

Indian Law & Gaming

Failure to Obtain NIGC Approval of Casino Finance Arrangement – A \$50M Mistake

by *Scott C. Freeny*

Tribes often enter into financing arrangements to fund the construction and development of tribal casinos. For some tribes, this private infusion is their only chance to participate in the booming tribal gaming industry. However, for the investor, this arrangement can be disastrous if the financing arrangement is determined to be a “management agreement” that was not properly approved by the National Indian Gaming Commission (NIGC) as required by the Indian Gaming Regulatory Act (IGRA). Wells Fargo and the Lac du Flambeau Band of Lake Superior Chippewa Indians have provided us the perfect example of just how catastrophic this situation can be for the lenders.

The Tribe, through the Lake of the Torches Economic Development Corporation (the Corporation), sold \$50 million in bond indentures in 2008. The Corporation is a tribal entity wholly owned by the Tribe and established to own and operate the Tribe’s casino. The Tribe subsequently defaulted on the indentures and was sued by Wells Fargo as trustee under the indentures.

The sole bondholder of the indentures issued by the Tribe is Saybrook Capital LLC of Santa Monica, California, a private firm which reportedly directs approximately \$1 billion in private equity and fixed income investments for a cadre of domestic and off-shore blue-chip investors, including public funds,

insurance companies, private clients, and private partnerships. After default by the Corporation under the indenture instruments, Wells Fargo filed litigation seeking the immediate appointment of a temporary receiver to oversee the casino and its revenues, issues, payments and profits.

in this issue

Failure to Obtain NIGC Approval of Casino Finance Arrangement – A \$50M Mistake	pg 1
A Way Out of the Mess - OK Gaming Compact Arbitration	pg 3
Echo-Hawk Honored at Native Justice Powwow	pg 4
Court Says Osage Reservation Defunct	pg 5
Announcing Release of <i>In the Courts of the Conqueror</i> by Walter R. Echo-Hawk	pg 5

One of the allegations by Wells Fargo was that the Corporation diverted approximately \$5 million from the indenture's trust for an impermissible purpose. At the time of default, the outstanding principal under the indentures was approximately \$47 million.

In its response, the Corporation argued that the indenture was a management contract that was not approved by the NIGC and was, therefore, void. The NIGC provides a process whereby a tribe may submit an agreement to it to determine whether the agreement is, or is not, a management agreement. If it is a management agreement, the NIGC must approve the agreement before it is put in place. If it is not a management agreement, the NIGC will issue a "declination letter" and prior approval will not be required. This process typically takes between 3 and 6 months, but it can last longer depending on the circumstances and the backlog at the NIGC. In some instances, the parties to such an agreement do not want to wait for NIGC review and enter into the transaction without NIGC approval or the issuance of a declination letter. This is very risky; if an agreement is later determined to be a management agreement with no NIGC approval, it is void and unenforceable. For whatever reason, there was no NIGC approval and no declination letter in the Wells Fargo case.

Once the tribal corporation raised the specter of an unapproved

management contract, it was up to the federal judge in Wisconsin to decide the issue. The judge found that the indenture instruments provided the trustee with management control over the gaming operations, thereby making it a management agreement under IGRA. The judge also found that the management portions of the agreement could not be severed, rendering the entire agreement void. Moreover, because the agreement was void, the waiver of tribal sovereign immunity in that agreement was ineffective and the Corporation could not be sued. As a result, the judge refused to put the tribal casino into receivership. Now, instead of securing a receivership, the trustee is in the unenviable position of having no rights and no means of enforcing the indenture instruments.

On February 8, the Wells Fargo lawyers filed motions to vacate the judgment and amend the complaint, arguing that the financing arrangement is not a management agreement. On March 1, the Corporation submitted its response to Wells Fargo's motions. Although the parties continue a fierce litigation, Tribal officials have stated that they feel a sense of responsibility for the outstanding debt. They have not, however, said that they will repay the debt as required under the terms of the indenture instruments. Instead, the Corporation will likely invite the bondholders to renegotiate these terms, probably requesting a lower

interest rate and better payment terms.

This case highlights how important it is for financiers of tribal casinos to be aware of the requirements of the NIGC and IGRA and engage experienced Indian gaming counsel. By getting prior approval or a declination letter from the NIGC, Wells Fargo and the bondholder could have ensured that their interests were secure before they loaned the Tribe \$50 million. This avenue would have been relatively inexpensive and added a few extra months to the financing timeline. Instead, the lenders and Wells Fargo will likely spend an exorbitant amount of time and money in litigating the current issues, while faced with the possibility that their \$50 million investment isn't worth the paper it was written on.



Scott Freeny, Associate
(405) 235-7702
scott.freeny@crowedunlevy.com

Court Says Osage Reservation Defunct

by Michael R. Pacewicz

The United States Court of Appeals for the Tenth Circuit on March 5 affirmed a lower court's ruling that the Osage Nation reservation was disestablished by the enactment of the Osage Allotment Act more than a century ago. The Nation had brought suit in federal district court in the Northern District of Oklahoma seeking a declaratory judgment that the reservation, which encompasses Osage County, Oklahoma, had not been disestablished. The Nation also sought a declaratory judgment that tribal members who live and work within the reservation's boundaries are not subject to Oklahoma state income tax. The federal district court granted summary judgment to the defendants, members of the Oklahoma State Tax Commission.

In affirming the trial court's decision, the appeals court stated, "[t]he manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished." Additionally, the court stated, "uncontested facts in the record provide further evidence of a contemporaneous understanding that the reservation had been dissolved."

The court also looked to events that occurred after the passage of the Osage Allotment Act as evidence that the reser-

vation had been disestablished. Among those events were the migration of a large number of non-Indians into Osage County, the shifting of land ownership from tribal members to nonmembers and the fact that "[a]fter enactment, federal officials responsible for the Osage lands repeatedly referred to the area as a 'former reservation' under state jurisdiction."

Notably, the court rejected the Nation's arguments that more recent events, such as the enactment of gaming and tobacco compacts recognizing Osage County as Indian Country, indicate that the reservation was not disestablished. The Nation

Announcing the Release of *In the Courts of the Conqueror* by Walter R. Echo-Hawk

Rich in historical detail, and showing how the echoes of court decisions over the years continue to resonate and shape Indian Country, *In the Courts of the Conqueror* provides a vital understanding of our current society. More than mere history, the book challenges readers to re-examine our country through a different lens and, in so doing, issues a clarion call for change. According to Echo-Hawk, the reader "will close this book with a thirst for justice and an eagerness to confront the many challenges that lie ahead as we stride toward a more just society in the postcolonial world."

As a staff attorney for the Native Ameri-

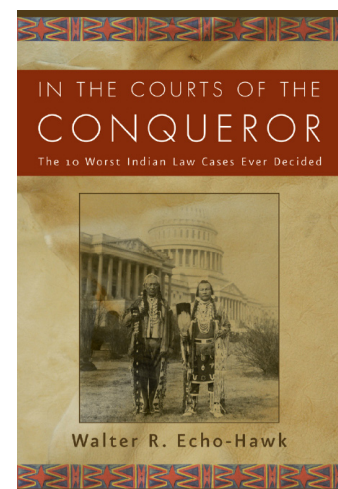
announced on March 8 that it plans to seek a rehearing before the circuit court.



Michael Pacewicz, Director
(918) 592-9847
michael.pacewicz@
crowedunlevy.com

can Rights Fund for thirty-five years, Echo-Hawk represented tribes and Native Americans on significant legal issues during the modern era of federal Indian law. In addition to litigation, he worked on major legislation, such as the Native American Graves Protection and Repatriation Act, and federal religious freedom legislation.

Mr. Echo-Hawk currently serves as Of Counsel to Crowe & Dunlevy.



Copyright 2010 Crowe & Dunlevy

This memorandum is provided by Crowe & Dunlevy for educational and informational purposes only and is not intended and should not be construed as legal advice.

A Way Out of the Mess - OK Gaming Compact Arbitration

by Gerald L. Jackson

The tribal sovereignty of gaming tribes in Oklahoma is under threat from a trilogy of Oklahoma Supreme Court decisions. These decisions allow claimants to bring casino tort and prize claims against Indian tribes in Oklahoma state courts. To address this attack, Oklahoma tribes have turned to the dispute resolution provision of the Oklahoma Gaming Compact.

In a series of three cases, five justices of the Oklahoma Supreme Court concluded that Oklahoma state courts have the power to adjudicate casino tort and prize claims brought by non-tribal members against Indian tribes operating Class III games under a Oklahoma Gaming Compact. See e.g., *Cossey v. Cherokee Nation Enterprises LLC*, 2009 OK 6, 212 P.3d 447; *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, ___ P.3d ___ (opinions filed June 20, 2009, but not yet released for publication); *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, ___ P.3d ___ (opinions filed June 30, 2009, but not yet released for publication). The critical issue in each of these cases is the Oklahoma Supreme Court's interpretation of the phrase "a court of competent jurisdiction" as used in the Compact

Faced with Oklahoma's exercise of jurisdiction over them, the Choctaw Na-

tion of Oklahoma and the Chickasaw Nation jointly initiated binding arbitration proceedings under Part 12 of their Compacts. Part 12 of the Gaming Compact provides that in the event of a dispute over the proper interpretation of the terms and conditions of the Compact, either party to the Compact may initiate arbitration proceedings. The Choctaw and Chickasaw Nations argued that no Oklahoma state court falls within the category of "a court of competent jurisdiction" for Compact purposes because Part 9 of the Compact provides that "[t]his compact shall not alter tribal . . . or state civil adjudicatory . . . jurisdiction." Prior to the Compact, Oklahoma state courts did not have relevant jurisdiction over Indian tribes in Oklahoma.

This past fall, the arbitrator found that the phrase "a court of competent jurisdiction" as used in Part 6(C) of the Compact should not be interpreted to include Oklahoma state courts, but should be interpreted to include the Compacting tribes' courts. See *Arbitration Award in Class III Gaming Compact Jurisdiction-Related Disputes Jointly Referred to binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the State of Oklahoma*, August 25, 2009, Hon. Layn R. Phillips, Sole Arbitrator. In reaching this conclusion, the arbitrator relied on the finding that, prior to the Compacts, the types of claims covered by Part 6 of the Compact could not have been brought in Oklahoma state courts and that there was no explicit consent by the tribes

in the Compacts to such jurisdiction. *Id.* at 12. Because there was no relevant pre-existing state court jurisdiction before the Compact, Part 9 of the Compact offered no new altered state court jurisdiction after the Compact. *Id.* As a result, no Oklahoma state court is "a court of competent jurisdiction" with in the meaning of Part 6(C) of the Compact. *Id.* at 20.

The Choctaw and Chickasaw Nations have asked the Oklahoma Supreme Court and honor the Arbitration Award and undo the trilogy; the Oklahoma Supreme Court has not yet ruled on these motions. See e.g., *Motion to Honor Arbitration Award*, Griffith, No. 104,887 (filed Aug. 27, 2009); *Motion to Honor Arbitration Award*, Dye, No. 104,737 (filed Aug. 26, 2009). Faced with additional new state court lawsuits, the Nations have also sought relief in January in the United States District Court for the Western District of Oklahoma.

The Eastern Shawnee Tribe of Oklahoma, also faced with a state court lawsuit, reached an agreement with Oklahoma through the Governor resolving the dispute over jurisdiction in the Tribe's favor. That Tribe, represented by this firm, also invoked arbitration and won. It is yet to be seen whether Oklahoma Courts will comply with the arbitration.

In the meantime, the harm caused to Oklahoma's compacting tribes

continues. Oklahoma tribes with Compacts are increasingly experiencing casino tort and prize claims filed in Oklahoma state courts. Since the mandate was issued in Cossey on June 11, 2009, Oklahoma district courts have stopped dismissing such cases for lack of jurisdiction or for infringing on tribal sovereignty. Tribes facing such lawsuits should consider whether to invoke the arbitration provision under Part 12 of the Compact and/or seek other relief in federal court. Armed with the reasoning and conclusions of the Arbitration Award, Tribes can and should seek a resolution of a dispute over the proper interpretation of the terms and conditions of the Compact. With Oklahoma courts in disagreement with both the executive and legislative branches of state government, federal courts will likely be the last word on the disputes.



Gerald Jackson, Director
(918) 592-9839
gerald.jackson@crowedunlevy.com



Walter R. Echo-Hawk (Photo by D. Michael McBride III)

Echo-Hawk Honored at Native Justice Powwow

Crowe & Dunlevy attorney and Native American activist Walter R. Echo-Hawk, Jr. was honored at the 5th Annual Native Justice Powwow on Saturday, March 20 at the University of Tulsa Allen Chapman Activity Center. The Powwow recognized organizations and individuals who have contributed to the legal field through law enforcement, legal services and legal scholarship. Sponsored by the University of Tulsa's Native American Law Students Association, this event included traditional tribal songs and dances throughout the day. Presentations honored contributors to the justice systems that served Native American communities.

Echo-Hawk's legal experience includes cases involving Native American religious freedom, prisoner rights, water rights, treaty rights and reburial/repatriation rights. He currently serves as Of Counsel

to Crowe & Dunlevy.

Echo-Hawk has worked as a lawyer for the Native American Rights Fund for more than 35 years. He was instrumental in securing passage of two federal laws that respect Indian and religious freedoms and also the repatriation of Native American remains to Indian tribes. He is chairman of the Board of Directors of the Native American Arts & Culture Foundation.

McBride to be Honored with Leadership in Law Award

D. Michael McBride III will be honored on April 30th with the Journal Record's Leadership in Law Award in Oklahoma City at the Annual Law Day Luncheon. This award recognizes outstanding leaders in the legal community who unselfishly give their time and energy to improve the lives of fellow Oklahomans.

Indian Law and Gaming contacts

D. Michael McBride III Director	..... mike.mcbride@crowedunlevy.com	(918) 592-9824
Elliot P. Anderson Associate	..... elliot.anderson@crowedunlevy.com	(918) 592-9844
LeAnne Burnett Director	..... leanne.burnett@crowedunlevy.com	(405) 239-6610
Walter R. Echo-Hawk, Jr. Of Counsel	..... walter.echohawk@crowedunlevy.com	(918) 592-9874
Harvey D. Ellis Director	..... harvey.ellis@crowedunlevy.com	(405) 235-7743
Scott C. Freeny Associate	..... scott.freeny@crowedunlevy.com	(405) 235-7702
Jimmy Goodman Director	..... jimmy.goodman@crowedunlevy.com	(405) 235-7717
Jeffrey T. Hills Director	..... jeffrey.hills@crowedunlevy.com	(918) 592-9817
Susan E. Huntsman Advisory Director	..... susan.huntsman@crowedunlevy.com	(918) 592-9866
Gerald L. Jackson Director	..... gerald.jackson@crowedunlevy.com	(918) 592-9839
Michael S. Laird Director	..... michael.laird@crowedunlevy.com	(405) 239-6623
Brett D. Liles Associate	..... brett.liles@crowedunlevy.com	(918) 592-9836
Brooke S. Murphy Director	..... brooke.murphy@crowedunlevy.com	(405) 235-7735
Michael R. Pacewicz Director	..... michael.pacewicz@crowedunlevy.com	(918) 592-9847
William G. Paul Advisory Director	..... bill.paul@crowedunlevy.com	(405) 239-6676
Randall J. Snapp Director	..... randall.snapp@crowedunlevy.com	(918) 592-9855
L. Mark Walker Director	..... mark.walker@crowedunlevy.com	(405) 235-7783
Madalene A.B Witterholt Director	..... m.witterholt@crowedunlevy.com	(918) 592-9809

Oklahoma City
20 North Broadway
Suite 1800
Oklahoma City, OK 73102
(405) 235-7700

Tulsa
500 Kennedy Building
321 South Boston Avenue
Tulsa, OK 74103
(918) 592-9800

Norman
The HiPoint Office Building
2500 South McGee, Suite 140
Norman, OK 73072
(405) 321-7317

E-Newsletter

Indian Law & Gaming Newsletter Sent Electronically

Help us reduce waste and save trees! Request to receive your Indian Law & Gaming newsletter via email. With the electronic version you can forward this newsletter to your colleagues, friends and other leaders.

Send an email to:

sarah.roberts@crowedunlevy.com

or call (405) 234-3287 to receive this newsletter electronically.



CROWE & DUNLEVY
Attorneys and Counselors at Law