



LETTER FROM THE EDITOR



Kevin C. Quigley
Special Edition
Editor

2017 Indian Country Regulators of the Year

BY KEVIN C. QUIGLEY

When the U.S. Congress enacted the federal Indian Gaming Regulatory Act (IGRA) in 1988, one of its primary objectives was to promote “tribal economic development, self-sufficiency, and strong tribal governments.” Another core objective was to design a unique regulatory regime between tribal, state and federal gaming regulators for gaming activities conducted on Indian lands to help “shield it from organized crime and other corrupting influences.”

Without question, IGRA has overwhelming advanced the first congressional objective, growing the Indian gaming market from a few hundred million dollars per year into a staggering \$31 billion per year powerhouse over the last 30 years. About 240 tribes operate nearly 500 Indian gaming operations across 28 states, directly and indirectly supporting nearly 800,000 jobs for tribal members and others in the local communities (see Alan Meister, *Indian Gaming Industry Report*, 2017 Edition), which helps to substantially reduce state governments’ public assistance outlays for these areas. IGRA has provided tribes with new hope for breaking out of decades of economic stagnation. With their gaming related revenues, Indian nations across the United States have been able to strengthen their tribal governments and cultures, and build vital tribal infrastructure including schools, elder housing, health care facilities, tribal community and law enforcement centers, water treatment systems, tourism destinations, etc. For the first time in generations, tribal resources are available to tribal members to explore entrepreneurial opportunities like their fellow off-reservation U.S. citizens.

IGRA’s other core objective has also been overwhelming advanced. The Indian gaming market has earned a nationally-recognized reputation as a well-regulated industry that secures fair play and honest gaming operations for all patrons, and has keep organized crime elements at bay. This has been accomplished in large measure by the professionalism and integrity displayed by tribal gaming regulatory agencies throughout Indian country in their central role as the primary regulators of Indian gaming under IGRA. This was not always considered a given. In fact, when IGRA was first implemented there was

some skepticism as to whether tribes were capable of keeping their games clean from cheaters and organized crime thugs.

Famously, this sentiment was express at a 1993 congressional oversight hearing by a certain New Yorker who at the time operated three struggling Atlantic City casinos. This New Yorker considered IGRA to be a “monster” created by Congress, legislation that was “a real mess” – *i.e.*, “a ridiculous Act” which “is going to taint the entire industry” – and claimed that Indian gaming is going “to be totally taken over by the mob” because “no way that the Indians are going to protect themselves from the mob.” In his view, “organized crime is rampant on Indian reservations” and within two years Indian gaming “will blow” and “be the biggest scandal since Al Capone in terms of organized crime” – that “there are going to be a lot of embarrassed and a lot of red faces” (no pun intended I think). In his words, only the “closed minded” would think otherwise.

Fortunately, the New Yorker’s dystopian prediction for Indian gaming’s future proved to be wildly inaccurate, in large part because of the dedicated efforts of strong, honest and knowledgeable tribal gaming regulators like David Vialpando and Terry Hale, IMGL’s Indian Country Regulators of the Year for 2017. As described further in our *lead article*, both Mr. Vialpando and Mr. Hale exemplify the very best of tribal gaming regulation today, particularly with respect to their contributions in enhancing the professionalism of tribal gaming regulatory authorities and actively promoting best practices for tribal regulators.

Dave has extensive experience in Indian gaming regulation as both a state agent and as a tribal gaming regulator. This gives him a unique perspective on Indian gaming regulation issues and practices. He has led the way in crafting and promoting tribal regulations for new and innovative gaming products for tribal casinos, such as adopting “gold standard” regulations for licensing and classifying Class II gaming systems. Dave is a frequent author and seminar panelist on regulatory issues at many Indian gaming related conferences held throughout the country. He is widely recognized as a leading participant in state

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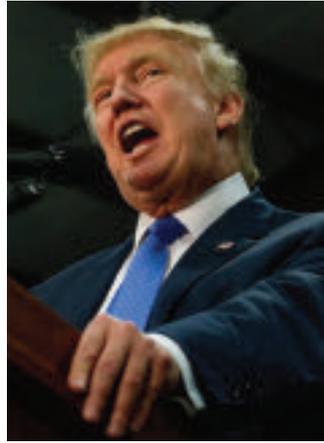
and national tribal gaming regulators associations.

Terry successfully took on the task of serving as Acting Chief Gaming Regulator of the Seminole Nation of Oklahoma during a time of regulatory crisis. When questions of regulatory compliance were raised by the National Indian Gaming Commission, the tribe terminated its gaming commissioners and gaming enterprises leadership and installed Terry to address the matter. Working under very difficult circumstances, Terry addressed the areas of concern, helped disprove many purported violations, and swiftly brought the three tribal gaming operations into full compliance so that the tribal casinos stayed open and no fines needed to be paid. His efforts led to a special commendation from his fellow tribal gaming regulators and national Indian gaming leaders.

Indian Country is fortunate to have ever vigilant “Guardians of Indian Gaming” like Dave Vialpando and Terry Hale serving to protect the reputation of the gaming industry. They, along with hundreds of their fellow tribal gaming regulators nationwide, work with their state and federal counterparts every day to protect Indian gaming from “bad guys” and other corrupting influences – continuing their exceptional regulatory efforts so that the Indian gaming community, and the wider gaming industry, does not suffer any red faced “embarrassment.” IMGL is proud to salute their outstanding regulatory work by honoring David Vialpando and Terry Hale as IMGL’s Indian Country Regulators of the Year for 2017!

TRIBAL-STATE REGULATORY CONFLICT AND COOPERATION UNDER IGRA

The historically rooted doctrine of tribal sovereignty is the primary legal and political foundation of federal Indian law and Indian gaming. The inherent sovereign authority of tribes to regulate their tribal gaming activities was specifically upheld by the U.S. Supreme Court’s seminal decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In making the determination that state regulation of tribal gaming activities was preempted by operation of federal law, the Court “proceed[ed] in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.” In response to *Cabazon*, Congress enacted the Indian Gaming Regulatory Act (IGRA), using its plenary power



President Donald J. Trump

over Indian affairs to create a set of limited restrictions on tribes’ sovereign rights over their tribal gaming activities. See generally Steven Andrew Light and Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty—The Casino Compromise*, University of Kansas Press (2005) (describing in detail how a tribe’s right to conduct and regulate tribal gaming activities is an inherent tribal right which has been compromised by IGRA).

The limited nature of IGRA’s “compromise” of tribal sovereignty authority over tribal gaming activities and how this compromise is working “on the ground” today is the subject of this edition of the *Indian Gaming Lawyer*. We explore the nature and context of the assorted ways Tribal-State conflicts and cooperation arise from IGRA’s unique regulatory jurisdictional structure.

In her article, *New Mexico Tribal Gaming: Long and Bumpy Road*, Hedi McNeil Staudenmaier, a past president of IMGL and one of the United States most distinguished gaming law experts, describes recent events on the long and bumpy road that Indian tribes have traveled in New Mexico to secure their class III gaming compacts. In an example of one of the “conflicts” that can arise under IGRA’s regulatory scheme, she highlights the leverage points that the State of New Mexico has used over non-tribal gaming equipment vendors in order to wear down a tribe reluctant to sign onto compact terms it considers unlawful under IGRA.

In our article, *What Constitutes Class II Bingo Gaming “Conducted” on Indian Lands for Purposes of the Indian Gaming Regulatory Act?*, Tom Foley, nationally-recognized as one of Indian Country’s premier legal advisors for Indian gaming/regulatory affairs, and I discuss another regulatory “conflict” arising under IGRA. It is undisputed that Class II bingo conducted on Indian lands is not subject to state laws or regulatory measures, and NIGC regulations delegate to tribal gaming regulators the responsibility for the licensing/classification of Class II gaming systems with built in innovative technology enhancements that promote participation among bingo players. But what exactly, for purposes of IGRA, constitutes the “bingo” gaming activity that must be conducted on Indian lands, and what does it mean under IGRA to “conduct” such gaming? These are questions that lie at the heart of a recent Ninth Circuit appeal involving a tribally-regulated proxy play server-based bingo gaming accessed by patrons using an Internet link.

Bill Bogot and Donna More, both long time state gaming regulatory lawyers with experience in multiple jurisdictions nationwide, explore ways tribes and states can cooperate to mutually benefit from tribal gaming enterprises looking to expand their offerings beyond IGRA Indian lands in their article, *Building “Walls” to Enhance Tribal-State Cooperation: Designing Successful*

Regulatory Structures for Tribal Expansion into Commercial Casinos. As they explain, such “cooperation” can be best advanced if states take the time to understand the unique character of tribal business structures and keep these in mind when designing state licensing procedures for tribal gaming enterprises seeking to join state licensed commercial casino markets.

An area of continuing “conflict” between states and many tribes over the issue of free play credits is the subject of *Compact Conflicts Over Free Play Credits: The Fight to Protect Tribal Gaming Revenue from Impermissible State Taxation*. Little Fawn Boland, a rising star of the next-generation of Indian Country attorneys, and I lay out the reasons why tribes should resist attempts by states to include free play credits in making the calculation of compact revenue share fees, arguing that such calculations constitute an impermissible tax on tribal gaming revenues in violation of the IGRA.

Mike McBride, a leading Oklahoma Indian gaming lawyer, discusses in his article, *Tribal Gaming Compacts in Oklahoma: Evergreen or Renegotiate Success?*, how the current tribal-state compact arrangements in Oklahoma have benefited state economic development and strengthened both the state budget and tribal communities. As Mike notes, with the current compacts nearing their expiration date, the big question is whether these compact arrangements will continue as they are, or will negotiations for new terms lead to new “conflicts.”

In his article, *Avoiding Regulatory Agency Communication Breakdowns: Remember, You’ve Got a Friend*, John Roberts, who has been a stalwart tribal gaming regulator over the last 20 years (and a past recipient of the IMGL Indian Country Regulator of the Year award), draws on his vast experience as both a tribal and state gaming regulator to lay out ways tribal and state regulators can work “cooperatively” to assist in making sure “tough guy” thugs do not gain a toehold in Indian gaming.

Another common source of “conflict” under IGRA arises when tribes conduct negotiations with local municipalities with respect to their tribal casino developments. In her article, *IGRA and Tribal “Non-Gaming Spaces”: Fighting Back Against State Government Overreach in Compacts and Intergovernmental Agreements*, Little Fawn Boland describes the proper scope of topics that can be the subject of such negotiations and those that have no place for discussion under IGRA’s requirements.

I hope that this edition of *Indian Gaming Lawyer* will help shine a spotlight on the vital role tribal gaming regulators have under IGRA as the primary regulators of the booming Indian gaming industry, and give greater understanding of the myriad ways that “conflicts and cooperation” between tribes and states can arise under IGRA’s unique regulatory regime. ❄

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