Indian Gaming: Legal Background and the Indian Gaming Regulatory Act (IGRA)

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Summary

In the 1980s, a number of Indian tribes developed high-stakes bingo and other gaming operations to raise non-federal revenue to fund their governments. In 1988, after the Supreme Court held, in *California v. Cabazon Band of Mission Indians*, that federal and tribal interests in Indian gaming preempted state law such that state regulation of gaming did not apply to tribal gaming operations on tribal land, Congress passed the Indian Gaming Regulatory Act (IGRA). IGRA provides a statutory basis for Indian tribes to conduct gaming on "Indian lands" and establishes a regime for regulating Indian gaming. It prohibits gaming on newly acquired land—that is, land acquired in trust after October 17, 1988—subject to two exceptions: the "two part determination"; and, land taken in trust as part of a land settlement, restoration of land for a restored tribe, or the initial reservation of a newly acknowledged tribe. In establishing a framework for regulating Indian gaming, IGRA was intended to balance the interests of the tribes, the states, and the federal government in Indian gaming and apportion responsibility for regulating it accordingly. To do this, IGRA divides Indian gaming into three classes: class I includes traditional or social gaming and is subject to exclusive tribal regulation; class II covers bingo and similar games and is subject to tribal regulation and oversight by the National Indian Gaming Commission (NIGC); and, class III includes all other gaming, including casino gaming or Las Vegas-style gaming, and generally can only be conducted pursuant to tribal-state compacts that must be approved by the Secretary of the Interior. IGRA also created the NIGC to provide regulation of Indian gaming on the federal level.

The tribal-state compact is the key to tribal casino gaming. Recognizing that some states might simply stonewall tribes and refuse to negotiate class III gaming compacts, Congress required that upon a request from a tribe to negotiate a compact, a state must negotiate in good faith. In order to create an incentive for states to negotiate in good faith, IGRA provided that tribes could sue states in federal district court for failing to negotiate in good faith. IGRA prescribes a series of steps to ensure that ultimately a tribe would be able to engage in class III gaming even over the state's objections. However, in *Seminole Tribe of Florida v. Florida*, the Supreme Court held that Congress did not have authority under the Indian Commerce Clause to waive the states' sovereign immunity to suits by tribes to enforce the good faith negotiation requirement. This decision, therefore, removed IGRA's practical guarantee that tribes would be able to engage in class III gaming over the objections of the state and gave states a veto over tribal class III gaming—a state can simply refuse to negotiate a class III compact to deny a tribe the ability to engage in class III gaming. Increasingly, states have demanded significant revenue sharing and non-gaming concessions in exchange for class III compacts.

In the last five years, there have been several bills introduced in Congress to amend IGRA, primarily to restrict off-reservation gaming. Two bills have been introduced in the 112th Congress to amend IGRA. H.R. 4033, the Giving Local Communities a Voice in Tribal Gaming Act, would give local jurisdictions the right to veto a class III gaming operation that the state has agreed to in a compact. S. 771, the Tribal Gaming Eligibility Act, would restrict the availability of off-reservation land for gaming by requiring that tribes demonstrate, by meeting certain criteria, that they have modern and historical ties to the land on which they propose to game.

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Introduction

Today, Indian gaming is big business. In 2010, 237 of the 565 federally recognized tribes operated 422 tribal gaming enterprises which generated $25.6 billion in revenues.[1] Twenty-eight states have some form of Indian gaming.[2] Indian gaming accounted for 25% of the total revenues of the legal gaming industry and is its fastest-growing segment.[3]

Indian gaming started out small.[4] In the 1980s, when the federal government severely cut funds for Indian tribes, Indian tribes began to turn to high-stakes bingo and other gaming to raise money to fund tribal government operations.[5] The Department of the Interior and other federal agencies actively encouraged tribal bingo to raise revenue to fund tribal governments.[6] However, the legality of these operations was uncertain. Local and state authorities threatened to shut down these operations, claiming that they violated state law.[7] Although federal courts enjoined state enforcement actions,[8] states continued to pursue them. The legality of Indian gaming under federal law was also questionable.[9] Meanwhile, a number of bills were introduced in Congress to regulate the growing Indian gaming industry.[10]

In 1987, in *California v. Cabazon Band of Mission Indians*,[11] the Supreme Court settled that Indian tribes could engage in gaming on tribal land free from state law. The Court held that

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[1] http://www.nigc.gov/LinkClick.aspx?fileticket=1P8h79gnJOU%3d&tabid=67; http://www.indiangaming.org/info/2011_Annual_Report.PDF.

[2] http://www.nigc.gov/Reading_Room/List_and_Location_of_Tribal_Gaming_Operations.aspx.

[3] Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 Drake L. Rev. 413, 414-416 (2010) (*The Hand That's Been Dealt*).

[4] In 1985, the Department of the Interior estimated that 80 tribes were conducting gaming on their reservations with some high-stakes bingo establishments earning as much as $1 million a month. Steven Andrew Light & Kathryn R.L. Rand, Indian Gaming and Tribal Sovereignty: The Casino Compromise (University Press of Kansas 2005) (Indian Gaming and Tribal Sovereignty) at 42.

[5] *Id.* at 39; Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L. J. 99, 110- 112 (2010-2011).

[6] Kevin K. Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 Ariz. St. L. J. 302, 308 (2010-2011).

[7] Ralph A. Rossum, The Supreme Court and Tribal Gaming (University Press of Kansas 2011) at 10-16.

[8] *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986), *aff'd sub nom*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

[9] It appears that prior to IGRA, the federal government had authority to shut down Indian gaming using federal laws that incorporated state criminal laws. Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act: The Return of the Buffalo to Indian Country or Another Usurpation of Tribal Sovereignty?*, 42 Ariz. St. L.J. 17, 34-41 (2010-2011). Federal authorities never acted to shut down tribal bingo operations. However, federal authorities successfully pursued actions against individuals engaged in Las Vegas-type gaming pursuant to tribal ordinances. *Id.* (discussing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) and *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986)).

[10] Steven Andrew Light & Kathryn R.L. Rand, Indian Gaming Law: Cases and Materials (Carolina Academic Press 2008) (Indian Gaming Law) at 79-83; Ducheneaux, *supra* note 5 at 116-16; see e.g., H.R. 4566, 98th Cong. (1983); H.R. 1920, 99th Cong. (1985); S. 902, 99th Cong. (1985); H.R. 1079, 100th Cong. (1987) H.R. 2507, 100th Cong. (1987).

[11] 480 U.S. 202 (1987).

federal and tribal interests supporting tribal gaming preempted state laws regulating tribal gaming on tribal land. It did not address federal authority over Indian gaming.

Cabazon focused congressional efforts to regulate Indian gaming that culminated in the passage of the Indian Gaming Regulatory Act[12] (IGRA).[13] IGRA provides a statutory basis for Indian tribes to conduct gaming on "Indian lands"; establishes a framework for regulating Indian gaming that divides authority between tribes, states, and the federal government; and created the National Indian Gaming Commission (NIGC) with authority to regulate tribal gaming on the federal level. IGRA prohibits gaming on most land acquired in trust after its effective date, October 17, 1988.[14] However, there are important exceptions for certain newly acquired lands.[15]

For the purposes of regulation, IGRA divided Indian gaming into three classes: class I gaming includes social or traditional gaming played for prizes of minimal value[16] and is subject to exclusive tribal regulation;[17] class II gaming includes bingo and similar games and non-banked card games,[18] and is subject to regulation by the tribes and NIGC,[19] and may be conducted only in states that allow such gaming;[20] and, class III gaming includes all other games[21] and may be conducted only pursuant to tribal-state compacts approved by the Secretary of the Interior (Secretary) in states that allow such gaming or pursuant to procedures approved by the Secretary under circumstances specified by IGRA.[22]

IGRA also created the NIGC.[23] NIGC has responsibility to monitor class II gaming and to approve tribal gaming ordinances and management contracts, and authority to impose fines and close gaming operations based on a violation of IGRA, NIGC regulations, or tribal gaming ordinances.

Class III gaming is the most lucrative class of gaming,[24] and a tribal-state compact is the key to a tribe's ability to engage in class III gaming. IGRA requires that states negotiate class III gaming compacts in "good faith."[25] In order to provide states with an incentive to negotiate class III gaming compacts, IGRA provided that tribes may sue states in federal district court to enforce the good faith requirement.[26] Upon a judicial finding of bad faith, IGRA provided a mechanism by

[12] 25 U.S.C. §§2701 *et seq.*

[13] Rossum, *supra* note 7 at 6.

[14] 25 U.S.C. §2719.

[15] For a detailed discussion of these exceptions see CRS Report RL34325, *Indian Gaming Regulatory Act (IGRA): Gaming on Newly Acquired Lands*, by (name redacted).

[16] 25 U.S.C. §2703(6).

[17] 25 U.S.C. §2710(a)(1).

[18] 25 U.S.C. §2703(7).

[19] 25 U.S.C. §2710(b).

[20] 25 U.S.C. §2710(b)(1)(A).

[21] 25 U.S.C. §2703(8).

[22] 25 U.S.C. §2710(d).

[23] 25 U.S.C. §2704.

[24] See, Indian Gaming and Tribal Sovereignty, *supra* note 4 at 11 (noting that casino games typically are more profitable than even high-stakes bingo.)

[25] 25 U.S.C. §2710(d)(3)(A).

[26] 25 U.S.C. §2710(d)(7)(A)(i).

which tribes may engage in class III gaming in the face of recalcitrant states.[27] However, in *Seminole Tribe of Florida v. Florida*,[28] the Supreme Court held that Congress did not have authority under the Indian Commerce Clause to waive the states' sovereign immunity to lawsuits by tribes to enforce the requirement that states negotiate class III gaming compacts in good faith. *Seminole* shifted the balance of power struck in IGRA between the tribes and the states in favor of the states by taking away the tribes' recourse when states refuse to negotiate class III compacts or demand concessions prohibited by IGRA.[29] Increasingly, states have demanded that tribes agree to share gaming revenues and make concessions on issues unrelated to gaming in order to obtain class III gaming compacts.[30]

More recently, Congress's attention has focused primarily on off-reservation gaming—that is, gaming on Indian lands located away from a tribe's reservation. There have been several bills introduced which would amend IGRA to limit tribes' ability to game on land located away from their reservations.

Pre-IGRA Legal Background of Indian Gaming

Federal Law

In the 1980s, the Department of the Interior and other executive branch agencies supported tribes developing gaming operations as a way to raise money to fund their governments. However, it appears that tribal bingo operations violated the Federal Assimilative Crimes Act[31] (FACA) and the Organized Crime Control Act[32] (OCCA). Both of these acts made it a federal crime to conduct gaming in Indian country if that gaming would violate state law if it were conducted in the state.[33] In addition, the Johnson Act[34] prohibited gaming devices, such as slot machines, in Indian country. Although federal officials never took steps to shut down tribal bingo,[35] these operations were vulnerable to being shut down should the federal government have a change of heart and choose to enforce FACA or OCCA.

California v. Cabazon Band of Mission Indians

In 1987, the Supreme Court considered whether states could enforce state gaming laws against tribal gaming operations on tribal land. The Cabazon and Morongo Bands of Mission Indians are two federally recognized tribes with reservations in Riverside County, California.[36] Each Band

[27] 25 U.S.C. §2710(d)(7)(B)(iii).

[28] 517 U.S. 44 (1995).

[29] Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. Legis. 39, 41-42 (2007).

[30] *Id.* at 59-60; Indian Gaming and Tribal Sovereignty, *supra* note 4 at 58.

[31] 18 U.S.C. §13.

[32] 18 U.S.C. §1955.

[33] Fletcher, *supra* note 29 at 21-24, 34-41 (discussing *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950) (FACA); *United States v. Dakota*, 796 F.2d 186 (OCCA); *United States v. Faris*, 624 F.2d 890 (OCCA)).

[34] 15 U.S.C. §1175.

[35] Clinton, *supra* note 9 at 40-41.

[36] 480 U.S. at 204-205.

conducted bingo on its reservation pursuant to a tribal ordinance approved by the Secretary.[37] Cabazon also had a card club.[38] All the tribes' games were open to the public and played predominantly by non-Indians.[39] The profits from these games were the tribes' sole source of income and the games were a major source of employment for tribal members.[40]

The state sought to enforce Section 326.5 of the California penal code. Section 326.5 does not strictly prohibit bingo. Rather it permits it under certain circumstances: the games must be operated and staffed by members of designated charitable organizations who may not be compensated for their work; profits must be kept in separate accounts and used only for charitable purposes; and, prizes may not exceed $250 per game.[41] Riverside County also sought to apply its ordinances regulating bingo and prohibiting the card games.[42] The federal district court and the U.S. Court of Appeals for the Ninth Circuit both held that the state and the county did not have authority over the tribal bingo and card games.[43]

The Majority Opinion

The Supreme Court began its analysis by noting that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided."[44] California and the county argued that Congress provided for their authority over the tribal games under Public Law 280[45] and OCCA.[46]

Public Law 280 granted to certain states, including California, criminal and civil adjudicatory jurisdiction over Indian country. Therefore "when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation …, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court."[47]

Rejecting California's argument that its gaming laws were criminal in nature because they carried criminal penalties, the Court held that the difference between laws that are criminal in nature and those that are civil in nature depends on whether the law is "prohibitory" or "regulatory."[48] "The shorthand test is whether the conduct at issue violates the State's public policy."[49] The Court concluded, "[i]n light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that

[37] *Id.* at 205.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id*

[43] *Cabazon Band of Mission Indian v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986).

[44] 480 U.S. at 207 (internal quotation marks and citation omitted).

[45] 67 Stat. 588, as amended 18 U.S.C. §1162, 28 U.S.C. §588.

[46] 18 U.S.C. §1955.

[47] 480 U.S. at 208.

[48] *Id.* at 208-210.

[49] *Id.* at 209.

California regulates rather than prohibits gambling in general and bingo in particular."[50] Because Section 326.5 was regulatory in nature, Public Law 280 did not authorize California to enforce it on the reservations.

The Court also rejected the state's and county's argument that they had authority to enforce state law on the reservations under OCCA. "There is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect.... [T]here is no warrant for California to make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes."[51]

The tribes urged the Court to simply affirm the lower court without further analysis, relying on the statement from *McClanahan v. Arizona State Tax Comm'n* that "'state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'"[52] However, the Court noted that the law is not that black and white.[53] In particular, the Court noted two cases concerning on-reservation tribal sales of cigarettes to non-Indians in which the Court held that even though Congress did not expressly authorize the states to apply its sales tax on the tribes, the state could require the tribes to collect state sales tax.[54] Because *Cabazon* also involved a "state burden on tribal Indians in the context of their dealings with non-Indians,"[55] the Court determined that:

> [d]ecision in this case turns on whether state authority is pre-empted by the operation of federal law; and state jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.[56]

The Court characterized the federal goals of "encouraging tribal self-sufficiency and economic development" as "important."[57] In support of that conclusion, the Court cited a number of executive branch policies and actions to demonstrate the magnitude of these interests: a statement by the President that, as part of the overriding policy of self-determination, tribes needed to reduce their dependence on federal funds;[58] the Department of the Interior's (Interior's) promotion of tribal bingo enterprises by making grants and guaranteeing loans to construct bingo facilities, approving tribal ordinances establishing and regulating tribal bingo, reviewing tribal bingo management contracts, and issuing detailed guidelines governing that review;[59] and the Department of Housing and Urban Development and the Department of Health and Human

[50] *Id.* at 211.

[51] *Id.* at 213-214.

[52] *Id.* at 215, quoting *McClanahan*, 411 U.S. 164, 170-171 (1973).

[53] 480 U.S. at 214-215.

[54] *Id.* discussing *Moe v. Confederated Salish and Kootenai Tribes*, 423 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

[55] 480 U.S. at 216.

[56] *Id.* at 216 (internal quotation marks and citations omitted).

[57] *Id.* at 217.

[58] *Id.* n. 20, quoting 19 Weekly Comp. of Pres. Doc. 99 (1983).

[59] *Id.* at 217-218.

Services providing financial assistance for the construction of bingo facilities.[60] The Court wrote that those policies and actions, "which demonstrated the Government's approval and active promotion" of tribal bingo, were "of particular relevance" because gaming was the tribes' sole source of revenues and without it, they would not be able to realize the federal policy goals of self-determination and economic self-sufficiency.[61]

The state and county sought to minimize these interests by arguing that the tribes were merely marketing an exemption from state law. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[62] the Court "held that the State could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services, because the Tribes had no right to market an exemption from state taxation to persons who would normally do their business elsewhere."[63] The Court distinguished the revenue generated from gaming from the revenue generated by cigarette sales based on the degree to which the tribes "generated value" in the service or product sold:

> [In *Confederated* Tribes, w]e stated that it is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games.... [T]he Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest.[64]

The Court apparently distinguished bingo enterprises from smokeshops, therefore, because the tribes invested more money and effort in bingo facilities than in smokeshops, and the customers were attracted by more than just the opportunity to play bingo free from the limitations from state law.

The state and county also argued that the Court's opinion in *Rice v. Rehner*[65] supported application of their laws to tribal gaming. In *Rice* the Court held that California could require a federally licensed Indian trader who was a tribal member and operated a general store on a reservation to obtain a state liquor license for sales for off-premises consumption.[66] The Court distinguished *Rice* based on the difference in federal policies concerning tribal and state authority over liquor and federal policies concerning tribal and state authority over gaming on Indian reservations:

> [O]ur decision [in *Rice*] rested on the grounds that Congress had never recognized any sovereign tribal interest in regulating liquor traffic and that Congress, historically, had

[60] *Id.* at 218.

[61] *Id.* at 218-219.

[62] 447 U.S. 134 (1980).

[63] 480 U.S. at 219 (internal quotation marks omitted).

[64] *Id.* at 219-220 (internal quotation marks and citation omitted).

[65] 463 U.S. 713 (1983).

[66] 480 U.S. at 220.

> plainly anticipated that the States would exercise concurrent authority to regulate the use and distribution of liquor on Indian reservations. There is no such traditional federal view governing the outcome of this case, since, as we have explained, the current federal policy is to promote precisely what California seeks to prevent.[67]

Essentially, therefore, *Rice* did not apply to Indian gaming because federal policy, as determined by the executive branch, promoted Indian gaming that was free from state regulation.

California also asserted that its interest in preventing organized crime from infiltrating tribal bingo outweighed the federal and tribal interests and justified imposing its laws on tribal gaming. While acknowledging that the state had a legitimate interest, the Court found it was insufficient "to escape the pre-emptive force of federal and tribal interests apparent in this case" because there was no proof that organized crime had infiltrated the tribes' gaming and because federal policy, as determined by the executive branch, favored tribal gaming.[68]

The Court concluded "that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government."[69]

The Dissent

Three Justices dissented from the majority opinion.[70] The primary argument of the dissent was that action by the executive branch is not enough to exempt Indian gaming from state law—Congress must act to exempt Indian gaming.[71]

The dissent also disagreed with the majority's analysis of Public Law 280. The dissenters believed the plain language of Public Law 280 authorized California to apply its gaming laws to the tribes' bingo operations: "Congress expressly provided that the criminal laws of the State of California 'shall have the same force and effect within such Indian country as they have elsewhere within the state.'"[72]

While acknowledging that the prohibitory/regulatory distinction drawn by the majority was consistent with precedent, the dissent stated that the Court's more recent decisions "have made it clear, however, that commercial transactions between Indians and non-Indians—even when conducted on a reservation—do not enjoy any blanket immunity from state regulation."[73] The majority had distinguished this case from *Rice v. Rehner*, in which the Court held the state could require a tribal member who was a federally licensed Indian trader selling liquor on the reservation to obtain a state liquor license for off-premises sales, on the grounds that Congress never recognized a tradition of tribal sovereignty over alcohol on Indian reservations, but it did recognize that states would have concurrent jurisdiction over alcohol on Indian reservations. The

[67] 480 U.S. at 220.

[68] *Id.* at 221.

[69] *Id.* at 221-222.

[70] Justices Stevens, O'Connor, and Scalia dissented with Justice Stephens writing the dissenting opinion.

[71] *Id.* at 222.

[72] *Id.* at 223, quoting 18 U.S.C. §1162.

[73] *Id.*

dissent rejected this explanation by quoting *Rice* itself: "'If there is any interest in tribal sovereignty implicated by imposition of California's alcoholic beverage regulation, it exists only insofar as the State attempts to regulate Rehner's sale of liquor to other members of the Pala Tribe on the Pala Reservation.'"[74] According to the dissent, therefore, the tribe's sovereign interest was limited to sales between tribal members, implying that the state had an interest in regulating transactions between Indians and non-Indians on the reservation.

The dissent also rejected the majority's conclusion that tribal bingo was consistent with the state public policy because the state regulated bingo, rather than prohibited it. "To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour."[75]

The dissenters believed that even if Public Law 280 did not authorize the state to apply its gaming laws to the tribes' bingo operations, the state had authority to apply the gaming laws under *Washington v. Confederated Tribes of the Colville Indian Reservation*. In that case, the dissent noted, the Court rejected the tribe's argument that, because the revenues from the smokeshops funded essential government services, the state did not have authority to tax on-reservation cigarette sales to non-Indians.[76] However, the majority seemed to accept that same argument here when it noted that the revenue from gaming was necessary for the tribes to realize the policy goals of self-determination and economic self-sufficiency. In addition, the dissent wrote, just as the smokeshops were marketing an exemption from state taxation, the tribal bingo operations were marketing an exemption to state law. "[I]t is painfully obvious that the value of the Tribe's asserted exemption from California's gambling laws is the primary attraction to customers who would normally do their gambling elsewhere."[77]

The dissent stated the state had both "economic and protective" interests that justified applying the gaming laws to tribal bingo.[78] The state had determined that:

> its interest in generating revenues for the public fisc and for certain charities outweighs the benefits from a total prohibition against publicly sponsored games of chance. Whatever revenues the Tribes receive from their unregulated bingo games drain funds from the state-approved recipients of lottery revenues—just as tax-free cigarette sales in the *Confederated Tribes* case diminished the receipts the tax collector would otherwise have received.[79]

The dissent thought the majority dismissed the state's concerns about criminal activity associated with "unregulated" tribal bingo too readily.[80] "[U]nless Congress authorizes and regulates these commercial gambling ventures catering to non-Indians, the State has a legitimate law enforcement interest in proscribing them."[81]

[74] *Id.* at 223-224 (quoting *Rice*, 463 U.S. at 721).

[75] *Id.* at 224-225.

[76] *Id.* at 225.

[77] *Id.* at 226.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 226-227.

[81] *Id.* at 227.

The dissent closed with the following:

> Appellants and the Secretary of the Interior may well be correct, in the abstract, that gambling facilities are a sensible way to generate revenues that are badly needed by reservation Indians. But the decision to adopt, to reject, or to define the precise contours of such a course of action, and thereby to set aside the substantial public policy concerns of a sovereign State, should be made by the Congress of the United States. It should not be made by the Court, by the temporary occupant of the Office of the Secretary of the Interior, or by non-Indian entrepreneurs who are experts in gambling management but not necessarily dedicated to serving the future well-being of Indian tribes.[82]

It appears, therefore, that Indian gaming escaped regulation by the states because the majority accepted that the executive branch's policies and actions supporting tribal bingo as a means for tribes to realize greater self-determination and economic self-sufficiency could pre-empt state law.

IGRA

Although the Indian tribes won a big victory in *Cabazon*, their right to engage in gaming was vulnerable because if the executive branch ever decided not to encourage Indian gaming as a means to realize federal policy goals of self-determination and economic self-sufficiency, under the reasoning of *Cabazon*, states would be able to enforce their gaming laws against tribal gaming on tribal land. Moreover, tribal gaming operations apparently were still subject to closure under FACA and OCCA. Therefore, federal legislation was needed to secure the tribes' ability to engage in gaming free from state regulation. One of IGRA's policy goals was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[83] Furthermore, Congress needed to provide for regulation of Indian gaming to satisfy state and federal entities concerned about criminal infiltration of Indian gaming. Congress had been considering Indian gaming bills for approximately four years when the Supreme Court decided *Cabazon*. IGRA was not so much a direct response to *Cabazon*, as it was the culmination of congressional efforts which were focused by the Court's decision in *Cabazon*.[84]

As explained in the Senate report on the bill that became IGRA, Congress sought to "preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons. An additional objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests."[85] The states wanted Congress to authorize state regulation of Indian gaming, to subject Indian gaming to the same rules as non-Indian gaming, and to allow state taxation of Indian gaming.[86] The tribes opposed any state regulation and lobbied for exclusive tribal regulation.[87] As a fallback position,

[82] *Id.*

[83] 25 U.S.C. §2702(1).

[84] Clinton, *supra* note 9 at 52.

[85] S. Rpt. 100-446 (100th Cong, 2d sess.) at 1-2.

[86] Indian Gaming and Tribal Sovereignty, *supra* note 4 at 43.

[87] *Id.*

tribes were prepared to accept federal, but not state, regulation.[88] In IGRA, Congress maintained the current regulatory scheme of tribal and federal regulation of bingo and provided a framework for the regulation of Indian casino gaming which would not unilaterally impose state jurisdiction on the tribe's gaming, but would allow tribes to determine the extent to which they were willing to subject themselves to state jurisdiction through a tribal-state compact.[89]

IGRA provided a statutory basis for Indian gaming on "Indian lands" and struck a balance between tribal, state, and federal interests in its scheme for regulating Indian gaming. It also created the National Indian Gaming Commission (NIGC) as an independent agency to oversee and regulate Indian gaming on the federal level.

What are "Indian Lands?"

Because IGRA authorizes Indian gaming only on "Indian lands," it is important to understand what land constitutes "Indian lands." Section 2703(4) defines "Indian lands" to include any lands within a reservation and any land outside a reservation which is either held in trust or the title to which is subject to restriction "over which an Indian tribe exercises governmental power."[90]

For non-reservation trust or restricted fee land, therefore, the tribe must exercise "governmental authority" over it. A prerequisite to exercising governmental power over trust or restricted fee land is jurisdiction.[91] A tribe cannot satisfy the requirement that it exercises governmental power over the land by taking unilateral action, such as obtaining the landowner's consent to its authority, posting the land as tribal territory, flying the tribal flag on the land, or providing periodic law enforcement on the land. Rather, the tribe must have jurisdiction over the land under federal law.[92]

A tribe's jurisdiction over land depends on whether the land is "Indian country."[93] Indian country includes reservations, dependent Indian communities,[94] and allotments held in trust or restricted fee.[95] Only land that has been set aside for Indian use and is superintended by the federal government qualifies as Indian country.[96] Land need not be formally declared a reservation to qualify as Indian country as a reservation; rather it is enough if it is tribal trust land.[97] Therefore, outside of a reservation, a tribe exercises jurisdiction over land that is its own trust land or an allotment belonging to a member of the tribe.

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[88] *Id.*

[89] S. Rpt. 100-44, *supra* note 85 at 5-6.

[90] 25 U.S.C. §2703(4).

[91] *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001).

[92] *Id.* at 1229.

[93] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n. 1 (1998).

[94] The term "dependent Indian community" "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian lands, second, they must be under federal superintendence." *Id.* at 527.

[95] 18 U.S.C. §1151. Although the Indian country statute addresses federal criminal jurisdiction, it applies to civil jurisdiction as well. *Venetie*, 522 U.S. at 527.

[96] *Venetie*, 522 U.S. at 530.

[97] See, *Oklahoma Tax Comm'n v. Citizen Band Potowatomi Indian Tribe of Oklahoma* 498 U.S. 505, 511 (1991).

Having jurisdiction and exercising governmental power are not the same thing.[98] Aside from jurisdiction, courts have looked for "concrete manifestations" that the tribe exercises governmental authority.[99] In *Rhode Island v. Narragansett Indian Tribe*, the court accepted the tribe receiving funds to administer federal programs under the Indian Self-Determination and Education Assistance Act, establishing a housing authority and receiving funds for federal programs from the Department of Housing and Urban Development, and receiving "treatment as a state" status for the purposes of federal environmental statutes as sufficient to establish that it exercised governmental power.[100]

"Indian lands," therefore, include any land within an Indian reservation and trust or restricted fee land over which the tribe has jurisdiction under federal law and exercises governmental power. The trust or restricted fee land can be owned by the tribe itself or a tribal member.[101]

Gaming on Newly Acquired Lands[102]

IGRA explicitly prohibits gaming on land acquired by the Secretary in trust after October 17, 1988, the effective date of IGRA.[103] However, there are a number of restrictions on, and exceptions to, this prohibition.

The prohibition does not apply to land acquired by the Secretary that is "located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988."[104] It also does not apply if the tribe has no reservation on October 17, 1988, and (1) the lands are located in Oklahoma and are within the boundaries of the tribe's former reservation or are contiguous to other trust land held for the tribe; or (2) the lands are located in a state other than Oklahoma and are within the tribe's last recognized reservation within the state or states in which the tribe is located now.[105]

There are two exceptions to the prohibition. The first exception, referred to as the "two part determination," allows gaming on trust land acquired after October 17, 1988, if the Secretary, after consulting with the tribe and appropriate state and local officials, "determines that a gaming establishment on the newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's

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[98] Indian Gaming Law, *supra* note 10 at 111-112.

[99] *Id.* quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994).

[100] *Narragansett*, 19 F.3d at 703; *see also, Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 527 (D.S.D. 1993) (finding record insufficient to determine "(1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.").

[101] 25 U.S.C. §2703(4).

[102] For a detailed discussion of this topic, see CRS Report RL34325, *Indian Gaming Regulatory Act (IGRA): Gaming on Newly Acquired Lands*, by (name redacted).

[103] 25 U.S.C. §2719.

[104] 25 U.S.C. §2719(a)(1).

[105] 25 U.S.C. §2719(a)(2).

determination."[106] The second exception applies to lands that are taken into trust as part of a settlement of a land claim,[107] as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process,"[108] or as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition."[109]

The Classes of Indian Gaming and Corresponding Regulatory Regimes

IGRA provides federal authorization for tribal gaming, including slot machines,[110] on "Indian lands." IGRA deals with the regulation of Indian gaming by dividing gaming into three classes and apportioning responsibility for regulating each class between tribes, states, and the federal government.

Class I Gaming

IGRA defines "class I gaming" to mean "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."[111] Class I gaming is regulated exclusively by the tribes and is not subject to the provisions of IGRA.[112]

Class II Gaming

Class II gaming is defined as "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) … including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo."[113] The NIGC regulations provide that "electronic, computer, or other technologic aids" means a machine or device that simply assists the player in playing the game.[114] It cannot be a facsimile of the game[115]—in other words, the player must play against other players, not a machine.[116] If the device merely broadens the participation in a game by allowing a player to play against more players, or to play at a remote location, it qualifies under class II.[117]

[106] 25 U.S.C. §2719(b)(1)(A).

[107] 25 U.S.C. §2719(1)(B)(i).

[108] 25 U.S.C. §2719(b0(1)(B)(ii).

[109] 25 U.S.C. §2719(b)(1)(B)(iii).

[110] 25 U.S.C. §2710(d)(6).

[111] 25 U.S.C. §2703(6).

[112] 25 U.S.C. §2710(a)(1).

[113] 25 U.S.C. §2703(7)(A)(i).

[114] 25 C.F.R. §502.7(a)(1).

[115] 25 C.F.R. §502.7(a)(2).

[116] Cadillac Jack "Triple Threat Bingo" Advisory Game Opinion, December 23, 2004, at 14 (available at http://www.NIGC.gov).

[117] 25 C.F.R. §502(b). The issue of whether a device qualifies under class II has been widely litigated. See Indian Gaming Law *supra* note 10 at 125-153 for a number of cases and discussion of the issues raised by the cases.

In addition to bingo and similar games, class II gaming also includes card games that are either "explicitly authorized by the laws of the State, or are not explicitly prohibited by the laws of the State and are played at any location in the State."[118] However, such card games must conform to state laws regarding hours of operation and "limitations on wagers or pot sizes."[119] IGRA explicitly provides that class II does not include "any banking card games,[120] including baccarat, chemin de fer, or blackjack (21), or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."[121]

Class II gaming may be conducted on Indian lands located in a state that "permits such gaming for any purpose by any person, organization or entity."[122] IGRA maintained the regulatory scheme that existed in *Cabazon*[123]—tribal regulation with federal oversight. Under IGRA, class II gaming is subject to regulation by the tribes—it must be conducted under a tribal gaming ordinance—and subject to the oversight of the NIGC—the NICG must approve tribal gaming ordinances[124] and has the responsibility for monitoring and inspecting class II operations.[125]

Class III Gaming

IGRA defines class III gaming simply as "all forms of gaming that are not class I or class II gaming."[126] The NIGC has defined class III gaming in its regulations as "including but not limited to" any card game that is played against the house, "such as baccarat, chemin de fer, blackjack (21), and pai gow," and casino games "such as roulette, craps, and keno."[127] It also includes slot machines,[128] sports betting and pari-mutuel wagering (horse racing, dog racing, and jai alai),[129] and lotteries.[130]

IGRA authorizes class III gaming subject to three conditions. First, class III gaming activities must be authorized by a tribal gaming ordinance that satisfies the same requirements as the ordinance governing class II gaming and is approved by NIGC.[131] Second, class III gaming can only occur in a state that permits "such gaming for any purpose by any person, organization or entity."[132] Jurisdictions vary on whether "such gaming" refers to the particular gaming activity[133]

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[118] 25 U.S.C. §2703(7)(A)(ii).

[119] *Id.*

[120] NIGC regulations define "house banking game" to mean "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. §502.11.

[121] 25 U.S.C. §2703(7)(B).

[122] 25 U.S.C. §2710(b).

[123] S. Rpt. 100-446, *supra* note 85 at 9.

[124] *Id.*

[125] 25 U.S.C. §2706(b).

[126] 25 U.S.C. §2703(8).

[127] 25 C.F.R. §502.4(a).

[128] 25 C.F.R. §502.4(b).

[129] 25 C.F.R. §502.4(c).

[130] 25 C.F.R. §502.4(d).

[131] 25 U.S.C. §2710(d)(1)(A).

[132] 25 U.S.C. §2710(d).

[133] *Rumsey Indian Rancheria of Wintum Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), *reh'g denied* 64 F.3d 1250 (9th
(continued...)

or refers to class III gaming in general.[134] Third, class III gaming can only be conducted pursuant to a tribal-state gaming compact approved by the Secretary or under procedures promulgated by the Secretary under circumstances identified in IGRA.[135]

Tribal-State Compacts

In *Cabazon*, the Court recognized that the state had a legitimate interest in preventing infiltration of Indian gaming by organized crime. Because there was no evidence of infiltration of tribal bingo operations, the Court did not find that the state's interest was sufficient to justify state regulation. However, the drafters of IGRA did not believe that this reasoning applied to casino gaming.[136] Because casino gaming was perceived as more vulnerable to criminal activity than bingo, the drafters of IGRA believed states had a legitimate interest in having a hand in regulating casino gaming.[137]

Congress recognized that both tribes and states have interests in class III gaming on tribal lands.

> A tribe's governmental interests include raising revenue for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands includes the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.[138]

The compact provision was a compromise between the state's position of exclusive state regulation and the tribal position of exclusive tribal regulation.[139]

IGRA identifies particular subjects that are appropriate for compact negotiation: the application of criminal and civil laws of the tribe and the state; the allocation of civil and criminal jurisdiction between the tribe and the state; assessment of fees by the state to recoup the cost of regulating the tribe's gaming; tribal taxation; and, remedies for breach of contract.[140] In addition, IGRA provides a catch-all for "subjects that are directly related to the operation of gaming activities."[141] Congress intended that gaming compacts would be limited to issues related to gaming[142] and would not "be used as a subterfuge for imposing State jurisdiction on tribal lands."[143] IGRA

(...continued)

Cir. 1994), *reh'g denied*, 99 F.3d 321 (1996), *cert. denied sub nom*, *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997).

[134] *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wisc. 1991).

[135] 25 U.S.C. §2710(d)(1)(C).

[136] Indian Gaming and Tribal Sovereignty, *supra* note 4 at 44.

[137] *Id.*

[138] S. Rpt. 100-446, *supra* note 85 at 13.

[139] Indian Gaming and Tribal Sovereignty, *supra* note 4 at 42-44.

[140] 25 U.S.C. §2710(d)(3)(C).

[141] *Id.*

[142] S. Rpt. 100-446, *supra* note 85 at 6.

[143] *Id.* at 14.

specifically provides that although states may recoup the costs of regulating a tribe's gaming, they may not "impose any tax, fee, charge, or other assessment upon an Indian tribe … to engage in a class III activity."[144]

Compacts take effect when the Secretary publishes notice in the Federal Register that he has approved the compact.[145] The Secretary may disapprove a tribal-state compact only if it violates IGRA, any other provision of federal law, or "the trust obligations of the United States to Indians."[146] If the Secretary does not approve or disapprove of a compact within 45 days of the date on which the compact was submitted for approval, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter."[147]

NIGC

IGRA established the NIGC to provide federal regulation of Indian gaming. NIGC is funded through fees on class II and class III gaming and appropriations.[148] It is composed of a chairman who is appointed by the President with the advice and consent of the Senate, and two "associate members" who are appointed by the Secretary.[149] Members serve for three-year terms, which may be renewed.[150] Members can be removed only for cause.[151] Both political parties must be represented among the members and at least two of the members must be enrolled members of Indian tribes.[152] NIGC plays a role in regulating class II and class III gaming by approving gaming ordinances and management contracts and taking enforcement actions. It also makes initial determinations of whether land qualifies as "Indian land" and is, therefore, eligible for gaming.

Approval of Tribal Gaming Ordinances

Tribes can conduct class II and class III gaming only if they have an ordinance or a resolution authorizing and regulating the gaming that is approved by the chairman of NIGC. The IGRA provisions regarding tribal gaming ordinances are aimed at ensuring that the tribe itself is responsible for the gaming, that the revenues from tribal gaming are used primarily to benefit the tribe and its members, and that the integrity of the tribal gaming operation is adequately protected.

IGRA mandates that the chairman approve any ordinance that:

[144] 25 U.S.C. §2710(d)(4).

[145] 25 U.S.C. §2710(d)(3)(B).

[146] 25 U.S.C. §2710(d)(7)(B).

[147] 25 U.S.C. §2710(d)(8)(C).

[148] 25 U.S.C. §2717.

[149] 25 U.S.C. §2704(a)(1).

[150] 25 U.S.C. §2704(b)(4)(A).

[151] 25 U.S.C. §2704(b)(6).

[152] 25 U.S.C. §2704(b)(3).

- ensures that the tribe has "the sole propriety interest and responsibility for the conduct of any gaming";[153]
- limits the uses to which gaming revenues may be put to those that benefit the tribe, tribal members, charities, or local governments;[154]
- requires annual outside audits of gaming operations, which the tribe must provide to the NIGC,[155] and independent audits of contracts exceeding $25,000 annually;[156]
- requires that construction, maintenance, and operation of the gaming facility is conducted "in a manner which adequately protects the environment and the public health and safety";[157] and
- provides a system for background checks of key persons, a standard for employing individuals to ensure the integrity of the gaming operations, and a gaming licensing process.[158]

If the chairman does not act within 90 days, IGRA deems the ordinance approved.[159]

For class III ordinances, there are two limitations on the chairman's authority to approve them which provide additional safeguards for the tribes and the integrity of the gaming. The chairman "shall approve any [class III] ordinance or resolution ... unless the Chairman specifically determines that":

- the ordinance was not adopted in compliance with the governing documents of the tribe;[160] or
- the tribal governing body was "significantly and unduly influenced" in its adoption of the ordinance by a person who "has been determined to be a person whose prior activities, criminal record, if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control or gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto."[161]

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[153] 25 U.S.C. §2710(b)(2)(A).

[154] Proceeds from gaming may only be used to fund tribal government operations and programs; to provide for the "general welfare of the Indian tribe and its members"; to promote economic development; to donate to charities; and to help fund local government agencies. 25 U.S.C. §2710(b)(2)(B). A tribe may make per capita payments to its members but such payments must be made under a plan approved by the Secretary. 25 U.S.C. §2710(b)(3). In approving such a plan, the Secretary must ensure that it is "adequate" in providing for tribal government operations or programs and tribal economic development. *Id.*

[155] 25 U.S.C. §2710(b)(2)(C).

[156] 25 U.S.C. §2710(b)(2)(D).

[157] 25 U.S.C. §2710(b)(2)(E).

[158] 25 U.S.C. §2710(b)(2)(F). Tribes must notify the NIGC when it issues licenses and NIGC has 30 days to notify the tribe of any objections to the issuance of the license. 25 U.S.C. §2710(c)(1). If the NIGC receives "reliable information" that a tribal license holder is a threat to the integrity of the gaming operation, the tribe will suspend the license or revoke it after an opportunity for a hearing. 25 U.S.C. §2710(c)(2).

[159] 25 U.S.C. §2710(e).

[160] 25 U.S.C. §2710(d)(2)(B)(i).

[161] 25 U.S.C. §2710(d)(2)(B)(ii).

Approval of Management Contracts

Indian tribes may enter into management contracts for the operation and management of class II and class III gaming, subject to the approval of NIGC.[162] IGRA provisions regarding NIGC review of management contracts are aimed at ensuring tribal control of Indian gaming,[163] ensuring that tribes are the primary beneficiaries of Indian gaming,[164] and protecting the integrity of Indian gaming.[165] Ultimately, NIGC has discretion to disapprove a management contract if "a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract."[166]

Enforcement Actions by the NIGC

The chairman has authority to impose civil fines up to $25,000 against the tribal operator or management contractor per violation of IGRA, NIGC regulations, or tribal gaming ordinances.[167] A tribal operator or management contractor may appeal the fine to the full commission at a hearing prescribed by regulations.[168] The chairman may order the temporary closure of an Indian

[162] 25 U.S.C. §2711(a). The NIGC has 180 days to approve or disapprove of a management contract.; NIGC may extend that deadline by 90 days provided it gives the tribe a reason for the delay in writing. 25 U.S.C. §2711(d).

[163] The management contract must provide for the maintenance of adequate accounting procedures and the preparation of monthly "verifiable financial reports" prepared by or for the tribal governing body. 25 U.S.C. §2711(b)(1). Appropriate "tribal officials" must have access to the daily operation of the gaming activity and a right to verify the daily gross revenues and income from the gaming activity. 25 U.S.C. §2711(b)(2). In general, the management contract term may not exceed five years. However, NIGC may authorize a term up to seven years, if it is "satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time." 25 U.S.C. §2711(b)(5). The management contract must provide the grounds and mechanisms for its termination. Actual termination, however, does not require approval by NIGC. 25 U.S.C. §2711(c)(1). NIGC "shall not" approve a contract if the contractor has, or attempted to, "unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity." 25 U.S.C. §2711(e)(2).

[164] The minimum guaranteed payment to the tribe must have preference over the retirement of development and construction costs. 25 U.S.C. §2711(b)(3). There must be an agreed ceiling for the repayment of development and construction costs. 25 U.S.C. §2711(b)(4). The NIGC may approve a management contract that provides for a fee to the management contractor based on a percentage of the net revenues of the tribal gaming, up to 30%, if the NIGC determines that the fee is "reasonable in light of the surrounding circumstances." 25 U.S.C. §2711(c)(1). If an Indian tribe requests a fee for the management contractor between 30% and 40% of the net revenues from tribal gaming, the NIGC may approve the request if it is "satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe." 25 U.S.C. §2711(c)(2).

[165] Before approving a management contract, NIGC requires background information on "each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for" the management contract, 25 U.S.C. §2711(a)(1)(A); a description of any previous experience that such person or entity has with Indian gaming or gaming in general, 25 U.S.C. §2711(a)(1)(B); and a complete financial statement of such persons. 25 U.S.C. §2711(a)(1)(C). The NIGC "shall not" approve a management contract if any person having a direct financial interest in, or management responsibility for, the management contract is an elected member of the tribe's governing body; has been convicted of a felony or gaming offense; has "knowingly and willfully provided materially important false statements or information" to the NIGC or the tribe or has refused to respond to questions of the NIGC; or "has been determined to be a person whose activities, criminal record, if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto." 25 U.S.C. §2711(e)(1). The NIGC "shall not" approve a contract if the contractor has "deliberately or substantially" failed to comply with the management contract or the tribal gaming ordinance. 25 U.S.C. §2711(e)(3).

[166] 25 U.S.C. §2711(e)(4).

[167] 25 U.S.C. §2713(a).

[168] 25 U.S.C. §2713(a)(2).

gaming operation for "substantial violation" of IGRA, NIGC regulations, or tribal ordinances.[169] Within 30 days of the chairman's order closing a gaming operation, the Indian tribe or management contractor has a right to a hearing before the full commission to determine whether the order should be made permanent.[170] The commission must make a decision within 60 days.[171]

Whenever the NIGC has "reason to believe" that a tribal operator or management contractor is engaged in activities that may result in a fine, permanent closure of the operation, or modification of the management contract, the NIGC must provide a "written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered."[172]

Other Authorities and Responsibilities of NIGC

The full commission has authority to adopt regulations for assessing and collecting civil fines, to establish the fees that the commission will collect to fund its activities, and to authorize the chairman to issue subpoenas.[173] The commission also has responsibility to monitor class II gaming "on a continuing basis";[174] to inspect class II premises;[175] to conduct background investigations;[176] to "demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter";[177] and to conduct hearings and administer oaths.[178] IGRA directs that NIGC submit a report, with minority views, to Congress every two years concerning matters related to NIGC's administration, recommended amendments to IGRA, and "any other matter considered appropriate by the Commission."[179]

Indian Land and Classification Determinations

In addition to the above authorities provided by IGRA, the NIGC makes "Indian land" determinations, which determine whether a given parcel of land qualifies as Indian land[180] and classification determinations, which determine whether a particular device qualifies as a class II or class III game.[181] For non-reservation land, the NIGC determines whether the tribe has jurisdiction and exercises governmental power over the land.[182]

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[169] 25 U.S.C. §2713(b)(1).

[170] 25 U.S.C. §2713 (b)(2).

[171] *Id.*

[172] 25 U.S.C. §2713(a)(3).

[173] 25 U.S.C. §2706(a).

[174] 25 U.S.C. §2706(b)(1).

[175] 25 U.S.C. §2706(b)(2).

[176] 25 U.S.C. §2706(b)(3).

[177] 25 U.S.C. §2706(b)(4).

[178] 25 U.S.C. §2706(b)(8)-(9).

[179] 25 U.S.C. §2706(c).

[180] Indian Gaming Law, *supra* note 10 at 112-113.

[181] *Id.* at 282-287.

[182] *Id.* at 112-113.

Tribal-State Compacts and *Seminole Tribe of Florida v. Florida*

As mentioned above, class III gaming can only occur under a tribal-state compact or under procedures promulgated by the Secretary under circumstances identified in IGRA. A tribe seeking to engage in class III gaming must request the state in which the Indian lands are located to negotiate a class III gaming compact.[183] IGRA provides that upon receiving such a request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact."[184] In order to make sure that states negotiate in good faith, IGRA gave jurisdiction to federal district courts over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact ... or to conduct such negotiations in good faith."[185]

In *Seminole Tribe of Florida v. Florida*,[186] the Supreme Court held that Congress did not have authority under the Indian Commerce Clause to waive states' sovereign immunity to lawsuits by tribes to enforce the good faith bargaining requirement. It held further that the doctrine of *Ex parte Young*[187] did not authorize suits against the governor for failing to negotiate in good faith because Congress provided the exclusive mechanism to remedy a state's violation of IGRA.[188] After *Seminole*, therefore, IGRA no longer guaranteed that tribes would be able to engage in class III gaming if a state refused to negotiate.

The Secretarial Procedures

The Supreme Court's decision in *Seminole* struck down IGRA's procedures that practically guaranteed that a tribe would be able to engage in class III gaming even when the state objected. The Secretary adopted regulations—called Secretarial Procedures—that provide an administrative process, modeled after the IGRA process, under which a tribe could conduct class III gaming when a state asserts its sovereign immunity to a lawsuit brought by the tribe to enforce the good faith requirement.[189] Once a state asserts its sovereign immunity, a tribe may submit a proposal for class III gaming to the Secretary.[190] The Secretary then gives the state 60 days to comment and submit its own proposal.[191] If the state does not submit a proposal, the Secretary reviews the tribe's proposal and either approves it or offers the tribe and the state a conference to address "unresolved issues and areas of disagreements."[192] The Secretary must then make a "final decision either setting forth the Secretary's proposed Class III gaming procedures for the Indian tribe, or disapproving the proposal."[193] If the state submits a proposal, the Secretary appoints a

[183] 25 U.S.C. §2710(3)(A).

[184] *Id.*

[185] 25 U.S.C. §2710(d)(7)(A)(i). Under 25 U.S.C. §2710(d)(7)(B)(i), a tribe may initiate such an action after 180 days of requesting the state to negotiate a compact.

[186] 527 U.S. 44 (1996).

[187] 209 U.S. 123 (1908). *Ex parte Young* held that federal courts have jurisdiction over a suit against a state official when the suit seeks injunctive relief to end a continuing violation of federal law.

[188] 527 U.S. at 74-75.

[189] 25 C.F.R. Part 291.

[190] 25 C.F.R. §291.7.

[191] *Id.*

[192] 25 C.F.R. §291.8.

[193] *Id.*

mediator who will follow the IGRA procedures to resolve the differences between the two proposals.[194] The Secretary may reject the mediator's proposal but he "must prescribe appropriate procedures within 60 days under which Class III gaming may take place."[195] While IGRA required a judicial finding of a state's bad faith, the Secretary's regulations apply anytime a state asserts its sovereign immunity, regardless of whether it was negotiating in good faith. Moreover, IGRA provided for a mediator selected by the court and proscribed the Secretary's discretion in prescribing class III procedures by requiring that they be consistent with the mediator's proposal.

In *Texas v. United States*,[196] the U.S. Court of Appeals for the Fifth Circuit held that IGRA did not authorize the Secretary to promulgate the Secretarial Procedures. In particular, the court noted that IGRA required involvement of the judiciary in finding bad faith and selecting a mediator, and circumscribed the Secretary's discretion to select procedures under which a tribe may engage in class III gaming by requiring that they be consistent with the compact the mediator selected.[197] Because the Secretarial Procedures did not require a judicial finding of bad faith and judicial appointment of a mediator, they were found to be inconsistent with IGRA.[198]

IGRA practically guaranteed that tribes would be able to engage in Class III gaming even over the objections of a state by providing that tribes could sue states in federal district court. After *Seminole*, IGRA no longer carried that guarantee. The Secretarial Procedures were designed to replace IGRA's procedures to allow tribes to conduct class III gaming when a state refuses to waive its sovereign immunity. *Texas v. United States* invalidated the Secretarial Procedures for the states of Mississippi, Louisiana, and Texas, the states located within the Fifth Circuit. Although the Secretarial Procedures are still presumably valid outside the Fifth Circuit, *Texas v. United States* has raised uncertainty about their legality.

Revenue Sharing Under Class III Compacts

At least one commentator has argued that the Supreme Court's decision in *Seminole* upset the balance of power between the tribes and the states in favor of the states.[199] *Seminole* left states in a position to dictate terms to tribes[200] and many states began negotiating for a share of gaming revenues.[201] Although IGRA explicitly prohibits states from imposing a tax or a fee on Indian gaming,[202] the Secretary and the courts have allowed revenue sharing provided the tribes get something to which they are not otherwise entitled, usually exclusivity for Indian gaming, in return.[203] However, revenue sharing percentages have increased even as states have not been able

[194] 25 C.F.R. §§291.9, 291.10.

[195] 25 C.F.R. §291.11.

[196] 497 F. 3d 491 (5th Cir. 2007), *cert. denied sub nom*, *Kickapoo Traditional Tribe v. Texas*, 555 U.S. 881 (2008).

[197] *Id.* at 503 and 512 (concurrence).

[198] *Id.* at 511 and 512 (concurrence).

[199] Steven Andrew Light, Kathryn R.L. Rand & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue Sharing Agreements*, 80 N.D. Law Rev. 657, 664 (2004).

[200] Indian Gaming and Tribal Sovereignty, *supra* note 4 at 58-59; Fletcher, *supra* note 29 at 57-58.

[201] Light, Rand & Meister, *supra* note 199 at 665.

[202] 25 U.S.C. §2710(d)(4).

[203] Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historic Critique of Tribal-State Compacting Under IGRA*, 42 Ariz. St. L. J. 185, 210-214 (2010-2011); Fletcher, *supra* note 29 at 61; *In re: Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2002).

to offer greater exclusivity.[204] Such revenue sharing appears to violate IGRA's prohibition on state taxation of Indian gaming. In *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*,[205] the U.S. Court of Appeals for the Ninth Circuit found that in negotiating an amendment to the tribe's compact, California's demand for a substantial percentage of the gaming revenues which would be paid to the state's general fund, was made in bad faith, in part, because the state was not offering any greater exclusivity than the tribe had under its existing compact.[206] *Rincon* has limited implications for states other than California because, California waived its sovereign immunity to suits to enforce the good faith negotiation requirement. Because of *Seminole*, most tribes that want to engage in class III gaming apparently have no alternative but to agree to revenue sharing if the state demands it.

States' Requests for Tribal Concessions Unrelated to Gaming

Although it is not as common as revenue sharing, some states are trying to obtain tribal concessions on issues unrelated to tribal gaming as a condition of agreeing to a class III compact.[207] For example, in Wisconsin, Governor Tommy Thompson proposed that the Wisconsin tribes relinquish their hunting and fishing rights and agree to state taxation of on-reservation cigarette and gasoline sales.[208] In California, environmental and labor issues have been included in class III compacts with tribes throughout the state.[209] Because most tribes have no recourse in the face of such demands, states may continue to raise non-gaming issues in compact negotiations.

Proposed Amendments to IGRA

Recent proposed amendments to IGRA have been aimed primarily at IGRA's provisions allowing gaming on newly acquired lands. Because location near a large metropolitan center may be critical to large profits for Indian gaming,[210] tribes have tried to acquire Indian lands away from their reservations near population centers under the exceptions to IGRA's prohibition on gaming on newly acquired lands.[211] Gaming on land acquired in trust pursuant to the exceptions is controversial.[212] As of June 2010, 31 applications for land into trust were granted under the

[204] Fletcher, *supra* note 29 at 60-64.

[205] 602 F.3d 1019 (9th Cir. 20100, *cert. denied sub nom*, *Brown v. Rincon Band of Luiseno Indians of the Rincon Reservation*, 2011 U.S. LEXIS 4917 (U.S., June 27, 2011).

[206] *Id.* at 1038.

[207] Indian Gaming and Tribal Sovereignty, *supra* note 4 at 58-59.

[208] *Id.* In the end, the tribes did not relinquish their hunting and fishing rights but did agree to pay the state $100 million dollars per year.

[209] Gover & Gede, *supra* note 203 at 207-208; see e.g. Compacts between California and the Dry Creek Rancheria and the Cahuilla Band of Mission Indians, May 5, 2000, §§10.7 and 10.8 (available at http://www.NIGC.gov).

[210] Tribal gaming in the two densely populated NIGC regions that include California, Connecticut, Florida and New York totaled 20% of the total number of Indian gaming operations but generated 50% of the revenues. *The Hand That's Been Dealt*, *supra* note 3 at 424.

[211] Indian Gaming and Tribal Sovereignty, *supra* note 4 at 63-65.

[212] *See id.*

exceptions.[213] Because of the controversy, however, off-reservation gaming has caught the attention of Congress.

Introduced in the 112th Congress, S. 771[214] would restrict gaming on newly acquired lands by requiring that tribes demonstrate to the Secretary that they have a "substantial, direct, modern connection" and a "substantial, direct, aboriginal connection" to the newly acquired lands. If the Secretary determines there is a modern connection to the land, he would have to certify the following:

- If the tribe has a reservation, the land is within 25 miles of the tribal headquarters or other government facilities on the reservation; from October 17, 1988, the tribe has demonstrated a routine presence on the land; and the tribe has not been restored to federal recognition or acknowledged within the preceding five years.
- If the tribe does not have a reservation, the land is located within 25 miles of where a substantial number of members live; from October 17, 1988, the tribe has demonstrated a routine presence on the land; the land was within the first-submitted request for land since acknowledgment or restoration or the application to take land into trust was within five years of acknowledgment or restoration; and the tribe is not gaming on other land.

In determining that the tribe has an aboriginal connection to the land, the Secretary would have to consider the following:

- The tribe's historical presence on the land;
- Whether the membership can demonstrate lineal descent or cultural affiliation with the land;
- The area in which the tribe's language was spoke;
- The proximity of tribal sacred sites;
- Forcible removal from the land; and
- Other factors that demonstrate the tribe's presence prior to its fist interactions with non-natives, the federal government, or another sovereign.

S. 2676,[215] introduced in the 110th Congress, would have amended IGRA in several ways. First, it would have struck all the exceptions to the prohibition on gaming on newly acquired lands, except for the two part determination. Second, it would have amended the two part determination to require that the Secretary consult with tribal, state, and local jurisdictions within 60 miles of the trust land and require that the Secretary consider the "results of a study of the economic impact of the gaming establishment" in determining that the gaming operation would not have a negative impact on any tribal, state, or local jurisdiction located within 60 miles. The proposed bill would also require the concurrence of the state legislature, as well as the governor, for the two part determination. In addition, it would have required that the tribe satisfy certain criteria to demonstrate that it has a "geographic, social, and historical nexus" to the land. The proposed bill

[213] June 18, 2010, Memorandum from Secretary Ken Salazar to Assistant Secretary—Indian Affairs Larry Echohawk re: Decisions on Indian Gaming Applications, at 2.

[214] S. 771, 112th Cong. (2011).

[215] S. 2676, 110th Cong. (2008).

would have amended IGRA's authorization of class II gaming by restricting class II gaming to lands that were Indian lands on the date of enactment or land acquired afterwards provided the tribe indicated it would engage in class II gaming on the land when it filed its application for taking the land into trust. It also would restrict a tribe's ability to change the use of non-gaming trust land to use it for gaming. S. 2676 would also have amended the authority of the chairman of NIGC to authorize background checks of the ten persons or entities with the greatest financial interest in any of the gaming enterprises regulated by the NIGC and any other person the NIGC deems appropriate.

The Limitation of Tribal Gaming to Existing Tribal Lands Act of 2007, H.R. 2562[216] from the 110th Congress, would have struck all of IGRA's exceptions for gaming on newly acquired lands, except for the two part determination. It would have amended the two part determination to require concurrence of the state legislature, as well as the governor.

H.R. 1654,[217] also introduced in the 110th Congress, would require the Secretary to determine that gaming on all newly acquired lands was in the best interest of the tribe and not detrimental to the surrounding community.

In addition, in the 112th Congress, H.R. 4033, the Giving Local Communities a Voice in Tribal Gaming Act, has been introduced. This bill would amend IGRA to give local jurisdictions a veto over class III gaming establishments to which the state has agreed in compacts entered after January 1, 2011.

Conclusion

Initially, Indian gaming arose on a small scale in response to cut-backs in funding for tribes in the 1980s. Because of the executive branch's support of Indian gaming as a legitimate source of tribal revenues, in *Cabazon*, the Supreme Court found that federal and tribal interests supporting tribal gaming outweighed state interests in regulating Indian gaming. Congress passed IGRA after *Cabazon* to provide a statutory basis for tribal gaming, to establish a system for regulating Indian gaming, and to establish the NIGC.

IGRA divides Indian gaming into three classes. Class I gaming includes traditional or social gaming and is regulated exclusively by the tribes. Congress affirmed *Cabazon* as to bingo, or class II gaming, by providing that it is subject to tribal regulation with federal oversight by the NIGC. However, Congress recognized that states had greater interests in casino-style, or class III, gaming and, therefore, gave states a role in regulating class III gaming through the tribal-state compact. In order to engage in class III gaming, a tribe must have a gaming compact that allows them to do so, or have procedures issued by the Secretary after a good faith lawsuit.

The NIGC plays an important role in regulating tribal gaming by approving tribal gaming ordinances, approving management contracts, imposing fines and closing gaming operations for violations of IGRA, NIGC regulations, or tribal ordinances, and monitoring class II operations. NIGC also makes determinations about whether land qualifies as "Indian land."

[216] H.R. 2562, 110th Cong. (2007).

[217] H.R. 1654, 110th Cong. (2007).

IGRA created an incentive for states to negotiate gaming compacts by providing that tribes could take states that did not negotiate in good faith to federal court. If, after a finding by the court of bad faith on the part of the state, the state and the tribe could not agree to a compact, IGRA provided a mechanism by which a tribe could engage in class III gaming without a state's agreement. However, in *Seminole*, the Supreme Court held that Congress did not have authority to waive the states' sovereign immunity to the tribes' lawsuits. Although IGRA bars states from imposing a tax or fee on Indian gaming and limits the issues subject to negotiation between tribes and states to those that are gaming related, states have been negotiating for a share of tribal gaming revenues and bringing non-gaming issues into compact negotiations. Because, after *Seminole*, tribes cannot resort to the courts to enforce IGRA's limitations, they have tended to accept arguably prohibited conditions in their compacts.

Congress has been most interested in off-reservation gaming on newly acquired lands. In the past five years, several bills have been introduced which would amend IGRA to limit the ability of tribes to game on newly acquired lands.

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