



Avoiding Regulatory Agency Communication Breakdowns

Remember, You've Got a Friend

BY JOHN N. ROBERTS

In the past year I was heavily involved in a project on the east coast involving a tribe with no prior gaming experience and a state government with no experience with tribal gaming. It brought me back to my first involvement with tribal gaming decades ago and reminded me of the importance of communication and relationships with regulators on both sides.

My adventures in tribal gaming regulation began in the early 1990s in Kansas when I was Director of Administration for the Kansas Lottery. I received a call one day from the Governor asking if I knew what a tribal-state compact was as it related to tribes under the Indian Gaming Regulatory Act (IGRA), legislation that had been passed by Congress just a few years earlier. After I gave her my understanding of the Act and the state's responsibilities under it, she said, "Great, write a compact!"

One of the few tribes in Kansas had petitioned the state to negotiate a compact under the Act. As the Lottery was the closest agency the state had for gaming, we were directed to draft the initial compact. That task fell to an assistant attorney general assigned to the Lottery and myself. At that time, the political climate in Kansas was not conducive to gaming because, even though the Lottery referendum had passed by a two-thirds majority, it was opposed by an identical majority in the state legislature.

Part of my responsibilities on the project was to meet with senior state legislators to brief them on the compact issues and what the legislature and the governor could do. As my colleague and I knew little about IGRA other than reviewing the legislation and any related materials we could find, which in the early days were sparse, I researched for names of anyone who could advise us on tribal gaming and IGRA. Two names came up, I. Nelson Rose and James Maida, both of whom in later years became IMGL members. Both gentlemen were eager to share the knowledge they had and their invaluable input gave us an informed starting point to commence drafting the compact.

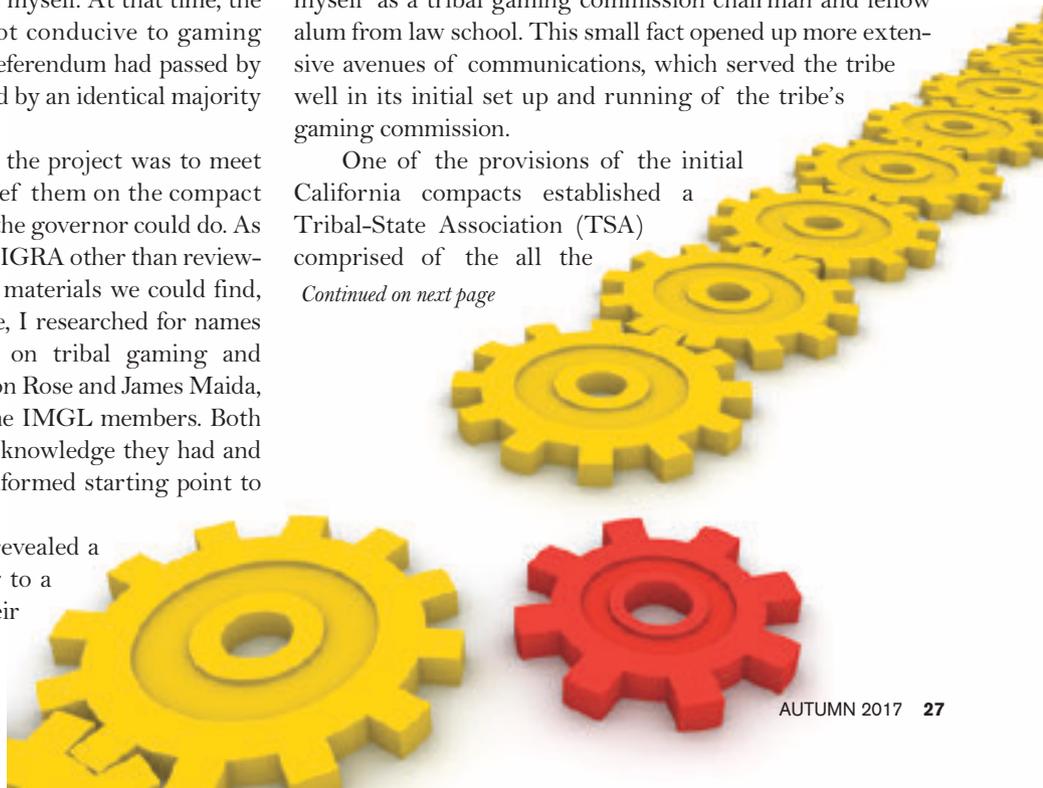
Meeting with the legislators revealed a deep mistrust of the tribes, owing to a complete lack of knowledge of their

history and of their rights under IGRA. I began a lengthy series of meetings with key legislators to educate them on these subjects. Over time, and with the help of the Governor who was pro tribe, the resistance began to fade and eventually, after I'd left Kansas for California, compacts were signed with the few tribes in Kansas.

In early 2000, I was appointed Chairman of the Rincon Gaming Commission overseeing a tribal casino that was managed by Harrah's. In these days communications between tribal regulators and the state agencies overseeing tribal gaming were infrequent and not very cordial. In California, there are two state agencies that oversee tribal gaming: the California Gambling Control Commission (CGCC) that reports to the Governor, and the Bureau of Gambling Control that reports to the attorney general. The CGCC was late to be appointed and formed and the two agencies had very little interaction between them. Our main guidance and information came from the National Indian Gaming Commission (NIGC), a part of the U.S. Department of Interior. During this time, I met NIGC Chairman Monty Deer at a small conference. I introduced myself as a tribal gaming commission chairman and fellow alum from law school. This small fact opened up more extensive avenues of communications, which served the tribe well in its initial set up and running of the tribe's gaming commission.

One of the provisions of the initial California compacts established a Tribal-State Association (TSA) comprised of the all the

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gaming tribes and the two state agencies previously mentioned. At my first TSA meeting, I quickly became acquainted with the extreme divide between the state regulators and the tribes. To say this meeting was contentious would be an extreme understatement. The head of the Bureau at that time was another IMGL member, Harlan Goodson. During a break, I approached Harlan and told him that I'd like to have an open line of communications with him to ensure that factual information was being exchanged. This led to a process where an agent from the Bureau, at the time called the Division of Gambling Control, would visit the gaming tribes and the main thrust of the meeting was to go through one paragraph of the compact to discuss each side's view. At the same time, we would have visits from NIGC field agents and these visits were instrumental in the tribe's gaining much needed information.

In October 2006, the NIGC was dealt a major setback by the DC Court of Appeals in a decision commonly known as the CRIT decision. The unanimous decision held that NIGC did not have regulatory authority over Class III gaming (*i.e.*, blackjack, video poker and the type of slot machines found in Las Vegas and other commercial casinos) conducted by the tribes, rather the gaming is regulated by tribal laws and tribal-state compacts. The NIGC had issued Minimal Internal Control Standards (MICS) for gaming operations on Indian land in 1999. After the NIGC sought to audit the CRIT Blue Water Resort and Casino under the MICS and the tribe challenged the audit, a series of administrative hearings were held with an administrative law judge finally ruling that NIGC's attempt to enforce the MICS infringed on tribal and state sovereignty. Following the CRIT decision the NIGC announced it would not enforce the Class III MICS and would only act in an advisory capacity for class III games.

Several months after the CRIT decision, the CGCC issued a proposed state-wide uniform gaming regulation covering comprehensive minimum internal controls for all class III games and related gaming areas that became known as CGCC 8. Under TSA rules, any regulation the state wishes to enact that affects tribal gaming must be reviewed and voted on by the TSA membership. The CGCC in short wanted to take on the role of regulating Class III gaming conducted by the tribes in California even though the tribal–state compacts gave the CGCC no clear authority to do so. Thus, began a 3 years saga where communications and relationships between tribal, state and federal regulators became critical.

Under TSA rules, a taskforce can be formed to review the proposed regulation and issue a report to the full membership. This is normally a short review process ending with a memo advising of taskforce findings. In this instance, it was not that simple. Given the magnitude of the proposed regulation on tribal

gaming, I formed a small working group to be the think tank. I sought out experienced lawyers that had advised tribes for years and seasoned tribal gaming regulators—focusing on those with whom I had developed close relationships built up over the years based upon mutual respect, experience and expert knowledge of the issues facing tribal regulators. A key participant was Jane Zerbi who had a good working relationship with both state agencies. She tutored me on the intricacies involved and helped me plan a realistic strategy to keep the taskforce on track. I developed a good working relationship with the general counsel for the CGCC. This relationship helped to cut through previously intransigent positions by the CGCC. This involved numerous calls and meetings between us to discuss in depth the tribe's position on the proposed regulation and to give him an education on the workings of tribal gaming commissions and factual knowledge of the roles played by both sides. This same approach was utilized with subsequent counsels for the Commission, again with great success.

During this time, a new head of the Bureau was appointed, Jacob Appelsmith. I first met him at a TSA meeting at a small tribal casino in northern California. We didn't have a quorum so the meeting was short. He and I spent that evening discussing the current state of the negotiations, and I was pleasantly surprised that he had read and understood all of the briefing materials previously sent to him. We also discussed music and as it turns out that was a key to a great working relationship. He and I, it turned out, shared a love for a little-known genre of music, one in which my band was involved. We also individually had large vinyl LP collections. This one meeting opened up a relationship that later proved invaluable to the eventual success of the taskforce. In the end, with his assistance, the taskforce proposed a completely revised version of the regulation that was accepted without any edits by the CGCC. I know that building relationships with key members of the CGCC and Bureau were critical to this eventual success.

Later, one of the tribes I served as a tribal regulator had a long-standing dispute with the state over the accounting treatment of certain lease payments on certain slot machines and other issues. My first meeting with the senior state auditor was preceded by a three-hour pre-meeting between her and me discussing the positions of both sides and the history of the dispute. Again, establishing a good foundation for a working relationship by personalizing the relationship was key to resolving the dispute. Her decision after a series of meetings resulted in a savings to the tribe of over \$900,000. Part of the problem had been the lack of understanding on the state's end and the flow of factual information she received from the tribe, information that had been ignored by her predecessor who was not open to communication with the tribe.

As previously mentioned, my most recent experience was on the east coast involving a tribe with no gaming experience and a



state gaming commission not familiar with tribal gaming. Fortunately, I had previously met with two of the state commissioners and their executive director at IMGL conferences where we had discussed regulatory issues involving states and tribes. I set up meetings and regular phone calls with the state commission to discuss at length the terms of the tribal-state compact from the tribe's side, and to explore ways to make the initial licensing processes of vendors and individuals more efficient and beneficial to both sides.

In my experience, in order to be successful in the gaming regulation environment it is critical for lawyers and regulators to work actively at establishing and nurturing lasting professional relationships. It is incredibly important to attend and participate in conferences such as those held by IMGL and tribal regulator associations. I receive calls from lawyers asking how to get involved in tribal gaming and the conference route is what I always suggest. Aside from educational presentations, these conferences usually offer various dinners and receptions that open the door for introductions and discussions. I have advised tribal regulators for years to do the same, and to actively seek out and establish a working relationship with

industry professionals having deep experience and knowledge in the field. These suggestions may sound common sense and simplistic but they aren't. Often a new state or federal regulator may come into their job with little direct experience in tribal gaming regulation or without a firm working knowledge about their particular role as part of the combined tribal, state and federal efforts to safeguard Indian gaming. They may rely on staff for their information or their own research. By reaching out to these individuals over decades, I and many other tribal regulators and lawyers have been able to enlighten and educate those regulators on both sides—in the end creating improved professional relationship based on facts, and helping to prevent regulatory communication breakdowns. ❁



John N. Roberts

John N. Roberts, a long-time IMGL affiliated member-regulator, has over 25 years of gaming regulatory experience, having served both as a tribal gaming regulator for several tribes and as a state agency head for the Kansas Lottery. He has appeared on numerous gaming industry panels nationwide and authored many nationally published articles. John can be reached at johnrobertsjd@icloud.com

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