TFA Monthly Newsletter

June 2021

HAS IGRA BECOME THE "THIN RED LINE" PROTECTING TRIBAL SOVEREIGNTY FROM AGGRESSIVE STATE GOVERNMENTS?

By William Newby

According to federal-Indian law expert, UCLA Law graduate and partner at Ocotillo Law & Policy Partners, LLP, Padraic McCoy, some Tribal Nations "view IGRA and its Compact requirement as an infringement on their sovereign right to be free of state and local interference with on-reservation activities." McCoy continued that "IGRA didn't grant tribes the right to conduct gaming; it just regulates it – including by requiring tribes to enter into state compacts in order to conduct class III gaming." Through IGRA's Compact requirement, "Congress sought to balance fundamental tribal rights with what states say are 'their' interests in protecting the gaming public." According to many Tribes in California, however, the State has used the Compact process to foist its prerogatives on Tribes for too long. But IGRA, sometimes derided for its diminution of Tribal sovereignty, may be seen as a defense against overly aggressive states looking to impose their agendas upon sovereign Nations and Tribal lands.

Summary:

Several California tribes pushed back on the State of California's infringement on tribal sovereignty in recent Compact negotiations. Citing the states' obligation to negotiate in good faith contained within IGRA, the tribes prevailed in the courts. The tenants of IGRA provided the foundation to combat the State of California's over-reaching tactics.

Tribes may have picked up a huge hammer in the form of a resounding federal court victory in California in late March – *Chicken Ranch Rancheria of Me-Wuk Indians et al. v. State of California et al*. In the process, ironically perhaps, IGRA may become an ally that Tribes hate to love: the "thin red line" that stands as a line of defense which protects and preserves the inalienable rights which should belong to all Tribal Nations, even those involved in gaming.

Background: Why IGRA came to be

As McCoy notes, after the Supreme Court confirmed the right of Tribes to conduct gaming on lands within their jurisdiction, Congress quickly enacted IGRA to provide a framework for how Tribes would operate gaming activities. But why did Washington decide any such framework was needed? Notables, including the late Senators McCain, Inouye and Udall, believed that it was in the public good to ensure that Tribal gaming would be run fairly and safely, and free from corruption and outside influences. The Act also aims to promote Tribal economic development and to guarantee that Tribes themselves are the primary beneficiaries of Tribal gaming. These multiple objectives lead, ultimately, to IGRA.

As to class III (Vegas-style, high-stakes) gaming, IGRA requires Tribes and states to enter into Compacts, but – anticipating that states might use this requirement as a way to open Indian lands to state jurisdiction – the Act expressly limits the topics a Compact may contain. By implication, it

(continued on Page 2)

IN THE NEWS

Pokagon Band Finalizes Historic Gaming Compact with Indiana
5/3/21 – indianz.com

San Manuel Gaming and Hospitality Authority to Acquire the Palms Casino Resort in Las Vegas
5/4/21 – indiancountrytoday.com

In Historic Move, County Removes Barrier to Tribal Land Expansion
5/5/21 – sandiegouniontribune.com

Relief Money for Tribes
5/10/21 – indiancountrytoday.com

Q1 Commercial Gaming Revenue Matches Highest-Ever Quarterly Total, Surpasses $11B
5/11/21 – pechanga.net

Florida Legislature Approves Deal Giving Tribe Sports Gaming
5/19/21— bloomberg.com

Arizona Sports Betting Deal Approved by Department of Interior, Now Legal in State
5/24/21— azcentral.com

(continued from Page 1)

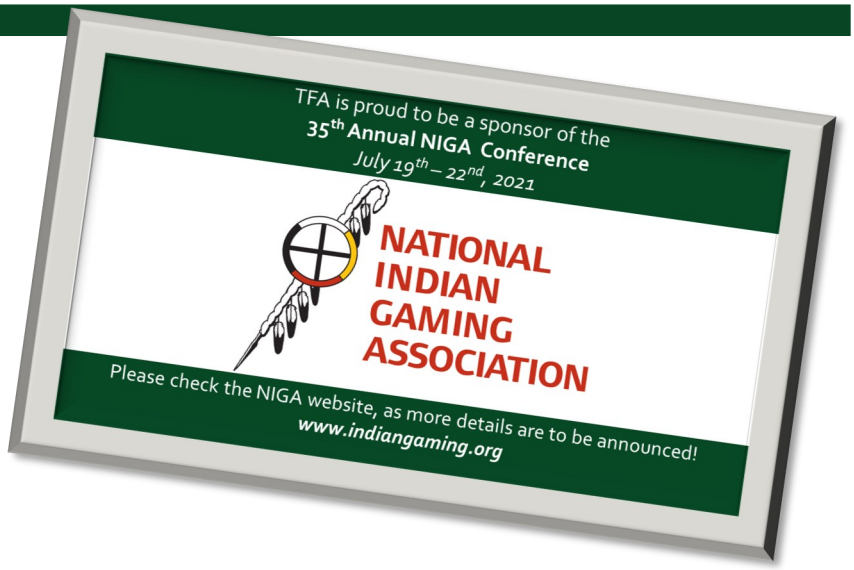
also limits the topics over which a state may "negotiate" for inclusion in a Compact. Otherwise, a state may be found to have negotiated in "bad faith" and in violation of IGRA. As Congress' concern arose from the prospect of Tribes operating high-stakes gaming activities, the list of acceptable Compact topics, naturally, identifies issues that are "directly related to the operation of gaming activities." The list, McCoy said, "should be viewed as both exhaustive and sacrosanct, meaning Congress defined clearly the bounds of acceptable state behavior in Compact negotiations, and states (and Tribes) are bound by Congress' choice." In addition, according to the courts, if an item is related to gaming, although slightly less directly, it "may" be permitted (although not necessarily) but only if the state offers additional "meaningful concessions" for that additional item. Thus, IGRA serves to balance competing—in many respects diametrically opposite—interests between states and resident Tribal Nations. These latter two points—the notion of what is a "meaningful concession" and the balance between the rights of the states and of Tribal Nations—make the recent California decision so potentially powerful.

Chicken Ranch Rancheria of Me-Wuk Indians et al. v. State of California et al.

According to McCoy, who represents California tribes involved in tense negotiations with the State of California and local municipalities over "Compact" issues, *Chicken Ranch* "could represent a notable shift in how states must behave going forward in Compact negotiations with Tribal Nations." But the decision also highlights the vulnerability of local government mitigation agreements, which find their basis in the California Compact, and which were challenged in *Chicken Ranch*.

The case was brought by five California Tribes who complained that the State failed to negotiate upcoming Compacts in good faith—thereby violating IGRA—by inserting into the Compact negotiation process items, in the Tribes' opinion, unrelated to gaming.

The five Tribes are Chicken Ranch Rancheria of Me-Wuk Indians of California, Chemehuevi Indian Tribe, Blue Lake Rancheria, Hopland Band of Pomo Indians, and Robinson Rancheria.



In popular context the label "Thin Red Line" refers to a small group of defenders who, against all odds, stand their ground against an overwhelming, adversarial force. The reference itself is rooted in history and comes to us from the 1854 Crimean War Battle of Balaclava. Around 500 Scottish Highland soldiers (in their scarlet red jackets and tartan plaid kilts) formed a paper-thin line only two men deep and successfully defended against a much larger attacking force of 2,500 mounted Russian cavalry. The phrase is also found in the title of the 1962 James Jones' novel based on the WWII battle of Guadalcanal, two feature films therefrom (1964 and 1998), and most recently a slogan used in support of firefighting personnel.

In addition to gaming provisions, California tried adding a collection of additional, non-gaming related provisions to the Compact, including application of State tort laws, environmental laws, local government mitigation, spousal and child support orders, minimum wage laws, anti-discrimination laws and labor laws. Some version of these had been seen in earlier California Compacts. But, McCoy notes, the State's continued demands to impose its State-law regime and agenda on Tribal lands, especially without additional concessions to Tribes, "amounted to a kind of jurisdiction shifting that Tribes universally oppose as a patent disregard for their sovereign right to control their lands."

And apparently, Senior District Judge Anthony W. Ishii agreed. He slammed the door on the State with a quick ruling in favor of the Tribal plaintiffs. Said Judge Ishii: *"The tribal plaintiffs have met their burden of producing evidence the state defendants did not negotiate in good faith by raising topics in negotiations that were beyond the scope permitted by IGRA or which required some form of meaningful concession in return."* Notably, Judge Ishii found the State's attempt to include certain items (in this case, child and spousal support matters) in the Compact as unacceptable, even with meaningful concessions. It was simply too attenuated to be viewed as "directly related" to gaming activities. This serves as an important and likely unwelcomed reminder to states that courts take seriously these IGRA limitations. At a broader level, the ruling clearly juxtaposed the priorities of a progressive leaning, super majority State accustomed to dictating domestic policy to its citizens against those of resident sovereign nations which are protected from state bullying by Federal laws, including IGRA.

Judge Ishii's opinion underscores the importance of IGRA—maligned as it is—as a bulwark against State attempts at hegemony over California Tribal Nations. According to Mr. McCoy and others, the State was handed a stinging rebuke which, if it withstands the State's appeal, could shift the balance in the state/Tribal Nation Compact debate back in favor of Tribal Nations. Indeed, it may be that IGRA can fulfill its role as the "thin red line" after all.

TFA
201 Continental Boulevard
Suite 110
El Segundo, CA 90245
tfacp.com

KRISTI JACKSON
CHAIRMAN
310.341.2335
kjackson@tfacp.com

DAVID HOWARD
CEO
310.341.2795
dhoward@tfacp.com

WILLIAM NEWBY
PRESIDENT
310.341.2796
wnewby@tfacp.com

WILLIAM CRADER, CFA
MANAGING DIRECTOR
310.341.2336
wcrader@tfacp.com

TFA CAPITAL PARTNERS

FOLLOW TFA ON: