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Recurring Problems in Indian Gaming

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RECURRING PROBLEMS IN INDIAN GAMING

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Indian gaming now exists in twenty-eight states at approximately 310 gaming facilities. Approximately 195 tribal governments, or a little more than one third of the 556 federally-recognized Indian tribes[1] nationwide, operate Indian gaming facilities. Based on audits submitted by Indian tribes to the National Indian Gaming Commission, the Indian gaming industry produced revenues of approximately $9.7 billion in the last calendar year.

Despite the fact that Indian gaming has grown to be a large and far-flung industry, it continues to be plagued by uncertainties and controversies. During the time since Congress enacted the Indian Gaming Regulatory Act a decade ago, numerous issues have arisen surrounding Indian gaming. Few have been resolved for all time and some have recurred repeatedly. This essay briefly summarizes the history and legal framework of Indian gaming, describes the recent growth in the industry, and discusses some of the legal controversies that have been repeated across the country as states and tribes adjust to their respective roles in the Indian gaming industry.

I. A BRIEF HISTORY OF INDIAN GAMING

The modern Indian gaming industry began in the 1970s when Indian tribes in Florida and California began operating bingo halls and other gaming activities.[2] The gaming activities were controversial because

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1. List of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298 (Mar. 13, 2000).

2. *See, e.g.*, Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1 (9th Cir. 1974) (card room); Seminole Tribe of Fla. v. Butterworth, 491 F. Supp. 1015 (S.D. Fla.. 1980) (involving bingo operations). *See also* United States v. Farris, 624 F.2d 890 (9th Cir. 1980) (involving casinos in the State of Washington).

tribes did not comply with state gambling laws. Indian tribes and state governments disagreed sharply as to whether tribes had the right to engage in gaming activities free of state jurisdiction. The dispute eventually reached the United States Supreme Court in 1987, producing the watershed opinion entitled *California v. Cabazon Band of Mission Indians*.[3] In that case, the Supreme Court rejected California's argument that state gaming regulatory laws should apply to Indian bingo halls. The Court held that although Congress may have given to the State of California criminal jurisdiction within Indian reservations, Congress had not given the state the lesser power of civil regulatory jurisdiction on reservations.

The distinction between criminal matters and civil regulatory matters was key to the Supreme Court's reasoning. In a statute commonly known as Public Law 280,[4] Congress had authorized some states, including California, to exercise broad criminal jurisdiction and limited civil jurisdiction on Indian reservations. Congress stopped short, however, of giving states civil regulatory jurisdiction on Indian reservations. Because regulatory matters within reservations are vital to the maintenance of tribal self-government and values, the Supreme Court held that tribes have retained exclusive civil regulatory jurisdiction over reservation affairs.

Because the State of California regulated, but did not criminally prohibit, gambling activities such as bingo within the state, the Supreme Court held that Indian tribal gaming was subject only to tribal jurisdiction and, as a civil regulatory matter, was free of state interference. The effect of this decision was to make it clear that in states where gaming was not criminally prohibited, tribes are immune from state regulation or other interference over that gaming.[5]

II. THE INDIAN GAMING REGULATORY ACT

Following the *Cabazon* decision, Indian tribes increased development of Indian gaming establishments. Meanwhile, states went to Congress, seeking a legislative limitation to the tribal power recognized in the *Cabazon* decision. Congress responded by enacting the Indian

3. 480 U.S. 202 (1987).

4. 67 Stat. 588 (1953), as amended, 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1360 (1953).

5 One of the first issues to arise was the scope of gaming that was allowed under this theory. For example, what is the lawful scope of Indian gaming if state laws prohibit the game of poker through criminal sanctions, but allow gambling at horse races or offer a state lottery.

Gaming Regulatory Act of 1988 (IGRA).[6] In IGRA, Congress provided that tribes have the unilateral authority to conduct bingo and similar games such as "pull-tabs" games (which are defined as "Class II" games in the Act) on Indian lands, if such games are not prohibited in the state in which the tribe is situated.

In contrast to Class II gaming, Congress realized that states were likely to have more serious and more legitimate public policy concerns related to more expansive casino-type gaming which is defined as "Class III" gaming in IGRA. Accordingly, Congress stopped short of giving tribes the unilateral power to conduct full casino-style Class III gaming. Congress limited Class III gaming to those states that already allow some measure of Class III gaming and gave states a voice in tribal decisions to conduct such gaming.

As for Class III gaming, Congress adopted the criminal-prohibitory versus civil-regulatory distinction set forth in the *Cabazon* decision. IGRA allows tribes to offer Class III gaming if a state permits Class III gaming for any purpose by any person, organization or entity.[7] In other words, if a state allows a limited class of organizations such as charitable groups to offer low-stakes gambling on a limited number of occasions each year, a tribe may offer such gambling activities. The theory is that state public policy toward such activity is merely regulatory rather than prohibitory.[8] On the other hand, IGRA forbids a tribe from conducting Class III gaming if the state has adopted a "no-Class III-gaming-and-no-exceptions" approach.

A. State Tribal Compacts for Class III Casino-style Gaming

Congress imposed one other major requirement for Class III gaming. IGRA provides that tribes may engage in Class III casino-style gaming only if they first negotiate "compacts" with states. Through the compacting process, Congress empowered states to negotiate with tribes to address seven areas of legitimate state concerns related to public safety and regulation of gaming. Each of the seven subjects are directly related to the operation of gaming establishments.[9] Since the enactment

6. 25 U.S.C. §§ 2701-2721 (as amended) (1999).

7. 25 U.S.C. § 2710(d).

8. *See, e.g.*, Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1028 (2d Cir. 1990).

9. The subjects that Congress allows states and tribes to address in compacts are: (1) the application of state or tribal laws and regulations regarding the licensing and regulation of Indian gaming; (2) the allocation of jurisdiction necessary to make those laws and regulations enforceable; (3) the collection of fees by the states for their costs in regulating the gaming; (4) taxation by the tribe in comparable amounts to amounts

of IGRA, twenty-four states have entered compacts with Indian tribes involving some level of Class III, casino-style gaming.[10]

Through the compacting process, Congress offered states the right to negotiate with tribes regarding specific state interests that might be affected by Indian casinos. With this right came a responsibility. Congress imposed upon states the responsibility of engaging in good faith negotiations. To insure that states entered negotiations and negotiated in good faith, Congress gave Indian tribes the power to bring an action in federal court against a state that failed to negotiate in good faith. In such a suit, Congress provided that a mediator appointed by the court would choose between compacts proposed by each party, which the Secretary of the Interior would then implement.[11]

IGRA's federal court remedy for a state's refusal to negotiate in good faith, however, has been struck down as unconstitutional. In *Seminole Tribe v. Florida*[12] the Supreme Court ruled that the Eleventh Amendment prohibited Congress from subjecting the states to civil actions by tribes in federal courts. The *Seminole* decision has thrown the compacting process and Indian gaming itself into some disarray. While tribes may not lawfully engage in Class III gaming without a compact, tribes now lack the power to force states to come to the table to negotiate.

Citing *Seminole*, several states, including Florida, have refused to engage in compact negotiations. Although the Supreme Court did not reach the question in the *Seminole* case, many tribes argue that Congress would not have narrowed the tribal right to conduct gaming and simultaneously allowed the state an unfettered opportunity to block that right. Accordingly, while the lack of a compact renders Class III gaming illegal, federal authorities have, for the most part, been sympathetic to the position of tribal governments who would otherwise be left with a right that they cannot exercise.

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that the state may assess for comparable regulatory activities; (5) remedies for breach of contract; (6) standards for the operation, maintenance and licensing of gaming facilities; and, (7) any other subjects directly related to the operation of Indian gaming. 25 U.S.C. § 2710(d)(3)(A).

10. A complete list, state, of the tribal-state compacts that have been approved by the Secretary of the Interior is available online at: http://www.doi.gov/bia/gaming/complist/gamingcmptindex.htm.

11. 25 U.S.C. § 2710(d)(7).

12. 517 U.S. 44 (1996).

B. Regulation of the Business of Indian Gaming: the National Indian Gaming Commission

Aside from giving states a role in Indian gaming, Congress sought to insure the lasting integrity of the Indian gaming industry, so that it would endure as a viable tool for tribal economic development.[13] In IGRA, Congress sought, first, to shield Indian gaming from organized crime and other corrupting influences. Second, Congress sought to insure that Indian tribes themselves, rather than outside investors or gaming industry consultants, are the primary beneficiaries of the revenues from Indian gaming. Finally, Congress sought to insure that such gaming is conducted fairly by both the operator and the players.

To effectuate this mandate, Congress established an independent federal regulatory agency called the National Indian Gaming Commission.[14] The Commission meets its mandate through a variety of powers related to the oversight of the business of Indian gaming. One of the Commission's primary tasks is to review management contracts that tribes enter with outside parties to run tribal casinos.

1. Background Investigations

To insure that Indian gaming remains free of corrupt influences such as organized crime, IGRA mandated that the Commission would insure that background investigations were performed on certain persons active in Indian gaming. First, IGRA mandates that the Commission conduct background investigations to determine whether a person is "suitable" to be involved in performing services under a gaming management contract.[15] Second, to insure that the IGRA mandates that tribal officials, such as tribal gaming commissions, conduct background investigations and to license "key employees" and "primary management officials."[16] This requirement sweeps in persons who are working for a tribal operation as employees or consultants, but not under a gaming management contract approved by the Commission.

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13. 25 U.S.C. § 2702.

14. The Commission employs a total staff of seventy-five people who are located in Washington, D.C., and also included five field offices nationwide. The staff primarily consists of investigators, auditors, financial experts and attorneys. The Commission operates on an annual budget of less than $8 million which is collected not from taxpayer receipts, but from a fee collected from the Indian gaming industry; the Commission currently collects slightly less than one-tenth of one percent of each tribe's gaming revenues over $1.5 million.

15. 25 U.S.C. § 2711.

16. 25 U.S.C. § 2710(a)(1)(F).

2. Limits on the Terms of Management Contracts

To insure that tribes remain the primary beneficiaries of gaming conducted under such contracts, IGRA provides that such contracts can endure no longer than five years and that the management consultants may lawfully take no more than thirty percent of tribal gaming revenues.[17]

The management contract review process contains several inherent challenges to both the Commission and the tribes. First, because the decision of the Chairman of the Commission to approve a management contract may constitute a "major federal action significantly affecting the quality of the human environment," the Chairman generally will not approve a management contract until the environmental assessment requirements set forth in the National Environmental Policy Act (NEPA) are addressed.[18] These requirements dramatically increase the time and resources necessary to complete the management contract review process.

Complicating matters further is the fact that consultants often fail to label such agreements "management contracts." Understandably, consultants seek to avoid engaging the lengthy process of management contract review and all the associated burdens, such as IGRA's term and fee requirements and background investigations as well as the environmental protocol set forth in NEPA and other federal laws. Accordingly, a consultant often seeks to portray a management contract as something else, such as an "equipment lease," a "financing agreement," a "consulting contract," a "development agreement," or an "employment contract."

Moreover, the tribe and the consultant often enter two or more different agreements that the Commission must evaluate to understand the relationship between the tribe and the contractor. Ultimately, the Commission must determine whether the agreements, alone or in concert, provide sufficient indicia of control to constitute "management" as that term is used in IGRA.[19] Because of the unwieldiness of the man-

17. In exceptional circumstances, IGRA allows a management contract to endure for seven years and to provide the contractor forty percent of revenues.

18. *See* 42 U.S.C. § 4332(2)(C).

19. The management contract review process is a very crude tool to meet Congress's objectives to insure that tribes are the primary beneficiaries of Indian gaming and to make certain that the contractors are suitable parties to work in the industry. Consultants who stop short of management and other vendors are not subject to the limitations on revenue or the term of the contract. Moreover, these non-management contractors need not comply with the background investigation for suitability.

agement contract review process and the ease with which tribes can avoid it, tribes only rarely enter management contracts.

If, however, a tribe or contractor fails to submit a management contract for approval, the Commission may take enforcement action against either the contractor or the tribe. Because the management contract review provision is designed to insure that the tribe is the primary beneficiary of its gaming revenues, a tribe may be able to recover fees paid to the manager who manages without an approved contract.

3. Compliance with Regulatory Mandates

The Commission also has substantial other responsibilities. The Commission reviews tribal ordinances to insure that the ordinances comply with the provisions of IGRA and drafts regulations designed to meet the various purposes of IGRA. To protect the industry as well as the public confidence in the integrity of the industry, and also to protect the gaming revenues as a tribal financial asset, the Commission monitors the industry closely and requires it to operate under strict controls.[20]

Because casinos are primarily cash businesses, the industry is particularly vulnerable to fraud, theft, embezzlement, and associated crimes. With this in mind, the Commission has enacted a set of regulations entitled the "Minimum Internal Control Standards" for Indian gaming operations.[21] The "MICS" address the handling of money, the operation of individual types of gaming, the scope of surveillance, and the requirements for internal auditing and accounting, among other things.[22] The Commission ensures compliance with its regulations through technical assistance and education and, when necessary, through administrative enforcement actions, fines, and closure orders.

III. THE GROWTH AND STRUCTURE OF THE INDIAN GAMING INDUSTRY

The Indian gaming industry has grown rapidly in the past dec-

20. Tribal gaming commissions serve as the front-line regulators in this regard. As tribal commissions develop expertise and sophistication, the Commission's role may shift from compliance and enforcement to mere oversight. Moreover, through tribal-state compacts, many states have become involved in the regulation of Indian casinos. Indeed, in states with Class III tribal-state compacts, tribal gaming operations are subject to three levels of regulation: federal, state and tribal.

21. 25 C.F.R. pt 542 (2000).

22. The federal MICS promulgated by the NIGC are not dissimilar from the control standards adopted, for example, by the New Jersey Casino Control Commission. *See* N.J. ADMIN CODE 19 § 45-1 (1999).

ade. According to industry estimates, when IGRA was enacted in late 1988, the Indian gaming industry earned approximately $500 million in annual revenues. Based on audit reports tribes are required by law to submit to the National Indian Gaming Commission, the industry earned revenues of approximately $9.7 billion last year. Indian gaming is estimated to account for approximately one-tenth of all legal gambling nationwide.

A. Future Growth

Despite the near twenty-fold increase in Indian gaming over the past ten years, industry experts predict substantial additional growth because of the legalization of Indian gaming in California. After two successful statewide voter initiatives, the governor of California signed compacts this past spring with sixty different Indian tribes located throughout the state. Industry experts estimate that the Indian gaming industry in California alone may ultimately produce revenues of $10 billion, making it as large as the entire Indian gaming industry as it currently exists.

To provide a yardstick to understand the magnitude of current Indian gaming revenues, the Clinton administration proposed a budget slightly in excess of $1 billion for all federal Indian programs for the fiscal year that began on October 1, 2000.

Unfortunately, the yardstick fails in some respects to provide an accurate portrayal of Indian wealth. While Indian gaming revenues dwarf federal expenditures for Indian programs, Indian gaming revenues are not equally distributed among tribes. Indian gaming revenues are generally enjoyed, of course, only by the tribes that engage in gaming.[23]

B. Concentration of the Industry

The Indian gaming industry is a boon to relatively few tribes. Two-thirds of the federally recognized tribes and native villages in the United States have no gaming facilities. Among the one third of tribes that operate gaming facilities, Indian gaming revenues are not earned evenly across the country. Like many industries, the Indian gaming in-

23. A couple of exceptions to this have developed. In California, for example, the tribal-state compacts provide for the creation of a trust fund designed to provide up to $1.5 million a year for each non-gaming tribe within the state. In Washington, the tribal-state compacts limit the number of machines each tribe is allocated. The compacts give non-gaming tribes a right to an allocation of gaming machines; non-gaming tribes may then lease their allocation rights to gaming tribes.

dustry is concentrated. A handful of highly successful operations account for most of the revenue. Indeed, twenty of the nearly 310 Indian gaming operations nationwide account for greater than fifty percent of revenues of all operations. And twenty percent of the gaming operations account for eighty percent of the total revenue.

Not surprisingly, the most successful gaming operations are located in close proximity to large urban areas. A handful of tribes blessed by geography and demographics have been fabulously successful. The poorest of tribes have remained the poorest communities in the United States.

C. Uses of Indian Gaming Revenues

While Indian gaming facilities may physically resemble commercial non-Indian gaming establishments in Las Vegas or Atlantic City, Indian casinos are generally owned by tribal governments. Because one hundred percent of net revenues from Indian gaming go directly to those tribal governments, Indian casinos have, in effect, a 100 percent tax rate. From the governmental standpoint, Indian casinos are more akin to state-operated lotteries than to commercial casinos.

IGRA allows tribes to use gaming revenues only for specific purposes.[24] Tribes regularly use such revenues for a variety of governmental purposes, including reservation transportation infrastructure, such as roads and vans or busses, and the development of housing, community centers, and even cultural centers, such as museums. Some have used revenues to fund higher education scholarships for tribal members or to support start-up and development costs for non-gaming tribal businesses.

While IGRA requires tribes to use tribal gaming revenues only for certain purposes, it also allows tribes to distribute a portion of tribal gaming revenues to individual tribe members in "per capita" payments.[25] To distribute per capita payments, a tribe must first enact a "tribal revenue allocation plan" and obtain approval of the plan from the Secretary of the Interior.[26] Any per capita payments of tribal gaming revenues are

24. Tribal gaming revenues may be used only for the following purposes: 1) to fund tribal government operations or programs; 2) to provide for the general welfare of the Indian tribe and its members; 3) to promote tribal economic development; 4) to donate to charitable organizations; or 5) to help fund operations of local government agencies. 25 U.S.C. § 2710(b)(2)(B).

25. 25 U.S.C. § 2710(b)(3).

26. 25 C.F.R. pt.290 (2000).

subject to federal income tax and withholding.[27] To date, the Secretary has approved tribal revenue allocation plans for less than one-third of the gaming tribes.

D. New Tribal Economic and Political Clout

Both as employers and as contributors to political campaigns, tribes have newfound political clout. An industry group estimates that tribal gaming has created approximately 200,000 jobs in Indian gaming facilities.[28] Although many of these jobs have gone to tribal members, some of whom were previously unemployed, an estimated seventy-five percent of employees are non-Indians from local communities.

Tribes have also become more actively involved in politics. A recent study found that tribes had made far greater soft-money contributions to political parties during this election year than in past years.[29]

IV. ONGOING CONTROVERSIES IN INDIAN GAMING

A number of controversies have emerged and arisen repeatedly as tribes in different states have sought to exercise their rights to operate gaming establishments. These controversies, which continue to disrupt the Indian gaming industry across the country, revolve around the following questions: first, what is a compact and who may enter a compact on behalf of a state? Second, can a state demand a share of a tribe's gaming revenues in return for entering the compact? And, third, what is the scope of gaming allowed in a Class III compact?

A. What is a Compact?

In IGRA, Congress enacted into federal law a process that had never been imposed nationwide on state and tribal governments. Aside from identifying the matters that may be addressed in tribal state compacts,[30] Congress failed to provide much guidance as to what it meant by

27. 25 U.S.C. § 2710(b)(3)(D).

28. The Washington, D.C.-based National Indian Gaming Association, a leading tribal gaming association, has published these estimates on its website at www.indiangaming.org/library/index.html.

29. Greg Wright, *Indian Tribes on a Roll With Campaign Donations*, GANNETT NEWS SERVICE, Oct. 1, 2000 (discussing a study by the Center for Responsive Politics). On the other hand, the same study apparently found that the 557 federally-recognized tribes combined had nevertheless given less cash than a single corporation, AT&T, proving that all things are relative.

30. *See supra* Part II.A.

"compact" and how one should be entered.[31] Little more can be gleaned from IGRA and its legislative history[32] than that Congress intended a compact to be an agreement between two sovereigns.

Congress clearly sought to be respectful of the fact that it was legislating a relationship between two sovereigns. However, in being respectful of state sovereignty, Congress failed to instruct the states as to what is required of a state government to enter a compact. While the determination as to how to enter a compact ought to be left to individual state governments out of respect for state sovereignty, states and tribes have employed substantial resources litigating about the requirements for entering compacts. The ironic result is that IGRA, a federal law, has driven the development of a great deal of *state* constitutional law.

Faced with the necessity of negotiating and approving compacts, states have adopted several different models for implementing IGRA's compacting scheme. Most states have ultimately adopted a model like the federal treaty-making model with the executive negotiating a compact that becomes lawful only upon ratification by the legislature. Other states have proceeded in other manners.

The result in several states was the development of state constitutional law on the separation of powers. In New Mexico, for example, the governor entered compacts with Indian tribes only to be sued by state legislators who were not consulted in the process.[33] Finding that the

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31. *See* 25 U.S.C. § 2710(d)(3)(C).

32. IGRA's legislative history consists primarily of the following:

A. Three congressional committee reports: 1) REPORT ON THE IGRA FROM THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, S. REP. NO. 446, 100th Cong., 2d Sess. (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071; 2) REPORT ON ESTABLISHING FEDERAL STANDARDS AND REGULATIONS FOR THE CONDUCT OF GAMING ACTIVITIES ON INDIAN RESERVATIONS AND LANDS, AND FOR OTHER PURPOSES FROM THE HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, H.R. REP. NO. 488, 99th Cong., 2d Sess. (1986); and, 3) REPORT ON ESTABLISHING FEDERAL STANDARDS AND REGULATIONS FOR THE CONDUCT OF GAMING ACTIVITIES ON INDIAN RESERVATION AND LANDS FOR OTHER PURPOSES FROM THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, S. REP. NO. 493, 99th Cong., 2d Sess. (1986).

B. Three entries in the Congressional Record: 1) 134 CONG. REC. 25,369-25,381 (Sept. 26, 1988) (House consideration for S. 555, Sept. 26, 1988 (Passed House, Sept. 27, 1988)); 2) 134 CONG. REC. 24,016-24,037 (Sept. 15, 1988) (Senate consideration and passage of S. 555, Sept. 15, 1988); and, 3) 134 CONG. REC. 2012-2021 (daily ed. Apr. 21, 1986) (House consideration and passage of H.R. 1920).

C. Several hearing transcripts, including, among others, *Hearing Before the Select Committee on Indian Affairs on S.555 and S.1303*, 100th Cong., 1st Sess. (June 18, 1987).

33. New Mexico *ex rel.* Clark v. Johnson, 904 P.2d 11 (N.M. 1995).

question implicated "fundamental constitutional questions of great public importance," the Supreme Court of New Mexico accepted the case within its original jurisdiction.[34] After evaluating the state constitutional doctrine of separation of powers, the supreme court sided with the legislators, holding that the governor's action in negotiating and signing a compact with an Indian tribe was not an action to execute existing state law, but an attempt to create new law.[35] Accordingly, the court held that the right to enter compacts rested with the legislature.[36] The court suggested that the legislature could take action to ratify the governor's action or could, consistent with state principles of separation of powers, authorize the governor to negotiate and enter a compact on the state's behalf.[37]

In Arizona, the legislature enacted a statute empowering the governor to negotiate compacts.[38] The governor negotiated and entered compacts with several tribes and then, following the *Seminole* decision, refused to negotiate compacts with any additional tribes. Soon thereafter, the people of Arizona overwhelmingly approved a ballot initiative directing the governor to offer the additional tribes the same compacts that the state had given the original tribes. The Supreme Court of Arizona was then forced to choose between the position of the governor or the people who had expressed their will through the initiative process. The court ruled for the people, holding that the people had taken away the "the almost unlimited power the legislature gave the governor" and properly "exercised their power to remove the governor's unfettered discretion to decide on the terms of the compact[.]"[39] Because "both the legislators and governor are elected to serve the will of the people," the court held that the will of the people, when made apparent through the

34. *Id.* at 18.

35. *Id.* at 23.

36. *Id.*

37. Following the New Mexico Supreme Court's holding in the *Johnson* case that the governor lacked authority to execute the compacts, federal officials were left with the difficult question of how to proceed in light of the fact that the Secretary of the Interior had already approved those compacts. On the theory that the Secretary was entitled to rely in good faith on the actions of the governor in approving them, the United States argued that the compacts were "in effect" when they were approved by the Secretary. Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1552 (10th Cir. 1997). Agreeing that it was bound by the state court's decision in *Johnson* on the separation of powers question, the Tenth Circuit later held that the compacts were invalid and that the tribes could not lawfully rely upon them.

38. *See* Salt River Pima-Maricopa Indian Community v. Hull, 945 P.2d 818 (Ariz. 1997).

39. *Id.* at 824-25.

initiative process, trumps the authority of the governor or the legislature.[40] The court ordered the governor to sign the compacts.

In Kansas, the state attorney general sued the state governor, arguing that the governor had no authority under the state's constitution to enter compacts that provided for "a new and separate function" to be grafted onto the state lottery agency.[41] The Supreme Court of Kansas agreed, finding no constitutional impediment to the governor's authority to negotiate compacts, but indicating that the power to bind the state to such a compact lies within the legislative branch.[42]

Other courts have wrestled with similar questions involving separation of powers. In Mississippi, for example, a federal court held that the governor had the authority to enter into a compact by virtue of a state law allowing the governor to transact business on behalf of the state.[43] In Louisiana, a federal court reached a similar conclusion; it held that IGRA does not specify which branch of state government should negotiate with a tribe and asserted that "it is simply not the case" that the governor usurped the authority of the legislature.[44]

The constitutional questions have also arisen outside the context of separation of powers. In Michigan, for example, a state trial-level court has held that the state legislature may not enact a compact through the summary process of resolution, but must follow the more rigorous procedures of a bill to become lawful legislation.[45]

In short, IGRA has had the unintended consequence of forcing the development of state constitutional law. While the compacting process evinces Congress's respect for the state sovereign, it may not have been the most efficacious process to implement. In some cases, uncertainty as to state procedures for enacting compacts has caused serious delay in the implementation of valid gaming compacts, leaving Indian tribes in the unfortunate position of choosing between operating illegal gaming or not operating at all. For many poor tribes who want to abide

40. *Id.* at 825.

41. Kansas *ex rel.* Stephan v. Finney, 836 P.2d 1169 (Kan. 1992).

42. A Michigan appellate court has reached a similar conclusion. McCartney v. Attorney General, 587 N.W.2d 824 (Mich. App. 1998).

43. Willis v. Fordice, 850 F. Supp. 523, 532-33 (S.D.Miss.1994), *aff'd*, 55 F.3d 633 (5th Cir.1995).

44. Langley v. Edwards, 872 F. Supp. 1531, 1535 (W.D.La.1995), aff'd, 77 F.3d 479 (5th Cir. 1996). *See also* Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp 37, 46, (D.D.C. 1993).

45. *See also* Taxpayers of Mich. Against Casinos v. Michigan, No. 99-90195 (Ingham County Cir. Ct. Jan. 18, 2000). The case is on appeal.

by the law, the choice has been a difficult one. Had Congress chosen an alternative method for compacting, the development of Indian gaming may have followed a more smooth trajectory.

B. Revenue Sharing Among Tribes and States

Another aspect of Indian gaming that has sparked a good deal of litigation is the practice of revenue sharing. While IGRA gives states the right and responsibility to negotiate with tribes to protect the limited interests set forth in IGRA, including the collection of fees from tribes related to the costs of any state regulation, IGRA explicitly disclaims any state authority to impose taxes on Indian gaming revenues.[46] Despite IGRA's specific and narrow provision as to how Indian tribes may use gaming revenues and despite the prohibition on taxation, many states and tribes have negotiated compacts in which tribes agree to share a portion of gaming revenues with state and/or local governments. While some tribes have agreed to such terms reluctantly or under protest, other tribes have willingly accepted such terms as a cost of doing business.

IGRA's prohibition on state taxation of Indian gaming revenues has required the Secretary of the Interior to be creative in finding ways to approve compacts that contain revenue sharing provisions. The Secretary has generally taken the position that such compacts are lawful only if the tribe obtains separate consideration for revenue sharing. One example of such consideration is an exclusivity agreement giving tribes a monopoly over gaming. Absent such consideration, the Secretary has taken the position that the sharing of revenue works like a tax.

Doctrinally, it is difficult to reconcile revenue sharing arrangements with Congress's intentions in IGRA. It is apparent from the language and structure of IGRA that Congress recognized a tribe's unmitigated right to engage in Class III gaming in a state that allows any such gaming. The compacting process was not intended to give states an avenue to obstruct this right, but rather to give states an opportunity to address legitimate public policy concerns related to the tribes' exercise of the right. In other words, the compacting process was intended to give states a voice in Indian gaming to address legitimate concerns, not to give states an opportunity to demand a cut of the profits.

The decision in the *Seminole* case, however, dramatically

46. Federal common law generally prohibits states from imposing taxes on tribal governments. *Cf.* County of Yakima v. Confederated Tribes and Bands of the Yakima Nation, 502 U.S. 251, 257 (1992); McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164 (1973).

changed tribes' negotiation positions. Prior to *Seminole*, states not only had the right to negotiate with tribes, they also had the responsibility to negotiate. Otherwise, a tribe could bring an action in federal court where a mediator, rather than the parties, would choose the terms of Indian gaming in the state. In other words, if a state wanted to have a voice in addressing its legitimate concerns, it had to negotiate.

Following *Seminole*, tribes still have the legal obligation to enter compacts prior to engaging in Class III gaming. Indeed, it remains unlawful for tribes to operate Class III gaming without a compact.[47] Tribes lack, however, any means of forcing a state to live up to its continuing *responsibility* to negotiate. Tribes have a right without a remedy.

As a political matter, revenue-sharing agreements have served a useful role in encouraging states to sign compacts.[48] Where tribes once had a stick to force states to negotiate, tribes are now forced to offer carrots.[49] Indeed, in states where opposition to gaming is high, revenue sharing provides an incentive for state officials to sign compacts. Absent revenue sharing, it is difficult to determine what incentive a state official might have to sign a compact.

Opposition to tribal casinos frequently arises in county and local governments, many of which provide services, such as road maintenance and traffic control, that are highly impacted by large scale Indian gaming facilities. While tribes remain outside the domain of county planners, some tribes have embraced local governments by promising to help rejuvenate local economies and by agreeing to provide payments in lieu of taxes to local governments.[50]

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47. In United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998), the Ninth Circuit refused to allow federal enforcement against a tribe that operated Class III gaming without a compact in circumstances in which the state had invoked its Eleventh Amendment immunity following the *Seminole* case. The Ninth Circuit held that *Seminole* had "emasculated" the provisions of IGRA.

48. Perhaps the most widely-known revenue sharing agreement is the agreement between the Mashantucket Pequot Tribe and the State of Connecticut. According to public sources, the Tribe's Foxwoods casino grosses nearly one billion dollars a year. *See* Connecticut v. United States Dep't of the Interior, 2000 WL 1375578 (2d Cir. Sept. 25, 2000), slip op. at 2. During the past decade, the Tribe's agreement has reputedly provided the state more than one billion dollars.

49. Ongoing litigation in federal court in New Mexico over payments to that state under a revenue-sharing agreement will likely address whether revenue-sharing agreements are lawful.

50. The lands on which Indian tribes operate casinos are not subject to state property taxes. IGRA authorizes and governs Indian gaming only on lands that are within Indian reservations or are restricted Indian trust lands, both of which are immune from state or local taxation. *See* The Kansas Indians, 72 U.S. (5 Wall) 737 (1866).

C. *The Scope of Gaming Allowed Under IGRA*

One of the prime areas of controversy has been the scope of gaming allowed under IGRA. According to the language of IGRA, an Indian tribe may engage in Class III gaming on Indian lands if such activities are "are located in a state that permits such gaming for any purpose by any person, organization or entity."[51] This language is the subject of great disagreement as to whether it requires states and tribes to negotiate over particular types of games.

On the one hand, the language can plainly be interpreted to indicate that if a state allows any Class III gaming activities, IGRA requires states to negotiate with tribes generally about Class III games and does not necessarily limit the negotiations to the particular Class III games that are offered under state law. Under this reading, the language constitutes an adoption of the criminal-prohibitory versus civil-regulatory distinction set forth in *Cabazon.*

In Connecticut, for example, a state statute allowed charities and religious organizations to conduct "Las Vegas night" fund raisers. In seeking to limit the scope of compact negotiations, state officials initially argued that "the limited authorization" of some casino-style games by non-profit organizations "does not amount to a general allowance of" casino-style gaming. The state argued that Indian tribes could conduct such games, but only "in accordance with, and by acceptance of," the state legal and regulatory apparatus with the inherent limitations on such gaming.

In *Mashantucket Pequot Tribe v. Connecticut*, the Second Circuit disagreed with the state's argument.[52] It read IGRA to require a determination whether, as a matter of criminal law and public policy, the state prohibits Class III gaming. It found the state's "Las Vegas nights" law dispositive on this issue because the statute demonstrated that the state had adopted a regulatory rather than prohibitory policy toward gambling in general. The court rejected the state's argument that existing state law should control the extent of play of the subject games. It held that the extent to which such games could be offered by tribes was a proper subject for compact negotiation.[53]

In California, the Ninth Circuit adopted a far more restrictive in-

51. 25 U.S.C. § 2710(d)(1)(B).
52. 913 F.2d 1024, 1026-27 (2d Cir. 1990).
53. *Id.* at 1032.

terpretation of IGRA. In *Rumsey Indian Rancheria v. Wilson*,[54] Indian tribes argued that because the state allowed video lottery terminals, parimutuel horse racing, and certain types of gambling card games, the state demonstrated a regulatory rather than prohibitory policy toward gambling in general and the tribes should be allowed to negotiate a wide variety of gaming activities. The Ninth Circuit disagreed, ruling that "IGRA does not require a state to negotiate over one form of Class III gaming simply because it has legalized another, albeit similar form of gaming."[55] Rather, "a state need only allow Indian tribes to operate games that others can [already] operate, but need not give tribes what others cannot have."[56] Thus, the Ninth Circuit rejected the theory that IGRA retained the criminal prohibitory versus civil regulatory distinction that was set forth in *Cabazon*.

At least in some circumstances, it seems clear that it is possible to divide the broad range of Class III gaming into portions that the state prohibits and portions that do not violate state policy. For example, if a state prohibits gambling on cock-fighting, it is doubtful that any court would hold the state liable for failing to negotiate in good faith regarding that activity. On the other hand, what if the state bans seven-card poker but allows five card poker, or bans single-deck blackjack, but allows blackjack that is dealt out of a six-deck shoe? In such circumstances, it seems that the proper approach is a negotiation process in which the state can explain its concerns about the particular evil that accompanies a particular game.

Another interesting problem is the interpretation of the word "permits." Recall that IGRA requires negotiation over Class III gaming activities "in a state that permits such gaming." What types of state action must a state take to "permit" such gaming? What if a state has a century-old law on the books that prohibits gambling, but the law is never enforced against charities that regularly violate this law in an open manner?

In some cases, the issue of the scope of gaming can lead to an interesting philosophical discussion as to who sets state policy toward gambling. Is it the legislature that sets such policy? Or, is it the prosecutor who makes the discretionary decision as to whether or not to prosecute violations? What if the legislature enacted the law a century earlier and it has never been prosecuted? What if the only criminal gambling

54. 62 F.3d 1250 (9th Cir. 1994) (as amended on denial of rehearing, 1996).
55. *Id.* at 1258.
56. *Id.*

law on the books was held unlawful by the state supreme court for a technical deficiency and the legislature never reenacted a proper law? What if the only reported case involving the law held that the law was unconstitutional as applied but did not reach the question of whether the law was unconstitutional as written?

The broader evaluation allowed under a criminal-prohibitory versus civil regulatory distinction may be helpful in providing a framework here in this area. It may be easier to determine a state's "gestalt" toward gambling by looking at a wider variety of state action.

V. CONCLUSION

In summary, IGRA has been a law of unintended consequences. And because of the compacting process that it has created, it has posed numerous controversies that remain unresolved or are being resolved in a piecemeal fashion one state at a time. The legal obstacles and uncertainties posed by IGRA have undoubtedly slowed the growth of this young and dynamic industry. The industry as a whole has, however, been resilient.

The industry is taking root and will prosper as the legal controversies are resolved. Whether the remaining issues are resolved in favor of, or against, tribal gaming interests, the industry itself will stand on firmer footing. Because of the breadth and wealth of the industry and the number of people employed in Indian gaming activities, Indian gaming has become a powerful political constituent in House and Senate districts nationwide.