while Bureau of Indian Affairs weighs its application for federal recognition.

Nov. 20, 2003: After receiving notification that the Shinnecock case will not be decided in 18 months, Platt says he will hold a nonjury trial to determine whether the Shinnecock can build a casino.

Dec. 22, 2003: Platt brings the U.S. attorney general's office into the lawsuit as an involuntary plaintiff.

Thursday: A hearing is held before Platt. State requests more time to analyze the tribal members' genealogy and is given until April 24.



Getting Recognized

The process of acquiring federal recognition as an Indian nation is time-consuming and bureaucratic. The Shinnecock first applied to the Bureau of Indian Affairs in 1978.

1. A group of Indians must be identified as a community from 1900 to the present.
2. It must show that it has been a continuous community from the time it first had contact with non-Indians.
3. It must show that there are and have been leaders within the tribe.
4. It must submit a copy of its governing document.
5. It must show that current members are descendants of a historic tribe or tribes.
6. It must demonstrate that members do not belong to another federally recognized tribe.
7. It must prove that the group has never been terminated by legislation.

SOURCES: www.indiancountry.com, staff reporting

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take for a court," said Jonathan Turley, a professor at George Washington University Law School in Washington, D.C. "This court is pushing the envelope on separation of powers by bringing in the Justice Department and declaring itself authorized to make decisions on federal recognition."

Although a judge has never before granted a tribe federal recognition for the purpose of opening a casino, there has been at least one case in which a federal judge ruled on a tribe's status for the purpose of a land claim. In 1977, a federal judge ruled that the Mashpee Wampanoag Indians of Massachusetts were not a tribe, in part because they had intermarried with non-tribe members over the years, said Professor David Braveman, who teaches a course in federal Indian law at Syracuse University College of Law. That could be some relevance to the Shinnecock: some say they all have intermarried with outsiders over the years. The Mashpee case was upheld on appeal, Braveman said.

Even if Platt were to grant the tribe some form of federal recognition, and his decision were upheld on appeal, "that wouldn't mean they're entitled to build a casino," Braveman said. The tribe would then have to prove that the land they want to build on is their ancestral land — a matter the state disputes — and they would have to enter into a compact with New York State.

If Platt were to deny the tribe federal recognition, the Shinnecock would have at least a couple of options, legal experts said. They could appeal to the Second Circuit Court of Appeals, or they could simply wait for the Bureau of Indian Affairs to make a ruling on their case — an option that could take a decade or more.

Any decision by Platt will be big news for dozens of tribes around the country, many of whom have been living in poverty for years awaiting a ruling that could wind up earning them as much as \$1.2 billion a year, according to some casino proponents. Whether the case ends with a casino in the Hamptons is another question.

"I really believe that, when all is said and done, the Shinnecock will not be able to open a casino," said Assemblyman Fred Thiele (R-Sag Harbor), who has opposed the casino because he says it would harm his district. Others say anything could happen.

"This is not pie in the sky at all," Eberhard, the Seattle lawyer whose firm represents several tribes nationwide, said. "This is serious business."



Photo by Joseph D. Sullivan

Shinnecock tribal council members James Eleazer, left, Lance Gumbs and chairman Charles Smith, during a news conference in June, hold up a rendering of the casino the tribe wants to build in Hampton Bays.