

# NEGOTIATING MEANINGFUL CONCESSIONS FROM STATES IN GAMING COMPACTS TO FURTHER TRIBAL ECONOMIC DEVELOPMENT: SATISFYING THE “ECONOMIC BENEFITS” TEST

EZEKIEL J.N. FLETCHER<sup>†</sup>

## I. INTRODUCTION—THE USE OF TRIBAL GAMING REVENUE TO FOSTER TRIBAL ECONOMIC DEVELOPMENT AND DIVERSIFICATION

## II. TRIBAL GAMING AS A MEANS TO AN END

### A. INDIAN GAMING COMES ALIVE: *CALIFORNIA V. CABAZON BAND OF MISSION INDIANS*

### B. THE GREAT (AND FRAGILE) COMPROMISE: THE INDIAN GAMING REGULATORY ACT

1. Classes of Indian Gaming
2. The Tribal Trump Card: IGRA’s Good Faith Negotiation Requirement
3. The Trump Card is Trumped: Judicial Elimination of the Tribal Remedy Under IGRA and the One-Sided Compacting Process Since *Seminole Tribe v. Florida*
4. 25 C.F.R. Part 291: The Department of the Interior Administratively Replaces the Tribal Trump Card in Response to *Seminole Tribe*

## III. GAMING COMPACT SUBJECT AREAS: THE ECONOMIC BENEFITS TEST

## IV. BARRIERS TO ECONOMIC DEVELOPMENT ON THE RESERVATION AND THE SUBSTANTIAL BENEFITS TEST

### A. QUANDARIES WITH TRUST LAND AND TAXATION ISSUES

### B. ATTEMPTING TO RESOLVE THE “DOUBLE TAXATION” PROBLEM AS A SUBJECT OF A GAMING COMPACT TO PROVIDE TRIBES WITH A TAX BASE

## V. CONCLUSION

---

<sup>†</sup> J.D., University of Wisconsin, 2006; B.A., University of Michigan, 2003. Associate, Rosette & Associates, P.C. Enrolled citizen of the Grand Traverse Band of Ottawa and Chippewa Indians and former Grand Traverse Band Assistant General Counsel. I would like to thank Matthew Fletcher, Kathryn Tierney, John Petoskey, Michael Phelan, Joan Summers, and the editors of the South Dakota Law Review for comments, guidance, and assistance offered during the writing of this Article. All views expressed by this Article are solely those of the author and not of Rosette & Associates, P.C. All errors are my own. The author can be reached at [zfletcher@rosettellaw.com](mailto:zfletcher@rosettellaw.com). *Chi-miigweitch*.

## I. INTRODUCTION—THE USE OF TRIBAL GAMING REVENUE TO FOSTER TRIBAL ECONOMIC DEVELOPMENT AND DIVERSIFICATION

Tribes in California, Florida, Maine, New York, and Wisconsin, in search of funding for tribal governmental services, opened high-stakes bingo parlors during the 1960s and 1970s long before any federal laws were enacted to address Indian gaming.<sup>1</sup> At the time the Indian Gaming Regulatory Act<sup>2</sup> (IGRA) was enacted in 1988, there were over eighty tribes licensing, conducting, and operating bingo and card games throughout Indian country.<sup>3</sup> Despite the relative infancy of Indian gaming at that time and lack of profitable slot machines, these Indian gaming facilities managed to gross over \$110 million for the year.<sup>4</sup>

At this point, there are over 382 tribal gaming facilities in 28 states, operated by approximately 225 tribes, with gaming revenue surpassing \$26 billion for the year 2007.<sup>5</sup> Much of the revenue generated, however, comes from tribal gaming facilities located in metropolitan or at least somewhat populated areas.<sup>6</sup> For example, the two Indian gaming facilities in Connecticut, Foxwoods

1. See KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 17, 21 (2006) [hereinafter RAND & LIGHT]; Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 45 (2007); STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 39 (2005) [hereinafter LIGHT & RAND] (California and Florida); Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 565 (1994) (New York); Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 69 (1995) (Florida and Wisconsin); Anthony J. Marks, Note & Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 LOY. L.A. ENT. L. REV. 157, 158-59 (1996) (Florida and Maine).

2. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006).

3. RAND & LIGHT, *supra* note 1, at 23. The term "Indian country" is defined in 18 U.S.C. § 1151 (2006) as:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

*Id.* Although this statute defines what constitutes Indian country for purposes of criminal jurisdiction, this definition is also used for purposes of civil jurisdiction. See *DeCoteau v. Dist. County Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975). In addition to using Indian country in the context of both criminal or civil jurisdiction, this Article uses Indian country to reference Indians, tribes, and tribal land generally.

4. RAND & LIGHT, *supra* note 1, at 23; I. Nelson Rose, Commentary, *The Indian Gaming Act and the Political Process*, in INDIAN GAMING AND THE LAW 4 (William R. Eadington, ed., 2d ed. 1998).

5. Press Release, National Indian Gaming Commission, NIGC Announces 2007 Indian Gaming Revenue (June 18, 2008) (NIGC statistics are based upon the audit reports received by the NIGC from the tribes), available at <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR93062008/tabid/841/Default.aspx> [hereinafter NIGC Press Release]. See also Kathryn R. L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396, 397 (2006).

6. See Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 435

Resort and Casino (owned by the Mashantucket Pequot Tribe) and the Mohegan Sun (owned by the Mohegan Tribe) account for nearly 10% of all revenue generated by tribal casinos.<sup>7</sup>

Based upon the yearly tribal gaming revenue statistics released by the National Indian Gaming Commission (NIGC), 22 tribal gaming facilities account for 42% of all tribal gaming revenue.<sup>8</sup> Each of these 22 casinos generates over \$250 million yearly in gaming revenue.<sup>9</sup> By contrast, there are 210 tribal facilities generating less than \$10 million in yearly revenue, and these tribes account for only 2% of all tribal gaming revenue.<sup>10</sup> In short, not every tribe or individual tribal member is making millions and millions of dollars from tribal gaming facilities and most facilities are rather modest.<sup>11</sup>

There are 562 Indian tribes recognized by the United States.<sup>12</sup> Roughly one-third of these federally-recognized tribes make up almost all Indian gaming revenue.<sup>13</sup> Not all tribal casinos are successful and many earn only marginal profits.<sup>14</sup> As Professor Kevin Washburn noted, many of the non-gaming tribes include some of the most poverty infested regions of the United States: "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."<sup>15</sup>

Even though much of the gaming revenue generated by Indian casinos comes from a small minority of tribal facilities, there are still states and citizens' groups that pour a substantial amount of resources into compact negotiations and litigating gaming-related trust land acquisitions.<sup>16</sup> These anti-IGRA states and citizens' groups completely misunderstand the intent and basis behind the enactment of IGRA. Overall, they are ignorant of basic concepts of federal

---

(2001).

7. For a comprehensive review of the economic status of Indian gaming, region by region, see generally ALAN MEISTER, CASINO CITY'S INDIAN GAMING INDUSTRY REPORT 2008-2009 ed. (2008).

8. See NIGC Press Release, *supra* note 5.

9. *Id.*

10. *Id.*

11. See Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 52-53 (2002) ("Of the 554 tribes in the United States recognized by the federal government, only a third or so conduct class III gaming on their reservations."); G. WILLIAM RICE, TRIBAL GOVERNMENT GAMING LAW: CASES AND MATERIALS 3 (2006) (noting that a majority of tribes have no gaming or only small scale gaming operations).

12. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (April 4, 2008) (notice).

13. Rand, *supra* note 11, at 53.

14. *Id.* at 53 n.34 ("Of course, not all tribal casinos are successful. Some operate at a loss, while many others break even or make only modest profits.").

15. See Washburn, *supra* note 6, at 435.

16. See, e.g., Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23 (D.C. Cir. 2008) (holding that the provision of Indian Reorganization Act (IRA) that authorized the Secretary of Interior to acquire land for Indians contained an intelligible principle to guide the Secretary's discretion, and thus did not violate non-delegation doctrine); Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007); Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006); Citizens Exposing the Truth About Casinos v. Norton, No. 02-1754, 2004 U.S. Dist. LEXIS 27498 (D.D.C. Apr. 23, 2004).

Indian law and seem offended by the notion of tribal sovereignty. Some groups and media continue to assert IGRA must be revisited because IGRA “gives too much power to tribes.”<sup>17</sup>

Of the tribes that have established gaming facilities, class III (casino-style) gaming is generally the most lucrative class of Indian gaming.<sup>18</sup> Class III gaming includes slot machines and other casino-style gaming.<sup>19</sup> In order for tribes to conduct class III gaming, however, a gaming compact must be executed between the tribe and the state in which the tribe is located.<sup>20</sup>

If and when a state is willing to negotiate with the tribe, the executive branch of state government, generally, will act as the lead state negotiator for state-tribal gaming compacts. Ratification by the state legislature, depending on the state constitution, state law, or state case law, may be required before a compact is finalized; this process has become a constant struggle under state constitutional law as the authority of each branch of state government with regard to state acceptance of tribal gaming compacts.<sup>21</sup>

Revenue sharing between the tribe and the state has become a topic of much debate among tribes, state governors, and if applicable, state legislatures even though IGRA specifically prohibits the state from taxing gaming revenue.<sup>22</sup> The explicit prohibition on state taxation of Indian gaming revenue is viewed, however, in a seemingly different manner since the United States Supreme Court’s decision in *Seminole Tribe v. Florida*.<sup>23</sup>

One major effect of the *Seminole Tribe* decision is that “revenue sharing” between the tribe and the state is now the norm.<sup>24</sup> Many gaming compact

17. See Editorial, *Landmark American Indian Gaming Law Gives Too Much Power to Tribes*, GRAND RAPIDS PRESS, September 21, 2008 (contending that the “fundamental flaw with IGRA is that it tilts power far too much in the direction of tribes and leaves states almost no control over where casinos are placed, much less whether they open”).

18. 25 U.S.C. § 2703(8) (2006). The different classes of Indian gaming under IGRA are described *infra* Part I.

19. 25 U.S.C. § 2703(8).

20. *Id.* § 2710(d)(3)(A).

21. See *Dewberry v. Kulongiski*, 406 F. Supp. 2d 1136, 1155 (D. Or. 2005) (holding the governor has constitutional authority to enter into compacts under constitutional provision authorizing governor to “transact all necessary business” on behalf of the state); *Taxpayers of Mich. Against Casinos v. State of Mich.*, 732 N.W.2d 487 (Mich. 2007) (upholding validity of amendment process by governor in gaming compacts); *Dairyland Greyhound Park v. Doyle*, 719 N.W. 2d 408 (Wis. 2006) (limiting the decision in *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004), that stated the governor did not have authority to waive immunity of the state or to authorize gaming compacts in perpetuity but *Dairyland Greyhound* was found to not jeopardize existing gaming compacts or renewals of those compacts).

22. 25 U.S.C. § 2710(d)(4) states:

Except for any assessments that may be agreed to under paragraph (3)(C)(iii) [costs of regulation] of this subsection, nothing in this section shall be interpreted as conferring upon a [s]tate or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No [s]tate may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such [s]tate, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

*Id.*

23. 517 U.S. 44 (1996).

24. See *Fletcher*, *supra* note 1 (arguing for congressional legislation to ratify all existing revenue

negotiations, in fact, are concentrated not on whether any revenue sharing provisions will be included, but rather what the percentage will be.<sup>25</sup> This major impact of the decision in *Seminole Tribe* negates any statutory bargaining leverage that tribes had under IGRA, and essentially permits states to engage in legal extortion.<sup>26</sup> If tribes are not going to “pony up” and give the state a percentage of gaming revenue (not a small percentage either), tribes are left with absolutely no statutory recourse to require a state to negotiate a class III gaming compact in the wake of *Seminole Tribe*.<sup>27</sup>

According to the United States Department of the Interior (DOI), revenue sharing, generally, does not constitute illegal state taxation if the tribes receive “a valuable economic benefit” in return for “substantial exclusivity.”<sup>28</sup> DOI officials have testified before Congress regarding revenue sharing provisions and exclusivity:

Up to now, the Department has only accepted one type of benefit as being sufficient to merit a revenue sharing payment, and that is substantial exclusivity. That is in a [s]tate where Class III gaming may be authorized but is not authorized for non-Indian persons to operate commercial enterprises, but the tribe is authorized to operate those enterprises. Then

---

sharing compacts/agreements to which tribes would first consent and instituting an IGRA requirement that all future gaming compacts include revenue sharing).

25. See Fletcher, *supra* note 1, at 80 (“Such a mandatory revenue sharing provision would eliminate a majority of the negotiating points that currently consume states and tribes in their compact negotiations. This would greatly reduce the transaction costs of reaching agreements and eliminate the nasty ‘crossover’ negotiating tactics, such as making treaty rights and tax agreements contingent upon gaming, which have been employed in some states.”).

26. See, e.g., Katie Eidson, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319, 327 (2004-2005) (quoting Pojoaque Governor Jacob Viarrial, who informed lawmakers that “revenue sharing has become a smokescreen for extortion”) (footnotes omitted); K. Alexa Koenig, Comment, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1059-60 (2002) (“The compact tries to avoid potential illegality by expressly stating that revenue percentages were not imposed as a condition to compact negotiations (which would be extortion) . . . .”); Steven Andrew Light, Kathryn R.L. Rand & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 666 (2004) (“Without the ability to challenge a state’s demand for revenue sharing in federal court under IGRA (unless, of course, the state consents to suit, as has California), the danger for tribes is that states can simply charge tribes what, in practice, amounts to a multi-million dollar fee to conduct Class III gaming, in direct contravention to tribes’ sovereign right under *Cabazon* and Congress’s intent under IGRA.”); Kathryn R.L. Rand & Steven A. Light, *Do “Fish and Chips” Mix? The Politics of Gaming in Wisconsin*, 2 GAMING L. REV. 129, 140 (1998) (contending that “Wisconsin is using the compact negotiations in order to extort revenue from the tribes in return for ‘allowing’ them to maintain their already highly tenuous sovereignty rights”).

27. See RAND & LIGHT, *supra* note 1, at 94-95; Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee’s Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121, 122 (1997); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 66 (1997); Washburn, *supra* note 6, at 430.

28. See, e.g., *Oversight Hearing on Indian Gaming Regulatory Act: Role and Funding of the National Indian Gaming Commission Before the S. Comm. on Indian Affairs*, 108th Cong. 2 (2003) (statement of Aurene M. Martin, Acting Assistant Secretary of Indian Affairs, Department of the Interior) [hereinafter Statement of A. Martin]; Press Release, Bruce Babbitt, Secretary of the Interior, Department of the Interior (Aug. 23, 1997) [hereinafter Babbitt Press Release] (on file with author), available at <http://www.scienceblog.com/community/older/archives/N/int0938.shtml>.

we would look at whether a revenue sharing payment is warranted and to what degree, given a particular tribe's circumstances.<sup>29</sup>

Essentially, if "substantial exclusivity" is not available, and therefore, the bargained-for exchange of a valuable economic benefit is not available, then revenue sharing payments must be relinquished for the compact to be valid under IGRA.<sup>30</sup> Although officials from the DOI have testified before the Senate Committee on Indian Affairs to garner congressional support for amendments to IGRA that would have provided a stronger statutory basis for revenue sharing, the Department has continued to approve compacts containing revenue sharing provisions.<sup>31</sup> DOI, in fact, recommended the maximum revenue sharing payment should be capped at 10% or the payment would constitute a tax in violation of IGRA.<sup>32</sup>

In the absence of congressional clarification at least one federal court has offered an interpretation of what constitutes "exclusive" by holding that exclusivity means the state will not itself engage in gaming or the state will not permit or will limit non-Indian commercial gaming:

Tribes enjoy the exclusive "right to operate" so long as the [t]ribes are the only person or entities who have and can exercise the "right to operate" electronic games of chance in the [s]tate or, in other words, as long as all others are prohibited or shut out from the "right to operate" such games.<sup>33</sup>

If exclusivity or substantial exclusivity constitutes the bargained-for exchange in return for sharing revenues to the state pursuant to a class III gaming compact, the tribes have negotiated to cease payments<sup>34</sup> or at least decrease the amount<sup>35</sup> given to the state<sup>36</sup> in the event the exclusivity provision is breached. In some cases, however, even if the substantial exclusivity provision is breached by the state and the payment amount is eliminated or decreased, in the event the tribe is able to actually increase revenue levels to 110% of net gaming revenue prior to the state's breach, the tribe will again be required to submit payments to the state.<sup>37</sup>

29. See Statement of A. Martin, *supra* note 28, at 5.

30. See Babbitt Press Release, *supra* note 28, at 1.

31. *The Indian Gaming Regulatory Act Amendments of 2003: Hearing on S. 1529 Before the S. Comm. on Indian Affairs*, 108 Cong. 1 (2004) (statement of George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, Office of the Assistant Secretary, Indian Affairs, Department of the Interior). See Statement of A. Martin, *supra* note 28.

32. See Eidson, *supra* note 26, at 339.

33. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 93 F. Supp. 2d 850, 852 (W.D. Mich. 2000).

34. See *infra* note 102 for examples of gaming compacts where if the "exclusivity" provision is breached, the tribe may cease revenue sharing payments to states.

35. See Little River Band of Ottawa Indians and the State of Michigan, Gaming Compact of 1998 § 17, December 3, 1998, amended January 24, 2008, available at [http://www.michigan.gov/documents/mgcb/LRB\\_Compact\\_Amd\\_2008-01-24\\_244326\\_7.pdf](http://www.michigan.gov/documents/mgcb/LRB_Compact_Amd_2008-01-24_244326_7.pdf); Little Traverse Bay Bands of Odawa Indians and the State of Michigan, Gaming Compact of 1998 § 17, December 3, 1998, amended January 24, 2008, available at [http://www.michigan.gov/documents/mgcb/LTBB\\_Compact\\_2nd\\_Amd\\_2008-01-24\\_244325\\_7.pdf](http://www.michigan.gov/documents/mgcb/LTBB_Compact_2nd_Amd_2008-01-24_244325_7.pdf).

36. See Babbitt Press Release, *supra* note 28.

37. See *supra* note 35.

Fair enough . . . but what does “valuable economic benefit” or “substantial economic benefit” mean? Alternatively, what if the state already engages in, permits, or licenses non-Indian commercial gaming or allows commercial gaming in the form of racinos? Maybe exclusivity does not match the economic benefit of revenue sharing payments distributed to the state. Are there other options available to the tribes? Could a tribe negotiate for other economic benefits in lieu of exclusivity? The recent amendments to the gaming compacts of the Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians in Michigan show the DOI discomfort in revenue sharing where there is not a clear showing of substantial exclusivity, or other meaningful concessions.<sup>38</sup>

This article argues that tribes, in some circumstances, can and absolutely should negotiate economic incentives, as part of the compacting process (whether negotiating an original, an amendment, or a renewal) to further reservation economic development. The DOI has taken a very broad interpretation of what IGRA requires and prohibits from being included within a class III gaming compact.<sup>39</sup> The key is to negotiate non-traditional compact subjects and still satisfy the administratively created “substantial economic benefits” test. If state and even local governments are going to rely upon tribal gaming revenues to the point where payments are included in yearly budgets, then tribes must use any leverage available to take advantage of the ever-growing state and local governmental reliance upon tribal revenue sharing payments.

The first part of this article explores the background and history of IGRA’s good faith requirement debacle. The background and history over the past twenty years since IGRA’s enactment is critical for understanding why the current revenue sharing concept is in effect in the first place. The second part of the article outlines what may or may not be included in a gaming compact. The final section examines some of the barriers to reservation economic development and how incorporating solutions to these barriers into gaming compacts in exchange for revenue sharing with the state may be a viable option for some tribes.

## II. TRIBAL GAMING AS A MEANS TO AN END

### A. INDIAN GAMING COMES ALIVE: *CALIFORNIA V. CABAZON BAND OF MISSION INDIANS*

In *California v. Cabazon Band of Mission Indians*, the State of California, along with Riverside County, argued they had jurisdiction to regulate and/or shut down tribal bingo halls and casinos.<sup>40</sup> Both the Cabazon Band and Morongo Band of Mission Indians operated bingo halls in an environment where

---

38. See *infra* notes 125-29.

39. See *supra* notes 28-30 and accompanying text.

40. 480 U.S. 202 (1987).

California had been granted criminal jurisdiction over crimes occurring within the boundaries of Indian reservations via Public Law 280.<sup>41</sup>

The Tribes, eventually, sued the County and sought a declaratory judgment that the County had no authority to apply its ordinance inside the reservations and requested an injunction against enforcement of the county's ordinance. The State of California intervened but the district court granted the Tribes' motion for summary judgment, holding that neither the State nor the County had any authority to enforce its gambling laws on reservations.<sup>42</sup> The Court of Appeals for the Ninth Circuit affirmed<sup>43</sup> and the State and the County appealed.

The *Cabazon* Court relied upon the plain language of Public Law 280 and the decision in *Bryan v. Itasca County*<sup>44</sup> and adopted the analysis distinguishing between the criminal-prohibitory and civil-regulatory nature of Public Law 280.<sup>45</sup> In *Bryan*, the Court held the congressional intent behind section 2 of Public Law 280<sup>46</sup> is a grant of criminal jurisdiction over Indian country and that section 4 of Public Law 280<sup>47</sup> is a limited grant of civil jurisdiction over tribes. In sum, the *Cabazon* Court recognized that Public Law 280 does not grant states general civil regulatory jurisdiction over reservation Indians.<sup>48</sup>

Under the holding in *Bryan* then, as applied to the *Cabazon* and Morongo bands and the gambling laws of California and the ordinances of the county, section 2 applies only to private civil litigation in state court: "[I]t must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under section 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court."<sup>49</sup>

Prior to *Cabazon* reaching the U.S. Supreme Court, congressional legislation had been proposed to regulate Indian gaming.<sup>50</sup> The Supreme Court's decision in *Cabazon*, however, certainly invited (or forced) congressional action as to Indian gaming activities.<sup>51</sup>

---

41. Public Law 280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006), 28 U.S.C. § 1360 (2006)). During the "termination era" Congress withdrew federal criminal jurisdiction and extended the criminal jurisdiction of California, Minnesota (except Red Lake), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin (except later the Menominee Reservation) and Alaska. See generally Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

42. *Cabazon*, 480 U.S. at 206.

43. *Id.* (citing *Cabazon Band of Mission Indians v. California*, 783 F.2d 900 (9th Cir. 1986)).

44. 426 U.S. 373 (1976).

45. See *Cabazon*, 480 U.S. at 210.

46. See 18 U.S.C. § 1162.

47. *Id.* § 1360.

48. See *Cabazon*, 480 U.S. at 208 (citing *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976)).

49. *Id.*

50. See *The Impact of the U.S. Supreme Court's Recent Decision in Seminole v. Florida on the Indian Gaming Regulatory Act of 1988*, 104th Cong. 171 (1996) (statement of Franklin Ducheneaux) ("In 1983, in the 98th Congress, Mr. Udall introduced the first bill to affect . . . gambling activities by Indian tribes.") [hereinafter Testimony of F. Ducheneaux]. See also H.R. Rep. No. 1920 (1985); H.R. Rep. No. 3130 (1985).

51. For a thorough discussion of the political landscape after *Cabazon* was decided, see RAND & LIGHT, *supra* note 1, at 29-33; Fletcher, *supra* note 1, at 50 (noting that "*Cabazon Band* created the



## B. THE GREAT (AND FRAGILE) COMPROMISE: THE INDIAN GAMING REGULATORY ACT

The Indian Gaming Regulatory Act (IGRA) was enacted by Congress on September 15, 1988, and IGRA contains three overriding and explicit policies forwarded by Congress through IGRA's passage. IGRA's "Declaration of Policy" states IGRA was passed: "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 . . .*"<sup>52</sup> Congress enacted IGRA only after much debate and, in painstaking fashion, attempted to craft a balance between the interest of tribes and states.<sup>53</sup> The crucial part of the balance was the compacting process.<sup>54</sup> The tribes, on the one hand, were strongly opposed to any inclusion of state jurisdiction over tribal lands, and the states, on the other hand, were very concerned about state laws not applying to the tribal gaming facilities operating within the boundaries of the state and how exactly proper regulation of such facilities would be ensured.<sup>55</sup>

### 1. *Classes of Indian Gaming*

IGRA mandates that Indian gaming may only be conducted on "Indian lands"<sup>56</sup> and divides Indian gaming in three categorical classifications.<sup>57</sup> The classifications of Indian gaming are class I, class II, and class III.<sup>58</sup> Class I

political impetus to finalize an Indian gaming act").

52. 25 U.S.C. § 2702(1) (2006) (emphasis added). The other two purposes of IGRA, as described in the "Declaration of Policy" in 25 U.S.C. § 2702(2)-(3) are:

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

*Id.*

53. See Fletcher, *supra* note 1, at 55.

54. S. REP. 100-446, at 3083-84 (1988), reprinted in 1988 U.S.C.C.A.N. 3071. (reporting that "the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises . . .") [hereinafter Senate Report 100-446]; see Testimony of F. Ducheneaux, *supra* note 50, at 175 ("The concept of a Tribe-State compact was the mechanism through which the Congress attempted to resolve the two opposing extreme positions in a manner which would preserve tribal self-government, yet recognize and accommodate legitimate state interests.").

55. See Senate Report 100-446, *supra* note 54, at 3083.

56. 25 U.S.C. § 2703(4) (2006) provides that "Indian lands" are:

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

*Id.*

57. 25 U.S.C. § 2703.

58. *Id.*

games are traditional and social games played for no significant financial stakes.<sup>59</sup> Class I gaming, although exclusively regulated by tribes,<sup>60</sup> is certainly the least lucrative form of Indian gaming and is generally non-existent in tribal gaming facilities.<sup>61</sup>

The class II classification was crafted to include games that traditionally include an element of chance.<sup>62</sup> Class II games, generally, include bingo, card games (whether or not electronic, computer, or other technologic aids) that are “explicitly authorized by the laws of the state” as well as card games that state does not prohibit and that occur in the state where the tribe is located.<sup>63</sup> Class II games are regulated by the tribes, but each tribe conducting class II gaming is required to have a tribal gaming ordinance approved by the NIGC.<sup>64</sup>

Class III gaming is the catch-all category including “all forms of gaming that are not Class I gaming or Class II gaming.”<sup>65</sup> Any casino-style games (blackjack, roulette, craps, etc), slot machines, and lotteries constitute class III gaming activities<sup>66</sup> in addition to any “electronic or electromechanical facsimiles” of class II games.<sup>67</sup> Significantly, class III Indian gaming is essentially prohibited absent a negotiated gaming compact executed between the tribe and the state<sup>68</sup> and duly approved by the Secretary of the Interior.<sup>69</sup> If the state public policy prohibits, moreover, the type of casino-style gaming classified as class III gaming, the tribe will be garnered ineligible for a class III compact.<sup>70</sup>

Class II gaming, on the other hand, may be licensed and conducted by a tribe without the execution of a gaming compact.<sup>71</sup> There are tribes that have

59. *Id.* § 2703(6).

60. *Id.* § 2710(a)(1).

61. See Fletcher, *supra* note 1, at 51; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 306 (4th ed. 2004) (noting that class I gaming is not of legal or economic significance); Mark J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345, 382 (2004) (“Such games are not regulated by the IGRA and tend to generate insignificant revenues.”).

62. 25 U.S.C. § 2703(7)(A)(i).

63. *Id.* § 2703(7)(A)(ii).

64. *Id.* § 2710(b)(1)(B).

65. *Id.* § 2703(8).

66. *Id.*

67. *Id.* § 2703(7)(B)(ii).

68. *Id.* § 2710(d)(3)(A).

69. *Id.* § 2710(d)(3)(B).

70. *Id.* § 2710(d)(1)(B); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994), *reh'g denied*, 99 F.3d 321 (1996) (holding that if the state does not permit other forms of gambling, it need not negotiate gaming compacts with Indian tribes); Washburn, *supra* note 6, at 429; Rand, *supra* note 11, at 52.

71. 25 U.S.C. § 2703(7) provides:

(A) The term “class II gaming” means –

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly

generated revenue for governmental functions without class III gaming.<sup>72</sup> Where states have been unwilling to negotiate class III compacts, class II gaming is the only option available and is not as lucrative but will certainly generate more revenue for essential governmental services than no gaming at all. For example, the Seminole Tribe and Miccosukee Tribe in Florida have been able to generate significant revenue solely from class II gaming.<sup>73</sup>

Technological advances have electronically advanced the playability of class II games, such as bingo and non-banking card games (where the house does not play).<sup>74</sup> The NIGC is often requested to determine whether a gaming machine is a class II or class III machine.<sup>75</sup> All NIGC game classification opinions/determinations are appealable,<sup>76</sup> and due to technological advances, the distinction between class II and class III gaming machines has resulted in a wide variety of litigation.<sup>77</sup>

The NIGC proposed regulations that would have drawn a bright line between class II and class III gaming machines.<sup>78</sup> The bright-line created by the proposed regulations would have classified many technologically advanced bingo and non-banking card gaming machines, as class III machines, and

numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that –

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include –

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

*Id.*

72. See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 290 (2004) (referencing so-called class II slot machines); Fletcher, *supra* note 1, at 51. See also Alan Meister, *The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations*, submitted to the NIGC, February 1, 2008 (on file with author).

73. Recently the Seminole Tribe was able to negotiate a class III gaming compact with Florida Governor Crist and the Tribe is currently operating class III machines in the Tribe's facilities. The compact, however, is being challenged and the Florida Supreme Court held that the governor did not have authority under the state constitution to bind the State of Florida to a compact that was contrary to state public policy. See *Fla. House of Representatives v. Crist*, 990 So. 2d 1035 (Fla. 2008).

74. CANBY, *supra* note 61, at 324.

75. See FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 863 (Nell Jessup Newton et al. eds., LexisNexis 2005).

76. See *Shakopee Mdewakanton Sioux Cmty v. Hope*, 16 F.3d 261 (8th Cir. 1994).

77. See, e.g., *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 14 F.3d 633 (D.C. Cir. 1994); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994); *Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992).

78. Definition for Electronic or Electromechanical Facsimile, 72 Fed. Reg. 60,482-01 (proposed Oct. 24, 2007) (to be codified at 25 C.F.R. pt. 502).

therefore, could only be used by tribes if the tribe had a valid gaming compact in place with the state and bringing in possible revenue sharing.<sup>79</sup>

The NIGC Chairman announced the proposed regulations would establish a bright-line between class II and class III gaming machines but were initially set aside until a cost-benefit analysis could be conducted.<sup>80</sup> Tribes operating a large number of class II machines, such as many of the Oklahoma tribes and other tribes in states where no gaming compacts has been negotiated, urged the NIGC Chairman to withdraw the proposed regulations. The bright-line created by the proposed regulations would have classified some machines as class III although currently such machines are classified as class II.<sup>81</sup> Due to massive amounts of pressure by tribes upon the NIGC to withdraw the regulations, due in large part to the possible financial impact/burden placed upon tribes reliant upon class II gaming, the NIGC then withdrew the regulations roughly a year later.<sup>82</sup>

## 2. *The Tribal Trump Card: IGRA's Good Faith Negotiation Requirement*

Tribes were provided with statutory protections against state interference or intrusion upon tribal sovereignty during the compacting process. First, if a state refused to negotiate in good faith a class III gaming compact with a tribe, the tribe could file suit in federal court to force negotiations.<sup>83</sup> Congress specifically intended for tribes to have a solid remedy in place where the tribe could still conduct class III gaming even if a state that "permits such gaming" ignored the tribe.<sup>84</sup> Secondly, states are prohibited from levying any "tax, fee, charge, or other assessment" against or upon a tribe engaged in or licensing an entity to conduct class III gaming on Indian lands<sup>85</sup> or refusing to negotiate a class III gaming compact due to the lack of authority to tax the Indian gaming activity.<sup>86</sup>

The balance struck by Congress with IGRA, unsurprisingly, led directly to litigation between tribes, states, and the federal government relating to the authority of Congress to enact IGRA as a constitutional exercise of authority.<sup>87</sup>

---

79. Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs, and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic Computer, or Other Technologic Aids", 72 Fed. Reg. 60,483 (proposed Oct. 24, 2007) (to be codified at 25 C.F.R. pt. 502 and 546).

80. Press Release, National Indian Gaming Commission, NIGC Sets Aside Class II Classification, Definition Regulations (June 5, 2008), available at <http://www.nigc.gov/ReadingRoom/PressReleases/PR92062008/tabid/839/Default.aspx>.

81. See the two proposed regulations by the NIGC, *supra* note 78-79.

82. Definition for Electronic or Electromechanical Facsimile, 73 Fed. Reg. 60,490-01 (Oct. 10, 2008) (Notice of Withdrawal of Proposed Rule); Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids", 73 Fed. Reg. 60,490-02 (Oct. 10, 2008) (Notice of Withdrawal of Proposed Rule).

83. 25 U.S.C. § 2710(d)(7)(A) (2006).

84. See *supra* note 54, at 3084-85, 3088-89.

85. 25 U.S.C. § 2710(d)(4). See *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433-35 (9th Cir. 1994) (holding the Indian law preemption test applied to IGRA so any state tax relating to Indian gaming was preempted).

86. See 25 U.S.C. § 2710(d)(4).

87. See *Fletcher*, *supra* note 1, at 56-57 (describing the various "waves" of IGRA-related

After the dust had settled and IGRA was still a valid act of Congress, another round of litigation ensued when tribes alleged that states refused to negotiate compacts in good faith as required under IGRA.<sup>88</sup>

IGRA requires states to enter into negotiations with tribes for a class III gaming compact or the tribe may file suit in federal court to mandate negotiations.<sup>89</sup> If the state continues to refuse, the Secretary of the Interior may impose a compact (called gaming procedures) upon the state which is selected by a court-appointed mediator.<sup>90</sup> The tribal remedy in federal court under IGRA played a key role in allowing some tribes to force negotiations with the states in some cases<sup>91</sup> and could require the parties honor a compact selected by a mediator and enforced by the Secretary of the Interior.<sup>92</sup> The balance carefully constructed by Congress, however, would evaporate in light of the U.S. Supreme Court's decision in *Seminole Tribe v. Florida* and leave tribes without a remedy.<sup>93</sup>

### 3. *The Trump Card is Trumped: Judicial Elimination of the Tribal Remedy Under IGRA and the One-Sided Compacting Process Since Seminole Tribe v. Florida*

In *Seminole Tribe*, the Seminole Tribe of Florida sued the State of Florida and its governor to force the governor to negotiate and enforce IGRA's tribal remedy.<sup>94</sup> The State of Florida argued that the suit should be dismissed as Eleventh Amendment sovereign immunity precluded the Seminole Tribe from filing the suit.<sup>95</sup> The Court, despite a clear recognition that Congress "unmistakably" intended to abrogate state sovereign immunity in IGRA,<sup>96</sup> held the Indian Commerce Clause does not provide Congress with authority to waive state immunity from suit.<sup>97</sup>

litigation).

88. See *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994) (en banc) (Canby, C.J., dissenting from denial of reh'g en banc), *amended on denial of reh'g*, 99 F.3d 321 (9th Cir. 1996) (en banc), *cert. denied sub nom.*, *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997); *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995); *Ponca Tribe of Okla. v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995); *Wis. Winnebago Nation v. Thompson*, 22 F.3d 719 (7th Cir. 1994); *Rhode Island v. Narragansett Tribe*, 19 F.3d 685 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147 (6th Cir. 1993); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

89. 25 U.S.C. § 2710(d)(3)(A), § 2710(d)(7).

90. *Id.* § 2710(d)(7)(B)(iv)-(vii).

91. See *Wis. Winnebago Nation*, 22 F.3d at 719 (referring to litigation against Wisconsin); *Sault Ste. Marie Tribe of Chippewa Indians*, 5 F.3d at 147 (referring to litigation against Michigan).

92. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) (referring to litigation against Connecticut).

93. 517 U.S. 44 (1996). See *Fletcher*, *supra* note 1, at 57; *Washburn*, *supra* note 6, at 441.

94. *Seminole Tribe*, 517 U.S. at 51-52 (citing 25 U.S.C. § 2710(d)(7)(A)).

95. *Id.* at 52.

96. *Id.* at 56-57 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)).

97. *Id.* at 72-73.

The Court's decision in *Seminole Tribe* left IGRA at the very least crippled, but at the most, completely broken (at least from the tribal prospective). Tribes were left with virtually no negotiating power. After *Seminole Tribe*, it was approximately two years before another class III gaming compact was finalized.<sup>98</sup> States simply refuse to negotiate if they do not want a tribe to conduct class III gaming without sharing revenue or for any other reason.

Tribes, pursuant to IGRA, are free to pursue class II gaming without having to negotiate a gaming compact and are subject only to the oversight of the NIGC.<sup>99</sup> There are tribes that have generated significant revenue conducting solely class II gaming. The Seminole Tribe, for example, has operated class II gaming for the past twenty-five years and since the Court's decision in *Seminole Tribe* has generated a significant amount of gaming revenue. In a showing of the economic status of the Seminole Tribe, the Tribe purchased the Hard Rock Café business for \$965 million.<sup>100</sup> When a tribal gaming facility is located near heavily populated urban areas, such as the Seminole Tribe's facilities, class II gaming can flourish. The vast majority of tribes, however, do not have the luxury of people living in large population centers coming onto the reservation to play bingo. In order to entice people to tribal gaming facilities, the full gamut of casino-style (class III) gaming needs to be offered by the tribe.

If class II was simply not an option, then tribes were left with little choice but to succumb to the legal extortion created by *Seminole Tribe* allowing states to demand a percentage of class III tribal gaming profits.<sup>101</sup> Even before *Seminole Tribe* there were several tribes that negotiated class III compacts with revenue sharing provisions.<sup>102</sup>

98. See Fletcher, *supra* note 1, at 57-58; LIGHT & RAND, *supra* note 1, at 50.

99. See 25 U.S.C. § 2710(a)-(b) (2006).

100. *Seminole Tribe Buys Hard Rock Cafe Business: \$965 Million Deal Gives Tribe World's Largest Rock Memorabilia Collection*, ASSOCIATED PRESS WIRE, Dec. 8, 2006, available at [www.msnbc.com/id/16090321/](http://www.msnbc.com/id/16090321/).

101. *Oversight Hearing on Indian Gaming Regulatory Act; Role and Funding of the National Indian Gaming Commission Before the S. Comm. on Indian Affairs*, 109th Cong. 89 (2003) (prepared statement of Aurene M. Martin, Acting Assistant Secretary of Indian Affairs, Department of the Interior, stating that the *Seminole Tribe* decision has resulted in states including revenue-sharing provisions in Class II compacts). See Light, Rand & Meister, *supra* note 26, at 665-66. See generally Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451 (2003); Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER, RACE & JUST. 487 (2002).

102. See Memorandum of Understanding between State of Connecticut and Mashantucket Pequot Tribe, January 13, 1993, available at [http://www.ct.gov/dosr/lib/dosr/Memorandum\\_Of\\_Understanding\\_Foxwoods.pdf](http://www.ct.gov/dosr/lib/dosr/Memorandum_Of_Understanding_Foxwoods.pdf); Tribal-State Compact between the Mohegan Tribe and the State of Connecticut, May 17, 1994, available at [http://www.ct.gov/dosr/lib/dosr/Tribal\\_State\\_Compact\\_Mohegan.pdf](http://www.ct.gov/dosr/lib/dosr/Tribal_State_Compact_Mohegan.pdf); Lac Vieux Desert Band of Lake Superior Chippewa Indians and the State of Michigan, Gaming Compact of 1993, August 20, 1993, available at [http://www.michigan.gov/documents/LVD\\_Compact\\_70616\\_7.pdf](http://www.michigan.gov/documents/LVD_Compact_70616_7.pdf); Bay Mills Indian Community and the State of Michigan, Gaming Compact of 1993, August 20, 1993, available at [http://www.michigan.gov/documents/BMIC\\_Compact\\_70611\\_7.pdf](http://www.michigan.gov/documents/BMIC_Compact_70611_7.pdf); Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan, Gaming Compact of 1993, August 20, 1993, available at [http://www.michigan.gov/documents/GTB\\_Compact\\_70613\\_7.pdf](http://www.michigan.gov/documents/GTB_Compact_70613_7.pdf); Keweenaw Bay Indian Community and the State of Michigan, Gaming Compact of 1993, August 20, 1993, available at

Nowhere in this specific declaration of policy, nor anywhere else in IGRA, did Congress permit a state or local government to demand payments from or a percentage of tribal gaming revenue.<sup>103</sup> The quandary for tribes is that a tribe cannot license or operate a class III (casino-style) gaming facility without a valid and duly approved tribal-state class III gaming compact executed between the tribe and the state in which the tribe is located.<sup>104</sup>

4. 25 C.F.R. Part 291: *The Department of the Interior Administratively Replaces the Tribal Trump Card in Response to Seminole Tribe*

In *Mashantucket Pequot Tribe v. State of Connecticut*, the Second Circuit forced the State of Connecticut to negotiate a class III gaming compact in good faith with the Mashantucket pursuant to the “tribal trump card” contained in IGRA.<sup>105</sup> The *Pequot* Court determined that class III casino-style gaming was not contrary to Connecticut’s public policy and, as such, the state was obligated to negotiate a compact.<sup>106</sup> The Mashantucket Tribe and Connecticut, however, were unable to come to an agreement. Following the procedure dictated by IGRA, the federal court appointed a mediator<sup>107</sup> and allowed the Tribe and Connecticut to submit their version or “last best offer” compact to the mediator. The mediator then selected the compact that closely comported to IGRA in addition to the order of the court.<sup>108</sup>

This is the process that was judicially destroyed by the U.S. Supreme Court in *Seminole Tribe*. In response to this destruction of IGRA’s tribal trump card, the Department of the Interior promulgated regulations allowing the Secretary of the Interior to issue “secretarial procedures” in the event the state refuses to negotiate a class III gaming compact and hides behind Eleventh Amendment immunity.<sup>109</sup> This way the intent of Congress in forcing a state to at least negotiate in good faith is restored under IGRA by way of the Secretary’s overall trust responsibility toward tribes to prescribe regulations for the benefit of Indians.<sup>110</sup> As is the case with most IGRA-related battles, the states will not go quietly into the night.

The U.S. Supreme Court recently denied a petition for certiorari in *Texas v.*

---

[http://www.michigan.gov/documents/KBIC\\_Compact\\_70615\\_7.pdf](http://www.michigan.gov/documents/KBIC_Compact_70615_7.pdf); Hannahville Indian Community and the State of Michigan, Gaming Compact of 1993, August 20, 1993, available at [http://www.michigan.gov/documents/HIC\\_Compact\\_70614\\_7.pdf](http://www.michigan.gov/documents/HIC_Compact_70614_7.pdf); Saginaw Chippewa Indian Tribe of Michigan and the State of Michigan, Gaming Compact of 1993, August 20, 1993, available at [http://www.michigan.gov/documents/SCIT\\_Compact\\_70617\\_7.pdf](http://www.michigan.gov/documents/SCIT_Compact_70617_7.pdf).

103. See generally Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006).

104. *Id.* § 2710(d).

105. 913 F.2d 1024 (2nd Cir. 1990) (addressing “good faith” negotiation requirement in IGRA).

106. *Id.* at 1032.

107. See *Mashantucket Pequot Tribe v. State of Conn., et al.*, Civil Action No. H89-717 (1989) (on file with author). The court-appointed mediator was Mr. Henry J. Naruk.

108. 25 U.S.C. § 2710(d)(7)(B)(iv).

109. See 25 C.F.R. § 291.3 (1999).

110. See 25 U.S.C. §§ 2, 9. See also *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1300 (9th Cir. 1998).

*United States*.<sup>111</sup> During the fall of 2007, a divided panel of the Fifth Circuit found that, through the promulgation of the secretarial procedures, or an alternative mechanism of judicial good faith determinations, IGRA had effectively negated the authority of the Secretary of the Interior to promulgate such regulations. The Fifth Circuit declined to hear the case en banc, even though the intent behind the Secretarial Procedures was to solve the *Seminole Tribe* problem.

At this point, the Secretarial Procedures are invalid, at least in the Fifth Circuit (*i.e.*, Texas, Louisiana, and Mississippi), and other challenges may arise. The possibility the U.S. Supreme Court will address the validity of the secretarial procedures may only occur if another circuit or circuits reach a different conclusion than that of the Fifth Circuit. The possibility the Supreme Court, moreover, will actually affirm the Secretarial Procedures as valid, based upon recent Indian law opinions including *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), is less than likely. This may mean, therefore, that revenue sharing in gaming compacts is here to stay as the states will again retain virtually all of the leverage when negotiating compacts.

### III. GAMING COMPACT SUBJECT AREAS: THE ECONOMIC BENEFITS TEST

Generally speaking, gaming compacts may include a wide variety of subjects.<sup>112</sup> Section 2710(d)(3)(C)<sup>113</sup> lists the seven general subject areas that may be included in gaming compacts:

Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the [s]tate that are directly related to, and necessary for, the licensing and regulation of [gaming] activity;
- (ii) the allocation of criminal and civil jurisdiction between the [s]tate and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the [s]tate of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the [s]tate for comparable activities;
- (v) remedies for breach of contract;
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
- (vii) any other subjects that are directly related to the operation of gaming activities.

This list establishes the general framework of negotiating compacts and,

---

111. 497 F.3d 491 (5th Cir. 2007).

112. See COHEN, *supra* note 75, at 77-78.

113. 25 U.S.C. § 2710(d)(3)(C).



generally, the over 250 gaming compacts approved by the federal government include provisions that address these subjects.<sup>114</sup> In the case of *In Re Indian Gaming Related Cases*,<sup>115</sup> the Ninth Circuit upheld a revenue-sharing agreement challenged by the Coyote Valley Band of Pomo Indians. The revenue-sharing agreement was structured according to demands by the State of California to create a “Revenue Sharing Trust Fund” (RSTF) allowing other California tribes without a stream of gaming revenue to share in the proceeds.<sup>116</sup> The Ninth Circuit held the provision did not offend IGRA’s gaming compact subject area provision as IGRA specifically allows any subject directly related to the operation of gaming activities to be negotiated into a gaming compact.<sup>117</sup> The Court, for support, looked to the overall congressional policy in enacting IGRA:

It is clear that the RSTF provision falls within the scope of paragraph (3)(C)(vii). Congress sought through IGRA to “promot[e] tribal economic development, self-sufficiency, and strong tribal governments.” [citation omitted]. The RSTF provision advances this Congressional goal by creating a mechanism whereby *all* of California’s tribes – not just those fortunate enough to have land located in populous or accessible areas – can benefit from class III gaming activities in the [s]tate.<sup>118</sup>

One could glean from the Ninth Circuit’s interpretation of IGRA that as long as the issue or subject addressed in the gaming compact somehow strengthens tribal governments and economies, then IGRA is not violated. This seems to be the approach the federal government has adopted in approving compacts:

To date, the Department has only approved revenue sharing payments that call for tribal payments when the [s]tate has agreed to provide valuable economic benefit of what the Department [of the Interior] has termed substantial exclusivity for Indian gaming in exchange for the payment. As a consequence, if the Department affirmatively approves a proposed compact, it has an obligation to ensure that the benefit received by the State is equal or appropriate in light of the benefit conferred on the tribe. Accordingly, if a payment exceeds the benefit received by the tribe, it would violate IGRA because it would amount to an unlawful tax, fee, charge or other assessment. Though there has been substantial disagreement over what constitutes a tax, fee, charge or other assessment within this context, we believe that *if the payments are made in exchange for the grant of a valuable economic benefit . . . these payments do not fall within the category of a prohibited tax, fee, charges, or assessments.*<sup>119</sup>

Based upon the Ninth Circuit’s overall view of congressional policy with the enactment of IGRA, along with the interpretation of what are permissible

---

114. See Statement of A. Martin, *supra* note 28, at 5 (stating approximately 250 compacts have been approved); COHEN, *supra* note 75, at 873 (stating over 200 compacts have been approved).

115. 331 F.3d 1094 (9th Cir. 2003).

116. *Id.* at 1105.

117. *Id.* at 1111.

118. *Id.*

119. Statement of A. Martin, *supra* note 28, at 5 (emphasis added). See Eidson, *supra* note 26, at 326.

subjects for inclusion in gaming compacts, there is wiggle room for permissible subjects of negotiation. If the statements and guidance provided by the federal government are added to the equation, there is ample support to negotiate other tribal economic incentives, aside from substantial exclusivity, in exchange for revenue sharing payments to state and/or local governments. On the other hand, the statements and guidance of the DOI would not constitute a final agency action or determination, and therefore are not entitled to *Chevron* or *Skidmore* deference; the statements may still assist a court in balancing the merits of a case.

After the *Seminole Tribe* decision shifted most negotiation leverage away from the tribes, however, states began to explore the universe of what could be negotiated as part of a gaming compact. There were and are states (such as Wisconsin under former Governor Tommy Thompson and Michigan under former Governor John Engler) in addition to citizens groups that hold the viewpoint that tribes, in order to conduct gaming activities on tribal lands, should not only give the state a percentage of the gaming revenue, but should relinquish treaty rights in exchange to conduct class III gaming.<sup>120</sup> Tribes that retain treaty rights have argued and would certainly argue such a negotiation tactic is outside the scope of the subject areas contained in IGRA. This negotiating tactic exemplifies the overwhelming leverage states have after *Seminole Tribe*.<sup>121</sup>

In some regions of the country, exclusivity provisions may still constitute effective consideration when amendments or compact renewal periods arise. Connecticut has effectively prohibited casino-style gambling within the state in exchange for 25% of net gaming revenue generated by the Foxwoods Resort, owned by the Mashantucket Pequots, and the Mohegan Sun Resort, owned by the Mohegan Tribe of Connecticut.<sup>122</sup>

If the State of Oklahoma, however, offers a similar guarantee to a tribe in Oklahoma, the bargained-for exchange may not reap the same benefit as there are over ninety tribal casinos or bingo halls in Oklahoma operating both class II and class III gaming. If Oklahoma allows further casino-style gaming at racetracks (which already are permitted a limited number of slot machines), allowing state-licensed gaming would simply be another casino to compete with. The real issue, however, is that Oklahoma gaming compacts are “one size fits all” and if an Oklahoma tribes seeks to conduct class III gaming, then the tribe must agree upon the terms in the statute.<sup>123</sup> There does not appear to be any room for negotiating any additional economic incentives into the gaming

---

120. See RAND & LIGHT, *supra* note 1, at 153; Fletcher, *supra* note 1, at 80 (“This would greatly reduce the transaction costs of reaching agreements and eliminate the nasty ‘crossover’ negotiating tactics, such as making treaty rights and tax agreements contingent upon gaming, which have been employed in some states.”).

121. See generally Fletcher, *supra* note 1.

122. See RAND & LIGHT, *supra* note 1, at 152.

123. See State-Tribal Gaming Act, OKLA. STAT. ANN. tit. 3A, § 281 (West 2008). State Question No. 712, Legislative Referendum No. 335, adopted at statewide referendum held on Nov. 2, 2004.

compacts.

In some states, for example Michigan, there are non-Indian commercial casinos regulated and licensed by the state.<sup>124</sup> In Oklahoma horse racing tracks are permitted by state law to have a limited amount of slot machines at the race track. These facilities are referred to as “racinos.” In Michigan, the non-Indian commercial casinos are all located in Detroit. There are over twenty tribal gaming facilities throughout Michigan, ten of which are located in Michigan’s Upper Peninsula,<sup>125</sup> and in some cases, the tribal gaming facilities are closer to Wisconsin than Detroit or anywhere in the Lower Peninsula. For those tribes in the Upper Peninsula, therefore, the main source of competition is the other tribal casinos, not casinos some 500 or 600 miles away in Detroit.

Michigan tribal casinos may have saturated the market to the point that the prospect of giving the state anywhere from 8% to 20% of tribal gaming revenue is unreasonable, and more importantly, unprofitable when the bargained-for exchange is the state’s promise not to game or to license non-Indian commercial gaming outside of Detroit. This is especially true if the compacting tribe is located in a remote region where the state, a non-Indian commercial casino developer, or a different tribe is likely to attempt to open a gaming facility. Where is the meaningful concession from the state if a tribe in Michigan’s Upper Peninsula is offered a guarantee the state will not permit gaming in the five or six county region surrounding the tribe? More than likely, the tribe would receive little benefit from such a guarantee.

In Michigan, more recently negotiated compacts and amendments to existing compacts, the compacts use the term “competitive market” to denote the level of exclusivity promised.<sup>126</sup> The Pokagon Band of Potawatomi Indians, however, negotiated an amendment permitting gaming at two additional sites.<sup>127</sup> The Pokagon Band and the State agreed that the ability to open satellite gaming facilities constitutes enough of a valuable economic benefit to promise revenue sharing payments of 6% of net gaming revenue at the Band’s Four Winds Casino, and to provide 8% of any net gaming revenue in the event the other two casinos open.<sup>128</sup> The State, in no uncertain terms, does not promise complete

124. See, e.g., MICH. COMP. LAWS § 432.201 (2006).

125. The tribes and tribal casinos in Michigan’s Upper Peninsula include the Keweenaw Bay Indian Community: Ojibwa Casino (Marquette), Ojibwa Casino Resort (Baraga); Hannahville Indian Community: Island Resort & Casino (Harris); Bay Mills Indian Community: Bay Mills Resort & Casino (Brimley); Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan: Lac Vieux Desert Resort Casino & Golf Course (Watersmeet); Sault Ste. Marie Tribe of Chippewa Indians: Kewadin Casino (Christmas), Kewadin Casino (Hessel), Kewadin Casino (Manistique), Kewadin Casino, Hotel and Convention Center (Sault Ste Marie), and Kewadin Shores Casino (St. Ignace). A complete list of all Michigan tribal casinos can be found on the Michigan Gaming Control Board website, [http://www.michigan.gov/mgcb/0,1607,7-120-1380\\_1414\\_2183---,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2183---,00.html) (last visited March 21, 2009).

126. See Little River Band of Ottawa Indians Gaming Compact, *supra* note 35, § 17; Little Traverse Bay Bands of Odawa Indians Gaming Compact, *supra* note 35, § 17.

127. See Pokagon Band of Potawatomi Indians and the State of Michigan, Gaming Compact of 1998 § 17, December 3, 1998, amended August 14, 2008, available at [http://www.michigan.gov/documents/mgcb/Pokagon\\_Amended\\_Compact.2008\\_253916\\_7.pdf](http://www.michigan.gov/documents/mgcb/Pokagon_Amended_Compact.2008_253916_7.pdf).

128. *Id.*

exclusivity, but rather contractually obligates itself to not allow a “commercial gaming facility”<sup>129</sup> to open within certain counties close in proximity to the tribal facilities.<sup>130</sup>

DOI took issue with the “Competitive Market” terminology but in the case of the Little River Band and Little Traverse Bay Bands, DOI neither approved nor disapproved the amendments to the gaming compacts within the 45-day review period.<sup>131</sup> In the Pokagon Amendment, there is no competitive market provision, but rather the ability to open additional gaming facilities is the benefit received by the Band from the state. In both cases, however, because DOI neither approved nor disapproved the amendments with the 45-day period, the compact as amended is deemed approved “but only to the extent the compact is consistent with the provisions” of IGRA.<sup>132</sup> The DOI, presumably (with the Tribes’ urging), could bring suit on behalf of the Tribes to strike the legality of the revenue sharing provision based upon the dictates of IGRA against state taxation of tribal gaming revenue, although this scenario may be unlikely.

After examining the amendments, DOI was satisfied that their implementation would put the tribes in a better contractual position than the terms of the extant agreement.<sup>133</sup> DOI, nevertheless, remained concerned as to whether the state made any meaningful concessions in exchange for a percentage of gaming revenue:

There is no question that the Tribe has provided sufficient documentation to show that it is in a far better position under the terms of the Amendment than it would be under the terms of the existing compact as interpreted by the U.S. District Court for the Western District of Michigan. For that reason, we do not believe that the Amendment should be disapproved. However, we are sufficiently troubled by the reduction in the exclusivity zone, the 85 gaming-device exemption within that zone, and the contingent 4% net win continued payment [even after the “competitive market” is lost] to be unable to determine with certainty that new Section 17 of the Compact meets the two-prong test [(1) meaningful concessions; (2) resulting in a substantial economic benefit to the Tribe]

---

129. See for example, the Little River Band of Ottawa Indians Gaming Compact, *supra* note 35, at § 17(c)(2), stating:

“Commercial Gaming Facility” means a facility operated by any person or entity including the [s]tate that contains 85 or more electronic wagering devices that are electronic games of chance as defined in Section 3(A)(5) of this Compact or other similar electronic devices designed and intended to closely simulate an electronic game of chance, regardless of how a device is categorized under IGRA or whether the device operates independently or through any type of common server, including video lottery terminals, stand alone keno devices, and other similar devices.

*Id.*

130. Letter from George Skibine to Jennifer Granholm, Governor of Michigan (March 11, 2008) (regarding the amendments to the 1998 class III gaming compacts between the Little River Band and the Little Traverse Bay Bands and the State of Michigan), *available at* [http://www.michigan.gov/documents/mgcb/LTBB\\_Compact\\_2nd\\_Amd\\_2008-01-24\\_244325\\_7.pdf](http://www.michigan.gov/documents/mgcb/LTBB_Compact_2nd_Amd_2008-01-24_244325_7.pdf).

131. 25 U.S.C. § 2710(d)(8)(C) (2006).

132. *Id.* § 2710(d)(8)(C).

133. See Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians v. Michigan, 5:05-CV-95 (W.D. Mich. 2007) (on file with author).

as to warrant an affirmative approval of the Amendment.<sup>134</sup>

While some tribes may seek to negotiate for an extremely low revenue sharing percentage under a compact or a renewed compact, the state, and in some cases local governments, formulate governmental budgets assuming some gaming revenue will balance the budget. Nevertheless, what if the tribe can get other “non-traditional” economic incentives or meaningful concessions from the state in exchange for sharing a percentage of gaming revenue?

#### IV. BARRIERS TO ECONOMIC DEVELOPMENT ON THE RESERVATION AND THE SUBSTANTIAL BENEFITS TEST

Tribes should consider whether negotiating with states to eliminate various problems or quandaries of federal Indian law in an effort to promote further economic development on or near the reservation. For example, the problem of double taxation could be eliminated via compact provisions or a separate agreement that would allow non-Indian businesses to conduct on-reservation business without facing both state and tribal taxation.

##### A. QUANDARIES WITH TRUST LAND AND TAXATION ISSUES

The Indian Reorganization Act of 1934<sup>135</sup> (IRA) signified a change in congressional policy toward Indians as individuals and as citizens of tribal communities. The policy change shifted away from the assimilation and allotment policies codified by the General Allotment Act (or Dawes Act) of 1887. The term “codified” is used, as opposed to “instituted,” as the allotment of Indian lands began as early as 1633<sup>136</sup> and continued until the passage of the Indian Reorganization Act. The General Allotment Act, generally, sought to end the communal ownership of tribal lands and convert or “assimilate” the Indians in mainstream America by converting reservation lands into property owned by individual Indians.<sup>137</sup>

There are approximately 560 federally-recognized tribes in the United States, of which 334 are located in the lower 48 states and 226 in Alaska.<sup>138</sup> Following the enactment of the IRA, 181 tribes (representing 129,750 Indians) adopted the terms of the IRA, while 77 tribes (representing 86,365 Indians) voted to reject it.<sup>139</sup> By 1947, 195 were organized pursuant to the IRA (excluding Oklahoma and Alaskan Indians).<sup>140</sup> Since that time other tribes, including those more recently recognized by the U.S. Government, have also organized under the IRA and adopted IRA constitutions. Many IRA tribes,

134. See Skibine Letter, *supra* note 130, at 2-3.

135. Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461 (2006) (also known as the Wheeler-Howard Act).

136. See COHEN, *supra* note 75, at 77-78.

137. *Id.*

138. See *supra* note 12.

139. THEODORE H. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER THE I.R.A. 3 (1947).

140. *Id.*

however, have deviated from the boilerplate structure of the IRA constitutions forced upon tribes during the 1930s and 1940s.

For example, upon receiving federal recognition on May 27, 1980, the Grand Traverse Band of Ottawa and Chippewa Indians adopted an IRA constitution.<sup>141</sup> Notably, the Grand Traverse Band Constitution established a separate and independent judiciary.<sup>142</sup> After the passage of the IRA, many tribal judiciaries served at the pleasure of the tribes' governing body.<sup>143</sup> This created a government structure that severely hampered the independence of tribal courts.<sup>144</sup> In the last fifteen to twenty years, tribes in Michigan and elsewhere in Indian country have recognized the need to establish the separation of powers between the judiciary and legislative branch.

Perhaps the most devastating impact caused by the General Allotment Act can still be felt and seen across Indian country even today.<sup>145</sup> At the time the IRA became law approximately 90 million acres of Indian land passed into non-Indian ownership.<sup>146</sup> The IRA, overall, focused on bringing local control back to tribes.<sup>147</sup> Part of the IRA's goal was to foster reservation economic development by placing restrictions on the alienation (*i.e.* sale) of Indian lands, taxation, establish a mechanism where tribes could reorganize and adopt constitutions.<sup>148</sup>

The IRA authorized the Secretary of the Interior to place land into trust for the benefit of Indians (individual and communal), and any land placed into trust would then be restricted from alienation and the land would be free of taxation.<sup>149</sup> Some tribes elected to utilize the structure, privileges, and detriments, while other tribes remained wary of any grant of federal authority over Indian tribes and remained "unorganized" or continued to operate under an existing government.<sup>150</sup>

The vast majority of tribally-held lands are lands placed into trust status by the Secretary of the Interior. Since 1934, once a tribe was able to reacquire land

---

141. See CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS (1988).

142. *Id.* art. V.

143. See Michael D. Petoskey, *Tribal Courts*, 67 MICH. B. J. 366, 368-69 (1988) (on file with author); Matthew Fletcher & Zeke Fletcher, *A Restatement Of The Common Law Of The Grand Traverse Band Of Ottawa And Chippewa Indians*, 7 TRIBAL LAW JOURNAL (2008), available at [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_7/a\\_restatement\\_of\\_the\\_common\\_law\\_of\\_the\\_grand\\_traverse\\_band\\_of\\_ottawa\\_and\\_chippewa\\_indians/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_7/a_restatement_of_the_common_law_of_the_grand_traverse_band_of_ottawa_and_chippewa_indians/index.php).

144. Matthew Fletcher & Zeke Fletcher, *A Restatement Of The Common Law Of The Grand Traverse Band Of Ottawa And Chippewa Indians*, 7 TRIBAL LAW JOURNAL (2008).

145. See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

146. See *id.*

147. See *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding employment preference for Indians in the Bureau of Indian Affairs, as provided by the Indian Reorganization Act); see also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("The Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunity from state and local control.").

148. See 25 U.S.C. §§ 461 et seq. (2006).

149. *Id.* § 465.

150. See generally Haas, *supra* note 139.

lost to the General Allotment Act, it seems the tribal government would follow the steps to place the land into trust. After all, when land is placed into trust, the tribe has jurisdiction over the land and state law has no applicability.<sup>151</sup> Some have mixed feelings as to the so-called economic benefits of placing land into trust status. Lance Morgan, Chief Executive Officer of Ho-Chunk, Inc., (a multi-million dollar tribally-chartered company started from scratch by Mr. Morgan) has said that trust land ensured decades of poverty for Indian tribes.<sup>152</sup>

One glaring issue with tribal trust land and economic development on the reservation is that tribal gaming may only be conducted on "Indian lands," and generally speaking, the only gaming-eligible lands are tribal trust lands.<sup>153</sup> There are some tribes with reservation boundaries that have not been disestablished or that have been judicially defined that conduct gaming on lands held in fee by the tribe within the reservation boundaries, and the NIGC has determined that fee lands within the exterior boundaries of a tribe's reservation could be classified as Indian Lands,<sup>154</sup> and therefore tribal gaming can occur on tribal fee land.<sup>155</sup>

Even now, there are tribes that do not have any land (fee or trust) to conduct gaming upon whether it is economically unfeasible or the tribe is recently recognized. Due to the involved and discretionary process of taking land into trust, there are states and citizens' groups that oppose land being taken into trust for gaming purposes, and will litigate the matter as far as it takes them.<sup>156</sup> Tribes may consider demanding that the state either take no action or affirmatively prevent local governments from taking any action when a tribe requests the Secretary to place land into trust for gaming purposes. Gaming-related trust applications can occasionally be controversial, and in order for states and/or local governments to demand a percentage of tribal gaming revenue through a compact, such entities should be prevented from opposing a tribal request to have land placed into trust.

In a non-gaming related context, the benefits of placing land into trust can work against a tribe depending on how the property is utilized. A tribe, for example, may acquire a hotel to further develop or expand a tribal gaming operation and the tribe acquires the property in the hopes it will serve as a solid investment. The tribe does not necessarily seek to conduct gaming at the hotel

---

151. See Public Law 280, *supra* note 41. Public Law 280 does grant criminal jurisdiction and does contain a very limited grant of civil jurisdiction to California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin (except the Menominee Reservation), and Alaska.

152. See Lance Morgan, *Ho-Chunk Inc.: Made in Native America*, Keynote Address at the Honigman Second Annual Great Lakes Tribal Economic Development Symposium (Nov. 30, 2007) (on file with author).

153. See *supra* note 56.

154. 25 U.S.C. § 2703(4)(A) (2006); 25 C.F.R. § 502.12(a) (2008).

155. NIGC Lands Determination, Status of the Picayune Rancheria Lands, 2-3, 7-8 (Dep't of Interior Dec. 3, 2001); Opinion of NIGC General Counsel Kevin K. Washburn, Picayune Tribe, 1-3 (Dep't of Interior March 3, 2001); NIGC Lands Determination, Tribal Jurisdiction over Gaming on Fee Land at White Earth Reservation, 9-10 (Dep't of Interior March 14, 2005).

156. See *supra* note 16.

but the initial reaction of the tribe's governing body or tribal professionals may be to place the land into trust.

The trouble with placing the land into trust status is the federal restriction upon alienating the land destroys the notion of a solid investment and the ability to leverage property is lost as no value can be assigned to the land.<sup>157</sup> By converting land into trust status, tribes lose the ability to freely sell the land at a moment's notice for a large profit or to measure equity on the property to procure financing for other projects.<sup>158</sup> On non-trust, freely alienable tribal land, for example, a hotel is purchased for \$10 million. The tribe elects to invest an additional \$2 million for renovations. After the renovations are complete, an appraisal is conducted and reflects a market value of \$15 million. Now the tribe may be able to borrow against the \$3 million in equity gained after the renovations.

If the tribal fee land used in the previous example is within the exterior boundaries of a reservation, the state is prohibited from taxing tribes.<sup>159</sup> If the tribal fee land, however, is outside the exterior boundaries of the reservation, tribes are subject to nondiscriminatory state taxes.<sup>160</sup> The businesses operating upon the land may be subject to state jurisdiction depending on the business structure, place of incorporation, and whether the business is owned by an Indian tribe.<sup>161</sup> If the tribe elects to form a corporation established pursuant to Section 17 of the IRA, the entity has the same status as a tribe for purposes of federal and state taxation.<sup>162</sup> Tribal corporations formed under state law, however, are not exempt from state or federal income taxes.<sup>163</sup> Whether a corporation formed under tribal law, whether or not owned by the tribe, retains the same tax status as a tribe or in the case of a non-Indian owned business incorporated under tribal law and operating on tribal land held in fee, is subject to only the tribal tax is unclear.<sup>164</sup>

#### B. ATTEMPTING TO RESOLVE THE "DOUBLE TAXATION" PROBLEM AS A SUBJECT OF A GAMING COMPACT TO PROVIDE TRIBES WITH A TAX BASE

There are a considerable number of issues for non-Indian businesses

---

157. 25 U.S.C. § 465.

158. *Id.*

159. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

160. See *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149-50 (1973).

161. See COHEN, *supra* note 75, at 686-728.

162. See Rev. Rul. 94-16, 1994-1 C.B. 19.

163. *Id.*

164. See generally Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435 (2008) (discussing whether a non-member business incorporated under tribal law would be subject to tribal or federal labor and employment laws and arguing that absent an explicit congressional statute preempting tribal labor and employment laws, non-member businesses are subject to tribal law).



seeking to enter into commercial transactions with tribes or tribal businesses.<sup>165</sup> Indian tribes, as sovereign nations, retain the sovereign authority to tax within Indian country subject only to federal law,<sup>166</sup> and because tribal taxation is an exercise of sovereignty, no prior federal authorization is required.<sup>167</sup> The power of tribes to tax non-Indians or non-tribal members when entering into economic activity on trust land<sup>168</sup> has remained strong despite the U.S. Supreme Court's slow assault upon tribal sovereignty over the past three decades.<sup>169</sup> Taxing non-member business is a critical source of tribal revenue in circumstances where the tribe cannot rely upon gaming revenue or natural resources to fund essential governmental services.<sup>170</sup>

The varying levels of regulation and taxation, including tribal, federal, or state, to which a non-tribal member business may be subjected, all can assist to bar reservation economic development.<sup>171</sup> Overall, Indian tribes and states have concurrent taxation authority with respect to non-Indian activity within Indian country boundaries.<sup>172</sup> States cannot enforce state law upon the actual tribe or tribal business(es),<sup>173</sup> and therefore states cannot enforce any state tax laws upon tribes. Moreover, even if the property is owned in fee the state cannot tax the land if it is on the reservation.<sup>174</sup>

The problem is that tribal taxes do not preempt concurrent state taxes<sup>175</sup> so non-member businesses may be taxed by both tribes and states.<sup>176</sup> Non-members, generally, may be taxed by the state if the legal incidence of the tax falls on non-members doing business with tribes in Indian country.<sup>177</sup> This

165. See COHEN, *supra* note 75, at 1287-88.

166. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-40 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980).

167. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198-200 (1985).

168. *Merrion*, 455 U.S. at 136-37; *Washington*, 447 U.S. at 152-53.

169. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Brendale v. Confederated Tribes of Yakima Nation*, 492 U.S. 408 (1989); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). For a thorough discussion of the U.S. Supreme Court's recent anti-tribal jurisprudence, see Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 588 (2008) (noting that "the Court has decided forty-eight Indian law cases since 1988 following *California v. Cabazon Band of Mission Indians*, with thirty-three of the cases going against the tribal interest and four being neutral" [footnote omitted] (citing Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. Rev. 777, 781 (2006))).

170. See *Atkinson Trading Co.*, 532 U.S. at 648.

171. *Id.*

172. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); COHEN, *supra* note 75, at 724.

173. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that the Cherokee Nation "is a distinct community occupying its own territory, with boundaries accurately described . . . which the citizens of Georgia have no right to enter").

174. See *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); CANBY, *supra* note 61, at 265.

175. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158 (1980). See *Cotton Petroleum Corp.*, 490 U.S. 163.

176. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134.

177. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). See *Wagon v. Prairie*

creates a disincentive for non-member businesses from developing economic opportunities on the reservation.<sup>178</sup> Based upon the multiple levels of taxation possible on a reservation for non-member business, in many circumstances, tribes have no tax base to derive revenue for essential governmental services.<sup>179</sup>

Many cases involving taxation of non-member entities operating within Indian country are generally very fact-intensive. When a dispute regarding taxation arises between a tribe and a state, the courts will generally utilize the balancing test created in *Montana v. United States*<sup>180</sup> to determine whether the tribe's interest or the state's interest is greater. The cost of litigating such fact-intensive issues can be very costly and many tribes have successfully created tax bases through tax agreements or tax compacts.<sup>181</sup> The concept of a state-tribal tax agreement, however, is certainly not anything new as there are currently more than 200 tribal-state taxation compacts, and the scope of each compact can vary from state to state.<sup>182</sup> For example, the Michigan Tribal-State Tax Agreements address sales and use taxes, tobacco and motor fuel taxes, individual income taxes, business taxes, exemptions, as well as dispute resolution.<sup>183</sup> In

Band Potawatomi Nation, 546 U.S. 95 (2005); *Moe*, 425 U.S. at 482; *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 179 (1973).

178. See *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1283 (9th Cir. 1981) (acknowledging that dual taxation of tribes and states ultimately reduces tribal tax revenue); Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771 (2004); Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 611 (1993); Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491, 491-92 (1975).

179. See Fletcher, *supra* note 178, at 771 ("Tribal governments have extreme difficulty in raising revenue; they have virtually no tax base."); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 169 (2004) ("But few tribes have any significant tax base."); Milo Colton, *Self-Determination and the American Indian: A Case Study*, 4 SCHOLAR 1, 35 n.270 (2001) ("In order to be successful, tribal governments must generate revenue through the development of businesses because they are prevented from establishing a stable tax base."); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1073 (1982) ("Unlike other governmental bodies, Indian tribes would find the loss of assets more difficult to replace because tribes have only a limited revenue base over which to spread any losses.").

180. 450 U.S. 544 (1981).

181. See, e.g., Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY. L. REV. 1, 44 (2004); Elizabeth Carvlin, *South Dakota Signs Third Tax Agreement with Indian Tribe*, BOND BUYER, Dec. 29, 2003 (on file with author).

182. See COHEN, *supra* note 75, at 725. See also Fletcher, *supra* note 181, at 4.

183. See, e.g., Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan, Dec. 20, 2002, available at [http://www.mi.gov/documents/LTBB\\_Agreement\\_58762\\_7.pdf](http://www.mi.gov/documents/LTBB_Agreement_58762_7.pdf); Tax Agreement between the Pokagon Band of Potawatomi Indians of Michigan and the State of Michigan, Dec. 20, 2002, available at [http://www.dykema.com/indianlaw/PokagonBandTaxAgreement\\_85485\\_7%5B1%5D.pdf](http://www.dykema.com/indianlaw/PokagonBandTaxAgreement_85485_7%5B1%5D.pdf); Tax Agreement Between the Bay Mills Indian Community and the State of Michigan, Dec. 20, 2002, available at [http://www.michigan.gov/documents/BayMillsFinalTaxAgreement\\_61196\\_7.pdf](http://www.michigan.gov/documents/BayMillsFinalTaxAgreement_61196_7.pdf); Agreement Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan, Dec. 20, 2002, available at [http://www.michigan.gov/documents/SaultSteFinalTaxAgreement\\_61197\\_7.pdf](http://www.michigan.gov/documents/SaultSteFinalTaxAgreement_61197_7.pdf); Agreement Between the Hannahville Indian Community and the State of Michigan, Dec. 20, 2002, available at [http://www.michigan.gov/documents/HannahvilleAgreement\\_58669\\_7.pdf](http://www.michigan.gov/documents/HannahvilleAgreement_58669_7.pdf); Tax Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan, May 27, 2004, available at [http://www.michigan.gov/documents/GTBTaxAgreement\\_96417\\_7.pdf](http://www.michigan.gov/documents/GTBTaxAgreement_96417_7.pdf).

Oklahoma, separate compacts have been negotiated for tobacco taxes<sup>184</sup> and motor fuel taxes. In other states as well, including South Dakota, New Mexico, Montana, and Minnesota, for example, tax compacts have been executed.<sup>185</sup>

In both circumstances, the tribes and the state recognized the need to voluntarily develop a method to properly allocate tax revenues between the state and tribes. The tobacco tax compact provides that the state shall exempt all sales of tobacco products to and by the tribes, and the tribes agree to make payments in lieu of state taxes.<sup>186</sup>

The Oklahoma motor fuels compacts provide a “solution” to the decision in *Oklahoma Tax Commission v. Chickasaw Nation*,<sup>187</sup> where the Court found that Oklahoma’s motor fuel tax laws in place at the time of the litigation could not be applied to sales of fuel by Indian tribes. The basic premise of the motor fuel compacts allows tribes to contract with the state to receive an apportionment of the annual gross motor fuel revenues collected by the state.<sup>188</sup>

Many of the existing tax compacts address and clarify the non-taxability of Indians and tribes within Indian country or share a percentage of tax revenue.<sup>189</sup> These compacts, however, do not contain a concession on the part of the state where non-members and non-member businesses are completely free or effectively free of state taxation and permit tribes to have a true unadulterated tax base.<sup>190</sup>

Complex taxation issues and costs of litigation tax issues can be addressed

184. See State of Oklahoma Indian Affairs Commission, Tobacco Compacts, available at [http://www.ok.gov/oia/Compacts,\\_Contracts,\\_and\\_Agreements/index.html#tobacco](http://www.ok.gov/oia/Compacts,_Contracts,_and_Agreements/index.html#tobacco). This compact states:

The compacts were executed in response to the decision in *Oklahoma Tax Commission v. Citizen Band of Potawatomi*, 498 U.S. 505 (1991), where the Supreme Court held tribal sovereign immunity prevented the State of Oklahoma from taxing goods purchased by a tribal member on tribal land, but allowed the State to collect taxes on sales to non-members of the tribe. Recognizing the need to develop a method to properly allocate tax revenues between the State of Oklahoma and the tribal governments, a tobacco tax compact system was implemented. The tobacco tax compact provides that the State of Oklahoma shall exempt all sales of tobacco products to and by the Tribe, and the Tribe agrees to make payments in lieu of state taxes.

*Id.*

185. See Fletcher, *supra* note 181, at 4 n.26.

186. See, e.g., Tobacco Tax Compacts Between the State of Oklahoma and Seminole Nation (filed June 4, 1992) (on file with author); Tobacco Tax Compacts Between the State of Oklahoma and Cherokee Nation (filed June 8, 1992) (on file with author); Tobacco Tax Compacts Between the State of Oklahoma and Chickasaw Nation (filed June 8, 1992) (on file with author); Tobacco Tax Compacts Between the State of Oklahoma and Choctaw Nation (filed June 8, 1992) (on file with author); Tobacco Tax Compacts Between the State of Oklahoma and Quapaw Tribe of Oklahoma (filed Sept. 3, 1992) (on file with author).

187. 515 U.S. 450 (1995).

188. See, e.g., Motor Fuel Compact Between the State of Oklahoma and Chickasaw Nation (filed Sept. 26, 1996) (on file with author); Motor Fuel Compact Between the State of Oklahoma and Cherokee Nation (filed Sept. 26, 1996) (on file with author); Motor Fuel Compact Between the State of Oklahoma and Choctaw Nation (filed Sept. 30, 1996) (on file with author); Motor Fuel Compact Between the State of Oklahoma and Ottawa Tribe (filed June 25, 1997) (on file with author); Motor Fuel Compact Between the State of Oklahoma and Peoria Tribe (filed Oct. 8, 1997) (on file with author).

189. See Fletcher, *supra* note 181, at 4.

190. See COHEN, *supra* note 75, at 725-26.

if a tribe could ensure that non-members and non-member businesses would not be taxed by the state for conducting business on the reservation. Then the tribe would have the actual ability to raise additional tax revenue and possibly offer tax incentives to businesses to foster reservation economic development.

Just as some states have crafted state tax laws to attract businesses by offering incentives, a tribe may be able to attract businesses to the reservation with further tax incentives in addition to the federal tax incentives for doing business on the reservation.<sup>191</sup> The incentives would be in addition to any federal tax incentives in place such as rapid depreciation of certain business property,<sup>192</sup> incentives for empowerment zone credits/incentives,<sup>193</sup> and new market tax credits for community development.<sup>194</sup>

If a state agrees not to tax any business or tax at a lower rate, as part of negotiating a class III gaming compact, these economic incentives in exchange for the payment of a percentage of gaming revenue may qualify as a “valuable economic benefit” for the tribe.<sup>195</sup> If the DOI reviewed a compact containing concessions by the state of the concurrent taxation authority over non-members, DOI’s “obligation to ensure that the benefit received by the state under the proposed compact is appropriate in light of the benefit conferred on the tribe” could be reasonably satisfied through tax benefits.<sup>196</sup> Negotiating tax clarity for purposes of tribal economic development would not constitute a situation where subjects negotiated are worlds apart, such as tribal treaty rights or water rights, from what is generally negotiated in a gaming compact.<sup>197</sup>

The state, in essence, would agree not to levy any taxes upon businesses located and business occurring on the reservation. The double taxation issue would be resolved and the tribe is left to determine what, if any, tax to levy upon any business occurring on the reservation. If the state is unwilling to concede what amounts to a substantial economic benefit for the tribe in the form of substantial exclusivity, then the tribes can use any leverage possible to get meaningful concessions from the state in exchange for submission of revenue sharing payments.<sup>198</sup>

## V. CONCLUSION

In many areas of Indian country, tribal gaming continues to grow but at a slower pace than over the last two decades. As Indian gaming levels out, tribes need to use whatever revenue available to diversify economies beyond gaming, natural resources, or any solitary source of funding for governmental services.

---

191. See *id.* at 690.

192. 26 U.S.C. § 168(j) (2006).

193. See *id.* § 1391(g)-(h); *id.* § 1392.

194. *Id.* § 45D.

195. See Statement of A. Martin, *supra* note 28, at 2; Skibine Letter, *supra* note 130, at 2-3.

196. See Statement of A. Martin, *supra* note 28 at 5.

197. See RAND & LIGHT, *supra* note 1, at 153.

198. See Fletcher, *supra* note 1, at 72-75.

In short, diversifying tribal economies through economic development is a must. Class III gaming compacts are an avenue to procure economic incentives and meaningful concessions of substantial economic value to the tribes from the state governments to foster reservation economic development. Although this article focuses on tribes resolving barriers to reservation economic development, such as trust land issues and taxation problems, if tribes can get meaningful concessions resulting in economic benefits, then IGRA is not violated. Tribes should do everything in their power to leverage any bargaining tools available, and if states and local governments are relying upon gaming revenue to balance budgets or pay for their own governmental programs, then additional concessions should be made.

Although IGRA seems to explicitly prohibit states from taxing or levying any assessment upon tribal gaming revenue, the question is no longer whether revenue sharing agreements violate IGRA. Too many states, local governments, and even charities rely upon tribal gaming revenue sharing payments prescribed by class III gaming compacts to balance budgets and fund programs. When it comes time for a tribe to negotiate, re-negotiate, or amend a gaming compact, it is unreasonable for a tribe to assume a state government will even come to the table without some revenue sharing structure as a given. In recognition of this, tribes need to use any leverage possible to negotiate advantages into compacts.

Overall, tribes need to become more creative when negotiating compacts or renewing existing compacts with states as “substantial exclusivity” becomes unrealistic from a state perspective or ineffective from a tribal perspective. Tribes should encourage DOI not to sit back and approve compacts where tribes will pay 8% to 20% of gaming revenue in exchange for the exclusive right to game in a sparsely populated five to eight county area. As evident by reading George Skibine’s letter to Michigan’s Governor, DOI recognizes the lack of substantial exclusivity and therefore, the lack of meaningful concessions resulting in a substantial economic benefit to the tribes in some gaming compacts. States will continue to insist upon revenue sharing payments, but further substantial economic benefits for tribes must be negotiated and included in each gaming compact in order to match the substantial benefits the state receives, and remain consistent with the intent and the plain language of IGRA—to benefit tribes, not states.