

Pennsylvania Gaming

DECEMBER 2004

Indian Involvement Thwarted

The Delaware Nation, a federally-recognized Indian tribe resident in the state of Oklahoma, has pursued two initiatives to involve itself in gaming in Pennsylvania. The first involved supporting proposed legislation that would have guaranteed a slots license to an Indian tribe as part of the recently enacted Pennsylvania Race Horse Development and Gaming Act (“Gaming Act”). The second consisted of a lawsuit filed in the United States District Court for the Eastern District of Pennsylvania, in which the Delaware Nation claims a right to land located in Eastern Pennsylvania. News articles appearing around the time the suit was filed reported that its purpose was to obtain “Indian land” in order to satisfy one of the pre-conditions for an Indian tribe to conduct casino-type gaming (which includes slots) in a state. The news articles also reported that the Delaware Nation hoped that if the land claim were successful, it could do a land swap and get land in a location better-suited for attracting customers to a casino-type gaming operation.

The Delaware Nation was unsuccessful in its legislative lobbying efforts, even though it was reported that the lawsuit might be dropped if the Gaming Act included the guarantee of a slots license for a federally-recognized Indian tribe. The Delaware Nation then lost the first round in its lawsuit when the district court granted motions to dismiss filed by several defendants, including the Governor of Pennsylvania. While the Delaware Nation appealed the dismissal on to the United States Court of Appeals for the Third Circuit on December 8, 2004, its attempts to conduct gaming in Pennsylvania have, at present, been thwarted. This Alert summarizes the requirements for an Indian

tribe to conduct casino-type gaming in a state and the basis on which the Delaware Nation’s land claim was dismissed.

INDIAN GAMING

Gaming by federally-recognized Indian tribes is governed by the federal Indian Gaming Regulatory Act (“IGRA”). To conduct casino-type gaming, which, under IGRA, is a type of “class III” gaming (which includes house banked games such as blackjack, roulette and slot machines) in a state, there are three pre-conditions. First, an Indian tribe must possess “Indian lands” (sometimes referred to as “tribal land”) within the state. Second, the state must permit casino-type gaming. And, third, the Indian tribe must have an agreement (typically referred to as a “tribal-state gaming compact”) with the state that has been reviewed and either accepted or not responded to within a specified time by the federal Department of the Interior, Bureau of Indian Affairs.

“Indian lands” refers to all land within any Indian reservation and to any land over which an Indian tribe exercises governmental power. A tribe may not simply purchase land and have it denoted “Indian lands” available as a location for gaming. Some landless Indian tribes have obtained Indian lands in a state by having its ancestral land (or substitute land) restored to it by Congress or through a lawsuit.

Even with Indian lands in a state, a tribe may not conduct casino-style gaming unless the state “permits such gaming for any purpose by any person, organization, or entity.” Before the Gaming Act was passed, no casino-type gaming was

permitted in Pennsylvania. The only class III gaming that was permitted was pari-mutuel wagering on horse racing and a state lottery run by the state, which, under Pennsylvania law, is not a person, organization or entity. All other class III gaming, including casino-type gaming, was specifically prohibited. Because Pennsylvania now permits licensed entities to operate slots (casino-type gaming), a tribe, if it possessed Indian lands in Pennsylvania, would, arguably, need only to negotiate a gaming compact with the Commonwealth that complies with IGRA in order to operate slot machines.

THE LAWSUIT

In January 2004, the Delaware Nation of Anadarko, Oklahoma filed suit in U.S. District Court for the Eastern District of Pennsylvania, contending that Thomas Penn, son of William Penn, the founder of Pennsylvania, fraudulently dispossessed the tribe of ancestral land in Forks Township, Northampton County, Pennsylvania, more than 200 years ago. The lawsuit named as defendants Governor Edward G. Rendell, the Commonwealth of Pennsylvania, county and townships and their officials, and the individual and corporate property owners who currently occupy the land, including Binney & Smith, the manufacturer of Crayola Crayons®.

In its December 2, 2004 decision dismissing the Delaware Nation's land claim, the Court, for purposes of ruling on the motions to dismiss, assumed the following facts to be true.

On March 4, 1681, King Charles II granted William Penn a Charter to establish a British colony in North America, later named the Province of Pennsylvania. Through the Charter, King Charles vested Wm. Penn and his heirs with sovereign control of Pennsylvania's land. Wm. Penn recognized the aboriginal land claims of the Indians and purchased Indian land from various Lenni Lenape chiefs. After Wm. Penn's death, his son Thomas Penn became the Proprietor of Pennsylvania. Thomas Penn executed the "Walking Purchase of 1737" through which he acquired 1,200 square miles of Lenni Lenape land in the Delaware River Basin of Pennsylvania. Subsequently, in 1738, Lenni Lenape Chief Tundy Tetamy received a land grant from the descendants

of Wm. Penn in recognition of his services to family. This land grant was recorded in two patents, evidencing Chief Tetamy's fee simple ownership in the land known as "Tatamy's Place."

The Delaware Nation asserts that it is the successor in interest and the "political continuation" of the Lenni Lenape tribe and alleges that Thomas Penn defrauded the Lenni Lenape chiefs of the land because he falsely represented to them that some fifty years prior their ancestors had signed documents that the "land to be deeded to the Penns was as much as could be covered in a day-and-a-half's walk." Believing that their forefathers had made such an agreement, the Lenni Lenape chiefs agreed to the terms of the deed and consented to the day-and-a-half walk, but, instead of a walk, Thomas Penn had a path cleared and hired runners to maximize the land acquisition. The Lenni Lenape chiefs complained, to no avail, to the King of England about the "walk." Because the land was allegedly taken by deception, the Delaware Nation claims that the tribe's aboriginal title had not been extinguished.

The Delaware Nation also contends that Chief Tetamy or his heirs never conveyed an interest in Tatamy's Place. State records contain a deed conveying the land from a William Allen to two other men but no document indicating how Allen obtained the land. The United States government never approved of any transfer of land from Chief Tetamy or his heirs. Because approval from the United States is required for a transfer under the Indian Trade and Intercourse Act, the Delaware Nation claims that Tetamy's title to the land had not been validly extinguished and, therefore, any transfer to a nontribal owner was invalid. The Delaware Nation asserts that Tetamy's title in the land was held not by Tetamy as an individual but on behalf of the tribe as a whole and that, therefore, the Delaware Nation holds title as Tetamy's successor in interest.

In deciding whether the alleged facts actually stated a claim upon which relief could be granted, the district court first considered the Delaware Nation's claim that because Thomas Penn acquired the land through deception, the tribe's aboriginal title to the land was never extinguished. The court found that even if the Lenni Lenape had aboriginal title to the land, the Charter from the King of England to the Wm. Penn

family had vested the sovereign authority to extinguish the tribe's right of occupancy and use of the lands and, therefore, Thomas Penn had the power to extinguish aboriginal title by any means, even fraudulent ones. Accordingly, the "justness" of a prior sovereign's decision to extinguish aboriginal title is a political question not open to inquiry in the courts.

The court also concluded that since the extinguishment of aboriginal title through the Walking Purchase of 1737 divested the Delaware Nation of all aboriginal land claim to Tatamy's Place, the Delaware Nation had failed to state a claim for which relief could be granted under the Indian Trade and Intercourse Act or federal common law because both claims require that the land at issue be "tribal land."

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The court then addressed the issue of whether the Delaware Nation's aboriginal title could be revived. The Delaware Nation argued that the extinguished aboriginal title was revived when Chief Tetamy took fee simple title to Tatamy's Place because he must be considered as having taken the fee simple title for the benefit of all tribal members since the tribe did not recognize individual land ownership. The court, however, disagreed, because the aboriginal right to possession "once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that right."

AFTERMATH

The Delaware Nation has appealed the district court's dismissal of its lawsuit. The Delaware Nation had little choice but to do so if it desires to conduct casino-type gaming in Pennsylvania because the possession of Indian land is a prerequisite to being able to do such. The challenge for the Delaware Nation, however, will be to overcome the well-articulated ruling of the district court. Although the Third Circuit will conduct plenary review of the district court's legal conclusions, it will undoubtedly give weight to the reasoning of the district court and to arguments that will be advanced by the parties prevailing before the district court and by those who participate as *amicus curiae*.

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