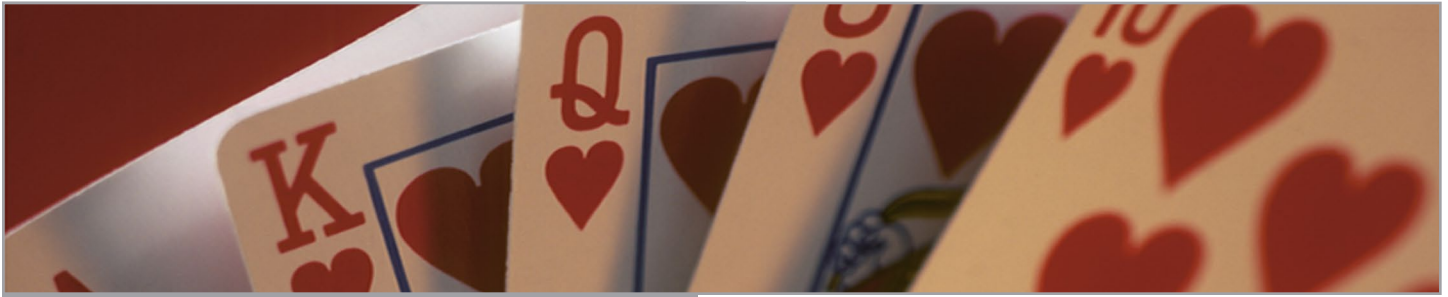


# GAMING LEGAL NEWS



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## CRIT'S LONG-STANDING CLAIM TO CALIFORNIA LAND WAS CHALLENGED IN 2008 BY GOVERNOR SCHWARZENEGGER BUT NEVER DISCLOSED

by Dennis J. Whittlesey

The Attorney General for the Colorado River Indian Tribes of Arizona ("CRIT") has for more than two and one-half years concealed the fact that CRIT's claim that California land is within its reservation was being formally challenged by the Legal Affairs Secretary to former Governor Arnold Schwarzenegger. This failure to disclose raises questions potentially affecting numerous legal actions mounted by and against CRIT, including at least one case which has been litigated in Arizona federal court and recently argued before the United States Court of Appeals for the Ninth Circuit.

[DISCLOSURE: This writer was lead counsel in the Arizona case and the appeal to the 9th Circuit.]

For years, CRIT and its Attorney General Eric Shepard have argued in numerous venues – including CRIT's tribal courts, federal courts in Arizona and California, state court in California and the Riverside (CA) County Board of Supervisors and its County Counsel – that CRIT's Reservation extends beyond the Colorado River into California, reservation land which they accordingly contend is exclusively subject to tribal jurisdiction. A number of tribal self-help evictions of residents and businesses have been sanctioned by Riverside County and its law enforcement personnel as a direct result of the tribal arguments. The most recent of these occurred only a few months ago, in which a business was forcibly displaced despite the fact that its claims were then pending before the 9th Circuit.

The United States has supported the CRIT jurisdictional claims, yet the federal attorneys working on the various CRIT disputes have never disclosed the Governor's concerns.

This writer has just been provided with a copy of the legal challenge which is articulated in a September 12, 2008, letter to Attorney General Eric Shepard. The letter was written by Andrea Lynn Hoch, then Legal Affairs Secretary to the Governor, in which she concluded that "any CRIT California reservation lands, which were terminated in 1904, have not been restored." In support of that conclusion, Secretary Hoch cited

a 1964 Act of Congress requiring a legal determination that never has been rendered.

The letter mirrors legal arguments presented by private litigants in all of the venues identified above, which have been aggressively contested by CRIT and its outside attorneys from a San Francisco law firm. Notably, federal attorneys do not appear to have actually made the CRIT argument, preferring to defeat legal claims through a variety of jurisdictional arguments unique to Indian lands and the sovereign immunity of both tribes and the United States.

Whether the disclosure of this letter will affect any litigation – either pending or already decided – remains to be seen. Also remaining to be seen is whether the actions of various attorneys who were aware of this challenge will be examined by appropriate reviewing authorities.

## **NIGA LEADERSHIP: BATTLE IN THE VALLEY OF THE SUN**

by Dennis J. Whittlesey

The National Indian Gaming Association may be at a crossroads. NIGA's long-time Chairman Ernie Stevens is being challenged for reelection for what effectively is the first time since he was initially elected 12 years ago. And, by all accounts, this challenge is serious. The battleground will be the association's annual Trade Show and Convention in Phoenix on April 3-6.

The "Valley of the Sun" is a self-designated moniker coined by Arizona's ever-growing population to popularize their notion that living in a desert need not be anything less than living in the proverbial land of "milk and honey" all year long.

Whether Ernie Stevens discovers milk and honey or just runs into a lot of heat will be determined within the next 14 days.

The election or defeat of Chairman Stevens is almost superfluous to the fact that a legitimate challenge is even being mounted. However, largely missed in the Indian gaming press is that serious issues about the nature of NIGA's operations surfaced a year ago at NIGA's annual meeting in San Diego. Although those issues ostensibly were then addressed by NIGA's most responsible voices, they have resurfaced in the person of Stevens' challenger, former President of the Salt River Pima-Maricopa Indian Community Ivan Makil.

At stake is leadership of the 184-tribal organization and the single most influential platform for addressing Indian gaming issues in the country. By most accounts, NIGA has been an effective and influential advocate for its industry and members, and the question quickly arises as to what are the issues and how did Ernie Stevens get to this level of challenge.

Stevens is an articulate and effective advocate for Indian gaming, and he has been recognized both nationally and internationally for his contributions. In addition, he has assembled a staff of professionals

widely praised for their work and intellectual contributions to the causes they represent. Stevens correctly claims that he has led the association's accomplishments in several areas critical to Indian gaming, including (1) defending against legislative attacks on tribal sovereignty and the Indian Gaming Regulatory Act, (2) working with NIGA's members to develop consensus on critical issues, (3) building coalitions between NIGA and other organizations, and (4) empowering tribal leaders and strengthening their collective voice in both Washington, D.C. and the gaming industry in general.

Throughout his tenure, Stevens has been a study in seriousness of purpose and dignity, and has worked to insure that his organization has been above intra-tribal disputes which often arise. Yet, questions have been raised, and there is widespread speculation that his reelection is in serious doubt.

The San Diego convocation a year ago was by all standards an amazing success, featuring an enormous turnout among conferees and exhibitors and an array of professional programs unequalled in Indian Country. Yet, the undercurrent of dissatisfaction surfaced during the business meetings when both Stevens and NIGA's Executive Director Mark Van Norman were openly criticized for failure to "educate tribes about online wagering" and what was generally described as failing to alert the membership about impending federal legislation on both internet and other issues. Other complaints concerned suspected excessive expenditures on staff salaries and travel, as well as lobbying activities. The Oklahoma Indian Gaming Association, a major constituency within NIGA, presented a two-page list of questions and issues concerning what was called "a need for fiscal transparency" and information about NIGA's relationships with its vendors.

While NIGA's General Counsel quickly responded at the time that all of the association's financial records are a matter of public record and readily accessible as a matter of federal tax law, the ongoing debate did not end and – in fact – is culminating in the open electoral challenge in Phoenix.

Challenger Makil apparently has moved beyond the harsh criticism of last year and conducted his campaign with emphasis on his accomplishments as a tribal leader and the work of his company, Generation Seven Strategic Partners LLC (which describes its work as "providing a conduit between tribal governments and non-tribal entities in government affairs, business and economic development"). Indeed, he avoided any direct criticism of Stevens during a recent candidate forum in California, instead directing his comments to the need to build better unity among tribes.

Many observers believe that Stevens will be reelected because he is both well liked and has been successful, and both are undeniably true. Elections are often decided on intangibles.

The outcome of the NIGA election is to be determined in two weeks. Until then, all eyes in Indian Gaming will be on Phoenix, for nothing less than the future of Indian gaming is at stake.

## PLAYING AND NOT PAYING

by Dennis J. Whittlesey

A Florida millionaire thinks he has found the ultimate gaming experience: patronize Indian casinos, rely on his wealth as collateral to play, lose lots of money, and then refuse to make payment on his accumulated markers on the grounds that state courts lack jurisdiction over tribal casino collection activities.

This really is happening in Connecticut. Right now. Really.

A cable television executive named Jerome Powers drew markers at the Mohegan Sun casino in Connecticut in May 2009, lost \$1.2 million playing blackjack, wrote checks to cover the markers on several banks, returned home, stopped payment on the checks, and now is fighting collection litigation in New London Superior Court on the defense that the state courts have no jurisdiction to entertain the litigation since the debt was incurred on Indian tribal lands which are beyond the reach of the state court. The Mohegan Tribe could have prosecuted Powers in the Mohegan Gaming Disputes Court, but opted for the state courts, where he is using various procedural maneuvers to delay having the claims heard.

Powers is a major investor in Plum TV, which is described as a “multi-platform lifestyle network,” and he seems intent on living a multi-platform lifestyle on tribal money. After losing the money, he wrote checks on May 23, 2009, for \$300,000; \$100,000; \$465,000; \$74,500; \$60,500; and \$200,000. On the following day, he returned to his mansion in Miami Beach and directed his banks to stop payment of each of the checks.

In addition to challenging state court jurisdiction, Powers is asserting that tribal law should apply with the implication that the matter belongs in tribal courts. This is a far cry from the customary complaint by non-Indians sued in tribal courts that there is no tribal jurisdiction over them. The casino undertook prejudgment seizure of Powers’ assets under state law, to which he objected through appeal to the Appellate Court of Connecticut, triggering an automatic stay of seizure pending a decision by that court. Connecticut attorneys advise that the Appellate Court normally will take two to four years to rule on such matters.

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POSTSCRIPT – As this publication was being finalized, there is a credible report that Powers’ business partners and colleagues have demanded that he quickly resolve the Mohegan debt in light of emerging publicity, and that he will be initiating settlement discussions with tribal representatives. Settlement here will defer adjudication of Powers’ unique legal theories to another day and another player seeking to play but not pay.