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Eastern Shawnee Tribe of OK Wins Significant Federal Court Gaming Compact Judgment Against Oklahoma Courts

by Susan E. Huntsman

In a case of statewide significance, the Eastern Shawnee Tribe of Oklahoma won a federal court judgment preventing Oklahoma courts, including the Oklahoma Supreme Court, from assuming jurisdiction over tort claims where an accident occurred on tribal lands. The judgment is final and the appeal time has expired.

photo by Lawrence R. Baca

Following a trio of Oklahoma Supreme Court decisions that misinterpreted the language and intent of the state-tribal gaming compacts, tribes all over Oklahoma have seen an increase in prize and

tort claim litigation filed in state court. In January 2009, the Oklahoma Supreme Court, in *Cossey v. Cherokee Nation Enterprises*, found that state courts had jurisdiction over tort claims arising under the Model Tribal Gaming Compact. Then, in June 2009, the Oklahoma Supreme Court issued two decisions reaching the same result but under a somewhat different theory – *Griffith v. Choctaw Casino* and *Dye v. Choctaw Casino*. In the process, the Oklahoma court also questioned the ability of tribal courts to hear these claims.

Faced with these decisions and increasing suits in state court, tribes looked to the alternative dispute procedures provided for in the Compact itself and to the assistance of the federal courts. One of the tribes that have pursued this course with great success is the Eastern Shawnee Tribe of Oklahoma, Crowe & Dunlevy's client.

On August 21, 2009, a casino patron filed suit in Ottawa County, Oklahoma, claiming that she had slipped and fallen at the Tribe's Bordertown Casino. Despite the very detailed requirements for submitting a tort claim under the Compact, the plaintiff simply filed a negligence lawsuit in state court. Based on the Oklahoma Supreme Court decisions, the trial court refused to dismiss the lawsuit. On December 29, 2009, the Tribe turned to Compact-sanctioned dispute-resolution procedures. By February 8th, the



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Tribe and Governor's office had executed a Resolution resolving their dispute. The parties also entered into binding arbitration, resulting in an April 5, 2010 award finding that the Oklahoma courts had exceeded their jurisdiction and were violating the Tribe's immunity. On May 4th, the Tribe filed a federal action to enforce the award, and the U.S. District Court entered judgment in the Tribe's favor on July 1st. The Tribe submitted this order to the Ottawa County court and, by July 12th, the Tribe finally obtained the dismissal of the state court action.

While this process took some time, the Tribe was able to stop the improper exercise of jurisdiction by Oklahoma state courts and obtain an enforceable federal order interpreting the Compact in its favor. Other tribes that are facing a similar dilemma as the Eastern Shawnee Tribe may want to consider this option where others have failed. Mike McBride can answer any questions you may have about whether this approach is right for you.

A postscript: In late August, the INTERNATIONAL MASTERS OF GAMING LAW, a worldwide peer-reviewed organization of gaming lawyers, regulators, educators and consultants selected Eastern Shawnee Tribe of Oklahoma Gaming Commissioner Brett Barnes as "Indian Country Gaming Regulator of the Year" in part for his work and leadership on this matter. Mr. Barnes will receive his award during the annual IMGL reception Global Gaming Expo in Las Vegas on November 16. The CASINO LAWYER will profile Mr. Barnes and his accomplishments this fall.

Indian Law Leadership Training Program

By Walter Echo-Hawk

Crowe & Dunlevy announces a new service available for tribal governments. We firmly believe that tribal leadership is one of Indian Country's greatest assets. During the tribal sovereignty movement of the past 35 years, America witnessed an historic social movement that gave rise to modern Indian nations. Historic gains were made as Indian tribes reclaimed their sovereignty, heritage, and land base. These great accomplishments were made possible by talented tribal leadership working tirelessly through the framework of federal Indian law. As a result, many Indian tribes in Oklahoma and the Southern Plains today find themselves in uncharted territory, as their modern governments face a brand new set of issues and challenges relating to the Indian gaming industry, even though many old challenges and unfinished business of the 20th century remain. As the new century unfolds, tribal leadership remains as vital as ever to consolidate gains made by the past generation and meet challenges of the 21st century.



photo by Lawrence R. Baca

To help enhance leadership, Crowe & Dunlevy presents a training program for tribal government leaders in the legal framework for governance. As new leaders are elected to tribal government positions or appointed to tribal agencies, a solid grounding in federal Indian law and related topics can help bring them up to speed, provide a solid orientation for their governance, and help nurture the leadership skills that proved so valuable to Native America during the rise of modern Indian nations. Courses such as these can provide vital information and a solid grounding for new leaders:

- Federal Indian Law 101
- Public Education/Relations 101
- Water Rights 101

- Employment Law for Tribal Governments
- Indian Gaming Law 101
- Health Law for Tribal Governments
- Cultural Sovereignty 101
- Legal History of Your Indian Nation
- Real Estate Issues—Building Your Reservation

These courses, and more, are taught by legal experts from the firm's Indian Law and Gaming Practice Group. They can be conducted at tribal facilities or the firm's offices in Tulsa or Oklahoma City in training sessions specially tailored for your Indian nation. If you feel this program will benefit your leadership, please contact Mike McBride or Walter Echo-Hawk. We hope this service will strengthen Indian Country's greatest asset—our tribal leaders—for the challenges that lay ahead.



Walter R. Echo-Hawk, Jr.

NAGPRA at 20

By Walter Echo-Hawk

Twenty years ago, on November 16, 1990, President George H.W. Bush signed into law the Native American Graves Protection and Repatriation Act (NAGPRA). This landmark legislation was seen as one of the most important human rights laws for Native Americans ever passed by Congress. It increases federal protection for Indian graves located on federal and tribal land, outlaws trafficking in Native American human remains, and requires museums, universities, and federal agencies to repatriate "cultural items" to Native American claimants, including human remains, funerary objects, sacred objects, and objects of cultural patrimony under standards and criteria provided in the act. NAGPRA addresses important human rights and cultural rights in every American Indian, Alaska Native, and Native Hawaiian community. Today, virtually every Indian tribe has a NAGPRA office that works to implement the Act. However, like other major civil rights laws, NAGPRA will take decades to fully implement.

As the 20th anniversary of the passage of this historic law draws near, several conferences are being held around the country to mark the occasion and take stock of the progress, problems, and plans for implementing NAGPRA. These observances began at the University of Arizona School of Law conference on January 28-29, will continue in Oklahoma City on September 22 with the "NAGPRA at 20" workshop held in connection with the American Association of State and Local History Conference, and will conclude in the "NAGPRA at 20 Conference" in Washington, D.C., during the week of November 15.

Several major implementation issues have been identified in Indian country, such as (1) the need for increased tribal funding to continue repatriation work, (2) the need for Congress to enact the two-word technical amendment ("or was") to the act's definition of "Native American" to clarify Congress's intent in light of the decision in *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004); and (3) the need to implement the new NAGPRA regulations (43 C.F.R. §10.11 (Mar. 15, 2010)) that require the repatriation of about 120,000 dead Indians whose cultural affiliation is unknown when museums and agencies cannot prove their right of possession of those dead. In addition, on July 28, the Government Accounting Office (GAO) released a study assessing federal implementation and agency compliance, entitled ["Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not](#)

[Fully Complied With The Act" \(July 2010\)](#). Inquiries about tribal repatriation issues can be directed to Walter Echo-Hawk, who was involved in the passage of that measure and is a participant in the "NAGRPA at 20" observances as a legal practitioner.

New Faces, Policy at the National Indian Gaming Commission

by Kathryn DuPree



From top left, clockwise: Steffani Cochran - Associate Commissioner, Tracie Stevens - Chairwoman, Lawrence S. Roberts - General Counsel, Daniel Little - Associate Commissioner

The National Indian Gaming Commission ("NIGC") recently selected Lawrence S. Roberts, a member of the Oneida Tribe of Wisconsin, as its new General Counsel. Roberts brings with him over fifteen years experience in federal Indian law matters. Roberts has practiced as a trial attorney for the Department of Justice ("DOJ"); worked in the Environmental Protection Agency's Office of General Counsel, where he assisted with the implementation of federal environmental programs in Indian Country; and, most recently, worked in private practice. Throughout his career, Roberts has handled a variety of administrative law and federal Indian law cases relating to the Indian Gaming Regulatory Act ("IGRA"), tribal jurisdiction, regulatory authority and reservation boundaries, tribal reserved treaty rights, and the recovery of tribal lands and resources.

As the new General Counsel for the NIGC, Roberts shoulders a multitude of responsibilities. He will handle the day-to-day legal affairs of the NIGC, providing legal advice and counsel to each division of the Commission. He will represent the Chair of the NIGC in all enforcement actions, coordinating with the DOJ, and will assist in handling appeals before the full Commission. Additionally, Roberts will assist with the review of tribal gaming ordinances and management contracts, and provide advisory opinions on the appropriate classification of games played in tribal gaming facilities. Finally, he will ensure the NIGC complies with the Freedom of Information Act.

The NIGC also welcomes a new Chairperson and two associate commissioners this year. Tracie Stevens, the NIGC's new Chairperson, is a member of the Tulalip Tribe of Washington. Sworn in on June 29, 2010, Stevens became the first Native American woman to chair the Commission. Steffani Cochran and Daniel Little have also joined the NIGC as Associate Commissioners. Cochran, an enrolled member of the Chickasaw Nation of Oklahoma, has served as the NIGC Vice-Chairperson since January 2010. Little joined the Commission as Associate Commissioner in April 2010.

The Chairperson and Associate Commissioners' responsibilities primarily include the regulation and oversight of Indian Gaming through IGRA. A few of these duties include inspecting gaming premises and monitoring gaming on an on-going basis to ensure compliance with IGRA standards, auditing gaming revenues, approving management contracts, levying fines or issuing temporary closure orders for IGRA violations, and promulgating rules and regulations in association with Indian Gaming. In addition, the Chairwoman oversees the administrative matters of the NIGC, such as hiring Commission employees and

managing its budget. The Chairwoman and both commissioners will serve three year terms.



photo by Lawrence R. Baca

Construction Law Practice Assists Tribal Development

By Michael Pacewicz

The continued growth of Indian gaming and other business ventures has been accompanied by a surge in construction activity and property development on Indian land. As tribes strive to become more economically self-sufficient, they encounter many issues related to real estate development and construction, ranging from the acquiring of trust land to the negotiation of construction agreements with contractors and subcontractors. Navigating through these issues often requires the assistance of experienced legal counsel.

Crowe & Dunlevy's Construction Law Practice Group provides a comprehensive array of legal services to construction industry, real estate and related clients. Our attorneys have extensive experience advising and assisting clients on a wide variety of business and litigation matters in all phases of real estate development and construction from property acquisition through project completion, including representation of our clients before state, federal and tribal courts and with regulatory agencies, as well as in mediation and arbitration.

The Construction Law Practice Group works closely with the firm's Indian law experts to assist tribal clients in all aspects of property development and construction. Several members of the Construction Law Practice Group are also members of the firm's Indian Law and Gaming Practice Group. Thus, they are able to bring their direct experience working with tribes and tribal entities to bear when dealing with the unique construction and real estate issues faced by Indians.

The experience of our construction and real estate specialists includes:

- placing Indian land into trust
- property acquisition and financing
- construction contract negotiation, drafting and administration
- bid processes and disputes
- environmental permitting, compliance and remediation, including Brownfields development and voluntary cleanup programs for environmentally challenged properties
- bonding issues
- construction contract disputes
- construction failure, negligence and warranty claims
- insurance coverage
- professional malpractice claims

Real estate development and construction on Indian land is likely to continue to increase for the foreseeable future. Complex and unexpected issues are bound to arise. Before embarking on a project, tribal officials should consider consulting with legal counsel who is familiar with those issues and is attuned to the unique needs and concerns of Indian tribes.



For questions or comments, please contact:

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