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Robert W. Stocker II, Gaming Law
517.487.4715 • rstocker@dickinsonwright.com

Dennis J. Whittlesey, Gaming Law/Indian Law
202.659.6928 • dwhittlesey@dickinsonwright.com

Michael D. Lipton, Q.C., Gaming Law
416.866.2929 • mdliptonqc@dickinsonwright.com

Peter H. Ellsworth, Gaming Law/Indian Law
517.487.4710 • pellsworth@dickinsonwright.com

Peter J. Kulick, Gaming Law/Taxation
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WHITE HOUSE TRIBAL CONFERENCE – WHAT GAMING ISSUES SHOULD BE ON THE TABLE?

by Dennis J. Whittlesey

In past years, the non-tribal gaming industry had little interest in the White House Tribal Nations Conference attended by tribal leaders from across the country. However, this year is different and many eyes will be turned to the session when it is convened on December 5 at the Department of the Interior. Internet gaming (“i-Gaming”) has been a major topic at gaming conferences for much of the past two years, and the December 5 discussions on that issue will be closely followed by the industry.

The attention-getting factor this year is that federal i-Gaming legislation has been elevated to the “front line” for Congressional action both during the “lame duck” session this year and the next session of Congress that convenes in January. And the Indian gaming community is seeking a spot at the table with its own agenda. While there is a division of opinion as to whether i-Gaming should be the subject of federal legislation or left to state action, the Senate leadership is clearly looking to enact a comprehensive regulatory framework.

With this, the gaming issues discussed during the White House Conference should look a lot like the following.

Item A – i-Gaming in Indian Country

The overarching question is whether tribal i-Gaming should be legislated at the federal level or on a state-by-state basis. The answer is complicated by the fact that a number of states have no tribal gaming. Others have Class III Indian gaming and others (Alabama is the most visible) only permit Class II Indian gaming. Moreover, Class III Gaming Compacts vary from state to state, and some of them establish geographical “exclusivity” for gaming that effectively gives the Compact tribes a gaming monopoly in defined areas. Thus, a “one size fits all” approach to tribal i-Gaming is difficult to frame, although the draft Tribal Online Gaming Act attempts to do so.

The key provisions of the federal legislation have been summarized by Seattle attorney Tony Broadman as follows:

1. Any federalization of online gaming must provide positive economic benefits for Indian tribes since such a program would create thousands of jobs within the United States.

2. "Tribal online gaming" means only online poker.
3. The Secretary of Commerce shall oversee and regulate tribal online gaming – not the National Indian Gaming Commission.
4. Tribes, consortiums of tribes, and "a consortium of tribe(s) and non-tribal entities" could be operators.
5. No Indian lands requirement appears to exist.
6. The legislation is not intended to affect compacts or cause them to be renegotiated.
7. A most-favored-games clause would allow tribes to offer games as they become legal – ostensibly beyond poker.
8. No state taxation of tribal online gaming revenue.

Some of these key provisions are easy to understand and not particularly controversial. However, the intended "non-impact" on Class III Gaming Compacts almost certainly will generate discussion, as would the elimination of any "Indian lands" requirement. While there will be no particular controversy as to any of these legislative provisions at the White House Conference, there certainly will be at Congressional hearings. And, if the past is prologue, the states will likely oppose any federal legislation, arguing that these matters should be resolved by their individual legislatures.

Item B – Off-Reservation Trust Acquisitions

The Obama Administration has loosened the decision-making process for taking off-reservation land into trust for gaming. This has been a particularly divisive matter in various states such as California, with firmly established gaming tribes opposing the acquisitions on the grounds that the projects represent nothing more than "reservation shopping." Much of this opposition seems to be driven by a desire to maintain territorial monopolies, and the established tribes have been sophisticated in their political relationships with their Governors and state legislatures (some of which must approve Gaming Compacts negotiated by the Governor). If this issue is not raised during the Conference, it will be something of a surprise.

Item C – Legislating a "Carcieri Fix"

The 2009 Supreme Court decision in *Carcieri v. Salazar* held that the Secretary of the Interior can only take land into trust for tribes that were "under federal supervision" as of June 18, 1934, the date of enactment of the only law authorizing trust acceptance. Since then, there have been continuous discussions as to legislating a "fix" to that law so that the Secretary can take land into trust for all federally recognized tribes. The opposition to the remedial proposals has been aggressive, with states and local governments demanding that they have a veto over any trust acquisition of land within their boundaries. Other opponents

have called for a legislative end to tribal sovereign immunity. This issue is enormous for Indian Country in general and Indian gaming in particular.

Item D – Legislating a "Patchak Fix"

A direct consequence of the *Carcieri* decision came earlier this year with the Supreme Court's ruling in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, a case coming out of Michigan. Patchak alleged that the tribe was ineligible to have land taken into trust for gaming; that case was dismissed at the lower level, with the subsequent construction and operation of a tribal casino on the subject land. The Supreme Court ruled that Patchak has standing to maintain his litigation under the federal Administrative Procedure Act and its six-year statute of limitations, essentially voiding the 30-day appeal period previously established by Interior Department regulations. The impact on any tribal casino development on new trust land was immediate, since the financial community correctly wants to know that casino operations are permanent and not subject to termination with a judicial decision that the land was illegally taken into trust – especially if the tribe is newly recognized and potentially ineligible for trust land under *Carcieri*. Moreover, without regard to the *Carcieri* ruling, the six-year statute of limitations could prove to be a deal breaker for many projects since the uncertainty of a permanent land status would not be eliminated until the statutory appeal period has run.

To conclude, the issues are both real and critical for Indian Country. This White House Conference likely will attract greater interest than at any time in the past because the stakes could not be higher for Indian gaming in particular and the entire gaming industry in general.

ECONOMIC DIVERSITY IN INDIAN COUNTRY: TWO SUCCESS STORIES

by Patrick Sullivan

Tribal gaming is the most successful, visible, and controversial economic driver in Indian Country. The Indian Gaming Regulatory Act of 1988 was intended to promote the federal policy goals of "tribal economic development, tribal self-sufficiency, and strong tribal government." Now, 241 tribes out of 565 federally recognized Indian tribes conduct gaming operations, and Indian gaming revenues totaled \$26 billion in 2011.

Despite that success, Indian reservations remain the most impoverished communities within the United States. Indian gaming faces inevitable competition from both non-Indian commercial casinos and internet gaming. Tribal economies must diversify, because gaming alone is not enough to bring most tribes out of poverty and bring jobs to Indian Country in the long term. Realizing this, most gaming tribes have implemented diversity initiatives. Here are two success stories in which visionary and committed leaders have diversified and strengthened tribal economies.

Winnebago Tribe of Nebraska and Ho-Chunk, Inc.

The Winnebago Tribe of Nebraska's experience is a roadmap for other tribes hoping to diversify. The Tribe's first casino was a success, but competition from non-Indian gaming expansion quickly cut into revenues. In 1994, the Tribe created Ho-Chunk, Inc., a tribally owned corporation. Ho-Chunk now employs 1,400 people in 24 businesses in 10 states and 5 countries in construction, government contracting, green energy, and information technology. Ho-Chunk has grown to \$230 million in annual revenue.

Ho-Chunk CEO Lance Morgan believes that reliance on gaming revenue is unsustainable and that true diversification is necessary to sustain tribes over time. He wrote in 2003, "Most tribes are using gaming dollars to create make-work type jobs, pay out per capita payments, dabble in economic diversification and pump up old social programs designed in another era." He believes that diversification efforts require commitment, political stability and continuity, and limiting per capita payments. Morgan added that staggering tribal board terms is "the one structural device that has the most chance of creating an economic, political, and legal environment where success is gradual, sustainable, and tribally oriented."

Tulalip Tribes and Quil Ceda Village

The Tulalip Tribes of Washington have taken full advantage of a prime location 30 minutes north of Seattle on Interstate 5. The Tribes built a successful first casino in 1992, but even then recognized the need for economic diversification. The Tribes invested gaming proceeds in a municipal corporation to build roads, sewers, and a wastewater treatment facility for a business park called Quil Ceda Village. In 1998, Home Depot and Wal-Mart signed on as anchor tenants. Between 2003 and 2008, the Tribes built the 2,000-machine Tulalip Resort Casino, a 100-store outlet mall, a large concert venue, and a 12-story hotel for the casino. Today, Quil Ceda Village businesses, including the casino, generate over \$720 million annually and employ 3,600 tribal citizens and area residents.

Stan Jones, Sr., who served as the Tribes' Chairman for most of his 44 years on the Tulalip Board of Directors, was instrumental in Tulalip's success. After completing eighth grade, Jones joined the Marines and served in Japan at the end of World War II. Jones worked in logging camps and as a fisherman, and he became a fishing rights activist in the 60s and 70s. His testimony was part of the government's successful prosecution of the 1974 Boldt litigation recognizing tribal treaty rights of Washington tribes to half of the salmon catch in "usual and accustomed fishing grounds." *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). The decision propped up the tribal salmon industry at Tulalip. Jones then became the first Chairman of the National Indian Gaming Task Force in 1982 and subsequently negotiated a gaming compact with Washington in 1991. Jones says Tulalip was guided by the need for jobs for tribal members, a health

care center, education, and protection of tribal culture. The Tribes use the proceeds from their businesses to fund those initiatives and have repurchased allotted land within their reservation. The Tribes now control three-fifths of the 22,000-acre Tulalip reservation, up from a low point of only 600 acres.

Conclusion

If one thing is clear from these examples, both Tulalip and Winnebago have benefitted by reinvesting gaming revenue into tribal businesses. Some tribes distribute revenue from gaming or judgments for the tribe via "per capita" cash distributions to help tribal citizens meet their own economic needs and spread the benefits of tribal success directly to tribe members. Other tribes choose to reinvest the revenue to create jobs and tribal programs for their members. While tribal business can reinvest these revenues tax-free, tribal members must pay taxes on distributions. Gaming tribes must balance the immediate needs of poverty-stricken tribal citizens and the need to make long-term investments in their economies.

Lance Morgan has called gaming dollars "Indian country's one big chance to set us up for decades of growth and prosperity." Tribes that built a workforce, business expertise, and financing relationships though gaming can extend those competencies to new businesses. While there is no formula for lasting diversification, the Winnebago and Tulalip, along with many other successful entrepreneurial tribes, have shown that strong leadership, an emphasis on the long-term well-being of the tribe, and allowing new businesses time and resources to grow are crucial elements of success.

Patrick Sullivan is an associate in Dickinson Wright's Washington, D.C., office. He can be reached at 202.659.6936 or psullivan@dickinsonwright.com.