



LETTER FROM THE EDITOR



Dennis J. Whittlesey
Editor

Shaping the Future of Indian Gaming Law

BY DENNIS J. WHITTLESEY

Welcome to this Inaugural Issue of *Indian Gaming Lawyer*, a publication dedicated to issues associated with the Indian gaming industry in the United States. Our goal is to present a wide range of subjects related to and/or affecting the industry. To this end, we welcome input from any reader as to any relevant subject of interest which, in turn, will be assessed by the Editors for inclusion in future issues.

The *raison d'être* for a magazine devoted to Indian Gaming can be found in the fact reported in this issue that the Indian Gaming industry has grown to an unanticipated size and revenue production. The still-young industry has its roots in the 1987 U.S. Supreme Court decision in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), in which the Court ruled that Indian tribes have a right to conduct gaming activities not prohibited under the law of the states in which they are located. The federal legal framework for this activity was established through enactment of the Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. §2701, *et seq.* ("IGRA"), and the growth of Indian Gaming since then has been remarkable.

As reported by Dr. Alan P. Meister in his annual study of Indian gaming, which is summarized in this issue, the most recent calendar year for which there is data is 2014. In that year, 243 tribes were conducting gaming. They were operating 489 gaming facilities in 28 states. The total revenue generation for that year was \$28.9 billion, a sum virtually equaling the revenues generated by non-tribal gaming in the U.S.

The small cottage Indian gaming industry that existed as of the enactment of IGRA consisted of small bingo halls and card rooms. Since 1988, it has exploded in size and revenue, and continues to grow every year.

The importance of the remarkable (and unpredicted) growth of the Indian Gaming industry underscores the need for attorneys and their clients to understand the nuances of working with tribes and developing business relationships with them.

Certainly, vendors and equipment manufacturers increasingly are seeking to do business with tribal gaming enterprises although they may not fully understand that the laws protecting tribes can jeopardize their investments unless effective legal protections are built into transaction documents. The goal of this magazine is to present articles of current interest to the gaming industry as a whole. And it is a fact that the growth of Indian Gaming is going to continue, at a rate almost certainly not equaled in the gaming industry as a whole. The rest of the gaming industry will want to continue developing working relationships to match that growth.

THE ECONOMIC EVOLUTION OF INDIAN GAMING

Consistent with our intention to focus on the business of Indian Gaming, our *lead article* presents the aforementioned annual report researched and written by Dr. Meister: *The Economic Evolution of Indian Gaming*. Dr. Meister certainly needs no introduction to many of our readers, for he has become the authoritative reporter of the economic growth and development of the Indian Gaming industry and, in turn, has worked with all elements of the industry over the years.

The value of this work is that Dr. Meister reports all of the economic information, even to the point of identifying the states in which there has been a growth in Indian gaming from the previously-reported year as well as the states experiencing a decline. In short, he gathers data, analyzes it and renders his annual report. It has become both a barometer and Bible for those of us working with Indian Gaming.

PROTECTING INVESTMENTS IN INDIAN COUNTRY

Our *second article* is the first in what we anticipate will be a regular feature that this Editor informally calls the "History Corner." It is not written by an economist, attorney or businessman working with tribal

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governments. Rather, the author is Dr. Stephen Dow Beckham who has been widely recognized for decades as the leading ethno-historian working in Indian Country in the United States. His article points out the need to insure that the tribal land proposed for an Indian casino will qualify for that gaming under the strict requirements imposed by IGRA and the implementing federal regulations.

The article is entitled “Identifying Land That Is Eligible for Indian Gaming.” The subtitle tells the tale: “If There’s a Driveway There Just May Be a Way.”

There have been many legal disputes concerning this issue over the past several years and some investors and suppliers have discovered that *at best* they were funding a project that would be stalled for years through legal and factual challenges. *At worst*, the projects have not been approved by the necessary state and federal government decision-makers. Given the potential for delay or outright failure, this article underscores the need to work with experts on both Indian history and Indian Law.

Dr. Beckham introduces us to the need for preliminary research and the development of a strategy to secure approvals using (1) ancient and obscure maps and journals and (2) legal arguments structured to maximize the impact of that historic documentation. In the case study he uses as an example, the federal government refused to recognize the proposed casino site as eligible for gaming activity, requiring the Tribe to file and prosecute federal litigation to compel the Secretary of the Interior to render a positive determination, based on the facts in the record and applicable law.

As the article’s title suggests, the key to the tribal claim was the discovery of an old driveway serving an ancient Indian cemetery which appeared to have been granted trust land status many years before. In the face of this critical historical evidence (documented in the old maps and documents attached to Dr. Beckham’s article, the litigation resulted in a resounding victory recognizing the legality of the casino project. The site today houses the Three Rivers Casino and Hotel, a very successful destination on Oregon’s Pacific Coast owned and operated by the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Western Oregon. The resulting success for this project is demonstrated in photos of the Three Rivers facility accompanying Dr. Beckham’s article.

THE TRIBAL TRUMP CARD IN GAMING COMPACT NEGOTIATIONS

Tribes cannot conduct casino gaming as we think of it until, and unless, they have negotiated and completed a Gaming Compact with the states in which they are located. IGRA imposes a duty on the states (principally through their Governors) to negotiate such compacts in good faith. Should the

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states fail to do so, the law establishes a process through which tribes can seek to invoke procedures for securing a Compact and impose it on a state which refused to negotiate in good faith or to even not negotiate at all. The threshold requirement is that a federal judge must render an Order adjudicating that the state had failed to meet the requirement.

The states enjoy sovereign immunity from lawsuits unless they have consented to the specific lawsuit presented. Since most states have not so consented, this provision of IGRA proved to be somewhat elusive in practice, but a number of current lawsuits have invigorated that provision and some courts are now enforcing its requirements.

In his article entitled “IGRA’s Good Faith Compact Negotiation Requirement,” Patrick Sullivan presents a comprehensive explanation of the law’s provisions and how it has been either rejected or accepted by various elected officials and, in turn, federal courts. However, as Mr. Sullivan reports, what has been a somewhat neglected legal tool is suddenly finding new life. This dynamic issue demonstrates the need for any potential business partners for an Indian casino project to consult knowledgeable consultants and attorneys who can assess the situation and advise them as to whether and how to proceed.

IGAMING UNDER IGRA

To paraphrase a statement once made about the weather by the great Oklahoma humorist Will Rogers, “Everyone is talking about iGaming, but nobody is doing anything about it.” That is not true in Indian Country.

Heidi McNeil Staudenmaier and Anthony J. Carucci have examined the efforts of two Indian tribes to pursue online Gaming. One is the Iipay Nation of Santa Ysabel Tribe of California and the other is the Iowa Tribe of Oklahoma.

These tribes have pursued contrasting approaches to Indian iGaming and the results to date are similarly contrasting. Each has been involved in litigation. One is enjoying success and the other is having a rougher time. As the authors point out, the different approaches seem to have led to the respective results. Again, this article documents the need for anyone pursuing gaming in Indian Country – whether it is casino gaming or iGaming – to consult experts in working with tribes. It goes without saying that the economic returns for successful Indian gaming projects can be enormous.

CLASSIFYING SERVER-BASED ELECTRONIC BINGO GAMING SYSTEMS UNDER IGRA

Another hot subject in Indian gaming is the classification of gaming systems. IGRA defines three categories for tribal gaming: (1) the first is “Class I” which means social games not relevant to casino gaming; (2) the second is “Class II” which means “the game of chance known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)” And (3) the third is “Class III” which means all forms of gaming that are not Class I or Class II.

The question addressed by Kevin Quigley and Tom Foley is “Who gets to decide Game Classification?” The competitors for this role are Tribal Gaming Regulatory Authorities and the National Indian Gaming Commission and the authors make a compelling case in favor of the TGRA making the classifications. This issue is not yet fully resolved, yet it is one which any vendor should fully understand before contracting with any tribal casino.

THE CONFLICT IN INDIAN COUNTRY OVER SAME SEX MARRIAGE

This article may seem somewhat out of place in the context of Indian Gaming, but it is a current hot topic issue throughout Indian Country and one with which tribal business partners or potential partners should absolutely be aware. Given the dialogue on what is an emotional issue for many, we believe that it is important for anyone doing business with gaming tribes to be familiar with the development of tribal statutes dealing with same sex marriage. This is especially true in light of the federal law and judicial rulings that are explained by the author.

IMGL Second Vice President Mike McBride has furnished us with a serious discussion about this closely-watched subject. Consequently – and importantly — he has given the readers a road map as to how tribes are attempting to deal with it in the course of exercising their rights as sovereign governments.

Understanding the issues that are important to Indian Country – such as this one – is a critical ingredient to developing business relationships with the tribes. ✪

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IMGL wishes to thank the spring conference co-chairs, committee members, the moderators and the panelists for the contribution of their time and efforts in putting together the excellent educational opportunities IMGL is proud to provide at the spring 2016 conference.

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