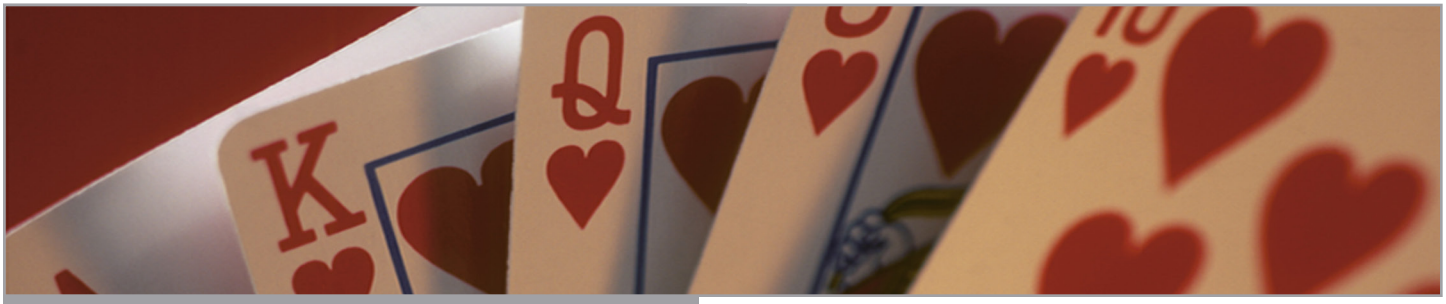
GAMING**LEGAL**NEWS



December 20, 2012 • Volume 5, Number 28

GAMING WEB SITES OF INTEREST

www.indianz.com
www.pechanga.net
www.indiangaming.org
www.nigc.gov
www.michigan.gov/mgcb
www.gaminglawmasters.com
www.casinoenterprisemanagement.com
www.ggbmagazine.com

INDIAN GAMING ISSUES TO WATCH IN 2013

by Dennis J. Whittlesey

The coming year will see major developments on a number of hot button issues for Indian gaming. The following list is certainly far from comprehensive, but it consists of matters that already are hot and even contentious. In each case, the stakes are high and the outcome will have enormous impacts, both negative and positive, for the players. The readers likely will have personal favorites to add to their own lists as the year proceeds, but the following includes what surely will be in the news throughout 2013.

1. The Mashpee Wampanoag Casino Project

The Mashpee Wampanoag Tribe continues to have major problems in the development of a tribal casino in Massachusetts, and the clear indication is that things are not getting better in the time frame necessary for the Tribe to qualify for a casino under the state law authorizing three casinos, one of which was designated for a recognized Indian tribe to be located in southeastern Massachusetts.

Mashpee clearly was the preferred tribal licensee, but the law imposes stringent requirements for license qualification including (a) a federally approved Class III Gaming Compact and (b) federal acceptance of tribal land into trust with qualification for gaming within a time frame viewed by most observers as virtually impossible to satisfy. These requirements became less onerous on Tuesday when the Massachusetts Gaming Commission voted to delay by three months the deadlines imposed, giving Mashpee until March 15 in which to meet the requirements. This certainly eases the Tribe's burden, but whether even the new deadline provides sufficient time to conclude both the Compact and the trust acquisition remains to be seen.

The Tribe did conclude a Compact with the Governor's staff that was submitted to the Secretary of the Interior in what normally would have been a timely manner. However, that Compact was rejected by the Secretary with the explanation that its financial concessions to the Commonwealth of Massachusetts were beyond acceptable limits. The Compact is back before the Tribe and Governor for further discussions, but nobody can predict when it will be executed and resubmitted to the Secretary for review and decision as to approval.

As for the casino site – now proposed for the city of Taunton after several prior sites were publicly identified as under consideration – the Tribe faces the customary time delays in any trust acquisition for gaming, as well as litigation contesting the Secretary's legal authority to accept land into trust for Mashpee in light of the Supreme Court's decision in *Carcieri v. Salazar* (February 2009). That decision found that a tribe must have been "under federal supervision" as of the 1934 enactment date of the only federal law authorizing the Secretary to take land into trust for tribes; thus, the Secretary cannot accept land into trust for Mashpee if it does not satisfy that requirement.

Adding to the confusion is the litigation challenging the legality of a tribal preference for one license and the recent proposed intervention by the Wampanoag Tribe of Gay Head ("Aquinnah") challenging the legality of limiting the tribal preference to a single tribe. Aquinnah seeks to develop a casino of its own in southeastern Massachusetts, but it would be shut out of the process if Mashpee is awarded the "preference" license.

Moreover, it has just been publicly disclosed that the Governor's former legal advisor who was the lead negotiator for the failed Mashpee Compact is representing a potential competitor to Mashpee for the license otherwise earmarked for a tribe that can satisfy the statutory standards. The attorney and her law firm declare that any issues raised by her current assignment have been fully vetted and cleared, but those declarations will not preclude "conflict of interest" concerns from being raised as further complications to the entire process.

With timelines in place, any delay in the Mashpee project could jeopardize it, if not cause the preference to become void. Any of the issues identified here could become a major problem. This project has implications and potential repercussions for many Indian gaming professionals, vendors, and financial institutions. Everyone is watching it closely.

2. Shinnecock Efforts to Develop Gaming on Long Island

The Shinnecock Indian Nation received federal recognition approximately 30 months ago and has been pursuing a casino development on Long Island ever since. While this Tribe does not necessarily have the same legal impediments as Mashpee, the situation is both intriguing and complicated. Shinnecock has an outstanding development and legal team in its corner that already has skillfully guided the Nation to the edge of success, but there currently is internal political turmoil that could cause delays in tribal decision-making and impact casino development.

In early August, tribal members voted to suspend two of the three tribal Trustees and two members of the tribal Gaming Authority. These suspensions were approved a second time only eight weeks ago, meaning that only one tribal Trustee ostensibly is still in office. While it is unclear whether the tribal government could function under this situation, the Bureau of Indian Affairs became involved in November by indicating that it recognized the ostensibly removed Trustees as continuing to serve as members of the Board of Tribal Trustees because they may not have been lawfully ousted in the earlier removal actions. Indeed, the Bureau's Eastern Regional Director Franklin Keel suggested that a federal mediator be employed to resolve the dispute. The situation has been quiet since the BIA's action in November, but the fact there were removal votes by the membership cannot be ignored. By any definition, the Shinnecock Nation is experiencing internal political turmoil that could jeopardize any tribal actions until it is resolved. Once the Nation gets past its political problems, it likely will have legal issues to confront, but the path to development will be less complicated.

The Nation has looked at some very desirable development sites on Long Island in close proximity to New York City, and any gaming development in those locations almost certainly would constitute a significant competitor to casinos in the greater New York area and probably impact Atlantic City. That fact alone puts this project on the "must watch" list.

3. The Continuing Saga in Alabama

The Poarch Band of Creek Indians has established a profitable gaming industry in Alabama, although it has been limited to Class II gaming due to the lack of a Class III Gaming Compact. Still the Band has moved forward and continued to flourish. But its progress has been subjected to continuing opposition at the state level over several years, and the principal boogeyman is Alabama Attorney General Luther Strange.

Strange has challenged any element of Poarch Creek development that he can conjure up, including whether tribal land can be used for any gaming at all. He has been as persistent as a hound dog with a bone. The continuing saga of *State v. Poarch Creek* merits attention if for no reason other than as spectator sport.

4. Tohono O'odham's Battle with the City of Glendale, Arizona

This is a case of a tribe that has done everything right, but its project still is in litigation and the subject of contentious public debate. In fact, the debate has risen to the level of participation by the Arizona Governor and members of the state's Senate and Congressional Delegations, as well as another Indian tribe. While this dispute has been going on for several years, the end is nowhere in sight.

The Tohono O'odham Nation proposes to build a Las Vegas-style casino and resort on a site of unincorporated land surrounded by the City of Glendale. The Nation has occupied its reservation in southwestern Arizona since it was established in 1882. The reservation originally contained some 22,000 acres, but it was reduced to 10,000 acres in 1909 by the federal government.

The current dispute dates to 1960, when the federal government completed a dam downstream from the Nation's Gila Bend Reservation,

the purpose of which was to provide flood control for people living south of the reservation. At the time of dam construction, the Nation was assured that its lands would not be significantly flooded, but this assurance proved to be false and reservation lands were repeatedly flooded over a period of years. The remedy to this situation was the enactment in 1986 of the Gila Bend Indian Reservation Lands Replacement Act, which provided in relevant part some $30 million for the tribal purchase of "replacement land" that would become part of the reservation.

Among the lands purchased pursuant to the 1986 Act was the Glendale parcel, and most legal scholars who have examined the situation have concluded that the land legally qualifies for reservation status and gaming. The Secretary of the Interior accepted the parcel into trust status in July 2010. However, that acceptance has been challenged in federal litigation that continues to this date. The plaintiffs include the federally recognized Gila River Indian Community, the City of Glendale, and assorted local residents and leaders of both houses of the Arizona Legislature.

The legal challenge rests on allegations that the trust acceptance was an arbitrary and capricious agency action violating the Administrative Procedure Act. A successful legal challenge would send the matter back to the Secretary for further review and decision. A second trust acceptance would almost certainly be back in court for further litigation. Given the level of opposition, it is clear that this battle is far from over.

5. Gaming Tribes Fighting Proposed Competing Tribal Casinos

The ugliest showdowns in Indian Country come when Indian tribes fight other tribes, and the battle for the gaming dollar is beginning to fuel such confrontations. The most visible of these disputes involves an Oregon tribe against a Washington tribe, a different Oregon tribe promising litigation against another Oregon tribe, and two California tribes opposing a third California tribe.

The Grand Ronde Tribes of Oregon are challenging the legal rights of the Cowlitz Tribe of Washington to have land taken into trust under the *Carcieri* decision.

The Coquille Tribe of Oregon has proposed to acquire land for casino development in the metropolitan area of Medford, which is more than 100 miles from its current reservation, in response to which the Cow Creek Band of Umpqua Tribe of Indians promises a legal challenge if Coquille moves forward.

Finally, in California, the effort of Butte County's Enterprise Rancheria Tribe to build a casino in neighboring Yuba County is being opposed in federal court by neighboring tribes that operate the Colusa Casino Resort and the Thunder Valley Casino and Resort. Among the issues is whether this project – which would be developed on off-reservation land – has been approved in accordance with federal law. The financial stakes are high in this case, and it appears that neither of the challenges will be resolved any time soon.

Tribes fighting tribes represents an unfortunate byproduct of the development of the Indian gaming industry, and each of these three instances is driven by a desire to preserve economic positions in the potentially affected markets. Their resolution will be closely watched both for their outcome and what they say about the current state of inter-tribal relationships.

WILL THE *EX PARTE YOUNG* DOCTRINE SWALLOW TRIBAL SOVEREIGN IMMUNITY WHOLE?

by Patrick Sullivan

Last Friday, the United States Court of Appeals for the D.C. Circuit rendered an opinion in *Vann v. Dept. of Interior* which threatens to eviscerate a central principal of Indian law – that Indian tribes enjoy sovereign immunity from suit – with a holding that, under the *Ex parte Young* doctrine, a plaintiff may proceed against Cherokee tribal officials without the consent of the Cherokee Nation. The opinion further allows suits against the United States affecting Indian tribal interests, which are traditionally barred by the tribe's status as an indispensable but sovereign immune party, to proceed without the consent of the tribe simply by naming tribal officials.

The stakes could not be higher for Indian Country in general and the Indian gaming community in particular. Tribal sovereign immunity limits remedies available in breach of contract actions. As a result, smart investors negotiate limited waivers of sovereign immunity when contracting with tribes. The doctrine also limits the scope of litigation from those opposing gaming projects. In short, tribal sovereign immunity from suits alleging violations of federal law helps establish predictability and a measure of certainty in prospective Indian gaming projects.

The Cherokee Freedmen Controversy

The underlying issue in the Cherokee litigation recalls the fascinating history of the "Five Civilized Tribes" (Cherokee, Choctaw, Creek, Chickasaw, and Seminole), all of which owned African-American slaves in the southeastern United States. When these tribes were removed to Indian Territory (which became the state of Oklahoma), they brought their slaves with them. The Cherokee Nation sided with the Confederacy during the Civil War (although Cherokee members fought on both sides), and at the war's conclusion, the United States forced the Nation to make a new treaty in 1866. The new treaty emancipated Cherokee slaves and made them "full citizens" of the Cherokee Nation known as "Freedmen."

The Freedmen continued to live among the Cherokee, as many had family ties and Indian blood. In 1896, the Dawes Commission made membership rolls for the Cherokee Nation for the purposes of allotting

tribal land to individuals with the goal of eventually extinguishing the reservations. The Freedmen were listed on a separate roll of former slaves and their descendants, although many of those listed on the Freedmen roll also had Cherokee blood.

The current dispute traces to actions of the Cherokee Nation, which recently prevented Freedmen from voting in tribal elections and amended the Cherokee Constitution to disenroll the Freedmen altogether.

The Freedmen's Federal Suit

The Freedmen sought injunctive relief against the United States and the Secretary of the Interior in federal court hoping to invalidate election results pursuant to the Administrative Procedure Act. In 2008, a panel of the D.C. Circuit granted the Cherokee Nation's motion to dismiss the suit on the basis that the Tribe was an indispensable party whose joinder was barred by sovereign immunity, but also held that under the *Ex parte Young* doctrine, tribal sovereign immunity did not bar the suit against tribal officers.

The Freedmen then filed a new suit against the United States also naming S. Joe Crittenden in his official capacity as Principal Chief of the Cherokee Nation. The Cherokee Nation again argued that it was an indispensable party whose interests could not be adequately represented by tribal officials, and the D.C. District Court agreed. On Friday, the D.C. Circuit reversed the District Court, stating that the Freedmen could proceed against the United States by naming the Principal Chief in his official capacity without joining the Tribe.

Judge Brett Kavanaugh, a Bush appointee and protégé of Kenneth Starr, wrote the opinion, stating "the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief." He continued, "As a result, the Principal Chief can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation itself is not a required party for purposes of Rule 19."

The D.C. Circuit panel opinion concluded that the 1866 Treaty, and even the 13th Amendment, did not abrogate the Tribe's sovereign immunity. Despite its own narrative describing Congress's declination to do so, the panel used the judge-made *Ex parte Young* doctrine to create a private right of action and effect a forfeiture of tribal sovereign immunity.

Unprecedented Abrogation of Tribal Sovereignty

The D.C. Circuit surprisingly relied, in part, on *Santa Clara Pueblo v. Martinez*, in which the Supreme Court decided that Congress intended that the internal affairs of Indian tribes remain beyond the reach of federal courts. In that case, a member of the Santa Clara Pueblo challenged the Tribe's membership law, which excluded children of female, but not male, members that had married outside the tribe, on the basis that the law violated the Indian Civil Rights Act ("ICRA").

The *Santa Clara Pueblo* Court held that Indian tribes are immune from suit and, after a painstaking examination of Congress's intent, that ICRA did not create a private cause of action. The plaintiff in *Martinez* named the Pueblo's governor in the suit, but the Court dismissed the action for lack of jurisdiction over the Tribe.

The court concluded that a waiver of sovereign immunity must be "unequivocally expressed." This conclusion does not lend support to the idea that the judge-made law of *Ex parte Young* may pierce tribal sovereign immunity without an unequivocally expressed waiver. In fact, the Court expressly held that Congress has the power to allow suits against tribal officials, but had not done so, writing "[a]lthough Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in [ICRA], a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."

Conclusion

Many people are sympathetic to the plaintiffs' civil rights arguments in the Cherokee suit. However, it is contrary to Indian law principles to apply *Ex parte Young* to reach these issues. The United States Congress has plenary power over Indian affairs under the Indian Commerce Clause of the Constitution, and that power leaves Congress to balance the sometimes competing interests of tribal sovereignty with the rights of tribal members. The *Santa Clara Pueblo* Court recognized Congress's intention that tribal courts are the appropriate forums for vindicating civil rights against Indian tribes.

The D.C. Circuit panel's announcement of a drastic diminishment in tribal sovereignty departs from well-established Indian law and injects unwelcome uncertainty into political and business relationships with Indian tribes. When it comes to Indian law, experience has shown us that it is better for the courts to "tread lightly."

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.

DETROIT CASINOS' NOVEMBER REVENUES DECREASE FROM SAME MONTH LAST YEAR: MICHIGAN GAMING CONTROL BOARD RELEASES NOVEMBER 2012 REVENUE DATA

by Ryan M. Shannon

The Michigan Gaming Control Board ("MGCB") released the revenue and wagering tax data for November 2012 for the three Detroit, Michigan, commercial casinos. The three Detroit commercial casinos posted a collective 1.95% decrease in gaming revenues compared to the same month in 2011. Aggregate gross gaming revenue for the

Detroit commercial casinos increased, however, by approximately 1.7% compared to October 2012 revenue figures, reversing the slight decrease in revenues between October and November in 2011.

MGM Grand Detroit posted lower gaming revenue results for November 2012 as compared to the same month in 2011, with gaming revenue decreasing by slightly more than 2.4%. MGM Grand Detroit continued to maintain the largest market share among the three Detroit commercial casinos and had total gaming revenue in November 2012 of approximately $47.8 million. MotorCity Casino had monthly gaming revenue approaching $38.5 million, with revenues increasing by nearly 2.1% in November 2012 compared to November 2011. Greektown Casino posted a 6.48% decrease in revenues for November 2012 compared to the same month in 2011, but it remains on pace to improve on its overall 2011 annual revenues. Greektown had gaming revenue of slightly more than $26.5 million for November 2012.

The revenue data released by the MGCB also includes the total wagering tax payments made by the casinos to the State of Michigan. The gaming revenue and wagering tax payments for MGM Grand Detroit, MotorCity Casino, and Greektown Casino for November 2012 were:

Casino	Gaming Revenue	State Wagering Tax Payments
MGM Grand Detroit	$47,835,292.66	$3,874,658.71
MotorCity Casino	$38,465,663.52	$3,115,718.75
Greektown Casino	$26,560,576.41	$2,151,406.69
Totals	$112,861,532.59	$9,141,784.15

Ryan Shannon is an associate in Dickinson Wright's Lansing office. He can be reached at 517.487.4719 or rshannon@dickinsonwright.com.