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The Development of Indian Law, Indian Gaming Law and Indian Gaming

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Welcome to the Second Issue of *Indian Gaming Lawyer*, a publication dedicated to issues associated with the Indian gaming industry in the United States. This issue is devoted to exploring the origins and development of Indian Law and, consequently, Indian Gaming Law. They constitute the foundation for an industry that is now generating annual revenues of $28.9 billion.

With this predicate, our goal is to explain the origins and development of Indian Law in general and how the evolving legal principles constitute the foundation for the development of the industry that exists today. This leads us to an in-depth look at issues – including, entirely too often, outright opposition – resolved and overcome by successful Indian gaming proponents in various states.

The discussion is supplemented with a comparative overview of Canadian and United States indigenous gaming law, including a unique opportunity for most of our readers to look at indigenous gaming in Canada..

THE FOUNDATION OF INDIAN LAW IN THE U.S.

This article establishes the foundation for those to follow. To this end, we carefully examined the three decisions written by, the Fourth Chief Justice of the Supreme Court, John Marshall, that are commonly referred to as the *"Marshall Trilogy."* These decisions were written in 1823, 1831 and 1832, laid the groundwork for what ultimately became Indian Law in the United States.

The principle of tribal Sovereign Immunity ultimately evolved from Marshall's efforts to provide a foundation for the law that he seemed to understand would come at some time in the future. However, the evolution he may have anticipated did not come quickly. Indeed, it was not until the 20th Century that the applicable modern law was developed and led to the Supreme Court's 1987 landmark Indian gaming decision of *California v. Cabazon of Mission Indians.*

THE SMALL RURAL OREGON TRIBE THAT OPENED THE STATE'S FIRST CASINO IN THE FACE OF STATE LAW PROHIBITING "CASINOS" AND NO TRADITIONAL FUNDING

This two-part article is the second in our "History Corner" series written by the well-known ethnohistorian, Dr. Stephen Dow Beckham who has worked continuously in Indian Country since his boyhood in the Oregon coastal city of Coos Bay. Dr. Beckham recounts the successful efforts of a small and largely-unknown tribe to secure a Class III Gaming Compact in 1992 and then finance its casino. That Tribe is the Cow Creek Band of Umpqua Tribe of Indians of Canyonville, Oregon.

With enactment of IGRA in 1988, tribes in many states began exploring the ways in which they could development gaming and realize what even then was expected to become a major financial opportunity the scope of which was previously beyond tribal dreams. However, Oregon tribes had little-to-no expectation of ever securing gaming approval because Oregon law prohibited the operation of "casinos" anywhere in the state.

In *Part I*, Dr. Beckham explains that the Tribe and its "Gaming Team" developed a creative strategy that identified a flaw in the Oregon law and led to development of Class III gaming in a manner that minimized the potential for an anticipated legal challenge from potential casino opponents. That challenge was never filed.

In *Part II*, Dr. Beckham explains that there was no conventional financing available within the state for the reason that Oregon banks viewed financing Indian gaming as beyond their confidence level. Indeed, the project seemed doomed since *no* Oregon banks would even seriously consider financing the project. Once again, the Tribe managed to overcome a seemingly-fatal obstacle and secure financing through federal and overseas resources. The Tribe's Seven Feathers Casino and Resort has become an economic success in spite of its rural location in its home town of Canyonville located far from any urban area.

THE CALIFORNIA TRIBES' DEVELOPMENT OF GAMING DESPITE LEGAL AND POLITICAL OPPOSITION

The California tribes' leadership is underscored by the *Cabazon Litigation* that, in turn, led to Congressional enactment and Presidential signature of IGRA only 20 months after that landmark Supreme Court decision. This article is written by Sacramento gaming lawyer Jane Zerbi who has been on the front lines of tribal gaming for more than 20 years, and it is important for more than just *Cabazon* since tribal development of casino gaming was stalled by one Governor's refusal to negotiate Compacts allowing significant types of legal gaming. The tribal proponents were compelled to develop a favorable ballot measures on two separate occasions, and the voters supported tribal gaming both times. The first was approved in November 1999, but legal challenges necessitated a second which was approved by voters on the

March 2000 ballot. Although legal challenges continued, the states tribes have moved forward to develop what today is a $7 billion industry.

INDIAN GAMING IN ARIZONA: "THE GREAT COMPROMISE AND CONTROVERSY"

To any observer, the Arizona Indian Gaming industry appears vibrant and smoothly-functioning. This situation was won by hard work, as is explained by Snell & Wilmer's partner Heidi McNeil Staudenmaier, one of the most well-known Indian Law attorneys in the country.

Faced with both political and legal opposition to the development of gaming, the tribes followed the California strategy that involved state-wide referenda on favorable ballot measures in face of strong anti-casino sentiment. During the battle to attain gaming approvals, the tribes received help from the Secretary of the Interior (and former Arizona Governor) Bruce Babbitt who assisted in tribal-state negotiations that resulted in a compromise in June 1993. The result was the development of Compacts for 16 tribes for 10-year terms, utilizing what the state anticipated would be a *standard form* compact.

The Compromise of 1993 was challenged two years later when the Salt River Pima-Maricopa formally requested a standard form compact, but the new Governor announced that he no longer would either negotiate new compacts or even renegotiate existing compacts when they expired. This led to litigation in federal and state courts and, ultimately, a tribal-backed 1996 ballot referendum known as the "Fairness Initiative" that was overwhelmingly adopted by the electorate. The Governor continued refusing to negotiate, leading to further litigation alleging that the Fairness Initiative was unconstitutional. This legal challenge was rejected by the courts.

Still seeking legal finality, the Salt River Tribe had filed a Mandamus Action in the Arizona Supreme Court in 1996, and the court ruled in 1997 that the Governor was required to negotiate a compact or at least execute a standard form Compact with the Tribe. That tribe's standard form compact was executed in 1998. Subsequent negotiations initially resulted in new compacts in 2002 and 2003 with a total of 21 tribes. Those compacts are essentially identical and their language has been codified as state law.

THE ADMINISTRATIVE AND JUDICIAL BATTLE TO ESTABLISH GAMING IN OKLAHOMA

Graydon Dean Luthey, Jr. is one of premier Indian Law and litigation attorneys in Oklahoma. He is writing this article in the context of both his private practice as a senior partner at his law firm and his role as General Counsel of the Oklahoma Indian Gaming Association. Luthey was one of the state's gladiators in the legal battles ultimately required before the Oklahoma tribes could conduct gaming, going back to early efforts to even offer Class II gaming and continuing through the development of the state's "legislated" Compact.

In this comprehensive article, the author recounts the fact that the Oklahoma tribes had to pursue federal litigation, and find ways to block federal agency attempts to legislatively and administratively shut down successful games that fully complied with federal law.

THE ALABAMA STORY: THE STATE'S ONLY TRIBE HAS PERSEVERED AND SUCCEEDED DESPITE LONG-TERM AND CONTINUING STATE OPPOSITION

For much of its existence as a tribe, the Poarch Band of Creek Indians (including its members) have resided in a corner of the State of Alabama near Montgomery and essentially been ignored as both a Tribe in specific and as Indians in general. That has changed and our author for this element of the Gaming Development story is a member of that Tribe. Indeed, she literally has lived the battle from tribal poverty and obscurity to the successful business juggernaut it has become.

During her childhood, our author Venus Prince lived within her tribal community, and has many memories of her youth and teen years which she has shared as part of telling the Poarch Creek story of overcoming state government hostility towards every step to economic independence undertaken within her community. In a very personal and poignant article, she recalls the tribe's gaining federal recognition in 1984 when she was 11 years old, followed by the federal government's declaring reservation status for the tribal lands only a year later.

While Ms. Prince has a compelling personal story and history, she does not dwell on her own achievements. Instead, she has chronicled the Tribe's work in developing small bingo venues into what today are spectacular gaming resorts. Her article details the constant hostility directed toward the tribe by state officials, *attitudes that continue to this day*. The response of the Tribe has always been to focus on the journey and, in turn, the amazing financial success now enjoyed by the Tribe.

This story is far from over. Our author reports that Poarch Creek is now using the fruits of its labors to work with and assist other tribes in pursuing their dreams. She mentions the Washoe Tribe of Nevada and California for one, but there are others whose members have gotten to know the Poarch Creek leadership and business development team as they work together for economic development and tribal self-sufficiency. After generations of isolation and lack of economic opportunity, this tribe has succeeded and, in turn, become a model for others to follow.

A COMPARATIVE OVERVIEW OF CANADIAN AND U.S. INDIGENOUS GAMING LAW

Finally, we have a unique article tracking and comparing the development of gaming in the United States and Canada. And, it is appropriate that the authors are from each side of the border. From the U.S. side are two gaming experts who are well-known throughout the country. Kathryn R.L. Rand is Dean of the University School of Law and her colleague is Dr. Steven Andrew Light, Associate Vice President for Academic Affairs and Political Science at the same university. Rand and Light are co-directors of the Institute for the Study of Tribal Gaming Law and Policy and have spoken widely and written extensively. The third author is Yale D. Belanger, who is a Professor of Political Science at the University of Lethbridge in Alberta

The scope of Indian gaming in the U.S. is well reported. It has become a $29 billion industry, with 240 tribes operating over 470 gaming operations. In contrast is the Canadian First Nations gaming industry which consists of fewer than 20 casinos in five provinces, as well as limited "VLT palaces in a sixth province. Still the combined gross is $1 billion and the authors report that the effects of that sum are similar to those in the U.S.

This article offers a rare opportunity to understand the parallel two-nation development of gaming, and its conclusion articulates a concise summary for the non-Canadian readers. With this, our authors make it clear that our gaming neighbors to the north share the same objectives as those of the tribes in the United States.

With the foregoing as predicate, enjoy the "gaming journey" upon which you are about to embark. We all personally learned a great deal while developing this issue of *Indian Gaming Lawyer*! As you read it, we think you will share that learning experience. ❄