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THE TEXAS LEGISLATURE TAKES A "TEXAS TWO STEP" APPROACH TO INDIAN GAMING

by Dennis J. Whittlesey

The Dance Known as "Texas Two Step"

> *The two-step is a partner dance, consisting of a "leader" (traditionally a man) and a "follower" (traditionally a woman). The leader determines the movements and patterns of the pair as they move around the dance floor. It is a progressive dance that proceeds counterclockwise around the floor.*

With the foregoing as predicate, it is an appropriate time to examine whether the Texas State Legislature is trying do something *for* Indian Gaming or *to* Indian Gaming. The only certainty is that something is likely to happen! And, like the Texas Two Step, the legislative casino dance changes at the whim of the "leader" – which in this case is the Texas Legislature.

The overriding question is, What is happening here, and why?

For starters, it is important to understand two things: (1) the state's three federally recognized Indian tribes do not share equal legal status and (2) the Legislature ostensibly has proposed to level the playing field so that all three enjoy an equal gaming opportunity. The three tribes are (1) the Texas Band of Kickapoo Indians in Eagle Pass, which is 143 miles southwest of San Antonio on the Rio Grande River and far from the Gulf Coast, (2) the Ysleta del Sur Pueblo Tribe – also known as the Texas Tigua Tribe, located near El Paso and far from the Gulf Coast, and (3) the Alabama-Coushatta Tribe of Livingston, 74 miles north of Houston and 76 miles northwest of Beaumont, and clearly much closer to the Gulf Coast and the hundreds of thousands of tourists annually traveling to the Gulf. Each of these tribes was recognized by a special Act of Congress.

Kickapoo was recognized by Congress through the Act of January 8, 1983, a federal law which imposed no restrictions on the Tribe's right to conduct gaming. The Alabama-Coushatta and Texas Tigua Tribes were recognized through the Act of August 18, 1987, which restricted any tribal gaming to gaming activities that are lawful under Texas state law. The distinction between Kickapoo gaming opportunity and that available to the Alabama-Coushatta and Tigua becomes important under both the Texas state laws and, in turn, the federal Indian Gaming Regulatory Act of 1988.

It should be noted that the Alabama-Coushatta opened a casino in 2001 on its Livingston reservation that produced monthly revenues of an estimated $1 million for nine months. A federal court shut it down,

and the facility has never reopened. Similarly, the Tigua Tribe operated a casino for a while, but it too was closed by court order. Since then, the Tigua gaming operation has been limited to a "sweepstakes" that the Tribe claims is legal under state law. In the meantime, the Kickapoo Tribe has been operating a Class II gaming facility on its reservation, but the State has refused to negotiate a Class III gaming compact.

The disparity between the Kickapoo on one hand and the two other Texas tribes has been the subject of discussion for years. Yet, nothing was ever really done to confront it and provide all tribes an equal opportunity to develop gaming and the resulting economic benefits generated thereby – until this year.

The two "have not" tribes are the subject of state legislation that would remedy the situation. This would be accomplished by a bill introduced on March 12 by state representatives for districts in Houston and El Paso purporting to put all three Texas tribes on an equal footing. Indeed, the legislation has been touted in the press as "recognizing the gaming rights of all tribes in Texas." It would do this by removing the restrictions of the 1987 federal law by extending the same rights to the two tribes recognized by that legislation to the level of rights enjoyed by the Kickapoo under the 1983 federal law. The bill sponsors' stated intent is to amend the Texas Constitution to allow the Alabama-Coushatta and Tigua to engage in gaming on their tribal lands, and thus putting them on the same footing as the Kickapoo.

This sounds good at first reading, and many involved with the Indian gaming community were surely pleased with the suggestion that the long-standing Texas situation was finally being addressed and that Indian gaming in the state would be expanded to the benefit of the two tribes that had been disadvantaged. The long-time "wrong" was about to be "righted."

As they say in this author's home state of Oklahoma: "Wrong, Red Rider! And watch out for the Texas Two Step!"

Within 24 hours of the introduction of the March 12 legislation, State Representative Joe Deshotel of Beaumont proposed to severely mitigate the pro-tribal benefits from the day-old legislation. The Beaumont politician introduced legislation proposing to authorize nine *non-tribal "Las Vegas style" casinos* to be located in counties on the Texas Gulf Coast. (As the reader will recognize, the sponsor's hometown just happens to be in one of the counties that just happens to be on the Gulf Coast.)

The ostensible purpose of the new bill is far from the costs incurred by property owners in those designated counties during violent storms, such as hurricanes. However, its actual effect would be devastating to an Alabama-Coushatta gaming facility located far from the tourism mecca of the Gulf Coast. It is true that the Tigua and Kickapoo would benefit, but they almost certainly would lose destination casino traffic in light of the competing opportunity on the Gulf Coast.

What initially appeared to be a great break for tribal gaming may be more of a pyrrhic victory, since the enormous population center of the Dallas–Fort Worth Metroplex will continue to patronize the large tribal casinos in Southern Oklahoma, many El Paso residents will continue to drive into nearby New Mexico and its scores of tribal casinos, and the Houston clientele would find ample gaming opportunity in their backyard.

The March 12 legislation looks great on paper. However, it looks much less so in light of the March 13 legislation. Moreover, current activity in the Legislature is even more troubling for tribal gaming. What initially seemed to be a fairly simple resolution is more complicated by recent statements by Texas legislators from Laredo, Houston, and Eagle Pass, as well as statements from anti-gaming lobbyists claiming a "clear majority" of lawmakers opposed to any expansion of gaming "even when times are hard."

Texas always has been a tough nut to crack with regard to gaming. It is clear that the three Texas tribes are nothing more than pawns in a larger game.

As Alice said to the Queen of Hearts in the great Lewis Carroll book *Alice's Adventures in Wonderland*: "**This is so unfair!**" And there are three tribes in Texas that surely are quoting Alice as this is being written.

BILLS PROPOSE TO REVERSE NATIONAL LABOR RELATIONS BOARD JURISDICTION OVER INDIAN TRIBAL GOVERNMENTS

by Patrick Sullivan

The National Labor Relations Act ("NLRA") was enacted by Congress in 1935. The Act, also known as the Wagner Act after its champion, New York Senator Robert F. Wagner, passed the Senate in May 1935, the House in June 1935, and was signed into law by President Roosevelt on July 5, 1935. The Act's purpose was to encourage workers' collective bargaining rights and protect them from retribution for organizing unions. The Act created the National Labor Relations Board ("NLRB"), a new agency, to enforce the new policy.

Despite the fact that Congress had enacted sweeping pro-Indian legislation in the form of the Indian Reorganization Act of 1934 in the previous year, the NLRA did not mention Indian tribes at any point. Until 2004, Indian tribes and tribally owned businesses were generally assumed to be beyond the jurisdiction of the labor legislation with few exceptions.

In 2004, the NLRB reversed that assumption with a ruling that it had jurisdiction over the San Manuel Casino pursuant to the NLRA. The matter originated from a complaint filed with the NLRB by UNITE HERE!, a large California hotel and restaurant workers' union, which complained that the Tribe had allowed a competing union, the Communication Workers of America, access to the casino to organize its employees while denying UNITE HERE! representatives access to the site. The Tribe moved to dismiss the proceeding for lack of jurisdiction.

The NLRB held that it had jurisdiction, reasoning that (1) the NLRA applies to tribal governments by its terms, despite any express reference to Indian tribes, (2) the legislative history of the NLRA did not suggest a tribal exception, and (3) federal Indian policy did not

preclude the application for the NLRA to the commercial activities of tribal governments. The board found an unfair labor practice and ordered the Tribe to allow UNITE HERE! access to the casino workers.

The Tribe appealed the ruling to the United States Court of Appeals for the District of Columbia Circuit. UNITE HERE! intervened as a defendant. The Court determined that the question of the NLRA's application to Indian tribes turned on two related questions: (1) whether application of the NLRA to San Manuel's casino would violate federal Indian law by impinging upon protected tribal sovereignty, and (2) whether the term "employer" in the NLRA reasonably encompasses Indian tribal governments operating commercial enterprises.

In resolving these questions, the D.C. Circuit recognized the tension between the Supreme Court's 1960 holding in *Federal Power Commission v. Tuscarora Indian Nation*, that "a general statute in terms applying to all persons includes Indians and their property interests," and other Supreme Court precedents favoring tribal sovereignty, including the 1978 *Santa Clara Pueblo v. Martinez* holding that any impairment of tribal sovereignty required a clear expression of Congressional intent in the statutory text. The Court resolved this tension by stating that "if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, then application of the law might not impinge on tribal sovereignty." Ultimately, the Court held that the impact of NLRB jurisdiction on the Tribe's sovereignty was "negligible in this context, as the Tribe's activity was primarily commercial," that the Board's decision as to the scope of the term "employer" in the NLRA was permissible, and affirmed the Board's jurisdiction over the casino.

More recently, in Michigan, the Saginaw Chippewa Indian Tribe has appealed an NLRB ruling that the Tribe violated the NLRA. In October 2014, the NLRB ordered the Saginaw Chippewa Tribe to reinstate an employee allegedly fired for union organizing at the Tribe's casino. The Tribe appealed to the Sixth Circuit Court of Appeals. If that Court rules that the NLRB lacks jurisdiction over the Tribe, that decision would create a circuit split and likely end up before the United States Supreme Court.

The NLRB website states "The Board asserts jurisdiction over the commercial enterprises owned and operated by Indian tribes, even if they are located on a tribal reservation. But the Board does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions."

In January, Kansas Republican Senator Jerry Moran introduced S.248, the "Tribal Labor Sovereignty Act of 2015." The Bill would amend the NLRA to exclude "any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands." At its February 2015 Executive Council Winter Session, the National Congress of American Indians, the largest Native American policy organization, passed a resolution in support of the bill. A similar bill has been introduced in the House of Representatives. The Senate Indian Affairs Committee will hold a hearing on the bill later this month.

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