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SHOULD THERE BE A "LEGISLATIVE SOLUTION" TO DISPUTED INDIAN TRUST APPLICATIONS?

by Dennis J. Whittlesey

Recent actions in Arizona and Indiana suggest that there is a new approach to local government opposition to Indian tribal applications for trust status of newly acquired land. The question has to be whether this is sound Indian Law policy, although the follow-up question seems to be whether the proponents even care.

The most shocking proposal is being sponsored by Arizona's Senior Senator John McCain and Congressman Trent Franks to repeal a federal law enacted long ago as part of a land settlement negotiated with the Tohono O'odham Nation of Arizona. Specifically, the Tribe entered into an agreement with the federal government pursuant to which the Tribe would be compensated for the flooding of tribal reservation land with both cash and the right to construct a casino in the state on land not otherwise restricted for such a project.

The history of this dispute was summarized by Tribal Chairman Ned Norris, Jr. before the House of Representatives in 2013 as follows:

> In 1986 the United States made a promise to the Tohono O'odham Nation when Congress enacted land and water rights settlement legislation, the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. 99-503 (Lands Replacement Act) – legislation that the Department of the Interior has described as "akin to a treaty." *Tohono O'odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 22 IBIA 220, 233 (1992). This settlement legislation was intended to compensate the Nation for the Army Corps of Engineers' unauthorized destruction of the Nation's Gila Bend Indian Reservation. Among other things, the United States promised in that settlement legislation that the Nation could acquire new reservation land in Maricopa County to replace its destroyed Gila Bend Reservation land (which also was located in Maricopa County). The United States also promised that the new land would be treated as a reservation for all purposes.

Following enactment of that federal law, the Tribe has moved forward to develop a resort/casino on newly acquired land on unincorporated land within Maricopa County in the Glendale-Phoenix area – commonly referred to as the "Glendale Project." It has been opposed with multiple lawsuits filed by the State, local governments and even other Indian tribes.

The Tohono O'odham Nation has prevailed in every judicial determination rendered and is now constructing its resort/casino project. But there is new Congressional activity to prohibit the project

and – in the process – change federal law for the sole purpose of stopping this single tribal project by unilaterally repealing critical parts of the Congressional Act settling an important dispute over federal flooding of tribal reservation lands.

The McCain-Franks bill has been favorably reported out of the relevant committees in the both the Senate and the House of Representatives. The legislation is not of general application; rather, it is written for the sole purpose of blocking the Glendale Project.

Indian gaming is conducted pursuant to a 1987 Supreme Court decision which led to enactment of the Indian Gaming Regulatory Act of October 17, 1988 ("IGRA"). Since that time, many local governments and citizen groups have opposed tribal gaming development on lands newly acquired in trust status. Those challenges properly have been grounded on the very clear requirements of IGRA which impose subjective standards for review and decision. To this end, the challenges to Glendale Project under applicable federal laws – including both IGRA and the Indian Reorganization Act of June 18, 1934 – have been unsuccessful. By all legal assessments, the Tribe is clearly within the law.

However, the Tribe is subject to Congressional action since the Indian Commerce Clause of the United States Constitution gives Congress plenary power over Indian affairs. And this legal fact is the foundation of the McCain-Franks assault on the project. Thus, what should be a dispute determined on the basis of existing law suddenly becomes a battle over whether Congress should legislate a final resolution in contradiction to existing law.

Let there be no doubt about the fact that Congress can terminate the Glendale Project, but the real question is whether it should do so through enactment of a dangerous precedent which likely would lead to other state Congressional delegations seeking "killer" federal legislation. And, the better question is whether this result is either necessary or advisable.

First, the Tohono O'odham situation is unique, in that the Tribe is pursuing an economic opportunity that is specifically tied to provisions of a federal land settlement statute. Reversing a key provision of that earlier legislation probably exposes the United States to a major Court of Federal Claims lawsuit for massive financial damages for the uncompensated taking of the tribal claims to the Glendale site that were legislated by the Gila Bend Indian Reservation Lands Replacement Act.

Second, how can this precedent be ignored when local politicians in other states propose similar legislative attacks on tribal projects that also are *concededly legal* under existing law? Rather than pursue claims on existing law, the door suddenly opens to outright statutory revocation of tribal rights.

And the scenario for the next such claim is coming from Indiana where state politicians are proposing federal legislation to block the Pokagon Band of Potawatomi Indians from expanding its casino empire from its reservation in the northern part of the state to newly acquired lands near South Bend. The tribe proposes to construct a $480 million project on lands that it claims qualify for gaming pursuant to specific provisions of IGRA. Whether the land does or does not quality for gaming has not been determined, but Indiana legislators do not want to take a chance on tribal success. Rather, they want immediate federal legislation blocking this single project without regard to legal or factual merit.

Other local groups are almost certainly watching these developments. If Congress blocks the Glendale Project, then there is no reason why it would not block others without regard to existing law. A political resolution of Indian trust applications would reverse many decades of established law. The precedent needs to be carefully considered.

CASINO CITY PRESS RELEASES 2015 INDIAN GAMING INDUSTRY REPORT

by Patrick Sullivan

Dr. Alan Meister has released his 2015 *Indian Gaming Industry Report*. This is the thirteenth edition of the Report and is widely regarded as the best source for the state of the Indian gaming industry, which has grown to $28.3 billion in revenue as of 2013, accounting for nearly half of the casino gaming business in the United States. The hundred-page Report (and hundred plus pages of data) dives into all 28 Indian gaming states with detailed reports and explanations of gaming trends on a state-by-state level.

Meister's comprehensive Report analyzes publicly reported data and information provided confidentially by Indian gaming operators. The 2015 Report covers calendar year 2013 due to data availability – still, it is the most up-to-date data available.

Meister reports that as of 2013, 244 tribes operated 479 gaming facilities in 28 states. These operations generated a record $28.3 billion in direct gaming revenue. In fact, every year except 2009, a devastating year for the entire United States economy, demonstrated growth over the previous year. Indian gaming revenue has more than doubled since 2001.

The 2013 revenue represented a 0.5% increase over 2012, despite the otherwise struggling economy. The small growth rate, however, reflects a gaming slowdown which Meister attributes to the simultaneous slowdown in the U.S. economy, reflected by slow growth rates in both GDP and disposable income in 2013 versus 2012.

Nationwide growth trends, however, can be deceiving. On a state level, revenue growth varied widely. Texas experienced 39% growth in its small Indian gaming market, but revenue shrank by 8% in New York. Among other states experiencing negative growth were Wyoming, Idaho, Connecticut and Alaska.

Success in Indian gaming remained very concentrated with the top 6% of all Indian casinos bringing in 41% of total revenue. California continued to bring in 25% of all Indian gaming revenue at its 69 facilities – about $7 billion. After California came Oklahoma

with $3.8 billion, a 2% increase from 2012. Those two states alone brought in 38% of all Indian gaming revenue in 2013.

Gaming revenue in Class II only states grew faster than the average, by approximately 9% in 2013. Class II only states are Alabama, Alaska, Nebraska and Texas, but gaming revenue in those states accounted for only 2% of total Indian gaming revenue. Many Class II gaming machines are in mixed Class II/Class III states, but data was not available for the total contribution of Class II gaming in such facilities.

Meister's Report also estimates the total economic impact of Indian gaming, including secondary economic activity – purchases of goods and services required to operate Indian casinos and other businesses down the supply chain. From that perspective, Indian gaming contributed a whopping $42 billion to the U.S. economy in 2013.

The 2015 Casino City's Indian Gaming Industry Report is available from Casino City Press at http://www.indiangamingreport.com.

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