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DICKINSON WRIGHT'S

GAMING LEGALNEWS

TEXAS CONTINUES TO WAGE WAR AGAINST INDIAN GAMING

by Dennis J. Whittlesey

Texas Attorney General Kenneth Paxton appears to not like Indian gaming. Two of the state's three federally recognized tribes have been pursuing gaming opportunities for years, but the Attorney General's opposition continues even in the face of a recent federal decision supporting their right to conduct gaming.

In the way of background, it is worth revisiting the current situation. For starters, it is important to understand two things: (1) the three tribes do not share equal legal status and (2) earlier this year, the Texas Legislature ostensibly proposed to "level the playing field" so that all three would have an equal gaming opportunity. The key word is "ostensibly."

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, which also is 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.

The Kickapoo Tribe 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 Tribe and Texas Tigua Tribe 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 the Kickapoo Tribe gaming opportunity and that available to the Alabama-Coushatta Tribe and Texas Tigua Tribe has become a legal battleground, and the Attorney General is leading the opposition to any new gaming development by the Texas Tigua Tribe.

Texas law has never specifically authorized gaming and, accordingly, the Texas Tigua Tribe has not been able to conduct gaming because of the language in the Tribe's 1987 Restoration Act requiring state laws specifically authorizing gaming.

The Texas Tigua Tribe's efforts to secure gaming are summarized in the following timeline:

1987: The United States Supreme Court rules in *California v. Cabazon Band of Mission Indians* that Indian tribes have rights to conduct gaming that is not prohibited by state criminal laws so long as the gaming activity occurs on tribal lands.

1988: Congress passes the Indian Gaming Regulatory Act ("IGRA"), which permits casinos on reservations.

1990: Tribes in other states begin opening casinos.

1991: Texas voters approve a state lottery.

1993: Texas Tigua Tribe wins federal court permission to open a casino. Speaking Rock Casino opens.

1998: Texas Gov. George W. Bush asks Texas Attorney General to close the casino.

1999: Texas Attorney General files suit against the Texas Tigua Tribe.

2002: Federal court rules against the Texas Tigua Tribe. Speaking Rock Casino closes February 12.

The Texas Tigua Tribe gaming issue has been in the courts continuously since 2002, and the Tribe's attempts to secure gaming approval have been successfully resisted by the State in a number of federal court rulings.

In the meantime, the Alabama-Coushatta Tribe has been in the same state of "gaming limbo" since it also was recognized by the 1987 Restoration Act and is subject to the same "lawful under Texas law" gaming limitation used to oppose the Texas Tigua Tribe's efforts. However, the landscape changed in late October with the publication of a decision by the Department of the Interior and the National Indian Gaming Commission that both tribes have a legal right under federal law to operate Class II gaming facilities on tribal lands. IGRA established classes of gaming that tribes can conduct on Indian lands. Class II gaming is defined as bingo, as well as pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo.

While the October decision has been hailed as a major turn in the Tribes' favor, the Attorney General sees it as a continuum of tribal efforts to conduct illegal gaming. This position was stated in a recent court filing in response to a request for comments from the federal court in which the Texas Tigua Tribe legal battles have been waged. The Texas Tigua Tribe did submit two documents in support of the proposed gaming, and the federal government declined the court's invitation to submit an *amicus curiae* brief. The Texas Attorney General continued his strong opposition to the decision.

The battle lines have been drawn for a number of years, as shown by the Texas Tigua Tribe timeline. In light of the statutory restriction in the 1987 Restoration Act, the Tribes continue to face a difficult fight. However, the federal decision is a new tool in the Texas Tigua Tribe's legal arsenal despite the federal government's reluctance to defend it at this time. Nonetheless, there is a legal precedent for the tribal position in the language of the *Cabazon* decision (allowing tribal gaming that is not prohibited by state law). The obstacle confronting the tribe is reconciling the Restoration Act's language with the Supreme Court ruling.

ALASKA PRESSES D.C. COURT OF APPEALS TO REJECT TRUST ACQUISITIONS IN ALASKA

by Patrick Sullivan

The question of whether Alaska Natives may place land in the same federal trust status as Indian tribes in the lower 48 states was widely thought to have been resolved but is now before the Court of Appeals for the District of Columbia Circuit. The issue in *Alaska v. Akiachak Native Community, et al.* is whether the Alaska Native Claims Settlement Act ("ANCSA"), signed into law by President Richard M. Nixon in 1971, withdrew the Secretary of the Interior's authority to place Alaskan land in trust under Section 5 of the Indian Reorganization Act of 1934 ("IRA").

The Secretary of the Interior has had the authority to place land into federal trust status for Indians since 1934 and to proclaim those lands to be Indian reservations. Subsequent amendments made the IRA applicable to Alaskan lands, and the Secretary proceeded to accept Alaskan land in trust and create several reservations there. Alaskan land was also held by Alaska Natives in allotment status and in reservations expressly created by Congress, including the Annette Island Reserve, which was set aside by Congress in the Act of March 3, 1891.

The 1968 discovery of enormous oil reserves in Alaska's Prudhoe Bay and the demand for a pipeline across the state to deliver that oil to the U.S. market required the settlement of pending Alaska Native land claims along the route. To settle those claims, Congress passed ANCSA in 1971. ANCSA was the product of a negotiated settlement between the federal government, the State of Alaska, and the Alaska Federation of Natives ("AFN"), an umbrella group representing the Alaska tribes. AFN had made clear that it was not interested in the traditional Indian reservation model adopted in the lower 48 states. The legislation created a new model for settling native land claims throughout Alaska without creating new Indian reservations. ANCSA expressly extinguished all claims of aboriginal title in Alaska, aboriginal hunting and fishing claims, and any "claims against the United States, the State, and all other persons that are based on . . . any statute or treaty of the United States relating to Native use and occupancy."

ANCSA dissolved the existing allotments and all but one of the reservations, compensated Alaska Natives with $962.5 million in state and federal funds, and conveyed 44 million acres of Alaskan land to "Alaska Native Corporations" ("ANCs"). Alaska Natives became shareholders in the ANCs instead of receiving money and land directly. Many of the ANCs continue to generate substantial dividends and employment opportunities for their shareholders.

In 1978, Associate Solicitor-Indian Affairs Thomas Fredericks issued an opinion declaring that acceptance of trust land in Alaska would be an abuse of secretarial discretion, and in 1980, the Department promulgated the regulation known as the "Alaska Exception." That regulation provided that the Department's land-to-trust regulations "do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members."

Akiachak Lawsuit and Department of the Interior's Reversal

In 2007, a group of Alaska tribes including the Akiachak Native Community sued the Secretary and Department of the Interior in the federal D.C. District Court arguing that the Alaska Exception illegally discriminated against Alaska Natives by prohibiting them from placing land in trust status. In March 2013, following years of litigation, the District Court agreed with the Tribes and held the Alaska Exception to be void and unenforceable because it violated a law prohibiting regulations that diminish the privileges available to Alaska Natives relative to the privileges available to all other federally recognized tribes.

In December 2014, Assistant Secretary Kevin Washburn formally revoked the Alaska Exception. Washburn's statement accompanying the revocation declared that ANCSA did not prohibit trust land acquisitions in Alaska under the IRA and that "the shocking and dire state of public safety" in Alaska Native communities could be improved by allowing land to be placed in trust status, thereby allowing Alaska Natives the opportunity to exercise criminal jurisdiction over those lands. The revocation was not legally challenged and became effective on January 22, 2015.

Alaska's Appeal

Despite the legal finalization of the Secretary's revocation of the Alaska Exception, the State appealed the District Court's decision and asked for a declaration that ANCSA prohibits the creation of new trust land and Indian Country in Alaska. The Alaska Native parties and the Secretary have moved to dismiss the State's appeal on the basis that ANCSA never repealed the Secretary's IRA authority to place Alaskan land in trust and that the Bureau of Indian Affairs' repeal of the Alaska Exception rendered the controversy moot.

In its appeal, the State characterized the revocation of the Alaska Exception as nothing more than an "administrative end-run around ANCSA, facilitating the re-creation of trust land in Alaska after Congress expressly revoked it." The State further argued that Congress never granted the Secretary the authority to reverse the deal struck between the State and the Tribes through ANCSA.

Implications of the D.C. Circuit Decision

The pending decision may have far-reaching consequences in Indian Country and may fundamentally alter the rights of Alaska Natives. In its 1998 *Alaska v. Native Village of Venetie Tribal Government* decision, the United States Supreme Court struck down a tribal tax imposed on non-tribal members contracted to build a school on land owned by the Native Village of Venetie, a former reservation which had been dissolved through ANCSA. The Court held that, because the Village was not "Indian Country," the Tribe could not impose any tax on the land.

Should the D.C. Circuit affirm the District Court and open Alaskan lands to trust status, key issues ostensibly decided in the *Venetie* case would be reopened, resulting in a likely contentious struggle between the State of Alaska and its large population of Alaska Natives to define the jurisdictional boundaries and taxability of those lands, as well as rights to conduct gaming and regulate natural resources development. Such an outcome would almost certainly prompt the State to propose federal legislation preventing the Department from accepting Alaskan land in trust. With those issues at stake, the D.C. Circuit's resolution of the case is being closely watched by Alaska Native communities and their neighbors alike.