

### ***FEE-TO-TRUST LAND TRANSFERS – UNFORTUNATE UNCERTAINTY***

This week the U.S. Supreme Court decided *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, et. al.* The case follows the Supreme Court's 2009 decision in *Carcieri v. Salazar*, in which the Court held federal law does not permit the United States to take land into trust for a tribe unless the tribe was "under federal recognition" in 1934. The *Carcieri* decision created a great stir in Indian country. It also caused a number of tribes and organizations to demand a Congressional "fix" that reverses the *Carcieri* decision and that eliminates any doubt about the validity of fee-to-trust land transfers. Though, in principal, the fix is very simple, Congress has not yet acted.

The decision in *Match-E-Be-Nash-She-Wish Band* (commonly referred to as the *Gun Lake* case) expands the potential impact of *Carcieri* by opening the door to more suits challenging fee-to-trust transfers. We believe that it will have significant impact on development of certain existing tribal trust land and on land that is to be transferred into trust. It will take some time for the case to shake out, to see how it progresses in the trial court and to see if Congress finally acts to clear up the confusion about the legality of fee-to-trust transfers caused first by the *Carcieri* decision and now by the *Gun Lake* decision before the precise impact of the decision on your business is clear. In the meantime, a few things, at least, merit consideration.

- **Impact on Off-Reservation Casino Projects:** If the trial court applies *Carcieri* to the Gun Lake fee-to-trust transfer (which, according to the plaintiff it should, since the tribe was not federally recognized until 1993), it is likely to hold that the fee-to-trust transfer of the land on which the Gun Lake Casino is located is invalid. If the transfer is invalid, the casino will be operating in violation of the Indian Gaming Regulatory Act and will be subject to closure. Similarly situated casinos (i.e., casinos located on land taken into trust for tribes who were not federally recognized in 1934) will be subject to the same risk.
- **More Law Suits; Less Certainty:** Expanding the number of persons who may challenge fee-to-trust transfers and allowing challenges to be filed for up to six years, is likely to mean that tribes will have a difficult time getting financing to develop newly-acquired trust lands for at least six years after fee-to-trust transfers are complete.
- **Local Jurisdiction and Taxes:** If fee title reverts back to the tribe, state and local jurisdiction and taxation will impact both new and existing projects.
- **Cash Flow:** Imposition of state and local taxes may negatively affect project cash flows for the tribe and for private developers and lessees of Indian land.
- **Governmental Services:** Jurisdictional claims by state and local governments may create overlaps and additional costs for projects. On the other hand, local governments may not be prepared to assume responsibility for services to, and/or to assert jurisdiction over, the tribal project where none had existed before. That may leave gaps in services.
- **How Will DOI React:** The *Gun Lake* decision will make DOI's job far more difficult, and fee-to-trust transfers may grind to a halt. If that happens, economic development of non-reservation Indian land also may grind to a halt.

**Appleby Law PLLC**  
333 North Fairfax Street  
Suite 302  
Alexandria, VA 22314

office: 703-837-0001  
mobile: 202-577-5655

[www.applebylawpllc.com](http://www.applebylawpllc.com)

At the end of the day, the *Gun Lake* decision is likely to chill economic development for tribes with little or no reserved land and for tribes wishing to develop both gaming and non-gaming projects on newly acquired trust land. And, its impact could very well disrupt and destabilize existing projects that are located on fee-to trust land. Until there is a *Carcieri/Gun Lake* fix, both the chill and the destabilization may impact your development, lending, underwriting and other decisions and strategies for doing business in Indian country. As always, I'm here to help you work through those, and other, issues.

