

## CHAPTER 6. NATIVE AMERICAN TRIBAL GAMBLING

Congress established the National Gambling Impact Study Commission in 1996 and directed it to study and report on the economic and social impacts of all forms of legalized gambling in the United States, including Indian gambling.<sup>1</sup> To ensure that sufficient attention was devoted to this important and complex subject, the Commission established a Subcommittee on Indian Gambling to supplement the full Commission's work in this area. In the course of seven formal hearings (in Del Mar, California; the Gila River Indian Community near Tempe, Arizona; Albuquerque, New Mexico; New Orleans, Louisiana; Las Vegas, Nevada; Seattle, Washington; and Virginia Beach, Virginia), and with the assistance of the National Indian Gaming Association (NIGA), the Subcommittee received testimony from approximately 100 tribal leaders, representing more than 50 tribes from every section of the country. At the invitation of officials from the Gila River Indian Community, the Subcommittee visited that reservation and toured a range of facilities,

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<sup>1</sup> *National Gambling Impact Study Commission Act*, Public Law 104-169. The charge to study Indian gambling is quite explicit. The Act provides:

- (1) IN GENERAL—it shall be the duty of the Commission to conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States on (A) . . . Native American tribal governments,
- (2) MATTERS TO BE STUDIED—The matters to be studied by the Commission under paragraph (1) shall at a minimum include (A) a review of existing Federal, State, local and Native American tribal government policies and practices with respect to the legalization or prohibition of gambling, including a review of the costs of such policies and practices . . . . (E) an assessment of the extent to which gambling provided revenues to State, local, and Native American tribal governments, and the extent to which possible alternative revenue sources may exist for such governments. . . . Section 4(a)

The Commission was also instructed by Congress to develop a contract with the Advisory Council on Intergovernmental Relations to conduct "a thorough review and cataloging of all applicable Federal, State, local and Native American tribal laws, regulations, and ordinances that pertain to gambling in the United States . . . ." Section 7(a)(1)(A).

including tribal housing developments, community centers, tribal government facilities, agricultural enterprises, and one of the reservation's two casinos. In addition to the Subcommittee's work, the full Commission heard testimony from tribal representatives, officials of the National Indian Gaming Commission (NIGC), the Bureau of Indian Affairs, and representatives of state and local governments at its hearings in Boston, Massachusetts; Del Mar, California; and Tempe, Arizona. The full Commission also visited Foxwoods, near Ledyard, Connecticut, the largest Indian gambling facility in the United States, to observe an Indian casino firsthand.

### GROWTH OF TRIBAL GAMBLING

Large-scale Indian casino gambling is barely a decade old. Its origins trace back to 1987, when the U.S. Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*. This decision held that the state of California had no authority to apply its regulatory statutes to gambling activities conducted on Indian reservations.<sup>2</sup> In an effort to provide a regulatory framework for Indian gambling, Congress passed the *Indian Gaming Regulatory Act* (IGRA) in 1988.<sup>3</sup> IGRA provides a statutory basis for the regulation of Indian gambling, specifying several mechanisms and procedures and including the requirement that the revenues from gambling be used to promote the economic development and welfare of tribes. For casino gambling—which IGRA terms "Class III" gambling—the legislation requires tribes to negotiate a compact with their respective states, a provision that has been a continuing source of controversy and which will be discussed at length later in this chapter.

The result of those two developments was a rapid expansion of Indian gambling. From 1988, when IGRA was passed, to 1997, tribal gambling revenues grew more than 30-fold, from \$212

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<sup>2</sup> 480 U.S. 202.

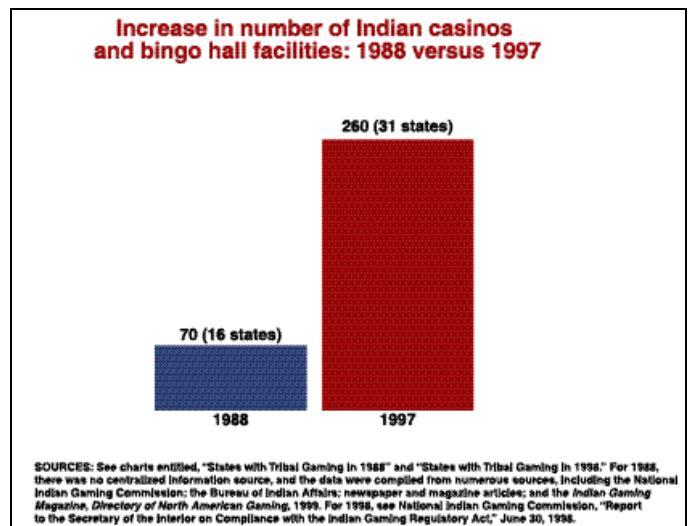
<sup>3</sup> 25 U.S.C.A. §2701-2721.

million to \$6.7 billion.<sup>4</sup> By comparison, the revenues from commercial casino gambling (hereinafter termed “commercial gambling”) roughly doubled over the same period, from \$9.6 billion to \$20.5 billion in constant 1997 dollars.<sup>5</sup>

Since the passage of IGRA, tribal gambling revenues consistently have grown at a faster rate than commercial gambling revenues, in large part because a relatively small number of the Indian gambling facilities opened in densely populated markets that previously had little, if any, legalized gambling. This trend has continued. For example, from 1996 to 1997, tribal gambling revenues increased by 16.5 percent, whereas commercial gambling revenues increased by 4.8 percent. The growth rates for both, however, have shown signs of slowing over the same period. There is a degree of economic concentration in a relatively small number of gaming tribes. The 20 largest revenue generators in Indian gaming account for 50.5 percent of the total revenue; the next 85 account for 41.2 percent.<sup>6</sup>

As was IGRA’s intention, gambling revenues have proven to be a very important source of funding for many tribal governments, providing much-needed improvements in the health, education, and welfare of Native Americans on reservations across the United States. Nevertheless, Indian gambling has not been a panacea for the many economic and social problems that Native Americans continue to face.

Only a minority of Indian tribes operate gambling facilities on their reservations. According to the Bureau of Indian Affairs (BIA), there are 554 federally recognized tribes in the United States, with 1,652,897 members, or less than 1 percent of the U.S. population. In 1988, approximately 70 Indian casinos and bingo halls were operating in a total of 16 states; in 1998, approximately 260 facilities were operating in a total of 31 states.<sup>7</sup> (See Figure 6-1) Of these 554 tribes, 146 have Class III gambling facilities, operating under 196 tribal-state compacts.<sup>8</sup>



More than two-thirds of Indian tribes do not participate in Indian gambling at all. Some tribes, such as the Navajo Nation, have rejected Indian gambling in referenda. Other tribal governments are in the midst of policy debates on whether or not to permit gambling and related commercial developments on their reservations.<sup>9</sup>

<sup>4</sup>See chart entitled “Trends in Tribal Casino Gaming Revenues, 1988-1997.” Amounts are in constant, 1997 dollars based on the CPI-U-X1 index in the *Economic Report of the President* (February 1999), p. 398. For Indian gaming revenues from 1988 and 1995, see U.S. General Accounting Office, *Tax Policy: A Profile of the Indian Gaming Industry* (May 1997), p. 6. For Indian gaming revenues in 1996 and 1997, see International Gaming & Wagering Business, *The Gross Annual Wager* (August Supplements, 1997 and 1998).

<sup>5</sup>See chart entitled, “Trends in Commercial Casino Gaming Revenues, 1988-1997.” Amounts are in constant, 1997 dollars based on the CPI-U-X1 index in the *Economic Report of the President* (February 1999), p. 398. For commercial casino revenues, see International Gaming & Wagering Business, *The Gross Annual Wager* (August Supplements, 1988 to 1997).

<sup>6</sup>Letter from Penny Coleman, Deputy General Counsel, NIGC, to Donna Schwartz, Research Coordinator, Advisory Commission on Intergovernmental Relations, dated December 4, 1998.

<sup>7</sup>See charts entitled, “States with Tribal Gaming in 1988” and “States with Tribal Gaming in 1998.” For 1988, there was no centralized information source, and the data were compiled from numerous sources, including the National Indian Gaming Commission; the Bureau of Indian Affairs; newspaper and magazine articles; and the *Indian Gaming Magazine, Directory of North American Gaming* (1999). For 1998, see National Indian Gaming Commission, “Report to the Secretary of the Interior on Compliance with the Indian Gaming Regulatory Act” (June 30, 1998).

<sup>8</sup>Figures obtained by Commission staff in oral communication with the Bureau of Indian Affairs, March 4, 1999. The larger number of compacts is due to some tribes operating more than one gambling facility.

<sup>9</sup>“Tribes Weighing Tradition vs. Casino Growth,” Brett Pulley, *New York Times*, March 16, 1999.

The reasons for opposition are varied, but a common theme among many opposed to Indian gambling is a concern that gambling may undermine the “cultural integrity” of Indian communities.<sup>10</sup>

For the majority of tribes with gambling facilities, the revenues have been modest yet nevertheless useful. However, not all gambling tribes benefit equally. The 20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for 41.2 percent.<sup>11</sup> Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities.

## TRIBAL SOVEREIGNTY AND INDIAN GAMBLING

Under the U.S. Constitution and subsequent U.S. law and treaties with Indian nations, Native Americans enjoy a unique form of sovereignty. Chief Justice John Marshall, who was instrumental in defining the constitutional status of Indians, described the legal relationship between the federal government and the tribes as “unlike that of any other two people in existence.”<sup>12</sup> Two centuries of often contradictory federal court decisions and Congressional legislation have ensured that the definition and boundaries of tribal sovereignty remain in flux. Differing perspectives on the nature and extent of that sovereignty—in particular, the relationship of Indian tribes to the state governments in which they reside—lie at the heart of the many disputes about Indian gambling.

The authority for tribal governmental gambling lies in the sweep of U.S. history and the U.S. Constitution. The Commerce Clause of the U.S.

Constitution recognizes Native American tribes as separate nations. The Supreme Court so held in the early years of the Nation’s history. In *Cherokee Nation v. Georgia*<sup>13</sup>—the Court held that an Indian tribe is a “distinct political society...capable of managing its own affairs and governing itself.” A year later in *Worcester v. Georgia*,<sup>14</sup>—Chief Justice Marshall, writing for the Court, held that Indian tribes are distinct, independent political communities “having territorial boundaries, within which their authority [of self-government] is exclusive...By entering into treaties, the Court held, Indian tribes did not “surrender [their] independence—[their] right to self-government...”<sup>15</sup>

These principles of federal law have been repeatedly reaffirmed by the Supreme Court. Thus, it is broadly understood that “[t]he sovereignty retained by tribes includes ‘the power of regulating their internal and social relations.’”<sup>16</sup>—and that this authority includes the “power to make their own substantive law in internal matters...and to enforce that law in their own forums.”<sup>17</sup> And under settled law these rights include the right to engage in economic activity on the reservation,<sup>18</sup> through means that specifically include the right to conduct gambling on reservation lands.<sup>19</sup>

As a result of these principles, state law generally does not apply to Indians on the reservation. Thus, in *Worcester*, the Court held that the law of the state of Georgia (which is one of the original 13 states) has no force within the boundaries of the Cherokee Nation. “The

<sup>10</sup> Anders, *supra* note 1 at 104.

<sup>11</sup> Letter from Penny Coleman, Deputy General Counsel, NIGC to Donna Schwartz, Research Coordinator, Advisory Commission on Intergovernmental Relations, dated December 4, 1998.

<sup>12</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) I (1831).

<sup>13</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

<sup>14</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

<sup>15</sup> *Ibid.*, at 561.

<sup>16</sup> *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)).

<sup>17</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citations omitted).

<sup>18</sup> *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1981).

<sup>19</sup> *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987).

Cherokee Nation, then, is a distinct community, occupying its own territory... in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress.”<sup>20</sup> As the Court explained in *Warren Trading Post v. Arizona Tax Comm.*, “from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference...”<sup>21</sup> Moreover, tribes enjoy immunity from suit absent a clear and express waiver by tribal governments.<sup>22</sup>

Consistent with the Supreme Court’s decisions, Congress and the Executive Branch have implemented a policy of supporting and enhancing tribal sovereignty.

The federal government’s unique obligation toward Indian tribes, known as the trust responsibility, is derived from their unique circumstances; namely that Indian tribes are separate sovereigns, but are subject to federal law and lack the lands and other resources to achieve self-sufficiency. Since it was first recognized by Justice Marshall in *Cherokee Nation v. Georgia*,<sup>23</sup>—federal courts have held that Congress as well as the Executive Branch must carry out the federal government’s fiduciary responsibilities to Indian tribes.<sup>24</sup> The trust responsibility is the obligation of the federal government to protect tribes’ status as self-governing entities and their property rights.

However, Congress may limit tribal sovereignty.<sup>25</sup> The Congressional power over Indian affairs is plenary, subject to constitutional restraint. Congress may use its plenary power to “limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”<sup>26</sup> But, federal law now recognizes that Congressional acts are subject to judicial review to determine whether such enactments violate Indian rights and whether they are constitutional. The notion that Congressional power to regulate commerce with Indian tribes under Art. 1, sec. 8, cl. 3 of the Constitution, is plenary or absolute, is no longer the law. To the contrary, the Supreme Court has expressly rejected contentions that Congress’ pervasive authority over Indian affairs presents “nonjusticiable political questions” that immunize federal legislation from constraints on Congressional power imposed by other parts of the Constitution.<sup>27</sup> As the Supreme Court held in *Delaware Tribal Business Comm. v. Weeks*,

The statement...that the power of Congress “has always been deemed a political one, not subject to be controlled by the judicial department of the government....” has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment....The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.”<sup>28</sup>  
(emphasis added)

Reaffirming this rule just three years later, the Court explained that “the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial

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<sup>20</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515,561 (1832); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>21</sup> *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685, 686-7 (1965).

<sup>22</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at 58.

<sup>23</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>24</sup> See, e.g. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (application of trust responsibility to the Congress); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) (same); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (application of trust responsibility to Executive Branch); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935) (same); *Cramer v. United States*, 261 U.S. 219, 232-33 (1923) (same).

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<sup>25</sup> *Santa Clara Pueblo v. Martinez*, *supra* note 10.

<sup>26</sup> *Santa Clara Pueblo v. Martinez*, *supra*. note 10. At 56. See *Talton v. Mayes*, *supra*, note 11 and *United States v. Kagama*, 118 U.S. 375, 379-381 (1886).

<sup>27</sup> *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977).

<sup>28</sup> *Ibid.* at 84, (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) and citing *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935).

review... has long since been discredited in the taking cases, and was expressly laid to rest in *Delaware Tribal Business Comm. v. Weeks*.<sup>29</sup> Thus, while Congress has power “to control or manage Indian affairs,” that power extends to “appropriate measures for protecting and advancing the tribe” and is further “subject to limitations inhering in a guardianship and to pertinent constitutional restrictions.”<sup>30</sup> In short, Indian rights are no longer excluded from the protection of the Constitution.

In these decisions, the Supreme Court also articulated the standard of review under which the constitutionality of Indian legislation is to be tested. That standard requires that the legislation “be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians ...”<sup>31</sup> Applying this standard, the Supreme Court has critically examined federal legislation affecting Indians to determine whether it comports with constitutional limits imposed on Congressional power. As a result of that analysis, the Court has set aside those enactments that contravene the Fifth Amendment<sup>32</sup>—or has held the United States liable to pay just compensation.<sup>33</sup>

### ***Federal Policy: Failure of the “Trust Responsibility” and Alternative Revenue Source to Indian Gambling***

One fact that is not in dispute is the federal government’s responsibility for the welfare of the Indian tribes and their members. In the *Cherokee* decision, Chief Justice Marshall described the relationship between the federal government and the Indian tribes to “that of a ward to his guardian.” This “trust relationship” is a term derived from treaties between the United

States and Indian tribes involving massive land successions and the fact that the title to Indian lands is held for tribal members “in trust” by the federal government. It has also come to mean that, among its other obligations, the protection of tribal members and the promotion of their economic and social well-being is the responsibility of the federal government. All observers agree that, in this regard, the federal government’s record has been poor, at best.

The statistics are disheartening. According to U.S. government figures, the rates of poverty and unemployment among Native Americans are the highest of any ethnic group in the U.S., whereas per capita income, education, home ownership, and similar indices are among the lowest. Statistics on health care, alcoholism, incarceration, and so forth, are similarly bleak. As summarized by Senator John McCain (R-Arizona) during a Senate debate:

Nearly one of every three Native Americans lives below the poverty line. One-half of all Indian children on reservations under the age of 6 are living in poverty.

On average Indian families earn less than two-thirds the incomes of non-Indian families. As these statistics indicate, poverty in Indian country is an everyday reality that pervades every aspect of Indian life. In this country we pride ourselves on our ability to provide homes for our loved ones. But in Indian country a good, safe home is a rare commodity.

There are approximately 90,000 Indian families in Indian country who are homeless or underhoused. Nearly one in five Indian homes on the reservation are classified as severely overcrowded. One third are overcrowded. One out of every five Indian homes lacks adequate plumbing facilities. Simple conveniences that the rest of us take for granted remain out of the grasp of many Indian families.

Indians suffer from diabetes at 2½ times the national rate. Indian children suffer the awful effects of fetal alcohol

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<sup>29</sup> *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980).

<sup>30</sup> *Sioux Nation of Indians*, 448 U.S. at 415.

<sup>31</sup> *Delaware Tribal Business Comm.*, 430 U.S. at 85 (quoting *Morton v. Mancari*, 417 U.S. 535, 555) (1974).

<sup>32</sup> see *Hodel v. Irving*, 481 U.S. 704 (1987).

<sup>33</sup> *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946).

syndrome at rates far exceeding the national average. Perhaps most shocking of all, Indian youth between the age of 5 and 14 years of age commit suicide at twice the national rate. The suicide rate for Indians between the ages of 15 and 24 is nearly three times the national rate.<sup>34</sup>

Congress directed the Commission to conduct an assessment of the extent to which gambling provided revenues to...Native American tribal government, and the extent to which possible alternative revenue sources may exist for such governments.<sup>35</sup>

Since the early 19th century, the federal government has attempted under specific treaty obligations and overall trust duty to provide for the health, education, and welfare needs of tribes and Indians. This has included federal efforts to promote mainstream economic activities in Indian communities such as agriculture, natural resource development, and various forms of industry and commerce. For example, the Allotment policies of the late 19th and early 20th centuries were aimed at breaking up the tribal land base and distributing it to tribal members thereby transforming Indians into farmers like their non-Indian neighbors. These policies failed to produce successful agricultural economies in tribal communities and, instead, are widely recognized as having had a disastrous impact on tribes and caused substantial reduction in lands owned by tribes and individual Indians.<sup>36</sup>

Today Congress continues to pursue efforts at stimulating economic development and to provide for the basic needs of Indians in Indian country. Recent enactments in pursuit of these objectives include the Native American Housing Assistance and Self-Determination Act of 1996,<sup>37</sup> the American Indian Agricultural

Management Act of 1993,<sup>38</sup> the Indian Energy Resources Act of 1992,<sup>39</sup> the Indian Tribal Justice Act of 1993,<sup>40</sup> the Indian Employment, Training and Related Services Demonstration Act of 1992,<sup>41</sup> and many more. In addition, the federal government operates dozens of programs through the Department of Interior and the other federal agencies to provide assistance to tribes and Indians in the areas of health care, law enforcement, fire protection, tribal courts, road maintenance, education, child abuse and neglect, housing, and natural resource management. However, major federal expenditures on behalf of Native Americans have declined during the period from FY 1975 through FY 1999 (in constant dollars), except for the Indian Health Service.<sup>42</sup> Further this decline indicates that most federal Indian program spending areas have lagged behind their equivalent federal spending areas.

The poor economic conditions in Indian country have contributed to the same extensive social ills generated in other impoverished communities including high crime rates, child abuse, illiteracy, poor nutrition, and poor health care access.

But with revenues from gambling operations, many tribes have begun to take unprecedented steps to begin to address the economic as well as social problems on their own. For example, through gambling tribes have been able to provide employment to their members and other residents where the federal policies failed to create work. This has resulted in dramatic drops in the extraordinarily high unemployment rates in many, though not all, communities in Indian country and a reduction in welfare rolls and other governmental services for the unemployed.

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<sup>34</sup>141 Cong. Rec. S11881 (August 8, 1995) (Statement of Sen. McCain)

<sup>35</sup>Pub. L. 104-169, 4(a)(1)(E).

<sup>36</sup>*Hodel v. Irving*, 481 U.S. 704, 707 (1987); see also *County of Yakima v. Yakima Nation*, 502 U.S. 251, 255-56 (1992); Felix S. Cohen's Handbook of Federal Indian Law 137-38 (1982 ed.).

<sup>37</sup>25 U.S.C. 4101 et seq.

<sup>38</sup>25 U.S.C. 3701 et seq.

<sup>39</sup>25 U.S.C. 3501 et seq.

<sup>40</sup>25 U.S.C. 3601 et seq.

<sup>41</sup>25 U.S.C. 3401 et seq.

<sup>42</sup>*Concurrent Resolution on the Budget, 1999 Report of the Committee on the Budget, United States Senate to accompany Con. Res. 86, together with additional and minority views, Report 105-170, March 20, 1998.*

Tribes also use gambling revenues to support tribal governmental services including the tribal courts, law enforcement, fire protection, water, sewer, solid waste, roads, environmental health, land-use planning and building inspection services, and natural resource management. They also use gambling revenues to establish and enhance social welfare programs in the areas of education, housing, substance abuse, suicide prevention, child protection, burial expenses, youth recreation, and more. Tribes have allocated gambling funds to support the establishment of other economic ventures that will diversify and strengthen the reservation economies. Gambling revenues are also used to support tribal language, history, and cultural programs. All of these programs have historically suffered from significant neglect and underfunding by the federal government. Although the problems these programs are aimed at reducing continue to plague Indian communities at significant levels, gambling has provided many tribes with the means to begin addressing them. There was no evidence presented to the Commission suggesting any viable approach to economic development across the broad spectrum of Indian country, in the absence of gambling.

### ***The Move Toward Self-Determination***

Over the past two centuries, the policy of the U.S. government toward the Indian tribes has oscillated between recognition of their separate status and attempts to culturally assimilate them into the broader society. Federal policy toward Indians in the first half of this century emphasized the latter and was characterized by an effort to reduce their separate status, culminating in the so-called Termination Policy of the 1950's. Under the Termination Policy, several Indian reservations were broken up and the land divided among members and some tribes were "terminated" and declared no longer in existence. This policy was reversed in the 1960's and 1970's when Native American self-awareness and political movements expanded. At the same time, there was growing public awareness of the difficult economic and social

conditions on reservations. As a result of these developments, the federal government's policy toward Native Americans shifted toward enhancing tribal self-determination and placing a greater emphasis on promoting economic and social development on the reservations.

The blueprint for this change was laid by President Johnson in his Presidential statement. And, a milestone in this change was the Nixon Administration's Indian Self-Determination policy.<sup>43</sup> In his July 8, 1970, Message to Congress on Indian Affairs, President Nixon stated: "[t]he United States Government acts as a legal trustee for the land and water rights of American Indians" and has "a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." This emphasis on self-determination has been reinforced by succeeding Administrations. For example, in 1975 Congress passed and President Ford signed the Indian Self-Determination and Education Assistance Act, which authorized the tribes to administer several federal programs and provided them with greater flexibility and decisionmaking authority regarding these programs and the associated funding.<sup>44</sup> In addition, promoting self-determination and economic development on the reservations was seen as requiring a move away from reliance on federal money. As President Reagan said in his 1983 Statement on Indian Policy: "[i]t is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government." These principles have been substantially expanded by President Clinton through four Presidential Executive Orders on various tribal issues.<sup>45</sup>

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<sup>43</sup>"The Forgotten American", Message to the Congress from the President of the United States, March 6, 1968 and Executive Order 11399, Establishing the National Council on Indian Opportunity, 33 FR 4245, March 6, 1968.

<sup>44</sup>25 U.S.C. §§ 450-458.

<sup>45</sup>For example, as recently as May 14, 1998, President Clinton issued Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments," reiterating the relationship between Federal and Tribal governments: "The United States has a unique

It was within this new context that large-scale Indian gambling made its appearance. One of IGRA's purposes was to ensure that the proceeds from tribal gambling were used to fund tribal government operations, including allowing for investment in the infrastructure relating to the promotion of tribal economic development.

### **Review of Regulations**

In its 1987 *Cabazon* decision, the Supreme Court held that the state of California had no authority to apply its regulatory statutes to gambling activities conducted on the reservation. In essence, this ruling held that unless a state prohibited a certain form of gambling throughout the state (in practice meaning either by means of its constitution or its criminal code), it could not prohibit gambling on reservations on its territory. In the *Cabazon* case, the Supreme Court concluded that because bingo and card games were permitted in California in some form—in that case, for charitable purposes—and were merely regulated by the state, these games could not be considered to be prohibited. The Court stated that “In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.” The conclusion was that tribes could operate these games on their reservations and that the authority to regulate them lay with the tribes, not the state.

This decision prompted the passage in 1988 of the *Indian Gaming Regulatory Act*.<sup>46</sup> IGRA provides a regulatory framework for the conduct of gambling on Indian lands. It divides the gambling into three classes, each with a separate treatment:

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legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. . . . The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian treaty and other rights.”

<sup>46</sup>25 U.S.C.A. §2701-2721.

- Class I consists of traditional tribal games and social games for prizes of nominal value, all of which are subject solely to tribal regulation;
- Class II consists of bingo, instant bingo, lotto, punch cards, and similar games and card games legal anywhere in the state and not played against the house. A tribe may conduct or license and regulate Class II gambling if it occurs in a “state that permits such gaming for any purpose by any person” and is not prohibited by federal law;
- Class III consists of all other games, including electronic facsimiles of games of chance, card games played against the house, casino games, pari-mutuel racing, and jai alai. Class III games may be conducted or licensed by a tribe in a state that permits such gambling for any purpose or any person, subject to a state-tribal compact. The compact may include tribal-state allocations of regulatory authority; terms of criminal justice cooperation and division of labor; payments to the state to cover the costs of enforcement or oversight; tribal taxes equal to those of the state; procedural remedies for breach of the compact; and standards for the operation of gambling, including licensing.<sup>47</sup>

### *Class II Tribal/Federal (NIGC) Regulation*

One of IGRA's provisions was the establishment of the National Indian Gaming Commission (NIGC), which was given certain regulatory and investigative functions regarding Indian gambling. Originally the NIGC's responsibilities were focused largely on Class II facilities, but the rapid growth in Class III operations has resulted in a shift of its emphases toward this sector of Indian gambling.

NIGC's regulatory responsibilities regarding Class II gambling are extensive. Prior to the opening of any Class II operation, NIGC must review and approve all related tribal gambling ordinances. If a tribal government is working with an outside investor, the NIGC also is

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<sup>47</sup>25 U.S.C. §2701(d)(7).



charged with reviewing all contracts with that outside management company.

Once a Class II gambling enterprise becomes operational, NIGC is authorized to monitor, inspect, and examine the gambling premises, as well as review and audit the operating records. NIGC has the broad authority to determine whether a tribal gambling operation is complying with the provisions of IGRA, NIGC regulations, and tribal regulations. If NIGC believes any of these provisions have been violated, it is empowered to issue notices of violation, closure orders, and civil fines up to \$25,000 per day, per violation.<sup>48</sup>

The Commission and the Subcommittee have heard testimony that, in the past, the NIGC had been underfunded and understaffed, and that neither the NIGC nor state regulatory authorities have been able to prevent tribes from operating uncompacted gambling facilities in some states. This situation may have improved: With the passage of federal legislation amending IGRA in October of 1997, the NIGC has been empowered to impose fees upon both Class II and Class III gambling activities. This change has increased the NIGC's annual level of funding and has allowed for a significant increase in the number of field investigators and compliance officers. The NIGC reports having issued more notices of violation, closure orders, and civil fines during the period between October 1997 and end of 1998 than during the entire life of the Commission prior to that point. According to its own figures, those efforts have proven successful in bringing more than 95 percent of all the tribal gambling facilities into compliance with federal law.

### *Class III Tribal/State Regulation*

NIGC's original purpose and focus was the regulation of Class II gambling. The explosive growth of Class III gambling has resulted in a greater emphasis on this area as well. NIGC has been assigned a number of responsibilities regarding the regulation of Class III operations, such as conducting background investigations on

individuals and entities with a financial interest in, or a management responsibility for, a Class III gambling contract. In addition NIGC reviews and approves Class III management contracts. However, NIGC's regulatory responsibilities and authority regarding Class III gambling are far more limited than for Class II because IGRA gives the primary responsibility for the regulation of Class III gambling to the tribes and the states.

Under IGRA, the conduct of Class III gambling activities is lawful on Indian lands only if such activities are:

- authorized by an ordinance adopted by the governing body of the tribe and approved by the Chairman of the NIGC;
- located in a state that permits such gambling for any purpose by any person, organization, or entity, and;
- conducted in conformance with a tribal-state compact that is in effect.

IGRA requires that tribes and states negotiate a compact covering, among other things, the regulation of Class III gambling on Indian lands.<sup>49</sup> The primary responsibility to regulate Class III gambling is with the tribe. States may, but are not required to, provide some form of regulatory oversight of Indian Class III casino games under the compact provisions of the Act.<sup>50</sup> Therefore, the level of state and tribal regulatory oversight in any given state is determined by the voluntary compact negotiations between the tribe and the state.

The primary regulators of tribal government gambling are Tribal Gaming Commissions with front-line day-to-day responsibilities for monitoring the gambling operations. As noted by

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<sup>49</sup> Section §2710(d)(3)(A) states: "Any Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact."

<sup>50</sup> 25 U.S.C. §2701(14)(a)(1-3).

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<sup>48</sup> 25 U.S.C. §2712(a)(1).

the NIGC's Deputy Counsel, "The tribes generally serve as the primary regulators for gambling. They're the ones on the ground. They're the ones that are there 24 hours a day. On occasion states are there 24 hours a day, too, if the tribal/state compact provides for it, but by and large it is the tribes who are doing the primary regulating of Indian gambling."<sup>51</sup>

If a state has a public policy of complete prohibition against Class III gambling, then tribes within the borders of the state may not initiate such gambling. However, if the state has no completely prohibitive policy against Class III gambling, then the federal courts have held that the state may not prohibit gambling on reservations.

Given the often opposing viewpoints between tribes and state governments, IGRA's requirement that the two parties negotiate compacts for Class III gambling has been the source of continuing controversy. On one hand, the federal courts have ruled that Indian tribes have a right to establish gambling facilities on their reservations; on the other hand, IGRA requires that compacts be negotiated between the tribes and the states, obviously requiring the state's consent. Clearly, some form of mutual agreement is required. Although most states and tribes seeking to open gambling facilities have managed to successfully negotiate compacts, many have not. When an impasse develops, each side commonly accuses the other of not negotiating "in good faith" and there is no accepted method of resolution.

### ***Eleventh Amendment Immunity for States***

IGRA contains a provision for resolving such impasses, at least when it has been the state that is accused of not negotiating in good faith: the tribe may sue the state in federal court. However, in *Seminole Tribe of Florida v. Florida*,<sup>52</sup> a federal court found that this violated the

Eleventh Amendment's guarantee of state sovereign immunity.

This decision, which covers a plethora of legal issues, has been widely interpreted. It did not, however, declare invalid nor set aside any part of the Act, nor did it set aside any Class III gambling pacts already negotiated. Obviously, states and tribes may continue to voluntarily enter into new compacts.<sup>53</sup>

One immediate and continuing effect of the *Seminole* decision is that a tribe has no judicial recourse if it believes a state has failed to comply with IGRA's "good faith" provisions. The *Seminole* decision contributed to a stalemate in negotiations between a number of tribal and state governments, a stalemate that continues nearly three years after the *Seminole* decision.

### ***State Criticism of IGRA***

Many states are unhappy with several of IGRA's provisions. In testimony before the Commission, representatives of the states have raised a number of areas of concern regarding Indian gambling, including: (1) The federal government does not actively and aggressively enforce IGRA on the reservations, and the states are unable to enforce it on their own; (2) IGRA requires states to negotiate in good faith but does not place the same requirement on tribes; and (3) the scope of gambling activities allowed to tribes is not clearly defined under IGRA.

In the large majority of cases, mutually acceptable tribal-state compacts have been successfully negotiated. In some states, however, including California, Florida, and Washington, tribes have opened Class III casinos without a compact. (As an indication of the difference in their perspectives, states refer to this as "illegal" gambling; tribes term it "uncompacted" gambling.) State governments are not empowered to act against Indian tribes if the tribes are operating Class III gambling establishments without a compact, as enforcement is a federal responsibility. Yet some

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<sup>51</sup> Penny Coleman, Deputy General Counsel, National Indian Gaming Commission, testimony before the National Gambling Impact Study Commission, Tempe, AZ (July 30, 1998).

<sup>52</sup> 517 U.S. 44 (1996).

<sup>53</sup> *Ibid.*

states have complained that the federal government refuses to act aggressively in these matters.<sup>54</sup>

State officials also argue that IGRA requires states to negotiate in good faith without placing the same requirement on tribes. According to Tom Gede, Special Assistant Attorney General for the state of California, this unilateral good faith requirement reduces the likelihood that states and tribes will come to agreement through the negotiating process:

[I]t's too easy to get to bad faith, and if there were incentives to allow legitimate differences of opinion to continue to be discussed at the table before somebody raises the bad faith flag, then both parties would be better off. What happens now is that any legitimate difference of opinion results in somebody hoist[ing] the bad faith flag, and it only goes against one party, the state.<sup>55</sup>

In addition, the states argue, IGRA lacks clarity on the scope of gambling activities permitted to tribes. For example, IGRA does not address whether states should be required to negotiate with tribes about providing electronic versions of games already authorized. As technological advances continue to blur the line between Class II and Class III gambling, this issue may become even more complex. Similar disputes have occurred regarding the proper classification of some bingo operations and, thus, the scope of the state's regulatory role.

The states also have bristled at court rulings that have held that if gambling is allowed anywhere in the state for any purpose, even if only under highly controlled and limited circumstances such as charitable gambling by non-profit institutions, there is effectively little restriction on what tribes may offer, including full-fledged casinos. Raymond Scheppach, Executive Director of the

National Governors' Association (NGA), summarized the states' position as follows:

It must be made clear that the tribes can negotiate to operate gambling of the same type and subject to the same restrictions that apply to all other gambling in the state. The governors firmly believe that it is an inappropriate breach of state sovereignty for the federal government to compel states to negotiate tribal operations of gaming activities that are prohibited by state law.<sup>56</sup>

### ***Mechanism for Handling Impasse Between Tribes and States***

In an attempt to resolve the impasse caused by the *Seminole* decision and provide a mechanism for resolving state-tribal disputes regarding compacts, the Bureau of Indian Affairs published an "Advanced Notice of Proposed Rulemaking" (hereinafter, "ANPR") on May 10, 1996.<sup>57</sup> The proposed procedures are a complex and lengthy series of steps involving repeated consultation with the respective tribes and states, but the key element is a provision that would allow the Secretary of the Interior to approve a tribe's request to operate gambling facilities, even if the state and tribe have been unable to agree on a compact. Tribes have strongly supported the ANPR because it would replace the remedy nullified by the *Seminole* decision<sup>58</sup>; states have strongly opposed the proposal as an infringement on their sovereignty.

In essence, the procedures would leave to the Secretary of the Interior the right to determine if the respective state had been negotiating in good faith and, if he determines that it has not, to approve a tribe's proposal to operate Class III gambling facilities. The proposed Secretarial procedures detail a number of steps and

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<sup>54</sup>Ray Scheppach, Testimony Before the National Gambling Impact Study Commission, Washington, D.C. (March 19, 1999) (Executive Director of the National Governors Association). See also *Rumsey Indian Rancheria v. Wilson*, 41 P.3d 421 (9<sup>th</sup> Cir. 1994).

<sup>55</sup>*Ibid.*

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<sup>56</sup>Raymond Scheppach, Testimony Before the National Gambling Impact Study Commission, Tempe, Arizona (July 30, 1998) (Executive Director of the National Governors Association).

<sup>57</sup>61 FR 21394 (1996).

<sup>58</sup>However, tribes disagree with the Secretary's decision to use the *Rumsey* case as the legal standard for the scope of gambling because it would impose the 9th Circuit's interpretation of California state gambling public policy on the rest of the nation.

conditions necessary before a final ruling can take place. For example, the Secretary would intervene only after a state had invoked sovereign immunity to block a suit regarding its failure to negotiate a compact in good faith and that suit had been dismissed under *Seminole*. Further, the state would have the right to put forward an alternative proposal, which the tribe would be asked to comment on. Absent such comments, the state's proposal could be adopted. The key point of dispute concerns the fact that, assuming no tribal-state agreement had been reached, the Secretary could then appoint a mediator to decide the issue or himself approve the operation of the gambling facilities, in both cases without the state's consent.

At its July 29, 1998, hearing in Tempe, Arizona, the Commission voted to send a letter to the Secretary of the Interior requesting that he defer issuance of a final rule pending completion of the Commission's *Final Report*.<sup>59</sup> However, on April 12, 1999, shortly after the expiration of a legislative ban imposed by Congress prohibiting the Secretary of the Interior from approving any Class III compacts without the prior approval of the affected states, the Department of the Interior published its final rule that, in effect, would implement the proposed procedures after 30 days. This measure was immediately challenged in federal court by the states of Florida and Alabama, which sought to block the new rules from taking effect. Senator Enzi offered an amendment to an appropriations bill that would have prohibited the Secretary from issuing the 'Procedures.' Senator Slade Gordon withdrew the amendment based upon a promise from Secretary Bruce Babbitt that he would not implement the 'Procedures' until a federal court decided the issue of his authority to issue such procedures under the IGRA. The resolution of

this problem will almost certainly become the responsibility of the federal courts.

### *Other Mechanisms*

Other mechanisms have been proposed for resolving the problems underlined by the *Seminole* case. For example, the Department of Justice might prosecute tribes in federal courts only when the state has acted in good faith or by suing states on behalf of the tribes when it determines that the states are refusing to comply with their obligations under IGRA.<sup>60</sup> One scholar has argued for expansion of federal jurisdiction to allow for federal resolution of state-tribal disputes.<sup>61</sup> Senator Daniel Inouye (D-Hawaii) has suggested that both states and tribes agree to waive their sovereign immunity on this issue. No proposal, however, has secured the agreement of tribes and states.

## LOCAL COMMUNITY IMPACTS

Local regulations such as zoning, building, and environmental codes do not apply on Indian lands. Tribal governments do, however, sometimes adopt local building and other health and safety codes as tribal laws. State and local governments usually provide and service infrastructure such as roads and bridges near reservations that are relied on by tribal gambling facilities. In some instances, state and local governments may provide water, sewage treatment, and electrical service to a tribal casino, and tribes may be charged (and pay) for such services. In addition tribal governments often conclude agreements with the local governments for certain essential governmental services such as fire and emergency medical services, or enter into reciprocal agreements to provide such services with an agreed level of compensation. Two of the largest Indian

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<sup>59</sup> Letter from Kay C. James, Chairman of the National Gambling Impact Study Commission, to Bruce Babbitt, Secretary of the Interior (August 6, 1998) (on file with the National Gambling Impact Study Commission). The Commission vote was 8 to 1 in favor of recommending to the Secretary of the Interior that he postpone issuing the final rule until after the Commission had delivered its report and recommendations to Congress and the President on June 18, 1999; Commissioner Robert Loescher opposed the motion.

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<sup>60</sup> Ibid.

<sup>61</sup> See Brian Casey Fitzpatrick, *Casenote: Finding a Fair Forum: Federal Jurisdiction for IGRA Compact Enforcement Action in Cabazon Band of Mission Indians v. Wilson*, 35 Idaho L. Rev. 159 (1998).

gambling enterprises in the United States remit substantial funds to the state that are then redistributed by the state on a formula to local communities.<sup>62</sup>

Tribal representatives often point to positive economic and social impacts of Indian casinos on neighboring communities. According to a study funded by five gambling tribes and presented at the Subcommittee's hearing at the Gila River Indian Community:

In addition to...positive economic and social impacts on reservations, the available evidence also demonstrates that tribes contribute to local economies through taxes, revenue sharing, employment of non-Indians, contributions to local charities, and a myriad of other ways. Furthermore, the case study tribal casinos we analyzed did not appear to have discernable negative impacts on off-reservation sales or crime rates.<sup>63</sup>

A similar view has been expressed by Richard G. Hill, chairman of the National Indian Gaming Association:

NIGA encourages all those who would disparage Indian governmental gaming to, first, add up all the benefits to their own communities from Indian gaming and what would happen to the jobs and businesses if Indian Nations and their economic development were no longer there. Those opponents of Indian governmental gaming who self-righteously speak about morality and "state's rights" would have much greater

problems to deal with than poor, starving Indians.<sup>64</sup>

In many cases, local government officials acknowledge the positive economic impact of tribal gambling but voice concerns regarding other matters. For example, William R. Haase, Planning Director for the town of Ledyard, Connecticut, near the Foxwoods Casino, owned by the Mashantucket Pequot Tribal Nation, stated that:

the three local host communities (Ledyard, Preston, and North Stonington), with a combined population of only 25,300, find it difficult to cope with the magnitude of Foxwoods Casino, primarily in the areas of diminished quality of life due to tremendous increases in traffic along local roads and state highways, deteriorating highway infrastructure, and increased policing and emergency services costs. Although confined to a 2,300-acre federally recognized Indian reservation, Foxwoods has expanded so rapidly that the host towns and Connecticut Department of Transportation have been unable to keep up. Fortunately, the adverse effects of Foxwoods are confined primarily to the immediate surrounding host communities, and problems diminish with distance.<sup>65</sup>

Similarly, Supervisor Dianne Jacob of San Diego, California, while noting that her county government "has had some success in establishing a government-to-government relationship with the members of the tribes in [her supervisorial] district," also pointed out that

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<sup>62</sup> Together, the Mashantucket Pequot Tribal Nation and the Mohegan Nation are forecasted to contribute \$294 million to the state of Connecticut in FY 1999, of which \$135 million will be redistributed directly to towns. *1999-2001 Biennium: Governor's Budget Summary, Connecticut, John G. Rowland, Governor, p. A-3, A-7, A-12, 1999.*

<sup>63</sup> Stephen Cornell, Joseph Kalt, Matthew Krepps, and Jonathan Taylor, "American Indian Gaming Policy and Its Socio-Economic Effects" (July 31, 1998), p. 78.

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<sup>64</sup> National Indian Gaming Association Press Release (March 16, 1998).

<sup>65</sup> William R. Haase, Testimony Before the National Gambling Impact Study Commission, Boston, Massachusetts (March 16, 1998) (Planning Director, town of Ledyard, Connecticut). Mr. Haase addressed the Commission during the bus trip to Foxwoods Casino and not during the regular meeting. He also indicated that the problem was less with the tribe reimbursing the local communities for the costs they incurred from the nearby presence of the Foxwoods Casino than with the state of Connecticut's failure to share sufficiently the revenues it obtained from the same casino.

local governments incur the costs of law enforcement for gaming-related crimes whether they are property crimes that occur at a casino or more serious crimes related to individuals who have been at a casino. For example, the San Diego County Sheriff, who is responsible for law enforcement adjacent to all 3 of the reservations [in San Diego County] on which there is gambling, responded to almost 1,000 calls for service in 1996 alone.<sup>66</sup>

Supervisor Jacob also testified at length about two tribal land acquisitions that had been proposed but not yet approved in her district:

In both of these situations, the impact on residents of adjacent communities—in terms of traffic, crime, and property devaluation—would have been devastating.

[I]t is one thing to respect the sovereignty of existing tribal lands, but another to annex lands simply for the purpose of circumventing local land use and zoning regulations.<sup>67</sup>

Many tribes have voluntarily entered into agreements with neighboring local governments to address those types of issues. Howard Dickstein, an attorney representing the Pala Band of Mission Indians in California, explained to the Commission how such agreements can be reconciled with tribal sovereignty:

I think the Pala and other tribes that I represent have determined that in an era when tribes have begun to interact with other non-reservation governments...and clearly have off-reservation impacts because of their on-reservation activities, what sovereignty requires is negotiation with those other governments that represent those non-reservation

constituencies and reaching agreements and accommodations that allow those other governments to protect their interests but maintain the tribes' interests and allow the tribes to protect their interests.<sup>68</sup>

## ECONOMIC DEVELOPMENT

Only a limited number of independent studies exist regarding the economic and social impact of Indian gambling. Some have found a mixture of positive and negative results of the impact of gambling on reservations,<sup>69</sup> whereas others have found a positive economic impact for the tribal governments, its members and the surrounding communities.<sup>70</sup> This is an area greatly in need of further research. However, it is clear from the testimony that the Subcommittee received that the revenues from Indian gambling have had a significant—and generally positive—impact on a number of reservations.

IGRA requires that the revenues generated by Indian gambling facilities be used to fund tribal government operations and programs, the general welfare of the Indian tribe and its members, and tribal economic development,

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<sup>68</sup> Howard Dickstein, Testimony Before the National Gambling Impact Study Commission, Del Mar, California (July 29, 1998) (Attorney Representing the Pala Band of Mission Indians).

<sup>69</sup> See General Accounting Office, Tax Policy: A Profile of the Indian Gaming Industry, GAO/GGD-97-91 (Letter Report, May 5, 1997) (as of December 31, 1996, 184 tribes were operating 281 gaming facilities with reported gaming revenues of about \$4.5 billion); Stephen Cornell, Joseph Kalt, Matthew Krepps, and Jonathan Taylor, *American Indian Gaming Policy and Its Socioeconomic Effects: A Report to the National Gambling Impact Study Commission* (July 31, 1998) (a study of five tribes that found gambling was an “engine for economic growth” and “the number of compulsive gamblers...has grown” but that “head counts of compulsive gamblers...pale in importance beside the demonstrable improvements in social and economic indicators documented for gaming tribes.” At iii-iv); William Bennett Cooper, III, Comment: What is in the Cards for the Future of Indian Gaming? *5 Vill. Sports & Entertainment L. Forum* 129 (1998) (discussion of the law and economics of Indian gambling that examines revenue increases, Indian cultural backlash, compulsive gambling, and crime); and Anders, *supra* note 1 (survey and discussion of a number of positive and negative aspects of Indian gambling).

<sup>70</sup> *The Connecticut Economy* (published by the Department of Economics, University of Connecticut), page 6, (Spring 1997).

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<sup>66</sup> Diane Jacob, Testimony Before the National Gambling Impact Study Commission, Del Mar, California (July 29, 1998) (Supervisor, County of San Diego, 2<sup>nd</sup> District).

<sup>67</sup> *Ibid.*

among other uses. This includes essential governmental services such as education, health, and infrastructure improvements.<sup>71</sup> According to the Chairman of the National Indian Gaming Commission, many tribes have used their revenues “to build schools, fund social services, provide college scholarships, build roads, provide new sewer and water systems, and provide for adequate housing for tribal members.”<sup>72</sup>

Many tribes are providing more basic services. One example is the Prairie Island Indian Community. Their representative testified before the Commission’s Subcommittee on Indian Gambling that:

We no longer rely only on government funding to pay for the basics. We have used gaming proceeds to build better homes for our members, construct a community center and an administration building, develop a waste water treatment facility and build safer roads. We are also able to provide our members with excellent health care benefits and quality education choices.... We are currently working with the [Mayo Clinic] on a diabetic study of Native Americans. We can provide chemical dependency treatment to any tribal member who needs assistance. And our education assistance program allows tribal members to choose whatever job training, college, or university they wish to attend.<sup>73</sup>

A representative of the Viejas Band of Kumeyaay Indians also testified that:

Our gaming revenues provide such government services as police, fire, and ambulance to our reservation, neighbors

and casino. Earnings from gaming have paved roads, provided electricity, sewage lines, clean water storage, recycling, trash disposal, natural habitat replacement, and watershed and other environmental improvements to our lands.<sup>74</sup>

Other tribal governments report the development of sewage management projects, energy assistance, housing, job training, conservation, education, native language programs, and many other services that previously were absent or poorly funded before the introduction of gambling. There also has been an emphasis by many tribes on using gambling revenues for preserving cultural practices and strengthening tribal bonds.<sup>75</sup>

For some, Indian gambling provides substantial new revenue to the tribal government.<sup>76</sup> For others, Indian gambling has provided little or no net revenue to the tribal government, but has provided jobs for tribal members. One estimate of employment at Indian gambling facilities puts the figure at 100,000 jobs. Indian gambling provides jobs for Indian tribal members in areas where unemployment has often exceeded 50 percent of the adult age population. Many of the casinos also employ non-Indian people and therefore can have a significant positive economic impact on surrounding communities, as well as for many small businesses near Indian reservations.<sup>77</sup>

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<sup>74</sup>Anthony R. Pico, Testimony Before the Subcommittee on Indian Gambling, National Gambling Impact Study Commission, Las Vegas, Nev. (Nov. 9, 1998) (Chairman of the Viejas Band of Kumeyaay Indians).

<sup>75</sup>Ibid., note 50, and Hilary Osborn, Testimony Before the Subcommittee on Indian Gambling of the National Gambling Impact Study Commission, Las Vegas, Nev. (Nov. 9, 1998) (Chairman of the Tribal Casino Gaming Enterprise, Eastern Band of Cherokee Indians).

<sup>76</sup>See, Sean Paige, *Gambling on the Future*, Insight on the News, 8. (Dec. 22, 1997).

<sup>77</sup>“Economic Contributions of Indian Tribes to the Economy of Washington State,” Veronica Tiller, Ph.D., Tiller Research, Inc., and Robert A. Chase, Chase Economics (1999). This study was a partnership effort commissioned by the State of Washington and the Washington state tribal governments. See also, “Economic Benefits of Indian Gaming in the State of Oregon,” James M. Klas and Matthew S. Robinson (June 1996) and “Statistics on the Economic

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<sup>71</sup>25 U.S.C. §2701(11)(B)(i-v).

<sup>72</sup>Tadd Johnson, (now former Chairman), Testimony Before the National Gambling Impact Study Commission, Boston, Mass. (March 16, 1998).

<sup>73</sup>Carrel Campbell, Testimony Before the Subcommittee on Indian Gambling, National Gambling Impact Study Commission, Las Vegas, Nev. (Nov. 9, 1998) (Secretary of the Prairie Island Indian Community).

Although the impact varies greatly, tribal gambling has significantly decreased the rates of unemployment for some tribes. For example, the Subcommittee received testimony that stated that, for the Mille Lacs Band of Ojibwes in Minnesota, unemployment has decreased from about 60 percent in 1991 to almost zero at present.<sup>78</sup> For the Oneida tribe of Wisconsin, the unemployment rate dropped from nearly 70 percent to less than 5 percent after their casino opened.<sup>79</sup> Representatives from the Gila river Indian Community testified that unemployment on their reservation has decreased from 40 percent to 11 percent since the introduction of gambling.<sup>80</sup> The Coeur d'Alene tribe reported a decrease in the unemployment rate from 55 percent to 22 percent.<sup>81</sup> A number of other tribes have reported similar results.

The Subcommittee also heard much testimony about the pride, optimism, hope, and opportunity that has accompanied the revenues and programs generated by Indian gambling facilities. As one tribal representative stated:

Gaming has provided a new sense of hope for the future among a Nation that previously felt too much despair and powerlessness as a result of our long term poverty...and a renewed interest in the past. The economic development generated by gaming has raised our spirits and drawn us close together.<sup>82</sup>

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Impact of Indian Gaming," National Indian Gaming Association, (February, 1997).

<sup>78</sup> Testimony submitted by Marge Anderson, Chief Executive, Mille Lacs Band of Ojibwe Indians, before the Indian Gambling Subcommittee of the National Gambling Impact Study Commission, Las Vegas, NV, November 9, 1998.

<sup>79</sup> Ibid.

<sup>80</sup> Letha Lemb-Grassley, Testimony Before the Subcommittee on Indian Gambling, National Gambling Impact Study Commission, Seattle, WA (Jan 7, 1999) (Board of Directors of the Gila River Indian Community).

<sup>81</sup> Information provided by the Coeur d'Alene Tribe to the Subcommittee on Indian Gambling, National Gambling Impact Study Commission, Seattle, WA (Jan. 7, 1999).

<sup>82</sup> Jacob LoneTree, Testimony Before the Subcommittee on Indian Gambling, National Gambling Impact Study Commission, Las Vegas, NE (Nov. 9, 1998) (President of the Ho-Chunk Nation).

The Chairman of the Hopi tribe testified before this Commission.

One need only visit an Indian casino to realize that a significant number of casino patrons are Indian people from the reservations on which the casino is located or from other nearby reservations, including non-gaming reservations.... I believe it is also safe to conclude that most Indian people do not routinely have a surplus disposable income which should be expended on games of chance. Most of our people on most reservations and tribal communities find it difficult enough to accumulate enough income on a monthly basis to meet the most basic needs of their families. While the decision to expend those funds in gaming activities is an individual choice, the impacts on family members who frequently do not participate in that choice are nevertheless affected.<sup>83</sup>

## EMPLOYMENT LAWS AND INDIAN TRIBAL GOVERNMENTS

The applicability of federal labor laws to tribal governments and their business enterprises is a controversial and much-discussed issue in federal courts.<sup>84</sup> Two federal statutes concerning employment issues expressly exclude tribes from coverage: *Title VII of the Civil Rights Act of 1964* and *Title I of the Americans with Disabilities Act of 1990*. In addition, certain other non-discrimination laws have been held not to apply where the alleged discrimination was in regards to admission to membership in the tribe.<sup>85</sup> All other federal statutes regarding

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<sup>83</sup> The Honorable Wayne Taylor, Jr., Testimony before the National Gambling Impact Study Commission, Tempe, AZ, July 30, 1998.

<sup>84</sup> See William Buffalo and Kevin Wadzinski, *Application of Federal and State Labor and Employment Law to Indian Tribal Employers*, 25 MR. ST. U.L. REV. 1365 (1995).

<sup>85</sup> *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462-1463 (CA10 1989).



employment “are silent.”<sup>86</sup> Some federal courts of appeals, however, have held that the following federal laws do apply to on-reservation tribal businesses under fact-specific circumstances: The Occupational Safety and Health Act,<sup>87</sup> the Employee Retirement Income Security Act,<sup>88</sup> and the Fair Labor Standards Act.<sup>89</sup>

The National Labor Relations Act (NLRA) permits employees to form unions and to bargain collectively with their employer. The law does not contain language that expressly applies the Act to Indian tribes nor does it expressly exempt Indian tribes from the Act’s coverage. However, the Act does expressly exempt government entities.

The National Labor Relations Board (NLRB or Board), which hears disputes brought under the Act in the first instance, has addressed the issue of whether the Act applies to Indian tribes and has twice held that a tribally owned and operated business located on Indian lands is exempt from the Act under the Act’s exemption for government entities. Similarly, at least one court has ruled that the NLRA does not apply to tribal governments.

An important case on the subject, *Fort Apache Timber Company*, was decided by the Board in 1976.<sup>90</sup> In this case, the Board ruled that it lacked jurisdiction over the White Mountain Apache Tribe and a wholly owned and operated

enterprise of the tribe. Central to the Board’s ruling was the recognition that the tribe was a government, and thus exempt from the Act:

Consistent with our discussion of authorities recognizing the sovereign-government character of the Tribal Council in the political scheme of this country it would be possible to conclude that the Council is the equivalent of a State, or an integral part of the government of the United States as a whole, and as such specifically excluded from the Act’s Section 2(2) definition of “employer.” We deem it unnecessary to make that finding here, however, as we conclude and find that the Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act.<sup>91</sup>

The Federal District Court for the District of Oregon expressly agreed with the Board’s position in *Fort Apache Timber* and similarly ruled that the Confederated Tribes of the Warm Springs Reservation was “not an employer for purposes of [the NLRA].”<sup>92</sup> The court held, however, that a business operated by a tribal corporation was covered by the NLRA.

It should be noted that the Board has expressly held, and the D.C. Circuit Court has upheld, that the Act’s provisions apply to private employers operating on reservations.<sup>93</sup> Similarly, the Board has applied the NLRA to a joint venture between a tribal employer and a non-tribal employer on a reservation.<sup>94</sup> In addition, the Board has also held that the Act applies to businesses wholly

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<sup>86</sup>Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ.L.J. 681 at 682.

<sup>87</sup>*Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (CA9 1985); *Reich v. Mashantucket Sand & Gravel*, 95 F. 3d 174 (CA2 1996). For example, in *Mashantucket*, OSHA was found to apply to the Mashantucket Pequot Sand & Gravel operation through its activities in interstate commerce, but recognized Tribe’s right to establish its own tribal OSHA system.

<sup>88</sup>*Smart v. State Farm Insurance Co.*, 868 F.2d 929 (CA7 1989); *Lumber Industry Pension Fund v. Warm Springs Forest Products*, 939 F.2d 683 (CA9 1991).

<sup>89</sup>*Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490 (CA7 1993). The Court ruled against the plaintiff on the grounds that the FLSA’s police exemption applied. The Court never reached or decided the question of whether or not FLSA applied directly to the tribal government.

<sup>90</sup>*Ft. Apache Timber Co.* 226 N.L.R.B. 503 (1976).

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<sup>91</sup>Ibid.

<sup>92</sup>103 L.R.R.M. (BNA) 2749 (D. Or. 1980).

<sup>93</sup>*Navajo Nation v. N.L.R.B.*, 288 F.2d 162 (D.C. Cir. 1961), cert. denied, 366 U.S. 928 (1961).

<sup>94</sup>*Devils Lake Sioux Manufacturing Corporation*, 243 N.L.R.B. 163 (1979).

owned and operated by a tribe if the business is located off reservation.<sup>95</sup>

The applicability of state labor law to tribal gambling employers is significantly less complex. Absent some showing that Congress has consented, the states have no power to regulate activity conducted on an Indian reservation.<sup>96</sup> Thus, tribal labor laws apply and state labor laws do not apply to tribal gambling employers under the federal law.<sup>97</sup> State laws that would be inapplicable include workers' compensation; state unemployment insurance; state minimum wage; daily or weekly overtime; state disability insurance programs; protection against discrimination for race, sex, age, religion, disability, etc.; protection of minors; no authorized deductions from paychecks; no kickbacks or wage rebates; mandatory day of rest; payment of wages at least semi-monthly; no payment in scrip, coupons, or IOU's; no required purchases at company store; and payment in full to terminated workers. It should be noted that most states have laws of the types listed, but some states do not. Other states have additional laws not on the list.

State labor law varies considerably with respect to the rights of state government employees. Under these laws, 28 states allow their employees to organize but not to strike; 9 states permit employees to strike in limited instances; 11 states put limits on the areas that are subject to negotiations; and 8 states do not grant their employees a right to bargain collectively. However, citizens of those states have the right to vote for their state and local government officials. Although tribal members make up a majority of tribal casino employees in a few

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<sup>95</sup> *Sac & Fox Industries, Ltd.*, 307 N.L.R.B. 241 (1992).

<sup>96</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

<sup>97</sup> Examples of state laws include workers' compensation; state unemployment insurance; state minimum wage; daily or weekly overtime; state disability insurance programs; protection of minors; no authorized deductions from paychecks; no kickbacks or wage rebates; mandatory day of rest; payment of wages at least semi-monthly; no payment in scrip, coupons or IOU's; no required purchase at a company store, and payment for terminated workers. It should be noted that while many states have these laws, some states do not. It is a prerogative of state sovereignty to choose its labor laws and of tribal sovereignty to choose its labor laws.

smaller rural tribal casinos, the great majority of tribal casino employees are not Native Americans; for example, in California, more than 95 percent of the estimated 15,000 tribal casino employees are not Indians; at Foxwoods, in Connecticut, there are a little more than 500 members of the Mashantucket Pequot Tribal Nation and more than 13,000 employees.

In Boston, the Commission heard extensive testimony on the issue of applicability of labor law to tribal employers. Connecticut Attorney General Richard Blumenthal urged the Commission to "apply basic worker protections in federal and state law to the tribal employers or require the tribes to enact laws and ordinances or protections that are commensurate with the federal protections."<sup>98</sup>

Noting that Indian casinos have created thousands of badly needed jobs in southeastern Connecticut, Connecticut State Senator Edith Prague, Chair of the Labor Committee for the Connecticut General Assembly, gave testimony on the relationship between tribal sovereignty and workers' rights:

Federally recognized tribes enjoy sovereignty which is guaranteed under the Constitution of the United States. Along with sovereignty, there is a responsibility to maintain a basic respect for human rights. This is the balance we need. The reason there is no balance at Foxwoods is because of how the Mashantucket Pequots have chosen [to use] their sovereign rights....

I am not opposed to sovereignty. I am however opposed to a tribe using sovereignty as a weapon to shield themselves from having to behave fairly and decently with their workers. There are just over 500 members of the Mashantucket Pequot Tribe, there are just over 13,000 workers at Foxwoods Casino, some of them may be

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<sup>98</sup> Richard Blumenthal, Testimony Before the National Gambling Impact Study Commission, Boston, Massachusetts (March 16, 1998) (Attorney General, State of Connecticut).

Mashantucket Pequots, the great majority of them are not. And what rights do these workers have?<sup>99</sup>

In addition, the Commission heard testimony from former employees of the Foxwoods Casino, including Fred Sinclair, who described his experience there:

I am part Cherokee and I support the dream of the Pequots and their success. I was at the original employer rally in 1992 and actually believed that they cared about their employees. I put my heart, soul, and thousands of uncompensated hours into Foxwoods. Even though my part may be considered small, I helped the Pequots achieve their dream, only to be severely injured, harassed, stripped of my position, my rights, my job, and my health benefits by the abusive upper management they are responsible for.<sup>100</sup>

Tribal representatives have disputed employee claims of poor working conditions. According to Richard G. Hill, Chairman of the National Indian Gaming Association:

The record clearly shows Indian Nations provide good jobs, often with wages in excess of the federal minimum wage, health care, retirement, burial insurance, and other fringe benefits. Indian Nation gaming jobs are generally better than other jobs available in the community. We agree that unemployment insurance and workman's compensation should be available under a Tribal system or the Tribe should participate in a state or federal plan. We reject the notion that Indian Nation non-Indian employees have no rights. Indians and non-Indians are permitted access to grievance procedures at every Indian gaming facility. This objection infers Indian

Nations cannot run fair grievance systems and is code for the implication that Indians are not able to govern themselves. This is an extremely prejudicial claim. No Indian Nation testified against Unionization. In fact, Indian people generally perceive Union members as working people like themselves.<sup>101</sup>

Although some tribes do not favor unionization, other tribes have taken an alternative approach by entering into labor agreements covering tribal gambling employees. Testifying before the Subcommittee in Seattle, Apesanahkwat, Chairman of the Menominee Indian Tribe of Wisconsin, described one such voluntary agreement between his tribal government and a group of unions, covering the tribe's proposed off-reservation casino in Kenosha, Wisconsin. This groundbreaking agreement affirms the tribe's sovereignty and guarantees the rights of tribal gambling employees to organize themselves, join unions, and bargain collectively. Among other things, it provides for employer neutrality on the issue of unionization; union access to employee dining and break rooms; and binding arbitration to settle disputes. The tribe also agrees to participate in the state's unemployment and workers' compensation programs. For their part, the unions agree not to engage in strikes, slowdowns, picketing, sit-ins, boycotts, hand-billing, or other economic activity against the tribe's casino.<sup>102</sup>

## **OTHER ISSUES FOR CONSIDERATION**

### ***Taxation***

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<sup>99</sup> Edith Prague, Testimony Before the National Gambling Impact Study Commission, Boston, Massachusetts (March 16, 1998) (Connecticut State Senator).

<sup>100</sup> Fred Sinclair, Testimony Before the National Gambling Impact Study Commission, Boston, Massachusetts (March 17, 1998) (Former employee at Foxwoods Casino).

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<sup>101</sup> Richard G. Hill, Testimony Before the National Gambling Impact Study Commission, Virginia Beach, Virginia (February 9, 1999) (Chairman of the National Indian Gaming Association).

<sup>102</sup> Apesanahkwat, Testimony Before the Indian Gambling Subcommittee of the National Gambling Impact Study Commission, Seattle Washington (January 7, 1999) (Chairman, Menominee Tribe of Wisconsin).

Few topics regarding Indian gambling have generated more controversy and heated dispute than the subject of taxation.

As governmental entities, tribal governments are not subject to federal income taxes. Instead, the Internal Revenue Service classifies tribal governments as non-taxable entities.<sup>103</sup> As Indian casinos are owned and often operated by the tribes, the net revenues from these facilities go directly into the coffers of the tribal governments. Some proponents of Indian gambling argue that these revenues are thus taxed at a rate of 100 percent.

As noted above, IGRA requires that the revenues generated by Indian gambling facilities be used for tribal governmental services and for the economic development of the tribe. To the extent that the revenues are used for these purposes, they are not subject to federal taxes. The major exception concerns per-capita payments of gambling revenues to eligible tribal members. According to IGRA, if any gambling revenues remain after a tribe's social and economic development needs have been met, and its tribal government operations have been sufficiently funded, then per-capita distributions can be made to eligible tribal members, if approval is granted by the Secretary of the Interior. Individuals receiving this income are then subject to federal income taxes as ordinary income.<sup>104</sup>

State income taxes, however, do not apply to Indians who live on reservations and who derive their income from tribal enterprises. State income tax does apply to non-Indians working at Indian casinos, and to Indians living and working off the reservations, as well as to those Indians who live on reservations but who earn their income at non-tribal operations off the reservations.

In general, state and local government taxes do not apply to tribes or tribal members living on

reservations. However, many of the state-tribal compacts that have been negotiated contain provisions for payments by the tribes to state governments, which may or may not then allocate some of the proceeds to local governments. These payments most commonly include reimbursement of the state's share of the costs of regulating tribal gambling facilities or similar types of services. But there are examples in which the state has required payment from tribes merely as a quid pro quo for concluding a compact. For example, in its compact with the Mashantucket Pequots, the state of Connecticut receives 25 percent of the proceeds from slot machines at the Foxwoods casino in return for maintaining the tribe's monopoly (shared along with the nearby Mohegan Sun casino on the Mohegan reservation) on slot machines in the state. In addition to these mandatory compacts, many tribes have negotiated voluntary agreements with neighboring communities in which compensation is provided for fire protection, ambulance service, and similar functions provided to the tribe.

### *Exclusivity Payments*

Tribes in some states have made "voluntary" payments to states in exchange for the exclusive right to conduct casino-type gambling on a large scale when states allow charitable casino nights but not commercial casinos. These "exclusivity payments" are usually based on a percentage of revenues earned from slots or other gambling.

These voluntary payments have created some confusion. Given that the IGRA specifically prohibits imposition of a state tax on an Indian tribe as a condition of signing a tribal gambling compact, the payments at first glance seem to violate this provision.<sup>105</sup> The distinction, however, is that in order for these voluntary

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<sup>105</sup> 25 U.S.C. § 2710(d)(4), as follows:

"(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State 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."

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<sup>103</sup> Internal Revenue Service Revenue Ruling 94-16, 1994-1 C.B. 19, as amplified by Rev. Rul. 94-65, 1994-2 C.B. 14. See also, "Indian Assistance Handbook," Department of the Treasury, Internal Revenue Service, (1994).

<sup>104</sup> 25 U.S.C. § 2710(b)(3)(D).

payments to be valid, the state must provide additional value that is distinct from the right of a tribe to operate Class III gambling in a state.

The Mashantucket Pequot Tribal Nation was the first such agreement to include exclusivity payments and provides the clearest example. The tribe was permitted to exclusively operate casino-style, Class III gambling in Connecticut in exchange for a 25 percent payment of the gross slot machine revenues to the state of Connecticut. The extraordinarily high value of the exclusivity consideration derived from the casino's location in one of the densest and wealthiest populations in the United States. Should the state of Connecticut permit any other party to operate casino-style gambling in Connecticut, the tribe's obligation to pay 25 percent of its slot revenues would cease, unless the tribe consents (as they recently did for the new Mohegan Sun casino). But the Mashantucket Pequot Tribal Nation would still be permitted to operate Class III gambling. Therefore, the additional agreement in which the state ensures non-competition for the tribe's gambling operation is distinct from the right of the tribe to operate Class III gambling.

### ***Off-Reservation Gambling***

It is possible for an Indian tribe to operate Indian gambling off existing reservation lands. The general rule under IGRA is that no Indian gambling may occur unless it is located on "Indian lands" acquired before the enactment of IGRA in 1988.<sup>106</sup> IGRA prohibits the operation of Indian gambling on lands acquired by a tribe and transferred into trust after its enactment in 1988, with the following exceptions:

- When an Indian tribe was without a reservation when IGRA was enacted and the

newly acquired lands in trust are within the boundaries of the tribe's former reservation;

- When an Indian tribe purchases off-reservation lands and transfers them into trust after the enactment of IGRA and it meets certain conditions and obtains certain consents. An Indian tribe is permitted to operate Indian gambling on newly acquired lands that have been transferred into trust and located off an existing reservation when "the Secretary [of the Interior], after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gambling establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination,"<sup>107</sup>
- When an Indian tribe acquires land as settlement of a tribal land claim or its former reservation lands are restored to trust status;<sup>108</sup>
- When an Indian tribe acquires an initial reservation as a part of its federal recognition under the federal acknowledgement process.

In the eleven years since IGRA's enactment, the Bureau of Indian Affairs has reviewed ten applications to operate off-reservation casinos in Milwaukee, Wisconsin; Council Bluffs, Iowa (two applications for the same parcel of land); Salem, Oregon; Park City, Kansas; Allen Parish, Louisiana; Oklahoma City, Oklahoma; Detroit, Michigan; Marquette County, Michigan; and Airway Heights, Washington. Of these, the BIA accepted two—the Forest County Potawatomi Tribe located in Milwaukee, Wisconsin in 1990; and the Kalispel Tribe, located in Airway Heights, Washington in 1998. One application—i.e., Allen Parish—was rendered moot by the tribe's decision to use a site that did

<sup>106</sup> 25 U.S.C. §2710 (b)(1), (d)(1). "Indian lands" are "all lands within the limits of any Indian reservation" and "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." 25 U.S.C. §2703 (4)

<sup>107</sup> The Indian Gaming Regulatory Act of 1988, 25 U.S.C., Sect. 2719.

<sup>108</sup> Ibid.

not require approval; three applications—Council Bluffs, Salem, and Detroit—were officially rejected by either the Secretary of the Interior or the state governor; and the remainder, though not officially rejected, apparently are no longer under active consideration, at least in some cases because of the governor’s stated opposition.<sup>109</sup>

Proposals for off-reservation tribal casinos do not always reach the formal application stage. For example, off-reservation tribal casinos also have been proposed in Bridgeport, Connecticut; Fall River, Massachusetts; Kenosha, Wisconsin; Kansas City, Kansas; Portland, Oregon; southern New Jersey; and New York’s Catskill Mountains.

Land acquisitions by Indian tribes for non-gambling purposes have been largely focused on reclaiming former reservation land that was alienated in the past. According to Richard G. Hill, Chairman of the National Indian Gaming Association (NIGA): “There is really no need for anyone to fear land-into-trust acquisitions. It’s not like Indian nations will ever be able to buy back the entire country.”<sup>110</sup>

### ***Class II “Megabingos”***

Tribes currently operate Class II “megabingos” that use the telephone lines to operate gambling similar to the current pari-mutuel uses. These are not Internet gambling, as the linkages are reservation to reservation and do not involve individual home terminal access. More than 60 tribal governments currently use these forms of technology in the play of interstate-linked Class II bingo games, which are satellite broadcast across the country. These forms of technology

are used to broaden the participation levels of these games and attract more people to visit Indian communities.

## **RECOMMENDATIONS**

6.1 The Commission acknowledges the central role of the National Indian Gaming Commission (NIGC) as the lead federal regulator of tribal governmental gambling. The Commission encourages the Congress to assure adequate NIGC funding for proper regulatory oversight to ensure integrity and fiscal accountability. The Commission supports the NIGC’s new Minimum Internal Control Standards, developed with the help of the National Tribal Gaming Commissioners and Regulators, as an important step to ensure such fiscal accountability. The Commission recommends that all Tribal Gaming Commission work ensures that the tribal gambling operations they regulate meet or exceed these Minimum Standards, and that the NIGC focus special attention on tribal gambling operations struggling to comply with these and other regulatory requirements.

6.2 The Commission recommends that IGRA’s classes of gambling be clearly defined so that there is no confusion as to what forms of gambling constitute Class II and Class III gambling activities. Further, the Commission recommends that Class III gambling activities should not include any activities that are not available to other persons, entities or organizations in a state, regardless of technological similarities. Indian gambling should not be inconsistent with the state’s overall gambling policy.

6.3 The Commission recommends that labor organizations, tribal governments, and states should voluntarily work together to ensure the enforceable right of free association—including the right to organize and bargain collectively—for employees of tribal casinos. Further, the Commission recommends that Congress should enact legislation establishing such worker rights only if there is not substantial voluntary progress toward this goal over a reasonable period of time.

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<sup>109</sup>U.S. Department of the Interior, Bureau of Indian Affairs, “Gaming Acquisitions Approved Since Enactment of IGRA, October 17, 1988”; “Unapproved Gaming Acquisitions Since Enactment of IGRA, October 17, 1988”; and “Actions by the Washington, D.C. Office of the Department of the Interior on Applications to Take Off-Reservation Land In Trust for Gaming (Not Including the Application Involving the Hudson Do Track)” January 8, 1998.

<sup>110</sup>Daniel Meisler, “State and Local Finance: Senate Proposal on Indian Gambling Is Under Attack By Governors’ Group,” *The Bond Buyer* (May 13, 1998), p. 5.

6.4 The Commission recommends that tribal governments, states and, where appropriate, labor organizations, should work voluntarily together to extend to employees of tribal casinos the same or equivalent (or superior) protections that are applicable to comparable state or private-sector employees through federal and state employment laws. If state employee protections are adopted as the standard for a particular tribal casino, then they should be those of the state in which that tribal casino is located. Further, the Commission recommends that Congress should enact legislation providing such protections only if there is not substantial voluntary progress toward this goal over a reasonable period of time.

6.5 The Commission recognizes that under IGRA, Indian tribes must annually report certain proprietary and non-proprietary tribal governmental gambling financial information to the NIGC, through certified, independently audited financial statements. The Commission recommends that certain aggregated financial, Indian gambling data from reporting tribal governments, comparable by class to the aggregated financial data mandatorily collected from commercial casinos and published by such states as Nevada and New Jersey, should be published by the National Indian Gaming Commission annually. Further, the Commission recommends that the independent auditors should also review and comment on each tribal gambling operation's compliance with the Minimum Internal Control Standards (MICS) promulgated by the NIGC.

6.6 The Commission recommends that, upon written request, a reporting Indian tribe should make immediately available to any enrolled tribal member the annual, certified, independently audited financial statements and compliance review of the MICS submitted to the NIGC. A tribal member should be able to inspect such financial statements and compliance reviews at the tribal headquarters or request that they be mailed.

6.7 The Commission recommends that tribal and state sovereignty should be recognized, protected, and preserved.

6.8 The Commission recommends that all relevant governmental gambling regulatory agencies should take the rapid growth of commercial gambling, state lotteries, charitable gambling, and Indian gambling into account as they formulate policies, laws, and regulations pertaining to legalized gambling in their jurisdictions. Further, the Commission recommends that that all relevant governmental gambling regulatory agencies should recognize the long overdue economic development Indian gambling can generate.

6.9 The Commission has heard substantial testimony from tribal and state officials that uncompacted tribal gambling has resulted in substantial litigation. Federal enforcement has, until lately, been mixed. The Commission recommends that the federal government fully and consistently enforce all provisions of the IGRA.

6.10 The Commission recommends that tribes, states, and local governments should continue to work together to resolve issues of mutual concern rather than relying on federal law to solve problems for them.

6.11 The Commission recommends that gambling tribes, states, and local governments should recognize the mutual benefits that may flow to communities from Indian gambling. Further, the Commission recommends that tribes should enter into reciprocal agreements with state and local governments to mitigate the negative effects of the activities that may occur in other communities and to balance the rights of tribal, state and local governments, tribal members, and other citizens.

6.12 IGRA allows tribes and states to negotiate any issues related to gambling. Nothing precludes voluntary agreements to deal with issues unrelated to gambling either within or without compacts. Many tribes and states have agreements for any number of issues (e.g., taxes, zoning, environmental issues, natural resources management, hunting and fishing, etc.). The Commission recommends that the federal government should leave these issues to the states and tribes for resolution.

6.13 The Commission recommends that Congress should specify a constitutionally sound means of resolving disputes between states and tribes regarding Class III gambling. Further, the Commission recommends that all parties to Class III negotiations should be subject to an independent, impartial decisionmaker who is empowered to approve compacts in the event a state refuses to enter into a Class III compact, but only if the decisionmaker does not permit any Class III games that are not available to other persons, entities, or organizations of the state and only if an effective regulatory structure is created.

6.14 The Commission recommends that Congress should adopt no law altering the right of tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of Class II bingo games as defined under IGRA.

6.15 The Commission recommends that tribal governments should be encouraged to use some of the net revenues derived from Indian gambling as “seed money” to further diversify tribal economies and to reduce their dependence on gambling.



