

GAMING LEGAL NEWS



June 29 2012 • Volume 5, Number 16

GAMING LEGAL NEWS EDITORIAL BOARD

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
517.487.4729 • pkulick@dickinsonwright.com

Kevin J. Weber, Gaming Law
416.367.0899 • kweber@dickinsonwright.com

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

Disclaimer: Gaming Legal News is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the fields of gaming law and federal Indian law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in Gaming Legal News.

THE GUN LAKE DECISION: WHAT DOES IT MEAN FOR INDIAN GAMING?

by Dennis J. Whittlesey

Introduction

By this time, everyone with an interest in gaming, is aware of last week's U.S. Supreme Court decision rendered in the case of *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*. The Tribe is commonly known as the "Gun Lake Band" and will be so known for the purposes of this article.

Certainly every recipient of the Dickinson Wright *Gaming Legal News* is fully versed in the decision by virtue of our Gaming Law Group's collaborative effort to quickly and comprehensively report the decision only a few days after it was rendered. See "Supreme Court Allows Challenge to Gun Lake Tribal Casino to Proceed Forward," *Gaming Legal News*, Vol. 5, No. 14 (June 14, 2012). In addition, the decision has been widely reported in both print and internet outlets, so the basic elements are well-known and need not be repeated here.

That said, many readers still do not understand what the Court's ruling means to Indian gaming and this article will attempt to identify – and respond to – the questions that may remain.

At the outset, it has to be said that the Patchak win was a tribute to skillful pleading by his attorneys, who carefully avoided invoking the federal Quiet Title Act ("QTA") which has proven to be quicksand for many challengers to decisions by the Interior Secretary to take land into trust for tribes. Indeed, many legitimate legal claims have been dismissed because of litigants over-pleading their cases to the point of asserting (often inadvertently) *some* property interest in the land, and that is sufficient to trigger the QTA and federal sovereign immunity, leading to dismissal of their litigation.

Even the slightest encroachment into the zone of "property interest" in such a challenge negates the waiver of federal sovereign immunity established by the Administrative Procedure Act ("APA") to allow private parties to challenge a federal agency action. The Patchak lawyers understood the puzzle and carefully crafted their claims of interest to avoid the QTA altogether. That single achievement may prove to be one of the lasting legacies of the entire Gun Lake case.

What The Decision Did And What It Means

The sole statutory authority pursuant to which the Secretary of the Interior can take land into trust for tribes is found in 25 U.S.C. §465, which is part of the Indian Reorganization Act of June 18, 1934 ("IRA"). In early 2009, the Supreme Court in the well-known *Carcieri* case ruled that the trust acceptance authority could only be exercised on behalf of tribes that were "under federal jurisdiction" on the date of IRA enactment. This ruling was a shock since the assumption (and even prior judicial determinations) was that the authority extended to all currently recognized tribes, without any regard of tribal status in 1934.

By remanding the Gun Lake case to the federal district court, the Supreme Court has given Patchak an opportunity to litigate the issue of whether the tribe was "under federal jurisdiction" when the IRA became law. The *Carcieri* Court did not define the term and it is widely misunderstood. In fact, Patchak's original Complaint alleged that Gun Lake Band was not "federally recognized" in 1934 and, thus, is legally ineligible for trust acceptance pursuant to Section 465. While that allegation was off-point, the Patchak decision pointedly repeated the *Carcieri* term as the standard that will have to be satisfied in the subsequent litigation.

While it is unknown whether Patchak can prove that the Gun Lake Band was *not* "under federal jurisdiction" at the critical date, the certainty is that this is an unresolved issue; indeed, nobody really knows what the term means. Many believe that these future challenges will have to be resolved on a case-by-case basis, meaning that there will be many battles of expert witnesses.

What is known is that the decision almost certainly opens the door to what will be many legal challenges to trust acceptances. Moreover, these cases will be prosecuted pursuant to the APA, a factor which really complicates the tribal situation since the APA provides a six year period of time for filing legal challenges. This is critical, since previous trust challenges had to be filed within 30 days under the applicable federal regulations, meaning that tribes almost always had legal finality on their land status in a very short period of time. With the new six-year challenge period defined, the landscape for development on new trust lands has shifted, and this could have profound impact on Indian casino projects since opponents could potentially delay development merely by announcing that legal challenges will be filed. If tribes proceed with development in the face of this threat, they run the risk of ultimately having their lands taken out of trust, which the Patchak Court noted was the ultimate issue confronting the parties.

The Gun Lake situation is a case in point. The decision remands the case for adjudication on its merits, and that means years of litigation and further appeals to come. However, the Gun Lake tribal casino is conducting gaming operations, and it is unimaginable that the federal courts would order the casino to cease operations pending judicial review. The key ingredient for an injunction is that Patchak would have to demonstrate a "likelihood of success on the merits" of his case, and that would be a difficult hurdle because of the lack of judicial

precedent on the *Carcieri* issue. So, this case literally has just begun and the outcome is unpredictable other than the Gun Lake Casino is not going to shutter its doors.

The Future Of *Carcieri*

Since *Carcieri* was decided more than three years ago, there have been continuing calls for Congress to enact what has become known as a "*Carcieri* Fix." This literally could be achieved with a provision of fewer than 10 words, and getting it should have been simple since so many tribes are affected by the decision. Several attempts have been made to do just this very thing, but the opposition has been both aggressive and effective. Many local and state governments have long sought a veto over any trust acceptance of land within their borders, a notion that is simply unacceptable to Indian Country because it effectively would lead to a major erosion of tribal sovereignty. This will not happen anytime soon unless Congress falls under the control of an anti-Indian majority capable of enacting the veto provision. Still, the politics of such a radical action probably insure that it will not occur.

Short of some special legislation on a tribe-by-tribe basis, the status quo will continue for some time. And that means that tribes and their various legal and historian representatives will be tasked with satisfying the undefined *Carcieri* standard. This likely will lead to further appeals and perhaps another Supreme Court consideration of what its own words mean.

The Bottom Line

Litigation challenging trust acceptance just became a lot easier since opponents know what they have to do to avoid the QTA and dismissal of litigation. The certain result is that delays in final trust decisions will become more common. The Gun Lake situation may be unique, in that the land was taken into trust and the project development proceeded under color of law and in good faith. The tribe did everything by the book and has a lot of time and money invested in its project. Also in its favor is that notion of actually having land taken out of trust is breaking new ground that should not be acceptable to anyone.

The practical effect is that developers may be reluctant to work with newly-recognized tribes without trust land until and unless there is some further resolution of how they can establish their entitlement. A number of tribes are pursuing administrative determinations that they do satisfy the "under federal jurisdiction" test, and Interior already has rendered a positive determination on this issue in favor of the Cowlitz Tribe of Washington, a newly-recognized tribe seeking to develop a major casino and resort project in southern Washington only 20 miles north of Portland, Oregon. (That determination is being challenged in court.) Other tribes under active consideration for the same determination include the Mashpee Wampanoag of Massachusetts and, presumably, the Gun Lake Band.

The Patchak decision sets the stage for a new round of challenges to trust decisions. It has redefined the legal landscape for Indian Country.