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GAMBLING ON INDIAN RESERVATIONS

M. Maureen Murphy
Legislative Attorney
American Law Division
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GAMBLING ON INDIAN RESERVATIONS

This report will discuss legislative proposals to set federal standards for bingo or gambling on Indian reservations. It will first summarize these bills that address the issue, then discuss the jurisdictional background, and finally analyze a recent Supreme Court case that may impact on the question.

1. SUMMARY OF S. 902, 99th CONGRESS.

This proposal would declare "not ... legal" "gaming within Indian country" unless it is conducted under a tribal ordinance or resolution approved by the Secretary of the Interior, provided it is not contrary to federal law or to the public policy (as a matter of criminal law) of the state in which the Indian country is located. The measure would allow tribes to license members and nonmembers to conduct gaming provided certain standards are met and provided that the licensing requirements and regulations governing the games are as restrictive as those of the state. One unique feature of this proposal is the authorization of Regional Indian Gaming Commissions for Indian tribes within the administrative jurisdiction of an area office of the Bureau of Indian Affairs. These Commissions may assume the authority of the Secretary of the Interior to approve tribal gaming ordinances or resolutions and to regulate gaming within the area of jurisdiction. The Secretary may suspend the Commissions upon a finding that a Commission "has failed or is incapable of effectively carrying out its responsibilities" under the proposal.

There is a provision for an immediate effective date except for existing gaming operations which are to have one year to comply with the legislation.

2. SUMMARY OF H.R. 1920, 99th CONGRESS.

This proposal would outlaw and provide federal criminal penalties for "gambling operations" within Indian country, a term that includes Indian reservations, unless the gambling operation is conducted in conformity with state law or with tribal law as certified by the Secretary of the Interior. The measure would authorize the Secretary of the Interior to approve tribal ordinances permitting gambling provided: (1) the gambling does not violate the public policy of the state within whose exterior boundaries the tribal gambling is located, (2) the gambling is conducted only by the tribe's governing body, (3) the gambling employs only tribal members, and (4) the proceeds are used for tribal government operations and not for personal gain.

The proposal also requires the Secretary to consult with the state's governor and to request comments on the public policy of the state. There is also a provision to the effect that no gambling operations permitted by the state may be rejected for an Indian tribe as contrary to the state's public policy.

The measure would be effective upon passage except with regard to tribes that are conducting gambling operations under contract for which the effective date is one year following passage.

3. SUMMARY OF H.R. 6390 (98th CONGRESS).

This proposal would make "gaming activity" within Indian reservations and on lands subject to tribal jurisdiction" "illegal" unless pursuant to a tribal ordinance or resolution approved by the Secretary of the Interior.

It would allow tribes to enact tribal laws permitting gaming in their lands unless the state in which the land is physically located prohibits such gaming as a matter of criminal law, or federal law prohibits. The measure would set up standards for tribal gaming but would allow tribes to license gaming owned by outsiders provided certain conditions were met. The proposal includes provision for Interior Department and tribal inspections of gaming and is effective upon passage except for existing gaming operations which are to have a further year to continue.

COMPARISON OF PROPOSALS FOR FEDERAL REGULATION OF INDIAN GAMBLING

S. 902 (99th Cong.) ("The Indian Gaming Control Act")	H.R. 1920 (99th Cong.) "The Indian Gaming Control Act")	H.R. 6390 (98th Cong.) "The Indian Country Gambling Regulation Act")
Includes a statement of findings: tribes have engaged in gaming for economic development; courts have upheld tribal rights to regulate gaming in states in which such gaming is not a criminal offense; some tribes have voiced concern about continuing to operate corruption-free gaming; no current federal standards for Indian gaming exist; tribal self-sufficiency is a principal goal of federal Indian policy; tribal licensing of gaming is a legitimate way to raise revenue.	Includes a statement of findings: tribes have engaged in gaming activity for economic development; courts have upheld tribal rights to regulate gaming in states in which such gaming is not a criminal offense; current federal law offers no standards for this gaming; a goal of federal law is tribal economic development and self-sufficiency; tribal licensing of gaming activities is a legitimate means of generating revenue.	No statement of findings
Includes a Congressional declaration: federal standards are necessary to meet concerns raised about and to protect gaming activities on Indian reservations and lands.	Includes a Congressional declaration: federal standards are necessary to meet concerns raised about and to protect gaming activities on Indian reservations and lands.	No Congressional declaration.
Defines "Secretary": Secretary of Interior	Defines "Secretary": Secretary of Interior.	Defines "Secretary": Secretary of Interior.
Defines Indian tribe": "any Indian tribe, band or nation, or other organized group or community which is recognized as eligible by the Secretary of the Interior for the special programs and services provided by the United States to Indians because of their status as Indians."	Defines "Indian tribe": "any federally recognized Indian tribe, band, or nation."	Defines "Indian tribe": "any Indian tribe, band or nation, which has a trust relationship with the United States."

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Defines gaming: "to deal, operate, carry on, conduct, or maintain for play any banking or percentage game or other game of chance played for money, property, credit, or any representative value, but does not include social games played solely for prizes of minimal value or games played in private homes or residences of [sic] prizes of minimal value, or traditional forms of Indian gambling engaged in by individuals as part of or in connection with tribal ceremonies or celebrations."	Defines "gaming": "to deal, operate, carry on, conduct, or maintain for play any banking or percentage game or other game of chance played for money, property, credit or any representative value, but does not include social games played solely for prizes of minimal value, or traditional forms of Indian gambling engaged in by individuals as part of or in connection with tribal ceremonies or celebrations."	Defines "gambling": "dealing, operating, carrying on, conducting, or maintaining for play any banking or percentage game or other game of chance played for money or other thing of value other than a game played in a private home or residence or social game played solely for prizes of minimal value, except that such term does not include any traditional form of Indian gambling engaged in solely by members of an Indian Tribe in connection with a tribal ceremony or celebration." Defines "gambling operations": "any activity or enterprise organized and operated for the purpose of gambling or for purposes which include gambling."

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S. 902 (99th Cong.) ("The Indian Gaming Control Act")	H.R. 1920 (99th Cong.) ("The Indian Gaming Control Act")	H.R. 6390 (98th Cong.) ("The Indian Country Gambling Regulation Act")
		Defines "tribal law": "any ordinance, resolution, bylaw, or other rule of law fully adopted by the governing body of any Indian tribe."
Defines "Indian country": "(a) all lands within the limits of any Indian reservation and, (b) any lands title to which is either held by the United States in trust for the benefit of any Indian tribe or individual subject to a restriction by the United States against alienation."	No definition of "Indian Country". (Proposal applies to tribal lands or reservations.)	Defines "Indian Country" in terms of its meaning under 18 U.S.C. § 1151.
Defines "Commission": "the Regional Indian Gaming Commission which may be established pursuant to section 11 of this Act."		
Makes "gaming within Indian country" "not... legal" unless pursuant to a tribal ordinance or resolution approved by the Secretary of the Interior.	Makes "gaming activity" "within Indian reservations and on lands subject to tribal jurisdiction" "illegal" unless pursuant to a tribal resolution or ordinance approved by the Secretary of Interior.	Sets criminal penalties -- $ 500, six months, or both, for conducting "gambling operations" within Indian country" unless conforming to state law or to tribal law as certified by the Secretary of the Interior.

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S. 902 (99th Cong.) ("The Indian Gaming Control Act")	H.R. 1920 (99th Cong.) ("The Indian Gaming Control Act")	H.R. 6390 (98th Cong.) ("The Indian Country Gambling Regulation Act")
Tribes may "engage in or license... gaming activity" unless prohibited by federal law or within a state that prohibits such gaming activity as a matter of criminal law.	Tribes may adopt tribal laws permitting gaming in their lands unless state in which land is physically located prohibits such gaming as a matter of criminal law or federal law prohibits.	Tribal gambling ordinances may be certified by the Secretary of the Interior unless the form or extent of the gambling operation violates the public policy of the state. Before approving a tribal gambling ordinance the Secretary is required to consult with the governor and to elicit comments on the state's public policy.
With respect to tribally conducted gaming, tribal ordinance must provide: (1)tribe to have sole proprietary interest, (2) tribe will conduct gaming activity, (3) revenue to be used solely to fund tribal government operations, programs, economic development, provide for the general welfare, for donations to charities, to fund local government operations, and for the Regional Commission, (4) tribal annual independent audits.	With respect to tribally conducted gaming, tribal ordinance must provide: (1) for gaming sole proprietary interest in tribe, (2) tribal responsibility for conduct of gaming, (3) revenues to be used solely to fund tribal government operations or programs, provide for general welfare of tribal members, or promote economic development, and (4) tribal annual independent audits.	With respect to tribally conducted gambling operations Tribal gambling ordinance must provide: (1) only governing body of tribe may conduct operation, (2) only tribal members may be employed, (3) revenues must be used to fund tribal government operations, (4) revenues may not inure to the benefit of any person, and, (5) an annual audit by a certified public accountant.

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Tribes may license gaming owned by outsiders to the tribe provided: (1) such licenses are as restrictive as those that would be permitted by the state, and (2) such licenses are granted only to persons eligible for comparable state licenses.	Tribes may license gaming owned by outsiders to the tribe provided: (1) such licenses are as restrictive as those that would be permitted by the state, and (2) such licenses are granted only to persons eligible for comparable state licenses.	No provision for licensing or regulating gambling operations other than those conducted by the tribe.
Secretary has 90 days to act on tribal gaming law or it is deemed approved.	Secretary has 90 days to act on tribal gaming law or it is deemed approved.	No similar provision.
Contains standards for tribal contact with outsiders to manage gaming for a fee: names, addresses, description of past experience, complete financial statements; contracts must provide for adequate accounting procedures and verifiable monthly financial reports, must give tribal officials reasonable access to daily operations and the right to verify daily income.	Contains standards for tribal contact with outsiders to manage gaming for a fee: names, addresses, description of past experience, complete financial statements; contracts must provide for adequate accounting procedures and verifiable monthly financial reports, must give tribal officials reasonable access to daily operations and the right to verify daily income.	No similar provision.
In cases of contracts for a percentage of gross or net, there must be no proprietary interest transferred; the contractor must make a significant financial contribution; there must be a two year limit; and, no fee may be greater than 40% of the net.	In cases of contracts for a percentage of gross or net, there must be no proprietary interest transferred; the contractor must make a significant financial contribution; there must be a two year limit; and, no fee may be greater than 40% of the net.	

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The Secretary may not approve and shall void such contracts if an interested party is an elected member of the tribal governing body, an interested person filed a material false statement, or the contractor has failed to comply with the contract or the tribal gaming law.	The Secretary may not approve and shall void such contracts if an interested party is an elected member of the tribal governing body, an interested person filed a material false statement, or the contractor has failed to comply with the contract or the tribal gaming law.	
Authorizes Secretary to inspect the premises, demand access to the books, and require verification of income.	Authorizes Secretary to inspect the premises, demand access to the books, and require verification of income.	No similar provision.
Prohibits disclosure by Secretary of information filed in connection with management contracts or encountered in inspection or examinations.	Prohibits disclosure by Secretary of information filed in connection with management contracts or encountered in inspection or examinations.	No similar provision.
Effective date: passage except for existing gaming operations which have a further year to continue.	Effective date: passage except for existing game operations which have a further year to continue.	Effective date: passage, except for existing gaming operations under contract which have a further year to continue.
Permits Indian tribes within administrative jurisdiction of a Bureau of Indian Affairs area office to organize a Regional Indian Gaming Commission (Commission). Sets procedures for ratifying and revoking governing documents and amendments of such Commissions. Requires secretarial approval.	No similar provision.	No similar provision.

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S. 902 (99th Cong.) ("The Indian Gaming Control Act")	H.R. 1920 (99th Cong.) ("The Indian Gaming Control Act")	H.R. 6390 (98th Cong.) ("The Indian Country Gambling Regulation Act")
Sets composition of Commissions.		
Prohibits convicted felons or convicted gamblers and persons having management responsibility for a management gaming contract from serving on Commissions.		
Delegates to Commissions Secretary's authority regarding Indian gaming.		
Requires Commissions to meet quarterly, to establish necessary procedures to maintain necessary records.		
Establish a financing mechanism for Commission: assessment among tribes with possible suspension of gaming for failure to pay after 90 days notice.		
Allows Secretary to resume authority assumed by Commission after notice and hearing upon a finding that Commission "has failed or is incapable of carrying out its responsibilities." Requires Secretary to provide assistance before disciplining a Commission.		

5. LAW REGARDING GAMING ON INDIAN RESERVATIONS.

Indian tribes are turning more frequently to innovative measures to raise revenues within their reservations. Among the most controversial is operating bingo games and other games of chance. According to reports, 75 to 80 of the nation's 300 Indian tribes have some form of game. 1/ On May 4, three tribes plan to participate in a satellite broadcasted bingo game with a prize of one million dollars. 2/ In 1984 the House Interior Committee held hearings on gambling within Indian country and took testimony as to fears that organized crime would infiltrate into tribal gaming operations. At least one Indian tribal gaming operation has been ordered closed following charges of racketeer involvement. 3/

The main reason that Indian bingo has been developing so rapidly, in addition to its potential lucrativeness, seems to be a legal doctrine of tribal sovereignty that recent court decisions are upholding and elaborating upon. This doctrine can be traced to early Supreme Court decisions, the

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1/ Richey, "Unregulated High Stakes Gambling Grows on American Indian Reservations," Christian Science Monitor, Mar. 25, 1985, p. 1, col. 1, quoting the Bureau of Indian Affairs.

2/ Ibid.

3/ The United States Attorney in Seattle, Washington, successfully petitioned federal district court for an injunction against Lummi Indian reservation gambling, alleging that two convicted felons were participating in the company that was managing the games. United Press International, Monday June 4, 1984, Headline: "Akron newspaper looks into background of Indian bingo promoter." NEXIS, PAPERS file, Available April 21, 1985.

chief of which is Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-557, (1832). In that case Chief Justice John Marshall enunciated what has since been the policy of the United States regarding the status of Indian tribes:

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts ... manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive ....

In recent years, the Supreme Court has adhered to the view that Indian tribes retain vestiges of their original sovereignty to the extent they have not been divested of it by specific federal statute or by their status as dependent nations within the United States and, thus, subject to the overriding sovereignty of the federal government. Montana v. United States, 450 U.S. 544 (1981). It has, thus, been held that tribes have inherently the power to punish tribal members who violate tribal law. United States v. Wheeler, 435 U.S. 313 (1978). They have, however, no inherent criminal authority over non-Indians within their territory. Oliphant v. Squamish, 435 U.S. 191 (1978). The federal Constitution gives to Congress power "[t]o regulate Commerce ... with the Indian Tribes...." U.S. Const. Art. I, Cl. 3. It is this federal power that has historically excluded the states from exercising jurisdiction over Indian reservations. Indeed, the very term reservation in a sense speaks to that issue for in reserving the land for exclusive use and occupation by the Indians, the federal government was precluding the states from exercising jurisdiction over the Indian land. 4/

4/ An example of such an executive order establishing an Indian reservation is that dated December 27, 1875, setting aside certain lands in the

(Continued)

From the initial relations between the federal government and the Indian tribes the federal government insulated Indian land from the reach of state law. Many of the early treaties provided for Indians' delivering up non-Indian malefactors to the federal government for prosecution and the federal government's turning over miscreant Indians to the tribes. 5/ Some of the early federal statutes provided for federal jurisdiction over crimes committed on Indian land. 6/ Today three statutes form the basis of federal jurisdiction over crimes in Indian country: (1) the General Crimes Act, 18 U.S.C. § 1152; (2) the Major Crimes Act, 18 U.S.C. §§ 1153 and 3242, and the Assimilative Crimes Act, 18 U.S.C. § 13. Essentially, the Major Crimes Act provides for federal jurisdiction over certain offenses committed by Indians in Indian country. Among the enumerated offenses are murder, manslaughter, rape, sodomy, assault, burglary, robbery and larceny. 18 U.S.C. § 1153. The General Crimes Act asserts federal jurisdiction over offenses that are subject to federal jurisdiction because they are specified in federal law as crimes in areas of exclusive federal jurisdiction. There are four exceptions to this juristiction: (1) "as otherwise expressly provided by law," (2) "offenses committed against the person or property of another Indian," (3) "to any Indian committing any offense in Indian country, who has been punished by the local law of the tribe," and (4) any case where, by treaty stipulations, the exclusive jurisdiction

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(continued) county of San Diego, California "for the permanent use and occupancy of the Mission Indians in Lower California," and signed by U.S. Grant, President of the United States. I Kappler, Indian Affairs: Laws and Treaties 820-821 (1904).

5/ See Treaty with Sacs and Foxes, 7. Stat. 84 (1804).

6/ See Clinton, K., "Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective, 17 Ariz. L. Rev. 951, 958-962 (1975); Cohen, F. Handbook of Federal Indian Law 286-308 (1982 ed.)

over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152. There is one exception announced by a Supreme Court decision. Crimes committed by non-Indians against non-Indians are exempt from federal jurisdiction and, thus, subject to state jurisdiction. United States v. McBratney, 104 U.S. 621 (1882). The question of jurisdiction over victimless offenses has never been definitely decided by the Supreme Court, a fact that may have complicated the jurisdictional issue regarding bingo on Indian reservations. The following table attempts to summarize the status of jurisdiction over various offenses in Indian Country as defined in 18 U.S.C. § 1151:

CRIMINAL JURISDICTION IN "INDIAN COUNTRY" [A/] IF PUBLIC LAW 280 [B/] OR A SPECIAL JURISDICTIONAL STATUTE [C/] DOES NOT APPLY

DEFENDANT	VICTIM	STATE JURISDICTION	FEDERAL JURISDICTION	TRIBAL JURISDICTION
Indian	Indian	No Jurisdiction.	Jurisdiction only over "Major Crimes" defined in 18 U.S.C. § 1153: Murder, manslaughter, rape, statutory rape, aggravated assault, arson, burglary, robbery and larceny.	Jurisdiction over all other crimes but sentencing authority is limited to $ 500 and 6 months under Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341. May have concurrent jurisdiction over major crimes.
Indian	Non-Indian	No Jurisdiction.	Jurisdiction over "Major Crimes" under 18 U.S.C. § 1152: U.S. has "General Crimes" jurisdiction and, thus, will apply federal enclave law for ennumerat-	May have concurrent jurisdiction over major crimes. Has concurrent jurisdiction over general crimes and assimilated crimes. Limited sentencing authority.

A/ Indian country is defined in 18 U.S.C. § 1152 to include: (1) all lands within the exterior boundaries of any Indian reservation under the jurisdiction of the United States government, including lands patented in fee to non-Indians and rights-of-way running through non reservation lands; (2) lands owned in fee by dependents Indian communities; and, (3) allotments that are still held in Indian title.

B/ Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162 (1953) provides for certain states to assume certain jurisdiction over certain reservations; now tribes must agree and retrocession is possible; therefore a chart that is constantly changing must be referred to for determining whether the state has PL 280 jurisdiction.

C/ Until 1953 Congress used a state-by-state approach relinquishing jurisdiction on a piecemeal basis by special jurisdictional statutes, e.g. 25 U.S.C. § 232, enacted in 1948, directs New York to exercise jurisdiction over crimes committed in Indian country to the same extent its laws (except with regard to hunting and fishing rights) apply elsewhere within its borders.

DEFENDANT	VICTIM	STATE JURISDICTION	FEDERAL JURISDICTION	TRIBAL JURISDICTION
			ed federal crimes and will use the Assimilated Crimes Act, 18 U.S.C. § 13, to apply state law in federal court for other crimes provided tribal court has not already punished offender or such jurisdiction contravenes treaty terms.	
Non-Indian	Indian	No Jurisdiction.	If crime is a federal enclave crime, federal jurisdiction is based on General Crimes Act; otherwise Assimilated Crimes Act will be used to prosecute in federal court, applying state law.	No jurisdiction
Non-Indian	Non-Indian	Jurisdiction. Although 18 U.S.C. § 1152 seems to accord the federal government jurisdiction over such crimes the Supreme Court has ruled that jurisdiction lies with the States. United States v. McBratney, 104 U.S. 621 (1882).	No jurisdiction (except a specific statute that applies without regard to locus of offense, e.g. presidential assassination).	No inherent jurisdiction

DEFENDANT	VICTIM	STATE JURISDICTION	FEDERAL JURISDICTION	TRIBAL JURISDICTION
Indian	No identifiable victim, e.g., crime against public order or voluntary sex offenses	No Jurisdiction.	There is some judicial authority from a federal appellate court to the effect that the General Crimes Act can be used via the assimilated crimes act to plead state law in federal court. United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950)	Exclusive Jurisdiction
Non-Indian		Concurrent jurisdiction if there is an interest of tribe, its members, its property in which the federal government has an interest. If not, state jurisdiction is exclusive.	Jurisdiction based on Indian interest involved; federal enclave law applies; the assimilated crimes act can be used to apply state law in federal court.	No Jurisdiction

There are various federal statutes that convey to the states jurisdiction over certain specified kinds of activities or cases arising on Indian land. Some address such issues as taxing of mineral leases; [7/] others are more general. For the New York Indians a 1948 statute conveyed criminal jurisdiction over offenses committed by or against Indians on reservations in the state. Act of July 2, 1948, ch. 809, 62 Stat. 1224, 25 U.S.C. § 232. In 1953, Public Law 280 was enacted delegating criminal jurisdiction over most crimes and many civil matters arising in Indian country to certain states.[8/] Act of August 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note.

7/ 25 U.S.C. §§ 396a-396g and 25 U.S.C. §§ 398a-398(e).

8/ At first five states, California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation), were designated for delegation of this jurisdiction. Later Alaska was added, Pub. L. 85-615, 72 Stat. 545. In 1954 the Menominee Tribe was added. Act of August 24, 1954, ch. 910, 68 Stat. 795. Another provision allowed any state to assume jurisdiction. This was repealed by Pub. L. 90-284, 82 Stat. 79 (1968), but not before 10 states assumed some jurisdiction under it: Arizona (air and water pollution), Ariz. Rev. Stat. Ann. §§ 36-1801, 36-1865; Florida (full), Fla. Stat. Ann. § 285.16; Idaho (full with tribal consent, and elsewhere, over seven subject areas), Idaho Code §§ 67-5101-67-5103; §§ 1.12-1.14; Montana (full, over Flathead Reservation, plus more with tribal consent, but revocable), Mont. Rev. Code Ann. §§ 83-801-83-806; Nevada (full, with counties able to withdraw and subsequently requiring tribal consent — later amended to retrocede with exception), Nev. Rev. Stat. § 41.430; North Dakota (civil, subject to tribal consent), N.D. Cent. Code §§ 27-19-01 to 17-19-13; South Dakota (criminal offenses and civil causes of action arising on highways provided federal government reimbursed state), S.D. Compiled Laws Ann. §§ 1-1-12 to 1-1-21, Utah (full, if tribe consents), Utah Code Ann. §§ 63-36-9 to 63-36-21; Washington (full over non-Indians and over Indians on non-trust land, and over Indians on certain subjects unless tribe consents to full) Wash. Rev. Code Ann. §§ 37.12.010-37.12.070.

In addition to the transfer of criminal jurisdiction, there was also a provision relating to civil jurisdiction. It was broadly worded:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> | "State of | Indian country affected |
> |---|---|
> | California | All Indian country within the State |
> | Minnesota | All Indian country within the State, except the Red Lake Reservation |
> | Nebraska | All Indian country within the State |
> | Oregon | All Indian country within the State, except the Warm Springs Reservation |
> | Wisconsin | All Indian country within the State, except the Menominee Reservation |
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.
>
> "(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Act of August 15, 1953, ch. 505,
Pub. L. 83-280, 67 Stat. 588, 589 (1953).

This provision can be found at 28 U.S.C. § 1360 and at 25 U.S.C. § 1321.

It has since been amended and now reads:

> **(a) Consent of United States; force and effect of criminal laws.** The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

> (b) **Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing.** Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.
> (Apr. 11, 1968, P. L. 90-284, Title IV, § 401, 82 Stat. 78.)

In Bryan v. Itasca County, 426 U.S. 397, 373 (1973), the Supreme Court intrepreted this statute in a restrictive manner: a state could not tax Indian land in Indian country under Public Law 280 jurisdiction; the legislative intent of Congress was read as not intending an overwhelming change in the state of jurisdiction on reservations and as not conveying general regulatory jurisdiction over Indian country to the states:

> And certainly the legislative history... makes it difficult to construe... jurisdiction acquired... as extending general state civil regulatory authority, including taxing power, to govern Indian reservations.

Against the Public Law 280 backdrop have arisen the cases concerning the regulation of bingo on Indian reservations. One case that addresses the issue was Seminole Tribe of Florida v. Butterworth, 491 F. Supp. 1015 (S.D. Fla. 1980), aff'd 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982). The case involved an attempt by Florida to enforce its bingo regulations against a Seminole operated bingo game. The court held Florida bingo laws to be civil/regulatory and not criminal/prohibitory and, thus, not within the Public Law 280 jurisdiction of the state of Florida. The main authority used by the court was United States v. Marcyes, 577 F. 2d 1361 (9th Cir. 1977), which involved a decision that the United States could on an Indian reservation within the state enforce Washington State laws against the possession or sale of fireworks because under the Assimi-

lative Crime Act, 18 U.S.C. § 13, the United States had jurisdiction over a criminal offense as defined under state law that is committed on Indian reservations provided federal law had no specific statute defining the offense. The Assimilative Crimes Act applies to federal enclaves such as Indian reservations that have not been the subject of a statute ceding jurisdiction to a state, such as the Public Law 280 states. Important to the court's reasoning in Marcyes and subsequently in the Seminole case was the fact that the state had an outright prohibition against fireworks. This the court saw as a prohibitory statute; the bingo statutes, on the other hand, according to Seminole Tribe, are regulatory:

> Washington sought to prohibit the general possession and/or sale of dangerous fireworks... It seems plain that Florida, in permitting bingo to be run by certain groups in a restricted manner, has acknowledged certain benefits of bingo and has chosen to regulate rather than prohibit.
> Seminole Tribe of Florida v. Butterworth, 491 F. Supp. 1015, 1019-1020.

Agreeing with this reasoning is Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F. Supp. 712 (1981); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (1982), cert. denied, __U.S. __ , 103 S. Ct. 2091 (1983). These cases involved bingo in states that allowed some form of bingo under certain specified conditions.

Cases in which state anti-gaming laws have been sustained to preclude gaming on Indian reservations include Penobscot Nation v. Stephen, 461 A 2d 478 (Me. Sup. Jud. Ct. 1983), which is distinguishable since it involved a clear Congressional grant to the state of jurisdiction which the tribe acknowledged. The tribe was challenging the state's statute not on the basis of lack of jurisdiction but on a statutory construction issue: the tribe contended it was not a "person" within the meaning of the state statute.

In United States v. Farris, 624 F 2d 890 (9th Cir. 1980), cert. denied sub nom Baker v. United States, 449 U.S. 1111 (1981), tribal gambling was stopped as a violation of the federal Organized Crime Control Act of 1970, 18 U.S.C. § 1955, which proscribes interstate travel in aid of racketeering with racketeering defined in terms that would include gambling that is illegal under state law. The question the court framed to decide the issue of whether the Puyallup Tribe was conducting gambling in violation of state law was whether the gambling involved was violative of the state's public policy. In Farris, the Court concluded that the gambling at issue was definitely violative of the State of Washington's public policy because the state allowed no gambling, penalizing all with criminal penalties. An early case sustaining application of state law to Indian gambling was United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950). It arose under the Assimilative Crimes Act. The court did not analyze whether there was a civil regulatory or a criminal prohibitory policy or statute involved. It merely reviewed whether any of the exceptions to the General Crimes Act applied, concluded none did, and ordered the Indian gambling closed. The case involved operating a slot machine and a state statute that absolutely prohibited gambling.

5. POSSIBLE RELEVANCE OF RICE v. REHMER.

Several federal statutes specifically define federal jurisdiction over liquor offenses in Indian country. Generally they prohibit such sales and transactions unless they conform to state law and to a tribal ordinance certified by the Secretary of the Interior. The case involved a person who was licensed by the Department of Interior as an Indian trader and who was selling liquor in Indian country without a state permit. The Court found that the statute, when interpreted against a backdrop of pervasive regulation of liquor in Indian country and an absence of exertion of tribal sovereignty in liquor matters, as well as when read in the light of traditional methods of statutory

interpretation and of discerning legislative intent, was intended to require compliance with both state and tribal law. In other words, it operated to transfer liquor jurisdiction over Indian reservations to the states, to operate concurrently with tribal jurisdiction.

This case seems to have no direct bearing on the regulation of Indian bingo. It dealt with a specific statute transferring some jurisdiction to the state. There is no such statute regarding Indian bingo now. The case does, however, suggest a method of legislating over Indian bingo that has not yet appeared in a bill in this Congress: permit bingo provided it conforms to State law and to tribal law. It also points out a mode of analysis that the Court will use in interpreting similar transfers of jurisdiction: (1) look for backdrop of tribal sovereignty and state and federal exercise of jurisdiction in the area -- determine whether tribe traditionally exercised sovereignty in the area at hand, and (2) analyze to see if federal law preempts state jurisdiction; traditional rule in favor of finding preemption in Indian statutes is reversed when there has been no tradition of tribal sovereignty in the area.

How this mode of analysis would affect a Congressional statute similarly worded but directed at bingo would be a matter of speculation at this time. If factual research showed that tribes have traditionally been precluded from exercising gambling jurisdiction by federal and state law, the result might be the same: requiring compliance with state law. If, on the other hand, the facts showed a strong tribal tradition of gambling laws or regulation, the result might be different.

CONCLUSION

At least two different legislative approaches have been proposed for addressing the question of bingo on Indian reservations within the context of overall federal regulation: (1) allowing greater coordination among tribes and (2) allowing more input from states. Rice v. Rehmer suggests a third: making Indian gambling comply with state and tribal law. Because of the growth of bingo on reservations and the concern that such bingo be free of corruption, Congress may devote some considerable attention to this problem in the 99th Congress.

M. Maureen Murphy
Legislative Attorney
American Law Division
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