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The House Always Wins: A Look at the Federal Government's Role in Indian Gaming & the Long Search for Autonomy.

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COMMENT

THE HOUSE ALWAYS WINS: A LOOK AT THE FEDERAL GOVERNMENT'S ROLE IN INDIAN GAMING & THE LONG SEARCH FOR AUTONOMY

CHRISTIAN C. BEDORTHA†

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I. INTRODUCTION

“. . . [T]he land was already claimed by a people when the cowboys came, and when the soldiers came. The story of the American Indian is, in a lot of ways, a story of tragedy.”¹

The phenomenon surrounding Indian Gaming has been met with neither uniform acceptance nor widespread understanding. Its origins can be found in the midst of a long, strained relationship between the Native Americans, the States, and the Federal government of the United States.² Between these actors exists an alliance so unique that, “. . . attempts to explain and define the relationship between the United States and tribal governments have been the subject of over one thousand law articles and many major studies.”³

This comment will focus on the evolution of rights possessed by the Native Americans, and the way in which these rights affect Indian gaming in today's society. The story will commence with a history of the relationship between the United States government and the tribal nations. The

1. JOHNNY CASH, *The West, on AMERICA* (Columbia/Legacy Records 1972).

2. Matt Nitzi, “Miami County Vice” & “Why Not the Wyandottes?": *Two Tales of the Struggle to Bring New Indian Gaming Facilities to Kansas*, 68 UMKC L. REV. 711, 714 (2000).

3. Kathryn Shanley, *The Indians America Loves to Love and Read: American Indian Identity and Cultural Appropriation*, in NATIVE AMERICAN REPRESENTATIONS: FIRST ENCOUNTERS, DISTORTED IMAGES, AND LITERARY APPROPRIATIONS 41 (Gretchen M. Bataille ed., 2001).

dialogue will then examine various rights and laws that are pertinent to present Indian gaming operation. Following a study of the legal components, a consideration of the never-ending financial straights of American tribes will be traversed, with an eye to the potential answers found in Indian gaming. Finally, an assessment of what the future holds for the Native Americans will be developed. This comment will advocate the ability of the gaming industry to help tribes make the imperative jump to self-sufficiency.

II. NATIVE AMERICANS AND THE UNITED STATES

A. *A Brief History of Early Encounters*

1. When the World Was Flat

The North American continent was an Eden in the early days before the arrival of the first explorers. "Sometime toward the end of the fifteenth century, two worlds virtually unknown to each other began to drift into a common orbit."⁴ This drift occurred unbeknownst to the Native Americans, who were enjoying life without any warning of the trials and tribulations awaiting them in the future.

In pre-Columbian times (prior to 1492) the Native American population of the area N[orth] of Mexico is conservatively estimated to have been about 1.8 million, with some authorities believing the population to have been as large as 10 million or more. This population dropped dramatically within a few decades of the first contacts with Europeans. . . as many Native Americans died from smallpox, influenza, measles, and other diseases to which they had not previously been exposed. Native Americans were far more likely to die.⁵

From the first days of exploration, history hints at the Indians' fate.

Even the common usage of the word Indian was a misnomer from its inception. "They have long been known as Indians because of the belief prevalent at the time of Columbus that the Americas were the outer reaches of the Indies (i.e., the East Indies)."⁶ From the Indian's point of view, the time following the introduction of Europeans into the Native American culture was an experience which relegated the American Indian to be rightfully been classified as "involuntary minorities": those

4. James P. Ronda, *Black Robes and Boston Men: Indian-White Relations in New France and New England, 1524-1701*, in *THE AMERICAN INDIAN EXPERIENCE* 3 (Philip Weeks ed., 1988).

5. The Expanded Columbia Electronic Encyclopedia, *Natives, North American* (2003), at http://www.historychannel.com/perl/print_book.pl?ID=103169 (last visited Sep. 9, 2003).

6. *Id.*

who had become a part of American society through coercion and assimilation.⁷

2. Free to Roam No More

By the time of Westward Expansion in the 1700s, not a single part of the Native American culture was disaffected.

Cattlemen wanted to graze their cattle cheaply on Indian land. Cowboys wanted to drive their herds across the reservations. . . Farmers wanted Indian land to settle upon. Settlers wanted Indian wood or ponies. Merchants wanted their money. Missionaries wanted to convert them. . . [t]eachers wanted them to learn. . . [t]he Army wanted them to remain peaceful. And government officials wanted them to give up their Indian ways and disappear. . .⁸

Though defeated in almost every way, Native Americans never accepted the outcome. “Your time of decay may be distant, but it will surely come, for even the white man, whose God walked and talked with him as friend to friend, could not escape our common destiny. . .”⁹

B. *Indian Sovereignty*

1. This Land is Our Land?

To understand Tribal Sovereignty, one must turn the clocks back to a time when the ‘New World’ was still ‘New’. It was around this time that the Indians found their first, formal recognition as legitimate sovereignties by the Crowns of various European nations.¹⁰ This was actually prior to the United States becoming an independent nation itself.¹¹ In the reality of the day, Native Americans were in a stronger position to recognize the United States’ rights as a nation, and not the other way around.¹² In fact, as a new nation the United States sought to enter into agreements with the Native Americans in the hopes of conferring a similar status as

7. WILLIAM T. HAGAN, *AMERICAN INDIANS*, at v (1961); Raymond Cross, *American Indian Education: The Terror of History and the Nation’s Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 941 (1999).

8. DAVID LA VERE, *LIFE AMONG THE TEXAS INDIANS: THE WPA NARRATIVES* 177 (1998).

9. John Mohawk, *Looking for Columbus: Thoughts on the Past, Present and Future of Humanity*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION AND RESISTANCE* 439 (M. Annette Jaimes ed., 1992) (quoting Seattle, Suquamish Leader, circa 1853).

10. Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION AND RESISTANCE* 89 (M. Annette Jaimes ed., 1992).

11. *Id.*

12. *Id.*

the Indians.¹³ The Natives had achieved their standing through extensive treaty-making with the Europeans.¹⁴ Inevitably, it did not take long until the tide began to turn against the tribes.

During the first decade of its existence, the Federal government of the United States was overcome with the notion of manifest destiny, and its desire for westward expansion became a priority.¹⁵ This ideology was accompanied by mounting friction between a fledgling nation and the defiant Native Americans.¹⁶ The policies surrounding the expansion spoke of boundaries between whites and Indians, along with the use of treaties to secure land from the Indians.¹⁷ Though fervently expanding through Indian lands, the States did not possess any authority in regards to Indian policy as stated under the Constitution.¹⁸

2. New Government Blues

As the nation continued to grow, three decisions by the United States Supreme Court laid the foundation for Indian law as it still exists today.¹⁹ In the most famous of the 'Trilogy' cases, Justice Marshall likened the Native Americans' relationship with the United States to a ward's relationship with its guardian.²⁰ Marshall's description of the tribal nations as dependent domestic nations is still accepted as the norm today.

Despite such longstanding comparisons, a treaty that an Indian nation makes with the United States has the overall effect of a treaty between the United States and any other sovereign nation.²¹ These powers are pursuant to the United States Constitution, which allows the tribes freedom from State law under the Supremacy Clause.²² Further, unless an act of Congress so authorizes it, the jurisdiction of any State government

13. Ward Churchill, *The Earth is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION AND RESISTANCE* 141 (M. Annette Jaimes ed., 1992).

14. *Id.*

15. DAVID E. WILKINS, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 106 (2002).

16. *Id.*

17. *Id.*

18. *Id.*

19. Derek C. Haskew, *Federal Consultation with Indian Tribes: the Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 *AM. INDIAN L. REV.* 21, 29 (2000).

20. *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1, 17 (5 Pet.) (1831).

21. H-8160-1- GENERAL PROCEDURAL GUIDANCE FOR NATIVE AMERICAN CONSULTATION, Bureau of Land Management <http://www.blm.gov/nhp/efoia/wo/handbook/h8160-1.html> (last visited on Sep. 9, 2003).

22. *Id.*

and State laws cannot take effect on Indian land.²³ Likewise, without congressional consent or consent of the tribe, claims cannot even be raised by or against a tribal defendant.²⁴ This would appear to put the States at a disadvantage when dealing with a tribe. Nevertheless, this is not entirely the case.

3. The State(s) of the Union

States may only seek enforcement against Native Americans through Federal law. Tribes retain the fundamental elements of sovereignty unless Federal law divests it.²⁵ That is, if the sovereign power is to be stripped from a tribe, it is the job of Congress to do so.²⁶ “It is clear that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.”²⁷ While the language is clear, such a decree may not mean exactly what it says.

For instance, the sovereignty enjoyed by any given tribe only extends to the boundaries of the specific tract of “Indian Land”.²⁸ That is to say that the sovereignty does not extend to foreign jurisdictions, it only affords protection within the confines of the reservation. As one scholar put it, “. . .the sovereign powers exercised by contemporary tribal governments are more illusion than real.”²⁹

However, the reality of Indian sovereignty has found recent support. The importance of the Native American tribes has been underscored in recent years by the Forty-Second President of the United States, William J. Clinton.³⁰ Former President Clinton authored his views in a memorandum describing how the government should deal with Native Americans.³¹ Unfortunately, President Clinton was the first active president to visit an Indian reservation since Calvin Coolidge made an official trip in 1927.³² Despite the lack of Executive activity in the past, such support is

23. *Kansas v. United States*, 249 F.3d 1213, 1223 n.6 (2001).

24. *George v. Sycuan Casino*, No. 00-57044, 2001 WL 1116881, at *624 (9th Cir. Sept. 10, 2001).

25. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

26. *United States v. Mazurie*, 419 U.S. 544, 558 (1975).

27. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

28. 25 U.S.C. § 2703(4)(A) (2003).

29. Robert A. Fairbanks, *Native American Sovereignty and Treaty Rights: Are They Historical Illusions?*, 20 AM. INDIAN L. REV. 141, 142 (1996).

30. Doc. No. 94-22, *Consultation and Coordination with Indian Tribal Governments*, 59 Fed. Reg. 22, 951 (Apr. 29, 1994).

31. *Id.*

32. David E. Wilkins, *Timeline of American Indian Peoples, All Tribes and Regions, in AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* (2002).

a step in the right direction. Perhaps the most support can be garnered through the trust responsibility of the United States of America.

C. *The Federal Trust Responsibility*

1. Generally

The long established doctrine which pervades the relationship of the Native Americans and the United States is the Indian Trust Doctrine.³³ “The general trust responsibility essentially encompasses a general duty of fairness and protection. It arises out of the special relationship between the United States and the various Indian tribes. . . .”³⁴ The term trusteeship has been attached to the responsibility as well.³⁵ This trust responsibility has dominated the United States’ interactions with Indian people, and its existence is not in dispute.³⁶

It is the understanding of this responsibility that is the real ambiguity. “The history of the trust relationship is the foundation for the political, social, legal and cultural factors. . . .”³⁷

It seems to me that the trust obligation is sensitive and complex because it is so multifaceted. And we all appreciate that as a concept it is poorly understood. The trust has several dimensions: it has a moral and political dimension, it has historical roots an development, and it has a legal dimension. . . [a]lthough legally the trust obligation exists between governments—the United States and Indian tribes—Indian people, properly in my judgment, view it as being somewhat in the nature of promises and guarantees being made to individual Indians.³⁸

As illustrated above, Native Americans and the United States government have tried to pinpoint a meaning of the relationship. However, when both sides are wading through the issues, the lucid concept quickly turns to a clouded reality.

33. John Fredericks III, *Indian Lands: Financing Indian Agriculture, Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105, 107 (1989).

34. *Id.* at 108.

35. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 320 (University of Oklahoma Press 1989).

36. *U.S. v. Mitchell*, 463 U.S. 206, 226 (1983).

37. COMPREHENSIVE TRUST MANAGEMENT PLAN, *History* 1-5, Mar. 28, 2003, available at http://www.ost.gov/trustreform/Documents/doi_trust_management_plan.pdf (last visited Nov. 18, 2003).

38. Charles F. Wilkinson, *The Trust Obligation*, in *INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN* 303 (Kenneth R. Philip ed., 1986).

2. Legally Speaking

A quick reference to the legal definition of a trust is a good starting point in order to comprehend the doctrine of trust as applied to the Native Americans.

TRUST, *n.* 2. A fiduciary relationship regarding property and subjecting the person with title to the property to equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it.³⁹

While the exact components for a trust are not met in the situation of the United States and the tribal nations, some parallels are obvious. In actuality, the two have conformed into the roles of a trust. That is, the Federal government is the trustee, while the tribal nations assume the position of beneficiaries.⁴⁰ Further, "It is analogous (to a legal trust). . . in that the government is said to be in fiduciary relationship vis-a-vis Native Americans and their tribes".⁴¹ Therefore, while the relationship may appear to be a legal trust, the trust doctrine is just that, a doctrine.

Another notion of the trust relationship is that there is an overreaching federal responsibility to enhance and protect the assets of the Native Americans' governmental actions and policies.⁴² This well settled idea has merit, but it lacks clarity and actually brings two more issues to light.⁴³ First, does the federal government maintain a responsibility to tribal interests?⁴⁴ Second, are there legal mechanisms in place to enforce such responsibility or is it merely a question of morality?⁴⁵ Both issues have been at the heart of the debate in Indian Law for more than a century.⁴⁶ There is no doubt that the trust responsibility with regards to tribal interests has existed throughout our nation's history. It is the enforcement of the trust that remains elusive.

39. BLACK'S LAW DICTIONARY 1513 (7th ed. 1999).

40. Haskew, *supra* note 19, at 30.

41. E-mail from Gerry W. Beyer, Professor of Law, St. Mary's University School of Law, to Christian C. Bedortha, Candidate for Juris Doctorate of Law (Oct. 22, 2003, 15:41:00 CST) (on file with author).

42. DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 65 (2001).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 66.

3. The Trust Doctrine in Our History

One way of establishing the federal government's role is through the prior acts of Congress. In what some consider the first instance of the trust relationship, the United States government acted as legal trustee to the Indians by enacting the General Allotment Act of 1887.⁴⁷ Also known as the Dawes Act, the allotment covered all lands that were to be converted from reservation land to individual allotments of land.⁴⁸ Under this law, the United States acted in its capacity as trustee to benefit the Indians by introducing the Western property concept of individualized parcels.⁴⁹ This example is just one in a long line of acts by the Legislature attempting to hold up the nation's end of the bargain. Although historical legislation establishes the duty undertaken by the government, the second issue remains: Is the responsibility morally or legally enforceable?

While each governmental branch maintains that they are upholding their collective position as trustee for the Indians, the course of history tells a different tale. As the country grew, the United States continually breached its trust responsibility to the Native Americans⁵⁰.

. . . [H]istorically, of 800 treaties entered into by both parties (the United States and the Tribes), 430 were simply rejected out of hand or disregarded by previous senators; of the 370 that were ratified, the United States violated every one of them. . . [t]hose in government who have studied these issues, however, believe that the solemn trust between the federal government and American Indian tribes needs to be respected—this relationship means that Indians must be given the opportunity to act as self determined peoples.⁵¹

In truth, the United States has never been held accountable for its repeated breaches against the Native Americans.⁵² Standing alone, the separation of powers may be the foundation for this profound confusion. The conclusion to be drawn is that there is no readily-enforceable remedy at law for the tribes.

Though there is no explicit remedy, the government is quick to assert their justifications. Congress uses the language of its own statutes as a

47. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 35 (1998).

48. *Id.*; see also, LAURENCE ARMAND FRENCH, *THE WINDS OF INJUSTICE: AMERICAN INDIANS AND THE U.S. GOVERNMENT* 58 (1994).

49. DAVID H. GETCHES, ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 167 (4th ed. 1998).

50. Sioux Harvey, *Winning the Sovereignty Jackpot*, in *INDIAN GAMING: WHO WINS?* 29 (Angela Mullis & David Kamper eds., 2000).

51. *Id.*

52. See *id.* (providing examples of repeated treaty breaches over time).

method of showing compliance with the trust.⁵³ These statutes reiterate that the United States maintains a trust responsibility to all tribes including the sovereignty of each tribe's government.⁵⁴ Although Congress will continue its claims of maintaining the trust, nowhere in its Legislation can evidence of remedial provisions be found.

Outside of the Legislature, most of the issues concerning Indians are handled by the Department of the Interior and the Bureau of Indian Affairs.⁵⁵ One encouraging sign to tribes is that the Department appears to be singing a different tune.⁵⁶ A change in the leadership for the Department of the Interior gives new hope to the Indian nations.⁵⁷ As an example, the objective of "Trust Reform" has come out of the Department, including the creation of an Office of the Special Trustee for American Indians.⁵⁸ These initiatives can expand and effectively increase the quality of the government's role in Indian Affairs.

D. *The Role of the Department of the Interior*

1. A Balance of Interests

The Executive office which addresses issues facing today's tribes is the Bureau of Indian Affairs, a subject of the Department of the Interior of the United States of America.⁵⁹ The Bureau of Indian Affairs is one of eight branches which serve as the framework of the Department.⁶⁰ The head of the Department is the Secretary of the Interior.⁶¹ The Secretary plays a crucial role in the negotiations between the state and the tribes, though the actual authority regarding gaming is uncertain. "The question

53. 25 U.S.C. § 3601; *See generally*, Heidi L. McNeil, *THE GAMING INDUSTRY ON AMERICAN INDIAN Lands*, (1994) (appearing in B-872 PRACTISING LAW INSTITUTE B4-7077).

54. 25 U.S.C. § 3601(2) (2003).

55. *See* U.S. DEPARTMENT OF THE INTERIOR, <http://www.doi.gov/bureaus.html> (last visited on Jan. 6, 2004) (providing access to the Department of the Interior, with links to individual bureaus, including the Bureau of Indian Affairs).

56. *See generally*, Press Release, Office of Special Trustee for American Indians, *Historic Increase in FY 2004 Budget for Indian Trust Management Reforms*, at <http://www.ost.doi.gov/trustreform/PressReleases/OST%20Press%20Release%20FY%2004%20Budget%20final.pdf> (last visited on Nov. 17, 2003) (demonstrating Secretary Norton's recent success with an 82 percent increase in spending in the area of Indian Affairs) (on file with author).

57. *Id.*

58. *Id.*

59. U.S. DEPARTMENT OF THE INTERIOR, *supra* note 55.

60. *Id.*

61. *Id.*

of whether the Secretary of the Interior can approve tribal casinos over a state's objections remains unresolved."⁶²

The real issue behind this problem is the method in which tribes and specific branches of the Federal government engage in consultations.⁶³ A conflict exists between policies handed down by the Executive branch of the government, and the statutory duty the government must recognize in dealing with tribes.⁶⁴ The result is confusion between internal policy and statutory duty, coupled with a creation of expectations amongst the tribes, amounting to expectation rights in several courts.⁶⁵ The nature of our governmental structure is to regulate through a system of checks and balances. As for the area of Indian law, the system seemingly chases its tail without ever catching it.

An illustration is in order to show the jurisdictional obstacles encountered when attempting to establish a gaming operation. All of the following terms will be explained later in this article, but for now the complexity of the interaction is the impetus sought. To begin with, the tribe must authorize such games by ordinance or resolution, as accepted by the tribal governing body, for the reservation requesting such gaming.⁶⁶ From there, Class III gaming will only be available if the State wherein the reservation lies considers it legal, even if in the form of charitable casino nights.⁶⁷ Once it is established as legal, a compact for Class III operations must be drawn up in "good faith" between the State and the tribe.⁶⁸ After court intervention, if no agreement is reached, the decision rests with the Secretary of the Department of the Interior for approval.⁶⁹ Approving such compacts only represents one role for the Department of the Interior in relation to the Indians. The larger responsibility is as the alleged keeper of the Federal trust.⁷⁰ As part of the Executive branch, it is upon the Department to administer and carry out the trust.

62. I. Nelson Rose, *Gambling and the Law: Status of Gambling Laws*, 7 GAMING L. REV. 1, 1 (2003).

63. Haskew, *supra* note 19, at 25.

64. *Id.* at 26.

65. *Id.*

66. 25 U.S.C. § 2710(d)(1) (2001).

67. *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 360 (8th Cir. 1990); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1026 (2d Cir. 1991); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 482 (1991); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 275 (8th Cir. 1993).

68. 25 U.S.C. § 2710(d)(7)(B)(vii) (2001).

69. 25 U.S.C. § 2710(d)(7)(B) (2001).

70. WILKINS & LOMAWAIMA, *supra* note 42, at 66.

2. The New Regime

The Department of the Interior was not always an ally of the Native Americans. Since its inception in 1849, the Department has been a conglomerate of several existing offices, including the Office of Indian Affairs, which was then a part of the War Department.⁷¹ This was when our military was engaging the natives on the frontier during the Indian Wars of the 1800's.⁷² Much has changed in the last 150 years. After years of conflict, one can only hope that the future represents a change in the tribes' favor.

In 2001, the Department got a make-over when the forty-eighth Secretary of the Interior was sworn in.⁷³ Upon taking the reigns, Secretary Gale A. Norton has stated that,

Increasing efforts to fulfill responsibilities for trust management and improving services to Tribes and individual Indians is one of our greatest challenges, and a key mission of the Department. We inherited a legacy of inadequate management of trust accounts. We propose major investments to reverse that legacy. . . . [W]e need to create . . . the groundwork for this better future.⁷⁴

The accountability for the trust that was reeling into obscurity may have found its place in the current Secretary. With the trust at the forefront, the tribes may be able to find new comfort. The following section discusses the definitive elements which have allowed Native American gaming to advance to its current state.

E. *Essential Elements Produced Indian Gaming of Today*

1. A Part of Their Lives

In a time prior to the era of doctrinal relations, the Indians avidly pursued their love affair with games of chance. Gaming was a part of the Indian culture pre-dating the arrival of the first Europeans.⁷⁵ Many tribal ceremonies and rituals included crude gaming forms.⁷⁶ This was at a time of relative Indian affluence.⁷⁷ But as time went on and the settlements

71. See U.S. DEPARTMENT OF THE INTERIOR, *Frequently Asked Questions*, <http://www.doi.gov/faq/> (last visited Nov. 18, 2003).

72. See HISTORY CHANNEL, http://www.historychannel.com/perl/print_book.pl?ID=93256 (last visited Jan. 8, 2004).

73. See U.S. DEPARTMENT OF THE INTERIOR, GALE A. NORTON—BIOGRAPHY, <http://www.doi.gov/secretary/biography.html> (last visited Nov. 17, 2003) (providing a link to the current Secretary of the Interior, Gale A. Norton).

74. See Press Release, *supra*, note 56.

75. McNeil, *supra* note 53, at 141.

76. *Id.*

77. *Id.*

moved west, the Indians lost their self-sufficiency in many respects.⁷⁸ Having no substantial alternative, the Indians began to use their right of self-rule in an effort to secure some basic standard of living.⁷⁹

Over the last two decades, Indians on reservations have fought to reestablish long-lost powers of self-rule. Governed by institutions, tribes now have powers akin to those of the U.S. states, including powers to make rules and regulations, to wield law enforcement and judicial authority, to tax, and . . . like states. . . run gaming operations. Self-rule is the indispensable first ingredient needed to turn reservation economies around.⁸⁰

This element of sovereignty, coupled with dwindling federal backing, laid the groundwork for Indian Gaming to start its development. “In the late 1970s and early 1980s, ‘[a]s federal support for tribal activities continued to diminish and alternative economic development activities in Indian Country remained minimal, tribal governments turned first to high-stakes bingo and then to other forms of gaming to provide revenue for tribal services.’”⁸¹ As more tribes tried their hands at gaming, the proponents of the operations continued to find themselves entrenched in litigation.

2. The Halls of Justice

It was within the halls of justice where the most crucial element of Indian gaming took shape. The pivotal step toward legitimizing gaming on reservations arrived in the landmark decision of *California v. Cabazon Band of Mission Indians*.⁸² This unexpected victory was handed down by the Supreme Court of the United States, signifying its importance.⁸³ In the years before the *Cabazon* decision, “Indian tribes in California and Florida began operating bingo halls. . . in direct conflict with those states’ . . . laws.”⁸⁴ Empowered by the Court’s decision, “tribal gaming

78. *Id.*

79. See Joseph P. Kalt and Jonathan B. Taylor, *Means Testing Indian Governments: Taxing What Works* (Sept. 3, 1997), at <http://www.nativeweb.org/pages/legal/gorton.html> (discussing how the policy of “self-rule” has led to effective and successful tribal government) (last visited on isited Mar. 25, 2004) (on file with Scholar).

80. *Id.*

81. Amy Head, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 385 (2003).

82. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); Kathryn R.L. Rand, *There are no Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 51 (2002).

83. Rand, *supra* note 82, at 51.

84. Tobi Edwards Longwitz, *Indian Gaming: Making a New Bet on the Legislative and Executive Branches After IGRA’s Judicial Bust* 7 GAMING L. REV. 197, 198 (2003).

spread [to the point that] . . . states sought Congressional intervention to reign in tribal gaming activities.”⁸⁵

This was a time when numerous tribes began to enjoy the economic success of lucrative gaming revenues.⁸⁶ With such a boom in activity, Congress had no other choice but to find a way of balancing the gaming interests of both the States and the tribes.⁸⁷ In 1988, Congress enacted the Indian Gaming Regulatory Act (“IGRA,” “the Act”) after numerous discussion and negotiations in the wake of Cabazon.⁸⁸ The passage of IGRA established the Legislative recognition of Indian gaming, the third essential element for Indian gaming today.

3. The Indian Gaming Regulatory Act

The Act afforded tribes the exclusive right to control all gaming on Indian lands.⁸⁹ This right was effective so long as the gaming was not prohibited by existing Federal law.⁹⁰ The Act also requires compliance with State law for gaming activities to take place.⁹¹ Further, the State where a reservation lies must not prohibit the methods of gaming sought by a tribe.⁹² The key aspect of the statute requires that deference be given to the interests of both the tribe and the State.

Respect for both the Indians and the States was the main goal of Congress in setting forth the legislation. In attempting to fulfill the goal of mutual respect, Congress employed three essential drives regarding the tribes and the States in formulating IGRA: (1) to establish a compact procedure allowing the State to regulate Class III gaming; (2) to allow flexibility between the tribes and the States when negotiating Class III gaming; and (3) to assure that the tribes would be able to conduct Class III gaming without being barred.⁹³ While it is clear that these goals are to formulate understanding between the tribes and the States, identifying a particular class of gaming without further explanation is elusive at best.

85. *Id.*

86. Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 230 (1997).

87. Head, *supra* note 81, at 390.

88. Public L. 100-497, § 2, Oct. 17, 1988, 102 Stat. 2467; Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 692 (9th Cir. 1997) (The Act is simply referred to as IGRA, not the IGRA).

89. 25 U.S.C. § 2701(5) (2000).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1123 (2002).

In order to see the significance of gaming types, the spectrum has been broken down into three classes by IGRA.⁹⁴ Class I gaming covers games played in a social manner without large prizes, which are generally part of the tribal tradition.⁹⁵ Class II gaming includes bingo, pull tabs, punchboards, instant bingo and non-banking card games, including games where players gamble between one another, not the house.⁹⁶ Finally, Class III is a catch-all, encompassing all other gaming forms, such as casino-style games and slot machines.⁹⁷

The important factor of Class III gaming is that the house plays against the patron.⁹⁸ This particular situation requires stricter regulation because of the potential for corruption and outside interference. If a tribe wants to implement Class III gaming, the first necessary step in the process is for the tribe to negotiate a compact between itself and the State as prescribed by IGRA.⁹⁹

F. *Compacts between the States and the Tribes*

1. Regulatory Posturing

While IGRA does provide “suggested compact provisions,” it does not lay out a specific order of guidelines that the parties must adhere to (restrictions, gaming limits, etc.).¹⁰⁰ It must be noted that the compacting process concerns only Class III operations, while Class I and II gaming forms are allowable without a compact.¹⁰¹ When negotiating a Class III compact, the standard encompassing the process is that of “good faith.”¹⁰² If good faith is breached or a compact cannot be resolved independently, the parties may proceed to the courts for mediation under IGRA.¹⁰³

When a tribe contends that a State acts in bad faith, the Federal district courts shall have jurisdiction over the dispute.¹⁰⁴ If the court finds that the tribe’s contention has merit, it will issue a sixty-day period of negotiation.¹⁰⁵ Should this fail, a federally appointed mediator will look at the

94. 25 U.S.C. § 2703 (2003).

95. 25 U.S.C. § 2703(6) (2000).

96. 25 U.S.C. § 2703(7) (2000).

97. 25 U.S.C. § 2703(8) (2000).

98. 25 U.S.C. § 2703(8) (2000); McNeil, *supra* note 53, at 144, n.11.

99. 25 U.S.C. § 2710(d)(3) (2000).

100. McNeil, *supra* note 53, at 146.

101. Interview with Carolyn J. Abeita, Attorney-at-Law, in Albuquerque, NM (Jan. 30, 2003).

102. 25 U.S.C. § 2710(d)(3)(A) (2000); *see also* McNeil, *supra* note 53, at 147.

103. 25 U.S.C. § 2710(d)(7) (2000).

104. 25 U.S.C. § 2710(d)(7)(B) (2000); *see also* McNeil, *supra* note 53, at 147.

105. 25 U.S.C. § 2710(d)(7)(B)(iv) (2000); *see also* McNeil, *supra* note 53, at 147.

last two proposed compacts and pick the one it feels is in the best interest of both.¹⁰⁶ If the State refuses this arrangement, then the issue is sent to the desk of the Secretary of the Interior.¹⁰⁷ At that point, the Secretary must implement procedural rules for the tribe to legally conduct Class III gaming activity.¹⁰⁸ This “complicated IGRA maze” can be more than frustrating for those who must find their way out.¹⁰⁹

This confusion led to an air of aggression toward forming compacts in the months following the passage of IGRA. Between 1989 and 1992, tribes emerged with arguments against the compacting system.¹¹⁰ Basically, the arguments stated that the compacting process undermined the sovereignty of the tribes, as well as the trust responsibility owed to the Indians by the United States.¹¹¹ In reality, the tribal governments did not want to walk away empty-handed. This lack of real alternatives led to the formation of only nine compacts between the tribes and the States in 1992.¹¹²

2. Proposition 5: California’s Shot at a New Look Compact

In more recent years, this process has led to various attempts at streamlining a “model version” of the Tribal-State compact. In 1998, a coalition of Californian tribes proposed a model compact to the people of the State through Proposition 5.¹¹³ These tribes drafted the statutory initiative in the hopes of amending California law, while not affecting the State’s Constitution.¹¹⁴ The proposition “obligated the governor to execute compacts . . . within thirty days” of request.¹¹⁵ If no action were taken by the governor, the compact would be deemed approved at the end of the thirty day period.¹¹⁶ Proposition 5 was passed by the popular vote without a problem.¹¹⁷ However, the Supreme Court of California struck down Proposition 5, finding that it violated the Constitution of the State of California.¹¹⁸

The Court’s decision did not put an end to the State’s journey of finding a better compact. “The State explained that it . . . wished to stay as

106. *Id.*

107. 25 U.S.C. § 2710(d)(7)(B)(vii) (2000); *see also* McNeil, *supra* note 53, at 147.

108. McNeil, *supra* note 53, at 147.

109. *Id.*

110. French, *supra* note 48, at 184.

111. *Id.*

112. *Id.* at 185.

113. *In re* Indian Gaming Related Cases v. California, 331 F.3d 1094, 1100 (2003).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1101.

118. *Id.*

close to the text of Proposition 5 as possible”, when the tribes began to negotiate with the State for new procedures of compacting.¹¹⁹ The result was the “Davis Compact”, which was accepted by the Department of the Interior, pursuant to IGRA, on May 5, 2000.¹²⁰

It turns out that Governor Davis wasted no time in trying to explore the new common-ground with the tribes.¹²¹ Davis sought over one and one-half billion dollars from the tribes in order to suppress the needs of his State generated by the economic crisis.¹²² The tribal governments rejected the offer, but the leverage used by the State has kept the process at standstill.¹²³ The State will not allow the gaming facilities to expand their amount of slot machines without further concessions by the tribes.¹²⁴ The highly publicized recall election has led to a change in California’s gubernatorial leadership.

Arnold Schwarzenegger, the new governor, stated that, “The California Gambling Control Commission should be completely independent of any perceived control of the very interests it is supposed to regulate. This is yet another example of Davis putting his own political interest ahead of the public interest.”¹²⁵

Governor Schwarzenegger has ideas on the issue of the Tribal-State compact, and the anticipation of this hot-button issue has grown with the omnipresence of a State in crisis. “. . . According to Indian gaming officials, the desire to renegotiate involves financial self-interest. If Schwarzenegger allows tribes to expand gambling operations in a way that increases overall revenue, they will reciprocate with more money for the state.”¹²⁶ According to Schwarzenegger’s communications director, “‘The gaming tribes will be welcome at the table’. . . and Schwarzenegger ‘is looking forward to it.’”¹²⁷

119. *Id.* at 102.

120. *Id.* at 107.

121. Don Thompson, *Negotiations Begin on California’s Indian Gambling*, ASSOCIATED PRESS, Mar. 25, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2003/03/25/state0506EST0022.DTL> (last visited on Feb. 27, 2004).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Schwarzenegger Statement on California Gaming Commission* (Aug. 30, 2003) at <http://www.joinarnold.com/en/press/pressdetail.php?id=71> (last visited on Oct. 27, 2003).

126. *Gaming Tribes Ready to Deal with Schwarzenegger*, CASINO CITY TIMES, Nov. 12, 2003, at <http://www.casinocitytimes.com/news/article.cfm?contentID=139254> (last visited on Nov. 18, 2003).

127. Mary Anne Ostrom, *Schwarzenegger taps Hollywood Insider*, MERCURY NEWS, Nov. 5 2003, available at <http://www.bayarea.com/mld/mercurynews/news/politics/7187325.htm> (last visited on Nov. 18, 2003).

3. Other Examples of Compact Agreements

Situations, such as the State of California experienced under Governor Davis, may lead some to believe that the process can be used for wrongdoing. "Compact negotiations have become a smokescreen for extortion,' Jacob Viarrial, governor of the Pojoaque Pueblo in Santa Fe, N.M., testified at a recent meeting of the Senate Committee on Indian Affairs."¹²⁸ Extortion may be a bit strong, but the percentage taken by an individual state can appear exorbitant.

In the State of Connecticut, the largest and most profitable casino in the world has been open since the early 1990s.¹²⁹ The Foxwoods Resort Casino is under compact with the State for a twenty-five percent gain off the net slot take.¹³⁰ Combined with the nearby Mohegan Sun Casino, the State takes in eighty million dollars annually, for a total of more than one-billion since their facilities began operations.¹³¹

While such a cut may seem astonishing, the compact governing two of the biggest casinos in the world cannot be the only reference. In the case of The Chitimacha Tribe of Louisiana, a new compact has the tribe voluntarily funding a community grant of ten and one-half million dollars.¹³² Perhaps not coincidentally, this figure is equal to the six percent take agreed to in a former compact.¹³³

On the whole, the compacting process should be one of mutual benefit. The tribes desire to reap the rewards of running profitable organizations, while the States receive much needed funding to supplement their budgets. It is important to note that, "IGRA says very clearly that the states are violating federal law if they try to exact a tax when negotiating a compact . . . [t]hat is a coercion of the tribes and against the will of Congress."¹³⁴ While a tax is prohibited by statute, in reality the tribes often view the compact clauses pertaining to revenue sharing as a price of doing business.¹³⁵ This is not something that the tribes always agree with as a sovereign government, but often the tribes' only real alternative to

128. Jacob Coin, *Tribal Gaming Needs the Same Federal Protections as Other Trust Resources*, INDIAN COUNTRY TODAY, Aug. 29, 2003, available at <http://www.indiancountry.com/?1062165355> (last visited on Sep. 9, 2003).

129. Robert L. Gips, *Current Trends in Tribal Economic Development*, 37 NEW ENG. L. REV. 517, 518-19 (2003).

130. Rose, *supra* note 62, at 3.

131. *Id.*

132. *Id.* at 5.

133. *Id.*

134. Steve Wiegand, *Filibuster Delays Debate on Indian Gambling Act*, THE SACRAMENTO BEE, Nov. 14, 2003, available at <http://sacbee.com/content/politics/story/7781822p-8720696c.html> (last visited on Nov. 18, 2003).

135. Abeita, *supra* note 101.

compacting with a heavy fee is to lose out on the compact entirely, or be limited to the less profitable Class I and Class II gaming.¹³⁶ Without a compact, no Class III gaming can exist.¹³⁷ This would be a true impossibility for a tribe to be successful in the area of gaming.

III. WHO REALLY WINS?

A. *Reservation Life: Plague or Paradise?*

Images of the Indians moving freely along the Plains are tough to compare with the descriptions of the fenced-in reservations of today. In fact, many of the Indian lands look more like impoverished third world nations when viewed in terms of the unemployment, economic depression, and inadequate housing facilities.¹³⁸ “Unemployment and poverty levels on reservations are incomprehensible to most Americans, even to those who lived through the Great Depression and suffered twenty-five to thirty percent unemployment during its heights.”¹³⁹

A few years ago, the National American Indian Housing Council decided to conduct a survey.¹⁴⁰ Using 71 tribes from 22 states, the goal was to assess the success of the Native American Housing Assistance Act.¹⁴¹ The results showed that 40 percent of tribal homes are overcrowded and contain serious deficiencies (compared to the national average of 5.9 percent).¹⁴² The same survey also stated that 69 percent of Native Americans are so overcrowded in their homes that “18, 20, or even 25 persons are jammed together in small two-bedroom houses”.¹⁴³ This is quite a contrast to the endless plains filled with buffalo that many of us attribute to the American Indian.

B. *The Advent of the Industry*

1. Generally

There is no doubt that the gaming industry has had an astounding effect on the American Indian. “In all, gaming has provided tribal nations with a means to improve distressed economic situations and boost tribal

136. *Id.*

137. *Id.*

138. George H. Cortelyou, *An Attempted Revolution in Native American Housing: The Native American Housing Assistance and Self-Determination Act*, 25 SETON HALL LEGIS. J. 429, 430 (2001).

139. 138 CONG. REC. S3,425 (daily ed. Mar. 12, 1992) (statement from Sen. McCain).

140. Chris De Reza, *Native Americans to Bush: Show Us the Money*, REAL ESTATE FINANCE TODAY, Jan. 15, 2001, available at 2001 WL 8192467.

141. *Id.*

142. *Id.*

143. *Id.*

self-sufficiency.”¹⁴⁴ “Increased employment and reduced welfare payments are the economic benefits most frequently mentioned as improving social conditions.”¹⁴⁵ “. . . [T]he revenues created by successful tribal gaming facilities are fueling the potential for a renaissance in tribal economic development.”¹⁴⁶ A renaissance is not hard to fathom when observing the industry’s growth of \$100 million a year to \$14.5 billion over the last fifteen years.¹⁴⁷

2. Tribal Examples

In one instance, the Alabama-Coushatta Tribe of Texas enjoyed rapid success with the building of its Entertainment Center.¹⁴⁸ After opening in November of 2001, it took only four months to recoup its original loan for construction.¹⁴⁹ Unfortunately, the United States District Court found that the “injury of continuing operation” to the State carried more weight than any potential harm that the Tribe may suffer.¹⁵⁰ Such a decision seems contradictory in light of the positive impact numerous operations have on their communities.

In fact, the impact of gaming facilities on the surrounding areas can be more profound than within the reservation’s own borders. For example, a number of tribes around Los Angeles run casinos or bingo halls, bringing in a gross income of fifty million dollars per year.¹⁵¹ This number translates into an overall impact of about one-hundred million dollars per year on the surrounding communities.¹⁵² In total, the effects of the facilities doubles once the money comes off the reservation.¹⁵³

The economic impact is just one measure of success. Expansion in the job market underscores the trend. In the State of California in 2000, fifteen thousand jobs were attributed to Indian gaming.¹⁵⁴ Many researchers believe that two to three jobs opened up for every one job created

144. Richard J. Ansson, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead For Tribal Nations as They Continue to Strive for Economic Diversity?*, 11 KAN. J.L. & PUB. POL’Y 441, 447 (2002).

145. Henderson, *supra* note 86, at 231-32.

146. Gips, *supra* note 129, at 519.

147. Wiegand, *supra* note 134.

148. *Alabama-Coushatta Tribes of Texas v. State of Texas*, 208 F. Supp. 2d 670, 680-81 (2002).

149. *Id.*

150. *Id.* at 681.

151. Ron Andrade, *Perspective of Ron Andrade: Executive Director, Los Angeles City/County Indian Commission*, in *INDIAN GAMING: WHO WINS?* 161 (Angela Mullis & David Kamper eds., 2000).

152. *Id.*

153. *Id.*

154. *Id.*

through the industry.¹⁵⁵ As a result, approximately thirty to forty-five thousand jobs arose from the industry.¹⁵⁶

Another great example of the industry's impact is found in the Grand Ronde Confederated Tribes of Oregon. In 1996, the Tribes opened up the Spirit Mountain Casino.¹⁵⁷ With an attorney-tribal member in place as CEO, the Tribes realized a profit of 30 million dollars in the first year alone.¹⁵⁸

In addition to the monetary gains, the Spirit Mountain Casino also created a prosperous job market. More than 1,200 jobs were created, 200 of which were awarded to Indians.¹⁵⁹ Prior to the hiring, 46 percent of the hirees were unemployed, 35 percent were on welfare and 42 percent had no health insurance.¹⁶⁰ A bright future for any tribe may be realized with the placement of a successful gaming operation.

3. Indian Gaming Today

Indian Gaming as it exists today is a universe unto itself. It not only includes the tribes, the States, as well as the Federal government, but it also brings in outside investors, construction companies and suppliers. With such an explosion in recent years, more businesses have explored the vast investment opportunities available in the gaming industry.¹⁶¹ The climate for creating new resort casinos will continue to be favorable for outside investors in years to come.

With that said, there are some limitations in place for Non-Indians on their returns. For instance, Non-Indian firms cannot receive over 30 percent of the casino's profits.¹⁶² This percentage remains in effect for not longer than five years, and after that the operation must be given entirely to the tribe (pursuant to IGRA).¹⁶³ However, if a period of more than five years is sought, it may be authorized by the Chairman of the National Indian Gaming Commission.¹⁶⁴ Under the Chairman's discretion, the absolute longest period allowable under the IGRA is a seven year term.¹⁶⁵

155. *Id.*

156. *Id.*

157. Joseph G. Jorgensen, *Gaming and Recent American Indian Economic Development*, in *INDIAN GAMING: WHO WINS?* 102 (Angela Mullis & David Kamper eds., 2000).

158. *Id.*

159. *Id.*

160. *Id.* at 98.

161. Heidi McNeil-Staudenmaier, *Negotiating Enforceable Tribal Gaming Management Agreements*, 7 *GAMING L. REV.* 31, 36 (2003).

162. Jorgensen, *supra* note 157, at 98.

163. *Id.* at 97.

164. McNeil-Staudenmaier, *supra* note 161, at 32.

165. *Id.*

No matter what the final term may be, investors can rest assured that a profit is likely to attach.

Outside investments are vital, but the most important part of any operation is its effect on a tribe. "In all, gaming has provided tribal nations with a means to improve distressed economic situations and boost tribal self-sufficiency."¹⁶⁶ Keep in mind that not every tribe is guaranteed a piece of the action. Participation is purely a choice of the tribal government itself.¹⁶⁷

A chief distinction amongst Native Americans today is that the majority of tribes in the United States do not operate gaming operations.¹⁶⁸ The Department of the Interior recognizes 562 tribal governments.¹⁶⁹ While some 330 gaming operations exist, the actual number of gaming tribes is not equally represented.¹⁷⁰ That is, many tribes have multiple facilities.¹⁷¹ There are close to 200 tribes operating casinos¹⁷², a composite of nearly one-third of all federally recognized tribal governments.

C. *Where Does All the Money Go?*

1. Numbers and Examples

The numbers involved in the Indian Gaming Industry today are staggering.¹⁷³

The purpose of Indian gaming, as stated in IGRA, is to promote tribal economic development, self-sufficiency and stronger governments for the tribes.¹⁷⁴ To achieve this purpose, a well-planned distribution is essential.

For an example of a comprehensive revenue distribution, we need not look any further than back to the Grande Ronde Confederated Tribes of Oregon. The Tribes proceeded to take their newly found revenues on to the greater callings prescribed by IGRA. Following its first year of operation in 1996, over eight million dollars in casino profits were put into improving highways, sewers, and the water system on the reservation.¹⁷⁵ A reservation medical facility was also opened to all comers, both Native

166. Ansson & Oravetz, *supra* note 144, at 447.

167. Abeita, *supra* note 101.

168. Longwitz, *supra* note 184, at 199.

169. Bureau of Indian Affairs, at <http://www.doi.gov/bureau-indian-affairs.html> (last visited Feb. 17, 2004).

170. National Indian Gaming Commission: *Tribal Gaming Revenues*, http://www.nigc.gov/nigc/nigcControl?option=TRIBAL_REVENUE (last visited on Feb. 17, 2004).

171. *Id.*

172. Longwitz, *supra* note 84, at 199.

173. National Indian Gaming Commission, *supra* note 170.

174. 25 U.S.C.A §2702(1) (2003).

175. Jorgensen, *supra* note 157, at 102.

Gaming Revenue Range	Number of Operations	Revenues (in thousands)	Percentage of Operations	Percentage of Revenues	Mean (in thousands)	Median (in thousands)
Gaming operation fiscal years ending in 2002						
\$100 million and over	41	9,398,962	12%	65%	229,243	166,977
\$50 to \$100 million	24	1,698,195	7%	12%	70,758	68,225
\$25 to \$50 million	55	1,977,753	17%	14%	35,959	34,291
\$10 to \$25 million	61	984,578	18%	7%	16,141	16,092
\$3 to \$10 million	59	367,821	18%	3%	6,234	5,894
Under \$3 million	90	69,691	27%	0%	723	448
Total	330	14,497,000				

American and Non-Indian.¹⁷⁶ Another part of the revenues were put in a community fund, representing six percent of the total.¹⁷⁷ Of this fund allotment, “\$335,000 was invested in studies on the negative impacts of gaming, rescue helicopters for Portland hospitals, and to an exhibition of Native American Art at the Portland Art Museum.”¹⁷⁸ Distributions such as these embody the positive expectations of IGRA.

2. IGRA’s Discretion is Distribute

With all of the revenues produced, it is easy to wonder how much of the money the tribes actually see. “IGRA allows tribes to use gaming revenues only for specific purposes.”¹⁷⁹ “IGRA requires all tribal gaming ordinances to contain the same requirements concerning ownership of the gaming activity, use of net revenues, annual audits, health and safety, background investigation and licensing of key employees.”¹⁸⁰ The allotment of funds in any particular required field varies because of the wide discretion afforded to the tribes under IGRA.

The options afforded the tribes fall into one of the following IGRA specified purposes: “(1) to fund tribal government operations or programs; (2) to provide for the general welfare of the Indian tribe and its members; (3) to promote tribal economic development; (4) to donate to charitable organizations; or (5) to help fund operations of local government agencies.”¹⁸¹

176. *Id.*

177. *Id.*

178. *Id.*

179. Kevin K. Washburn, *Indian Gaming: A Primer on the Development of Indian Gaming, The NIGC and Several Important Unresolved Issues*, 2002 A.B.A. INST. ON GAMING ENFORCEMENT.

180. Notice of Approval of Class III Tribal Gaming Ordinances, 67 Fed. Reg. 54,824 (Aug. 26, 2002).

181. 25 U.S.C. § 2710 (b) (2) (1995); *In re Kedrowski*, 284 B.R. 439, 442 (2002).

While more precise applications of the revenues are not specified, IGRA affords this flexibility to work with the differences amongst tribes. For example, the ability to distribute the funds toward rebuilding the infrastructure around the reservation may or may not be applicable.¹⁸² More specifically, a tribe with an updated infrastructure may not need the funds to repair the roads, but rather construct a hospital or library.¹⁸³ If a tribe is without any substantial needs around the reservation, the tribal government may seek to allot the revenues in per capita payments to the tribal members.¹⁸⁴ Whatever the need may be, the distributions must be in accordance with IGRA requirements and the tribes must adhere to such terms.

D. *What's to Come*

1. Setbacks on the Horizon?

Some states have fought stringently regarding gaming operations within their borders. Others have been open to the shared benefits it can provide. Nevertheless, the safety net enjoyed by the tribes through IGRA has weakened.

Over the past ten years, Indian gaming has met more significant challenges than at any time in the past. In *Seminole Tribe of Fla. v. Florida*,¹⁸⁵ the ambiguity of tribal-state relations took center stage in a decision that could spell the end of the IGRA as it was meant to exist.¹⁸⁶ The Court found that the Eleventh Amendment was compromised by a provision in the compact, and that Congress was prohibited from enacting such statutes.¹⁸⁷ Though the courts gave life to the industry in the first place, the courts may also be the ones to take it away in the end.

Proof of this new trend can be found in the recent decision of *Texas v. Ysleta Del Sur Pueblo*.¹⁸⁸ In that case, the Fifth Circuit Court of Appeals upheld an injunction that effectively closed the doors of an Indian casino outside of El Paso.¹⁸⁹ The tribe did not concede, but chose instead to work with the decision. In doing so, the Speaking Rock Casino reopened with Class II operations as its only tools for revenue.¹⁹⁰ Today the Speaking Rock Casino has a full calendar of events, yet the profits can be no-

182. Abeita, *supra* note 101.

183. *Id.*

184. *Id.*

185. 517 U.S. 44, 54 (1996).

186. Head, *supra* note 81, at 395.

187. Longwitz, *supra* note 84, at 199.

188. *Texas v. Ysleta Del Sur Pueblo*, 220 F. Supp. 2d 668, 702 (2001).

189. *Id.*

190. Rose, *supra* note 62, at 12.

where near the levels achieved prior to the injunction.¹⁹¹ In addition to working with court orders, tribes may be able to appeal to a state's constant need for extra income to attain full profit potential.

This has been done in the past with great success, such as in Wisconsin in 1998.¹⁹² There, the compacts between the tribes and the State government began to expire.¹⁹³ In order to smooth out the transition, the tribes elected to appeal to the public by raising the age to gamble from eighteen to twenty-one.¹⁹⁴ Additionally, the resulting increase of the State's share went from \$400,000 to \$20 million per year.¹⁹⁵ Though enormous, the alternative to such increase could mean closing down.

2. A Tale of Two Jurisdictions

The nature of the public opinion is to have more than one side to every issue. The gaming issue is no different. Recently, a proposal to open a casino in the State of Maine failed terribly.¹⁹⁶ This is despite a huge projected boost to the economy, and an estimated overall payout of 100 million dollars in its first year alone.¹⁹⁷ This figure was not exclusive to the tribes, but rather, ". . .the state's share was to be used for the education system and municipal revenue sharing."¹⁹⁸ The downfall of the casino is attributed in a large part to the brutal campaigning from the state's governor, as well as the State's biggest newspaper in circulation.¹⁹⁹ Interesting to note is that for the same exact election, the voters of Maine upheld installing slot machines at horse-racing tracks in the state.²⁰⁰

By contrast, in the nearby state of New York, The Saint Regis Mohawk Tribe has just entered into a management and construction agreement with Park Place Entertainment Corp.²⁰¹ The deal contemplates the com-

191. See SPEAKING ROCK CASINO, MONTHLY CALENDAR, http://www.speakingrockcasino.com/Monthly_Calendar.htm (last visited on May 4, 2004).

192. Rose, *supra* note 62, at 12-13.

193. *Id.*

194. *Id.*

195. *Id.*

196. Brian MacQuarrie, *Casino Plan for Maine Rejected by a Wide Margin*, BOSTON GLOBE, Nov. 5, 2003), http://www.boston.com/news/local/articles/2003/11/05/casino_plan_for_maine_rejected_by_wide_margin/ (last visited Nov. 18, 2003).

197. *Id.*

198. Ken Walker, *Voters Defeat Casino in Maine, Video Lottery Terminals in Colo.*, (Nov 5, 2003), at <http://www.sbc Baptist Press.org/bpnews.asp?ID=17005> (last visited Nov. 18, 2003).

199. *Id.*

200. *Id.*

201. *Saint Regis Mohawk Tribe and Park Place Sign New Casino Agreements*, BUS. WIRE, at http://home.businesswire.com/portal/site/googleindex.jsp?ndmViewId=news_view&newsId=20031113005701&newsLang=en (last visited on Nov. 18, 2003).

pletion of a 750-room hotel with a 160,000-square foot casino on Anawana Lake in the Catskill Mountains of upstate New York.²⁰² “In addition to providing at least 2,000 construction jobs and thousands more permanent positions for casino employees, the project will generate millions of dollars in annual tax revenue for New York State and millions more in direct payments to Sullivan County, the Town of Thompson and locally impacted entities.”²⁰³ This situation is ideal for an operation in regards to both the tribe and to the community.

IV. CONCLUSION

The common ground between any two diverse peoples is not an easy one to find. Indian gaming provides a means to an ends for the tribal people in our society. This is not to suggest that there is only one answer to a problem that has endured for hundreds of years, but the monetary and societal benefits of gaming operations are not in dispute. Gaming provides the tribal nations a legitimate shot at self-sufficiency for the first time since Columbus set sail.²⁰⁴

Under the trust responsibility shouldered by the Federal government, the Indians are to be rewarded as the beneficiary.²⁰⁵ The economic possibilities in gaming are clear-cut. There is no excuse for the government to try and abate its expansion. It is the duty of all three branches of government to give the trust teeth, so that the Native Americans can legitimately enforce their right to succeed. The confusion must be absolved, and the Indians must receive justice.

This land we call our own is the ancestral home of the American Indian. A house sustained by Mother Earth and Father Sky.²⁰⁶ Now the time has come for the house to win, and to win big.

202. *Id.*

203. *Id.*

204. McNeil, *supra* note 53, at 141.

205. Haskew, *supra* note 19, at 30.

206. LAURENCE ARMAND FRENCH, *THE WINDS OF INJUSTICE: AMERICAN INDIANS AND THE U.S. GOVERNMENT* 5 (1994).