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BARSTOW BOUNCES BACK

by Dennis J. Whittlesey

With the announcement last week that Interior is going to conduct public hearings on long-stalled casino development in Barstow, California, the City is once again a prominent player in the next round of gaming in Southern California.

The latest development follows some ten years of continuous effort by the Los Coyotes Band of Cahuilla & Cupeno Indians and Barstow to bring gaming to the high desert. There still is much to do, but the resilience of both the City and the tribal team has to be lauded, for nothing less than continuous persistence was required to bring the project to this point.

The project entered an active phase with the July 1 publication of a draft Environmental Impact Statement; the 75-day comment period commenced on that date, and the first public hearing was scheduled in Barstow for the evening of July 27.

While talks between the Tribe and City began in 2001, things took a dramatic turn in 2004 when they negotiated and executed a Municipal Services Agreement that has been widely recognized as one of the most generous such agreements in California. Among its provisions was a revenue-sharing provision through which the City would receive 4.3 percent of the casino's net revenues. At the time, the City estimated that it would receive more than \$4 million from the first year of casino operations alone.

Concurrently, the Big Lagoon Rancheria in far Northern California proposed a Barstow gaming development as part of a complex settlement of a major environmental lawsuit with the State of California. With that, the City entered into negotiations for the second casino to develop a two-tribe "casino zone" adjacent to I-15 that runs through the city. The resulting Big Lagoon agreement was virtually identical to the Los Coyotes agreement.

Suddenly, Barstow was "Ground Zero" for gaming projects, at which time a third tribe requested negotiations for a deal identical to that of the Los Coyotes and Big Lagoon. The new entrant was the Chemehuevi Tribe of Lake Havasu. While the first two projects openly proposed off-reservation gaming, the Chemehuevi contended that Barstow was within its aboriginal territory and the land would automatically qualify for gaming once it was taken into trust. This would have eliminated

the difficult multi-stage process for off-reservation gaming approvals. While virtually every credible historical record available refuted the Chemehuevi's historic land claim, the City entered into a third agreement with it since the land's qualification for gaming ultimately would be a decision for the federal government to make as part of the trust approval process. The Chemehuevi agreement was virtually identical to its two predecessors.

Opposition to the off-reservation projects in Barstow quickly surfaced, and it was led by some of the casino-rich tribes in Southern California that did not want new competition. Their concerns were somewhat understandable since I-15 is the major route connecting Southern California and Las Vegas and a new destination resort complex was the last thing they wanted. Those tribes went to their political allies in Sacramento, including some powerful Senate Committee Chairmen, and demanded that they publicly oppose any Gaming Compacts for the Barstow projects.

In the face of the ferocious political opposition, Big Lagoon ultimately withdrew from Barstow and began assessing development of a casino in its home county some 700 miles from Barstow. The Chemehuevi simply disappeared, and there was some speculation that its activity was more to derail the first two projects than a serious undertaking.

Meanwhile, the Los Coyotes team, including its Michigan developer Bar West, quietly kept working on its project. The Tribe began working with Interior on its land-to-trust process in 2006, knowing that it would require approvals under the two-part determination process established for off-reservation gaming projects. And, the Tribe also pursued a Compact. Although former Governor Schwarzenegger did execute a Compact with Los Coyotes, the Legislature refused to consider it.

Now, there is a new Governor and new resolve at Interior to consider off-reservation gaming projects, as articulated recently in the Department's revocation of a Bush Administration policy directive virtually eliminating all such projects from consideration. While the Obama Administration has opened the door for off-reservation gaming applications, it is important to remember that it did so by merely removing some artificial obstructions imposed by its predecessor. This takes the project back to a "pure" off-reservation process as defined in the Indian Gaming Regulatory Act, a process that has only been successful five times since the law was enacted some 23 years ago. In light of this history, it can hardly be said that any problems to securing the off-reservation approval were removed with the reversal of the Bush policy.

The off-reservation process requires that the Secretary make a determination that the gaming project would be in the best interests of the Tribe and not be detrimental to the surrounding community. And the project then would have to be approved by the Governor.

The road to Barstow is not a *fait accompli*, but the current developments are encouraging for anyone familiar with the financial hardships faced by the Los Coyotes and the fiscal situation at Barstow. There are legitimate circumstances when even hardened opponents to off-reservation gaming should back off. And the Barstow Project is Exhibit No. 1.

With that, the work is still ongoing for both the Tribe and the City. But, the pot at the end of this particular rainbow does contain gold. The \$160 million development will create more than 1,065 construction jobs and more than 1,000 permanent jobs for a city and surrounding area hard hit by California's current economic distress. The casino would include a gaming floor of 57,000 square feet, more than 1,300 slot machines, 57 table games, a 100-room hotel, conference and meeting room spaces, and dining and entertainment venues. The potential benefits to both parties are both enormous and long-lasting.

This has been a long march. And it came after many counted Barstow and Los Coyotes out. Big mistake....

NOTE: The author served as Special Counsel for Gaming to the City of Barstow throughout the development and approval of the three Municipal Services Agreements discussed above.

SOMEWHERE IN NORTHERN CALIFORNIA IS A REALLY ANGRY TRIBE...

by Dennis J. Whittlesey

Another gaming tribe feels that it has been exploited by a non-Indian gaming company with which it contracted for casino development and management services. While various tribes have tried to move on, one is aggressively pursuing legal remedies with a vengeance.

The Elk Valley Rancheria Tribe is headquartered in Crescent City, California, a small town on the Pacific Coast just south of the Oregon border. While that does not sound significant by itself, one needs to know that U.S. 101 runs through the city, and major retirement communities are situated in Southern Oregon only a few miles up the highway. The tribe has operated a casino for years.

Enter Las Vegas casino executive R. Shawn Ellis, who over the years has managed various tribal casinos, including Elk Valley Casino. In addition, he allegedly owns or has owned a number of companies through which he did business with Elk Valley. The Tribe contracted with him to manage its casino, and they apparently established a good relationship that in 2006 led to the Tribe loaning him some \$480,000 for development of a proposed resort in Las Vegas. That project did not come together, the loan was never paid, and there now is an ugly legal battle between the two, which became embroiled in the November 2010 Chapter 7 bankruptcy filing by Ellis personally and three Ellis companies.

The Tribe says it removed Ellis as casino manager for "inadequate performance" in May 2008 and the following year sued him for \$1 million in Nevada federal court to recover the still-unpaid loan, interest, and fees. That case was closed because of the bankruptcy, so last week the Tribe filed a second \$1 million suit – this time against Ellis's bankruptcy estate – alleging fraud and stating that Ellis had "falsely promised Elk Valley that no matter what happened with the loans, Elk Valley would be made whole." Other allegations include the making of false representations that other named California casino tribes, as well as a financial source in Dubai, also were investing in the resort project both as (1) inducement for Elk Valley to participate and (2) comfort that

the project was soundly financed. The newest Complaint alleges that none of the identified tribes had ever agreed to invest, adding that Ellis did persuade tribes in Washington and Idaho to invest because of Elk Valley's fraudulently induced participation.

The extent of the Elk Valley outrage is seen by even a cursory reading of the Complaint, which even alleges that Ellis used the Tribe's funds to pay for his personal expenses and to retire prior debts. Moreover, there also are charges of commingling funds from, and fraudulent transfers of assets between, various Ellis companies. The allegations of fraud could not be stronger.

While it is not clear how the Tribe can pursue the new lawsuit against the bankruptcy estate, it is unquestionably clear that Elk Valley is really angry. But the Complaint did not stop with Ellis; it also sued a former business associate and ten separate companies, seeking money damages from all of them.

Elk Valley clearly has become the modern incarnation of the character in the movie *Network*: the Tribe is "mad as hell and ... not going to take [it] anymore."