

Critical Legal Issues: Preparing for the Future

This month we asked our panel of leading attorneys to discuss some of the current and potential legal issues tribes should be preparing for today, in order to proceed toward the best possible outcomes in the future. Here is what they had to say...

Anthony S. Broadman, Partner
Galanda Broadman
Seattle, WA
www.galandabroadman.com



Where do businesses target high density customer bases? Where can tribal governmental gaming expand in the post-exclusivity age? The answer to both questions is the same: Cities. As tribes seek new markets, and novel revenue sources, we are seeing an uptick in conflicts in connection with attempts to capture urban gaming markets. These are both the Hail-Mary lawsuits

of anti-gambling community organizations and high-level intergovernmental disputes among cities, states, the BIA, and competing tribal governments.

These dynamics are historic – tribes have been battling state lotteries and local governments as market competitors and neighbors since the early days of Indian gaming. And these fights were predictable results of saturation. Still, they are occurring with more regularity. Take for instance the City of Glendale Arizona’s attempt to set aside the Department of Interior’s decision to accept land for a casino in trust for the Tohono O’odham Nation. This is a prime example of the kind of fights we expect to see as Indian gaming goes urban. In Washington State, the Spokane Tribe’s plan to build a casino near the Kalispel Tribe’s casino in nearby Airway Heights has pit Spokane County against the city where the project is located. Meanwhile the City of La Center vehemently opposed the Cowlitz Tribe’s land acquisition and related gaming development before it reversed court and supported it to further its own financial interests. And in Oregon, the Coquille Tribe’s attempt to take land into trust in Medford for a Class II casino, more than 150 miles from its current casino, is being challenged by almost everyone who could be affected. Recently Oregon Governor John Kitzhaber voiced opposition to the off-reservation casino, arguing that each tribe in Oregon should only have one casino. Medford seems opposed. The Cow Creek Umpqua Tribe, which owns a casino 70 miles north of Medford on I-5 – incidentally, on the route between Medford and the Coquille Tribe – is also fighting the new site.

One thing is certain: as more urban casinos are built, more tribes will look to cities for new customers. They will be forced to.

Jack Duran, Tribal Attorney
Duran Law Office
Roseville, CA
www.durandnlaw.com



The recent passage of 25 CFR 162.017(c.) which provides non-tribal businesses, located on tribal lands, the ability to utilize a tribe’s special tax status for infrastructure and other improvements, Indian tribes need to ramp up their ability to partner with and attract outside businesses on tribal lands. Under the law, states are no longer able to impose their tax schemes on non-

tribal businesses located on tribal lands. To best take advantage of this new law, tribe’s need to create the “legal infrastructure” to attract non-tribal businesses to locate their operations on tribal lands. Clear and concise corporations codes, business entity and tax codes, environmental regulations, and zoning ordinances are a must. Additionally, a well organized dispute resolution process, be it a full fledged court or participation in a respected multi-tribal dispute resolution forum assists with building confidence that disputes between businesses and the tribe itself will be handled fairly. The law appears most advantageous for manufacturers and industrial activities, but can also assist retail, on-line and transaction based business. With the passage of this new law, non-tribal businesses need to take a hard look at the advantages of locating their business within tribal lands.

Tribes must also be increasingly vigilant to protect their special tax status and must hire the best legal and political experts to assist with protecting their status. As states are increasingly desperate in their attempts to expand diminishing tax bases, they are looking for creative ways to tax every aspect of Indian commerce to fill their coffers. Creative uses of state tax schemes and broad interpretations of federal law have resulted in increasing taxation of gaming, fuel and cigarette revenue – regular staples of tribal economies.

Tribes also need to keep an eye on the Internal Revenue Service as it has a tendency to ignore tax exemptions provided specifically to tribes such as the 2000 Federal Employment Tax Act (FUTA). This law included language treating tribes the same as cities and counties for purposes of calculating federal employment taxes. In 2012, the Blue Lake Tribe of California prevailed in a Ninth circuit case in which the IRS denied refunding several million dollars overpaid by the tribe. In short,

tribes need to be proactive in both their pursuit of tribal economic development and protection of it.

Brian P. McClatchey, Attorney
K&L Gates
Spokane, WA
www.klgates.com



The biggest issue facing tribal gaming now is how to approach legal online gaming (iGaming). Delaware, Nevada, and New Jersey have authorized various forms of intrastate iGaming and California and Connecticut may soon do so as well. With federal regulations unlikely, iGaming regulation will be determined on a state-by-state basis. The tribes should be proactive,

particularly in this new, online area, where the inherent tension between state and tribal regulators and market participants could be intense.

iGaming presents multiple political, legal, and technical

dimensions for tribal gaming. The main political question will be balancing state and tribal authority. A big legal issue will be IGRA's role, if any, for iGaming. And each tribe will need to confront the myriad of technical issues in the space. How each tribe resolves these issues will determine the role the tribe can play in the online space.

To identify and address the issues presented by iGaming, tribes should engage a business consultant and legal counsel, both of whom are experienced and knowledgeable about iGaming. With these advisors, tribes should first evaluate whether and how online gaming can help them achieve their goals. This determination will include, among other things, whether iGaming fits with a tribe's gaming enterprise plan.

With its team in place, the tribe can then work to get up to speed on issues and opportunities surrounding "play for free" online offerings, the myriad of transition issues for this new area of gaming, and the choice of "interstate vs. intrastate" models. This new area also requires an extremely high level of experience in technology and intellectual property transactions, which could include employment and enterprise issues in the development of the intellectual property or the licensing of the technologies needed, such as the games themselves, geolocation and age and identity verification features, fraud protection

20 years, \$0 fines

They say time is money. At NEWave, we have been in business for 20 years – that's four times longer than any competitor. And in all that time, not one of our clients has ever been fined for noncompliance. In fact, our award-winning solutions, such as our **myCompliance™ software suite**, are the reason that more Tribal operators trust NEWave to protect them from costly fines than anyone else, at least four times more casinos. So call NEWave today, and get the compliance protection that **250** other tribal casinos have.



NEWave®

Creating Innovative Solutions Together

Celebrating 20 Years

702.891.0132 • www.mynewave.com

mechanisms, any mobile version of the games, customer relationship management, and the right payment processing systems, among many others.

Understanding the area will allow the tribe to step through the process of getting what offerings they want online. Of particular concern in that process is the issue of licensing suitability. Tribes, like commercial casinos and state lotteries, must be certain that any potential iGaming partners can undergo and survive suitability due diligence and obtain a license, whether from a tribal or state regulatory body. iGaming will likely prove to be the most highly regulated area of an already extraordinarily closely-regulated industry.

**Gary S. Pitchlynn, Adjunct Professor
of Law, University of Oklahoma
School of Law
Pitchlynn Law
Norman, OK
www.pitchlynnlaw.com**



I believe that two recent events may indicate a swing of the pendulum which favors more balance in the negotiating postures of tribes and states when negotiating gaming compacts in the future. First, with the 9th Circuit holding last year in the Rincon case, we witnessed both the recognition of an imbalance in the respective bargaining positions of the state and the Band since *Seminole*,

as well as the willingness of the federal courts to engage in correcting that imbalance. Second, I believe that the October 2012 rejection of the tribal-state gaming compact from the Commonwealth of Massachusetts indicates that the Assistant Secretary of the Interior will not further diminish the requirements for revenue sharing or other customary requirements and that he is also willing to undertake a similarly aggressive role in the oversight of the conduct of states in compact negotiations.

Although the Supreme Court did great harm to the bargaining position of the tribes when they undercut the intent of Congress to not permit states a heavy handed advantage over tribes in this process, we may be witnessing the early signs of corrective action both in the courts and in the Executive Branch that could make up some of the lost ground. Tribes should take these events as a sign that they don't have to allow state posturing and threats to intimidate them into making concessions that are neither fair, nor reasonable when viewed through the lens of IGRA and the Trust responsibility of the United States.

If I understand correctly that only minimal adjustments have been made to the original compact proposal, it is likely that the Mashpee Wampanoag Tribe and the Massachusetts

Governor will experience further difficulty in obtaining Secretarial approval of their compact. Whether it is a ploy on the part of the Governor, or simply a lack of understanding by the Commonwealth of the potential consequences of their failure to reach agreement with the tribe, is yet to be determined. Assistant Secretary Washburn pointed out the more significant problems he saw in the agreement and any future rejection will likely indicate that the Commonwealth has no real interest in compacting with the tribe and will instead rely on taxing commercial casinos instead. Although tribes should uniformly wish the Mashpee success in enjoying the benefits of gaming in the future, they cannot be expected to support further reduction in standards designed to protect all tribes.

**Lenor A. Scheffler, Attorney, Chair of
Best & Flanagan's Native American
Law Section
Best & Flanagan
Minneapolis, MN
www.bestlaw.com**



A legal issue facing tribes is a tribe's legal framework – tribal laws and judicial system. The adequacy of the legal framework impacts the integrity of tribal government, the general welfare of tribal members, and the ability of tribal business entities and the businesses of tribal members to operate effectively.

As a lawyer practicing in Indian Country for almost 20 years and as a Tribal Judge serving tribes for almost 15 years, I have seen first-hand the importance of a legal framework supporting a tribe's sovereignty, stability, economic development, and general welfare of its tribal members. This has become even more important with the recent passage of the Tribal Law and Order Act of 2010 (the TLOA) and the Violence Against Women Act, Reauthorization Act of 2013 (VAWA). Tribal laws provide the certainty of rules that parties will operate under when engaging in the financing of tribal projects, when entering into economic development projects, or as a defendant subject to tribal jurisdiction under TLOA and VAWA.

In the context of tribal financing, for example, financial institutions want to have access to tribal laws to understand a tribe's structure and to have confidence that the dispute resolution process is accessible, and permits a lender to recover in case of a default. Tribes with arbitration, UCC secured transactions, and garnishment laws, as well as, an independent judiciary will find advantages having these laws in place prior to a financing.

For economic development, the same legal framework is needed for tribal enterprises to be successful. There is a need

to have a legal framework for tribal limited liability, tribal corporation, tribal business licensing or tribal regulatory laws. The legal framework in the economic development arena helps not only a tribal business entity do business, but it also provides opportunity and stability for individual tribal member entrepreneurs who wish to engage in business.

The TLOA requires a number of “defendant protections” if a tribe wants to use the enhanced sentencing. One of those protections is access to publicly available tribal laws. Under VAWA, the alleged perpetrators are to have access to due process which is laid out in tribal law and court procedures.

The investment in tribal legal framework may not be as appealing as a housing or education program for tribal members. However, the benefits from such a legal framework are long lasting and far reaching for the tribe and its members. The key is for tribal leadership to work with their staff and attorneys to create the necessary tribal laws. Tribal attorneys whether in-house or outside counsel can provide the legal expertise while being sure that the laws reflect a tribe’s cultural norms, values and priorities. A tribal court’s bar association may also be able to provide expertise to assist in the development of a tribe’s legal framework.

Finally, it is important as has been discussed for the tribal laws to be accessible to the public, either on a tribal website or alternatively through law school or university libraries in a tribe’s state.

Heidi McNeil Staudenmaier,
Senior Partner
Snell & Wilmer
 Phoenix, AZ
www.swlaw.com

Without a question, the most important issue facing tribes and their brick-and-mortar casino operations is the inevitable arrival of online gaming. Even though federal legislation of online gaming remains a long shot, it is clear that the states are already moving at light speed to implement their own online regulations.

Nevada is up and running with Internet gaming licenses for intra state gaming already issued one year ago. New Jersey and Delaware are next to follow. In California, online gaming legislation failed to pass in 2012, but the online lobbying efforts are back with a vengeance during the 2013 session. A number of California tribes are at the table and deeply involved in shaping and moving the pending California legislation. Even if online gaming doesn’t make sense for a particular tribe given its location or other factors, it’s imperative that all tribes be cognizant and vigilant of the online industry and its potential opportunities (and pitfalls).

Some gaming industry observers have called the tribes’ exploration of the online gaming market as the “New Cabazon”



– referring to the landmark United States Supreme Court decision in 1987 which helped lay the foundation for the Indian Gaming Regulatory Act and the now \$27.4 billion tribal gaming industry.

A number of tribes are already moving forward with launching online poker, contending that poker constitutes Class II gaming under the IGRA and the Internet component is only an “electronic or electro-mechanically facsimile.” This scenario has yet to be tested in the courts.

There are other numerous issues to consider and be resolved, including taxation, implications of Internet gaming on tribal sovereignty, overall regulation of the online gaming, player protection issues, competition and/or partnerships with well-established igaming companies already operating in Europe and elsewhere online gaming is currently legal, competition with states already conducting online lotteries, coalitions with other tribes, intersection of federal and state laws, and impact upon revenues from existing tribal gaming operations. The online future is here and tribes need to be major players in it. ♣

COST
 WWW.COSTOFWISCONSIN.COM

THEME AND SPECIALTY CONSTRUCTION SINCE 1957

Jackson, WI **Orlando, FL** **Seattle, WA**
 www.costofwisconsin.com info@costofwisconsin.com 1-800-221-7625