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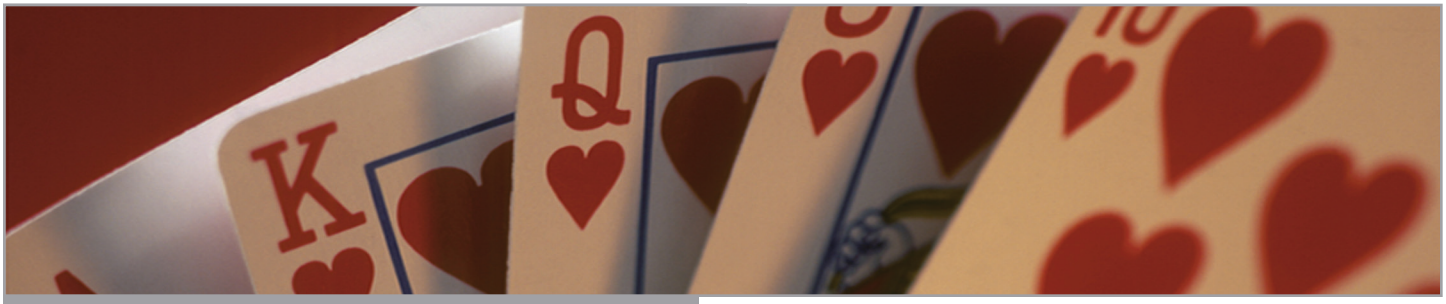

July 25, 2012 • Volume 5, Number 18

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THE CARCIERI CHALLENGE: PROVING "UNDER FEDERAL JURISDICTION [AS OF 1934]"

by Dennis J. Whittlesey

The June 18 Supreme Court ruling in *Match-E-Be-Nash-She-Wish Band ("Gun Lake Band") v. Patchak* will allow the challenge to the Gun Lake Indian casino to be litigated. In the process, the Court has put the spotlight back on the Court's February 24, 2009, decision in *Carcieri v. Salazar*. That decision concluded that the Secretary of the Interior cannot accept land into trust for any tribe not "under federal jurisdiction" as of the enactment of the Indian Reorganization Act of June 18, 1934 ("IRA"), the only federal law authorizing the Secretary to accept land into trust status for tribes.

The *Carcieri* decision did not define "under federal jurisdiction," and subsequent Congressional attempts to moot the ruling (the so-called "*Carcieri* fix") have been unsuccessful. The current situation is that nobody can predict whether Department of the Interior administrative determinations finding "under federal jurisdiction" status for tribes not federally recognized in 1934 will survive judicial challenge. In December 2010, Interior rendered such a ruling in favor of the Cowlitz Tribe of Washington, which was not federally recognized until 2002. The rationale of Interior's finding was that the Cowlitz Tribe was a party to the Treaty of Olympia of 1856, which established federal jurisdiction over the tribe some 78 years before Congress passed the IRA. The decision further declared that the tribe's 2002 recognition satisfied the law's requirement that land could only be taken into trust for "recognized" tribes.

The Cowlitz project was clearly intended to be a test case for administrative circumvention of what appeared to be an outright roadblock to newly recognized tribes gaining trust land in the absence of federal legislation. Legal challenges were quickly filed and are pending in federal court. By grounding the decision on tribal treaty status, Interior seems to be reaching for something broader than a case-by-case justification of facts existing in 1934. Whether that strategy is successful remains to be seen, but the pending legal challenge has indefinitely stalled the Tribe's efforts to construct a casino. The site is in southern Washington and is considered an excellent location for a casino since it is only a few miles north of Vancouver, Washington, and approximately 25 miles from Portland, Oregon.

The Cowlitz litigation is expected to be in the courts for years, and Interior has not indicated whether it will process other trust applications for newly recognized tribes while that matter is unresolved. However, those tribes may have other ways in which to independently establish that they were actually under federal jurisdiction in 1934. Indeed, the Cowlitz Tribe has an independent claim to such status that seems to have been ignored in the current round of decision making but, while untested, may be stronger than the broader stroke invoked by Interior in an effort to establish a precedent that could benefit many tribes in addition to Cowlitz.

The Alternative Cowlitz "Solution"

During the 1920s, the Quinault Reservation in Western Washington was largely federal trust land set aside pursuant to the Treaty of Olympia of 1856. Sometime prior to 1930, members of the Chehalis, Chinook, and Cowlitz Tribes began petitioning Interior to acquire allotments within the Reservation pursuant to the Quinault Allotment Act of March 4, 1911, a special act providing for such allotments on the Quinault Reservation. Interior refused to convey the allotments, and subsequent federal litigation resulted in a Supreme Court decision ordering the United States to immediately begin issuing Reservation allotments to members of the three tribes, as well as members of four other neighboring tribes. The Court concluded that the allotments were required because of the Act of 1911 and the fact that the Reservation originally had been set aside for seven tribes in addition to the Quinault. The specific order was that lands be allotted to members of the Cowlitz Tribe as well as the other six tribes. See *Halbert v. United States*, 283 U.S. 753 (1931).

The allotment process was immediately implemented, and virtually 100 percent of the Reservation was in allotment status by the end of 1933. Many Cowlitz members were among the allottees, and all of them were subject to federal restrictions and limitations concerning the use of their lands, including the sale of timber. Again, critical to this discussion is that Cowlitz Indians were allotted their land based upon their status as members of the Cowlitz Tribe. While Indian programs were much less comprehensive than they are today, there were other Bureau of Indian Affairs ("BIA") programs that applied to the Tribe and its members as a product of their allotment ownership.

Given these facts, there is a clear argument that the allotment process and resulting land ownership established federal jurisdiction over the Cowlitz Tribe and its members prior to the critical date of June 18, 1934. While it is not certain that the courts would agree, the issue is out there and may ultimately provide the temporal connection to enactment of the IRA. This course of action would not establish any kind of precedent that could be extended to tribes other than those whose members were allotted land as a result of the *Halbert* decision, and that limited impact could have been a factor in Interior's having taken the "treaty tribe" path it followed in making its decision. However, it is cited as an example of likely federal jurisdiction that would resolve the *Carcieri* "problem" for at least several tribes in Western Washington.

Other Indicia of "Federal Jurisdiction"

There could be a laundry list of factors indicating – although not clearly establishing – federal jurisdiction for non-recognized tribes in 1934.

Indian Education is a good starting point. For decades, the BIA provided education to members of tribes regardless of "recognition" status. In the early years of the 20th Century, there was a substantial "Field Matron" program under which female teachers were dispatched to tribal villages to live among the native population. The services they rendered went far beyond education, and their presence was a real reminder that the federal government was providing essential services to the tribal members. Two Field Matrons from the East Coast who traveled to Northern California and lived in isolated Klamath River Country in 1908-09 later published an engaging book about their experiences. See Mary Ellicott Arnold & Mabel Reid, *In the Land of the Grasshopper Song* (1957).

BIA Schools. In addition to the Field Matron program, it is well known that the BIA removed many Indian children from their homes and sent them to Indian schools far away. Those children came from many tribes, including tribes that were not formally recognized until sometime after 1934. Without asserting that this alone answers the question, it would be hard for the federal government to deny that it was exercising jurisdiction over children it was removing to federal schools away from homelands.

Public Schools. Finally, there also were BIA programs under which the BIA monitored enrollments and made tuition payments to local districts for Indian children of tribes not recognized in 1934 to attend public schools. Again, this suggests federal jurisdiction over the tribal members.

Other Areas Suggesting Federal Jurisdiction

The universe of areas potentially demonstrating federal jurisdiction will be limited by the conditions present during the Great Depression, but they certainly existed prior to 1934. Depending on the individual tribal situations, they could include Indian health care, management of grazing lands, oil and gas lands, and fishing resources.

Conclusion

The meaning of the term "under federal jurisdiction" for tribes not formally recognized in 1934 is undefined. However, it often is said that "every situation is different in Indian Country" and that certainly is true in this case.

Interior's "ratified treaty tribe" theory may well prove to be a strategy that ultimately allows a number of newly recognized tribes to gain land in trust and even establish reservations. But it will not apply to all. Some of the "others" were parties to treaties never ratified by the

United States Senate – such as the 18 treaties in California executed in the early 1850s – which may, although not necessarily, give them a "weaker" case than the Cowlitz precedent. (It is settled law and policy that the federal treaty negotiations with tribes established a government-to-government relationship, even when the resulting treaties were not ratified by the U.S. Senate.) Others may have been the beneficiaries of special federal legislation – such as the Quinault Allotment Act of 1911 mentioned above – which established certain federal entitlements in their favor.

With or without a successful Cowlitz strategy, there are tribes that will be searching for their own "magic bullet." Solid historical research and competent legal presentation will be required to successfully present those cases, similar to the complicated work submitted to Interior during the 26-year effort by Cowlitz to win federal recognition through the administrative "acknowledgement" process. But even a positive administrative decision can be a fleeting victory for any tribe, especially in light of the *Gun Lake - Patchak* decision, which has liberalized the requirements for "standing to sue" for tribal opponents as well as extending the time for challenging trust decisions to six years. It goes without saying that a simple "*Carcieri* fix" would be Indian Country's preference, but that is not going to happen anytime soon. The alternative for tribes is to develop strategies designed to fit their individual situations.

DETROIT CASINOS' JUNE AGGREGATE REVENUES SLIGHTLY DECREASE COMPARED TO SAME MONTH LAST YEAR: MICHIGAN GAMING CONTROL BOARD RELEASES JUNE 2012 REVENUE DATA

by Ryan M. Shannon

The Michigan Gaming Control Board ("MGCB") released the revenue and wagering tax data for June 2012 for the three Detroit, Michigan, commercial casinos. The three Detroit commercial casinos posted a collective 1.6% decrease in gaming revenues compared to the same month in 2011. Aggregate gross gaming revenue for the Detroit commercial casinos also decreased by approximately 5.8% in June compared to May 2012 revenue figures, continuing a trend of similar decline from May to June in prior years.

MGM Grand Detroit posted decreased gaming revenue results for June 2012 as compared to the same month in 2011, with gaming revenue decreasing by less than half of 1%. MGM Grand Detroit continued to maintain the largest market share among the three Detroit commercial casinos and had total gaming revenue in June 2012 of over $47.3 million. MotorCity Casino had monthly gaming revenue of nearly $37 million and posted a 0.2% increase in revenues in June 2012 compared to June 2011. Greektown had gaming revenue reaching nearly $27.3 million, a slight decrease compared to June 2011.

The revenue data released by the MGCB also included 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 June 2012 were:

Casino	Gaming Revenue	State Wagering Tax Payments
MGM Grand Detroit	$47,326,715.28	$3,833,463.94
MotorCity Casino	$36,905,378.50	$2,989,335.66
Greektown Casino	$27,259,606.31	$2,208,028.11
Totals	$111,491,700.09	$9,030,827.71

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