

TRIBAL GAMING REGULATION IN CALIFORNIA

Who does what and why



John Roberts

- Executive Director, San Pasqual Tribal Gaming Commission
- Former Executive Director Blue Lake Casino, Robinson Rancheria Casino
- 20 years experience in Indian Gaming.
- General Counsel Hawaiian Gardens Card Room, Los Angeles, CA
- Former Assistant Attorney General, State of Kansas
- Drafted Tribal-State Compact Kansas
- Former Drummer Shadows of Knight (Gloria)

Background Information

- Because of the growth of gaming on Indian reservations, and the claims by states that organized crime would infiltrate reservations, Congress passed the Indian Gaming Regulatory Act (IGRA) of 1988

IGRA

- IGRA took its precedent from the Supreme Court rulings in favor of Indian gaming in the cases of Seminole Tribe v. Butterworth (1979) and California v. Cabazon Band (1987).

IGRA

- It is important to mention that the IGRA did not decide whether Indian gaming could be undertaken at any particular site, but rather regulates how it proceeds

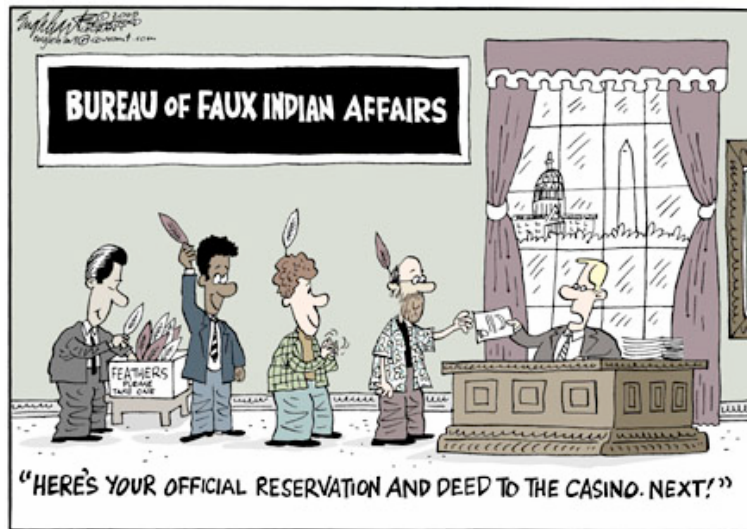
Goals of IGRA

- The major goals of IGRA are:
 - to provide a legislative basis for the operation and regulation of gaming by Indian tribes;
 - to establish the National Indian Gaming Commission (NIGC) as a federal agency to address congressional concerns
 - and to protect gaming as a means of generating tribal revenue; to promote within tribes economic development, self-sufficiency, and stronger governments;
- to shield tribes from organized crime; and to assure fairness of gaming to both operators and.....

Major Goal

- to assure fairness of gaming to both operators and players.





"HERE'S YOUR OFFICIAL RESERVATION AND DEED TO THE CASINO. NEXT!"

Differences

- The primary difference between Indian and white gaming is that the former is a type of governmental enterprise, and the latter is a private enterprise

TYPES OF GAMING

- There are three classes of gaming as defined by IGRA, with each class having different regulations
- Class I gaming includes social and traditional games in connection with tribal ceremonies, powwows, or celebrations.



CLASS II



- In this class of gaming, the tribes hold exclusive jurisdiction.
- Class II gaming includes bingo, lotto, pull-tabs, punchboards, and certain card games. IGRA allows this type of gaming on Indian lands if the same class of gaming is allowed in the surrounding state for any purpose or by any entity.
- The tribes and the NIGC share jurisdiction of this class of gaming.

CLASS III

- Class III gaming includes all gaming not covered by the previous two classes, such as roulette, slots, baccarat, blackjack, and craps.



REQUIREMENTS

- Before a tribe can legally offer such games, they must first negotiate a regulatory compact with the surrounding state. The Secretary of the Interior must approve all Indian-state compacts.



TRIBAL GAMING COMMISSION

- The authority to establish a regulatory structure or tribal gaming commission comes from the sovereign powers of tribal governments. An effective regulatory scheme should work to ensure that all gaming within a tribe's jurisdiction is operated in accordance with tribal laws and regulations. The tribal gaming commission should be an arm of the tribal government, established for the exclusive purpose of regulating and monitoring gaming on behalf of the tribe. It is important to note that if a tribe does not establish a tribal gaming commission, some other office or agency of the tribal government must fulfill these governmental obligations.

TRIBAL GAMING COMMISSION

- While neither the Indian Gaming Regulatory Act (IGRA) nor the NIGC regulations require tribes to establish tribal gaming commissions, there are specific governmental responsibilities tribes must undertake to engage in gaming under the IGRA. The NIGC believes that tribal gaming commissions are an appropriate type of governmental agency that can implement the regulatory responsibilities of the tribes under the IGRA.

TRIBAL STATE COMPACT

- Sec. 2.20. "Tribal Gaming Agency" means the person, agency, board, committee, commission, or council designated under tribal law, including, but not limited to, an intertribal gaming regulatory agency approved to fulfill those functions by the National Indian Gaming Commission, as primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance. No person employed in, or in connection with, the management, supervision, or conduct of any gaming activity may be a member or employee of the Tribal Gaming Agency.

FUNCTIONS OF A TRIBAL GAMING COMMISSION

- ESTABLISHING A TRIBAL GAMING COMMISSION
- There are many different factors a tribe should consider when establishing a tribal gaming commission. Most importantly, a tribal gaming commission should be established by ordinance. The following organizational and operational issues should also be considered when establishing a tribal gaming commission:
 - 1. The tribal gaming commission's responsibilities, powers, and enforcement authority should be specifically set forth in the tribal ordinance. Any responsibility reserved to the governing body of the tribe should also be specifically stated.
 - 2. The ordinance should include provisions regarding the number of commissioners, the method of selecting commissioners including the qualifications needed and the background requirements, their terms of office, and the methods and grounds for removal of commission members. The NIGC suggests staggering the terms of the commissioners so as to provide continuity in the tribal gaming commission's activities during transition of commission members.
 - 3. The ordinance should include a method for funding the tribal gaming commission and its staff. The NIGC suggests that funding be appropriated from the tribal government instead of direct funding from the gaming operation.
 - 4. The ordinance should include the basic procedures for conducting official commission business, including provisions regarding appeal procedures of tribal gaming commission actions.
 - 5. The ordinance should provide for the tribal gaming commission's autonomous authority. This authority should include, among other things, unrestricted access to any area of the gaming operation, including the books and records of the operation, in order to carry out the regulatory duties.

TRIBAL GAMING COMMISSIONS

- If a tribe elects to utilize a tribal gaming commission, the commission might be responsible for the regulatory functions outlined below. Items 1 - 12 are requirements contained in the IGRA and the NIGC's regulations. The remaining activities are additional and related functions a tribal gaming commission might perform.
- 1. Develop licensing procedures for all employees of the gaming operation pursuant to 25 CFR § 558.1(b).
- 2. Issue, suspend, revoke, and renew licenses of primary management officials and key employees upon completion of background investigations and after following the procedures contained in 25 CFR Parts 556 and 558.
- 3. Conduct background investigations on primary management officials and key employees according to requirements that are at least as stringent as those in 25 CFR Parts 556 and 558 pursuant to 25 CFR § 522.4(b)(5).
- 4. Forward completed employment applications for primary management officials and key employees to the NIGC pursuant to 25 CFR § 558.3. These applications should include the Privacy Act notice and the notice regarding false statements contained in 25 CFR §§ 556.2 and 556.3.
- 5. Forward completed investigative reports on each background investigation for each primary management official or key employee to the NIGC prior to issuing a license pursuant to 25 CFR § 556.5.
- 6. Review a person's prior activities, criminal record, if any, and reputation, habits and associations to make a finding concerning the eligibility of a key employee or primary management official for employment in a gaming operation pursuant to 25 CFR § 558.2.

Tribal Gaming Commissions

- 7. Notify the NIGC if, after conducting a background investigation on a primary management official or a key employee, the tribe does not license the individual pursuant to 25 CFR § 556.5(d)(1).
- 8. Retain applications and reports of background investigations of primary management officials and key employees for no less than three years from termination of employment pursuant to 25 CFR § 558.1(c).
- 9. Issue separate licenses to each place, facility, or location on Indian lands where a tribe elects to allow gaming pursuant to 25 CFR § 522.4(b)(6).
- 10. Ensure that gaming facilities are constructed, maintained and operated in a manner that adequately protects the environment and the public health and safety pursuant to 25 CFR § 522.4(b)(7).
- 11. Obtain annual independent outside audits and submit these audits to the NIGC pursuant to 25 CFR § 522.4(b)(3). The scope of these audits should include all gaming related contracts that result in purchases of supplies, services or concessions for more than \$25,000 in any year pursuant to 25 CFR § 522.4(b)(4).
- 12. Ensure that net revenues from any gaming activities are used for the limited purposes set forth in the tribal gaming ordinance pursuant to 25 CFR § 522.4(b)(2).

Tribal Gaming Commissions

- 13. If the tribe authorizes individually owned gaming, issue licenses according to the requirements contained in the tribal gaming ordinance pursuant to 25 CFR §§ 522.10 and 522.11.
- 14. Promulgate tribal gaming regulations pursuant to tribal law.
- 15. Monitor gaming activities to ensure compliance with tribal law/regulations.
- 16. Interact with other regulatory and law enforcement agencies regarding the regulation of gaming.
- 17. Conduct investigations of possible violations and take appropriate enforcement action with respect to the tribal gaming ordinances and regulations.
- 18. Provide independent information to the tribe on the status of the tribe's gaming activities.

Tribal Gaming Commissions

- 19. Take testimony and conduct hearings on regulatory matters, including matters related to the revocation of primary management official and key employee licenses.
- 20. Establish or approve minimum internal control standards or procedures for the gaming operation, including the operation's credit policies and procedures for acquiring supplies and equipment.
- 21. Establish any supplementary criteria for the licensing of primary management officials, key employees, and other employees that the tribe deems necessary.
- 22. Establish standards for and issue licenses or permits to persons and entities who deal with the gaming operation such as manufacturers and suppliers of machines, equipment and supplies.
- 23. Maintain records on licensees and on persons denied licenses including persons otherwise prohibited from engaging in gaming activities within the tribe's jurisdiction.
- 24. Perform audits of business transactions to ensure compliance with regulations and/or policy.
- 25. Establish or approve rules of various games, and inspect games, tables, equipment, machines, cards, dice, and chips or tokens used in the gaming operation. Establish or approve video surveillance standards. Establish standards/criteria for gaming machines and facilitate the testing of machines for compliance.

- 26. Resolve patron disputes, employees grievances, and other problems, pursuant to the tribal gaming ordinance.

INDEPENDENCE OF TRIBAL GAMING COMMISSION

- The purpose of a tribal gaming commission is regulatory not managerial. A tribal gaming commission conducts oversight to ensure compliance with federal, tribal, and, if applicable, state laws and regulations. The commission serves as the licensing authority for individuals employed in the gaming operation, administering an effective program for background investigations as part of the licensing process. The commission also has a role in monitoring compliance with the internal control standards for the gaming operation and in tracking revenues. In order to carry out its regulatory duties, the commission should have unrestricted access to all areas of the gaming operation and to all records. A tribal gaming commission should have clear authority to take enforcement actions, including suspension or revocation of an individual gaming license, when appropriate.

Independence

- A tribal government helps ensure the independence of a tribal gaming commission by creating for it a permanent and stable source of funding. This funding may originate in the tribal budget, which is recommended, or from license fees or assessments on the gaming revenue. The independence and integrity of the commission is seriously threatened if the tribal council is able to withhold funding from it or if the level of funding is not sufficient for the gaming commission to perform its role. Similarly, approval for day-to-day expenditures for the gaming commission should be within the authority of the gaming commission or a staff supervisor and not from an outside party. The tribal gaming commission should be supported by a qualified staff.

Term of Office

- The length of term in office and assurance of an opportunity to perform the required duties are important to the independence of tribal gaming commissions as both a matter of reality and perception. The term should be of fixed length and long enough to ensure stability. Continuity is fostered by staggering the terms of commission members thus avoiding wholesale changes in the membership. The commission should be non-partisan and non-political. Removal of commission members during term of office should be for good cause only and follow a procedure which provides for due process. Removal should not be permitted for simple disagreement with tribal leadership over matters that involve a gaming commissioner's exercise of discretion in the performance of duty.

Conflicts

- Serious conflicts of interest in the exercise of its regulatory responsibilities as well as an appearance of impropriety are avoided if members of gaming commissions are prohibited from playing in the gaming activities they regulate. Commission members should not be employed by gaming operations or by the management company or consultant serving the gaming operation. Participation as a player or as an employee in the regulated operations will likely raise questions about the independence of the tribal gaming commission and potentially compromise its integrity or that of its members.

No Conflict

- Ideally, no members of a tribal council would serve on the tribal gaming commission. Tribal council members and tribal gaming commission members may not always agree on matters about which the tribal gaming commission has taken a regulatory position because they may approach these matters from different perspectives. Actual and perceived independence for a tribal gaming commission is fostered if the roles of council member and gaming commissioner are separate and distinct.

FINALLY

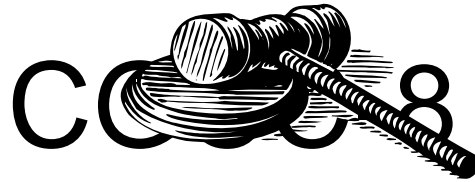
- The overall goal is, of course, to ensure integrity in Indian gaming.

CGCC-8

- For almost a year, the California Gambling Control Commission (CGCC) and the majority of tribal regulators in California have been at loggerheads over a proposed regulation by the CGCC, which would provide the CGCC with regulatory oversight of the gaming operations' compliance with the federal minimum internal control standards (MICS), final decision-making authority on any necessary variances from those standards, and authority to conduct financial reviews.

CGCC-8

- The CGCC introduced its proposed regulation, called CGCC-8, following a federal court of appeals ruling that the National Indian Gaming Commission (NIGC) did not have authority to promulgate or enforce its MICS for Class III gaming in tribal casinos. The CGCC's stated purpose was to fill the "void."



- The proposed regulation was considered by delegates to the Tribal-State Gaming Association, which is created by the Tribal-State Compacts and must approve any state proposed regulation intended for tribal casinos. Many tribal regulators believed the CGCC lacks legal authority to issue CGCC-8, noting their Compacts define the regulatory authority of the state and do not reference the MICS anywhere

Unnecessary

- Tribal regulators also contended CGCC-8 is unnecessary and duplicative due to the measures currently in place to ensure MICS compliance and discriminatory because the CGCC has yet to finalize any MICS for California card rooms despite having full regulatory authority over them.

Vote against

- On September 4, the proposed regulation came up for vote by the Association delegates. As anticipated, CGCC-8 was rejected by an overwhelming majority of tribal regulators. A surprise twist came when the Bureau of Gambling Control of the California Department of Justice (Bureau) also opposed CGCC-8.

So where is this heading?

- Tribal representatives have taken the position that no regulation can become effective unless approved by the Association. This is because the Compacts specifically say that at Section 8.4.1(a).

Rejection

- This would mean that the Association rejection of the regulation renders it ineffective and dead. CGCC representatives have taken the position that subsequent subdivisions of the same Section create an “override” capacity, so that the CGCC can re-adopt the regulation and send it out to Tribes for comment after which it takes effect.

Litigation?

- Whether or not the CGCC can override the Association is a legal issue that issue may well end up in the courts.



Money Spent

- As many involved in the gaming industry know, a tremendous amount of resources are currently invested in tribal gaming regulation and MICS compliance at tribal casinos in California.



Lots of Bucks

- Tribes in California direct significant funding towards fulfilling their role as the primary regulators under the Compact. The Rose Institute of State and Local Government has projected tribal gaming commission budgets in California total \$90,282,837, an average of more than \$1.5 million per tribe.

Still like NIGC

- Many tribes in California continue to recognize the NIGC's role in MICS oversight enforcement
- Over ten California tribes have recently amended federal gaming ordinances, which must be approved by the NIGC under the Indian Gaming Regulatory Act, to provide for enforceable MICS oversight.

- The State Gaming Agency has clear regulatory authority to conduct MICS audits and enforcement for some tribes -- those which have agreed recently to such state oversight as part of a Tribal-State Gaming Compact or Memorandum of Agreement (MOA).

More Issues

- The issue for many other tribes is that their Compacts executed in 1999 and 2004 provide no such explicit language referring to MICS, and because tribes are sovereigns, California civil regulatory laws only apply on Indian lands where either Congress or the Tribe expressly authorizes it.

Conclusion

- One thing appears certain as of April, 2009. This debate, whether headed for the courts or other means of resolution, is far from over.

QUESTIONS????

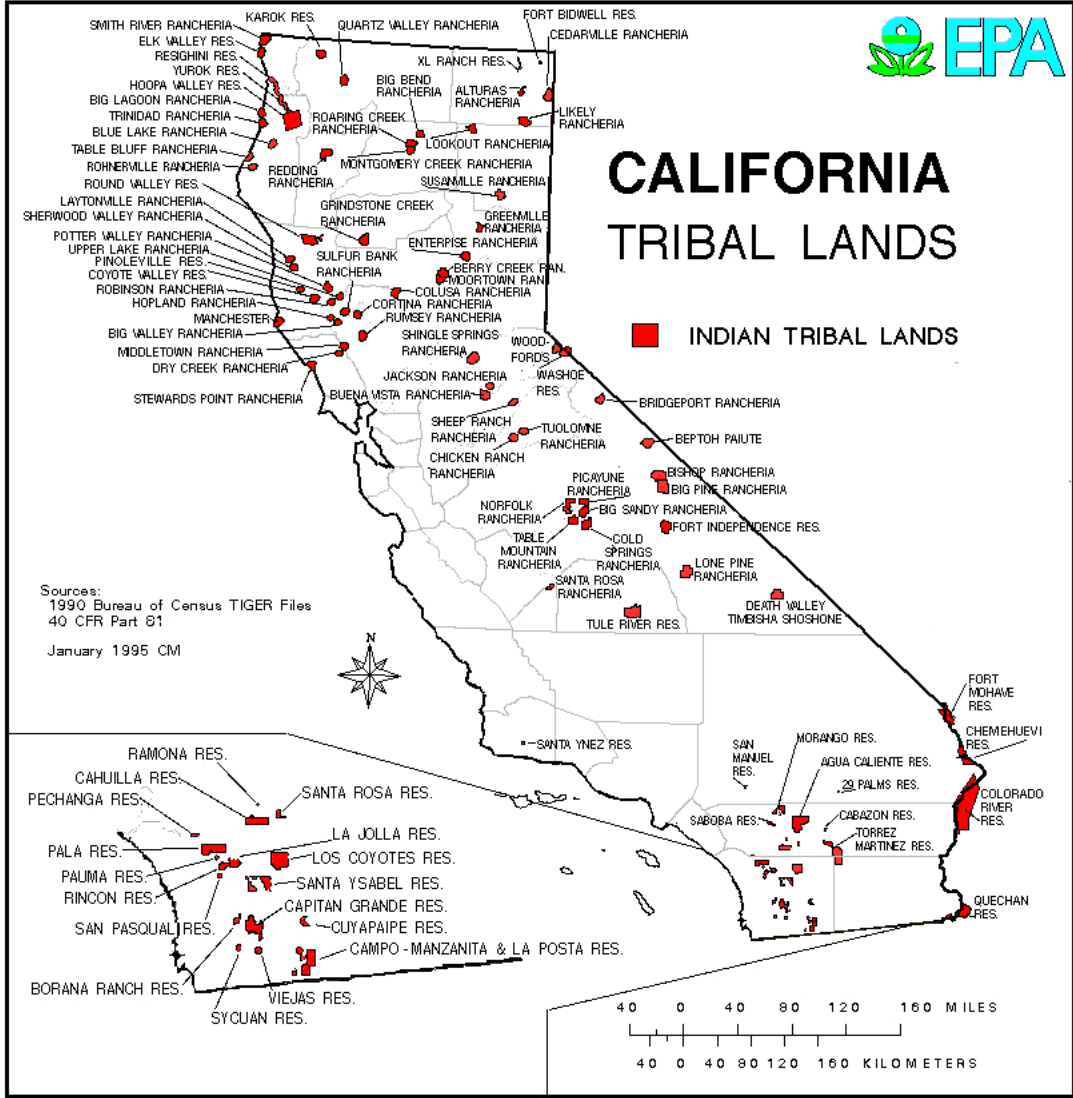
- Thank you!!!!





CALIFORNIA TRIBAL LANDS

■ INDIAN TRIBAL LANDS



Sources:
1990 Bureau of Census TIGER Files
40 CFR Part 81
January 1995 CM

