



## **Sound Regulation Grounded in Respect for Sovereignty and Self-Determination: Lessons from Three Decades of IGRA**

by Jonodev Osceola Chaudhuri

From the beginning of my service as Chairman of the NIGC in 2013, I have been profoundly grateful to lead an agency whose mission is, at its heart, to promote tribal self-determination. It is truly an honor to work with and be a part of NIGC's team of extraordinarily talented and dedicated professionals who are, without exception, fully-dedicated to this mission. As I near the end of my statutory term as Chairman, and with thirty years of IGRA on the books, it is an opportune time to reflect on our work in recent years and how that work has been guided by three decades of IGRA. As I do so, it is helpful to start with how our team has attempted in recent years to harmonize what seem to be contradictory attributes of IGRA: tribal self-determination versus very real limitations on the expansive pre-IGRA rights of tribes to exclusively manage and regulate all aspects of gaming on their lands.

### **The Seemingly Conflicting Goals of IGRA**

When enacted in 1988, IGRA was in many ways contradictory. It explicitly referenced longstanding pro-self-determination pillars of federal policy, yet it also curtailed tribal authority and incorporated critics' concerns about the vulnerability of Indian gaming to bad actors. In our work at the NIGC in recent years, we have harmonized these seemingly disparate facets of the statute in a manner that protects the integrity of Indian gaming for the larger purpose of supporting tribal sovereignty and self-determination.

IGRA's tenuous balance of pro-tribal principles tempered by nods to non-tribal interests reflects the balancing of interests Congress sought to achieve in the aftermath of *California v. Cabazon Band of Mission Indians*, the Supreme Court decision upholding tribes' rights to conduct gaming on their lands. Congress created the NIGC to implement the statute and vested the Agency with numerous powers to preserve the integrity of Indian gaming. Among them, it gave the Chairman authority to issue civil fines and temporary closure orders for IGRA violations.

Upon reviewing the collective powers of the NIGC, it may be tempting to consider NIGC's appropriate role as primarily one of enforcement and oversight. As I often point out, however, IGRA's first paragraph, upfront in its finding section, states that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." IGRA restates this goal front and center in its declaration of policy. This is the only broad Indian policy goal set forth in IGRA. Language

relating to organized crime and corrupting influences is expressly tied to the related goal of ensuring the primary beneficiary status of tribal nations.

The question arises then, how does the NIGC reconcile its enforcement and oversight functions with IGRA's central self-determination goals? After all, viewing the NIGC's relationship to tribes – Indian gaming's primary regulators – as primarily one of an overseer to a subordinate does not do much to foster relationships between regulatory partners and does less to build the internal capacities of tribal regulators – both counterproductive to supporting strong tribal government. The only sensible way to reconcile IGRA's competing ideas is that the NIGC's authorities, as well as the various provisions of IGRA, need to be viewed against a backdrop of Congress's attempt to advance self-determination policies. When viewed in this vantage, the purpose of all NIGC functions is to preserve the integrity of Indian gaming for the purpose of advancing self-determination.

### **The Appropriate Role of the NIGC**

After 30 years of IGRA, I am confident that the NIGC is on the right path. We are committed to the faithful execution of the law, but we are mindful of IGRA's self-determination goals at every turn. I am proud to have helped articulate our collaborative approach in a way that frames our efforts squarely within the mandates of IGRA. Doing so has not only helped us maintain our credibility as a regulatory agency, but has helped insulate the entire industry from criticisms against Indian gaming's regulatory structure. Of course, maintaining credibility requires much more than framing. A regulatory body can never shy away from taking aggressive action when appropriate, and we have certainly not done so. Instead, I believe we have found an optimum balance between enforcement and preventative efforts that strengthen our tribal partners' regulatory capacities. This balance has led us to a comprehensive agency approach.

### **Comprehensive Regulatory Approach**

Although it is only one tool the Agency has to achieve compliance with IGRA and our regulations, enforcement typically generates the most discussion. What usually are not discussed, though, are the tools utilized by, and the hours of work spent by the Agency in an effort to achieve compliance without having to resort to enforcement. The majority of the Agency's time and effort is spent ensuring tribes have the training and technical assistance necessary to keep matters

*"I am convinced now more than ever that the simple act of doing our job under IGRA and performing all agency functions with any eye toward tribal sovereignty and self-determination is in itself policy."*

from ever reaching the enforcement stage. Our time is spent reviewing management agreements and gaming ordinances to ensure not only that the requirements of IGRA and NIGC regulations are addressed, but also that agreements are in keeping with the purposes of IGRA. Our Office of General Counsel issues legal opinions to put tribes on surer footing regarding the requirements of IGRA and NIGC regulations before they act. A large part of our Technology Division is focused not only on the technological aspect of our regulatory duties, but also on helping tribes strengthen the technological know-how of its gaming regulators and operators. In short, nearly everything we do is designed to promote tribal self-determination and economic development by ensuring a well-regulated, compliant gaming infrastructure. When it does get to the point of enforcement, though, we have landed on a sound and cogent approach to utilizing our enforcement authority in a manner that respects tribal sovereignty and advances self-determination. A large part of that approach is knowing when to use and when to withhold the enforcement authority. For example, three situations that arose during my time as Chairman warranted three different approaches to enforcement. In the first, a tribal leadership dispute unfortunately spilled over into the gaming operation, leading to an attempted armed take-over of the facility. At that point, the health and safety of the gaming public and the employees of the facility took precedence over any considerations of economic benefit of the gaming, and I immediately issued a closure order until the health and safety issues were adequately addressed.

In another situation, a tribe came to the NIGC with concerns related to a real estate transaction that had cost the tribe millions in gaming revenue. In that situation, the NIGC's only enforcement authority was over the tribe, and though there had been a clear violation, I believed issuing a Notice of Violation (NOV) and fine against the tribe would not serve the stated purposes of IGRA. The tribe had already taken steps to recoup its losses and had terminated the employment of the individual responsible for the violation. As a result, I entered into a settlement agreement with the tribe that required safeguards be put in place to prevent the violation from reoccurring, thereby protecting the tribe's status as the primary beneficiary of its gaming operation and giving the tribe the tools needed to prevent such a violation from reoccurring; but also giving the NIGC the ability to immediately act if it did.

Finally, I recently determined in another matter that even though a clear technical violation of IGRA was on-going, due

to the context of the violation, I would temporarily refrain from taking any enforcement action against the tribe. In this case, a tribe had been unable to renegotiate its compact with the state, resulting in its expiration. When the Department of the Interior attempted to implement Class III gaming procedures, the State sued to prevent them. The United States defended the Department's authority to issue those procedures, and while it did, I believed that any attempt to fine the tribe or close the facility for operating Class III gaming without a compact was not in keeping with the provisions of IGRA intended to give tribes a way to Class III gaming when a state refuses to negotiate in good faith. In that instance a NOV and closure order, while legally supportable, would have subverted the purposes and policies of IGRA.

These are but three examples that demonstrate that no one approach to enforcement fits every situation. It is equally important to realize that enforcement is not the appropriate response to every compliance issue. I have made it my goal to ensure that any action I take serves the larger policy and purposes of IGRA. This commitment to sound regulation that advances self-determination extends to all NIGC functions and is reflected in our recently released 2018-2022 Strategic Plan.

### Conclusion

Within a few days of being designated Acting Chairman of the Agency in 2013, I had a conversation with an Indian gaming practitioner in which I mentioned how enthusiastic I was to help shape positive federal Indian country policy. He remarked, "but the NIGC is a regulatory agency" and questioned how much policy it could shape. I have thought about that conversation many times over the years. I am convinced now more than ever that the simple act of doing our job under IGRA and performing all agency functions with any eye toward tribal sovereignty and self-determination is in itself policy. Upholding our regulatory responsibility in a way that is collaborative with tribal nations demonstrates the success of self-determination policies and, through that successful example, advances the principles of self-determination in other areas. ♣

*Jonodev Osceola Chaudhuri is the Chairman of the National Indian Gaming Commission (NIGC) and a citizen of the Muscogee (Creek) Nation. He can be reached by calling (202) 632-7003. For more information about the NIGC, visit [www.nigc.gov](http://www.nigc.gov).*