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REGULATORY ISSUES AND IMPACTS OF GAMING IN INDIAN COUNTRY

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The Historical Origins of Indian Gaming

When North and South America were first discovered by Europeans, there was some question as to how the European governments would relate to the native Indian tribes. A Spanish scholar, Francisco de Vitorio, decided that Spain would consider them to be sovereign nations. Consequently, Spain entered treaties with the Native Americans. The original Indian treaties were modeled on those between European sovereigns. The Dutch, British and French soon followed Spain's example.

In the United States, during the Articles of Confederation in the 1770s, it was thought that individual states should deal with Indian tribes. That idea did not work very well. Consequently—as the Constitution was being drafted—it was decided that it would be better for a central authority to deal with the tribes. Hence, the United States largely followed the precedents of the European countries in sovereign relations with the tribes.

In the westward American migration that occurred in the 1800s, treaties were negotiated as the tribes were displaced. Negotiations would be settled between the Indian chiefs and Department of Interior representatives. The United States negotiated with the tribes for large parcels of land. In return, the Indian tribes were to retain control of a small parcel of land, but the treaty stated that the Indians would always be able to control what happened within their boundaries. Although there

have been numerous exceptions as American history has progressed, that is basically still the law.

The Marshall Trilogy. A good portion of what became the three pillars of federal Indian policy resulted from three decisions by Chief Justice John Marshall: *Johnson v. McIntosh* (21 U.S. 543 1823), *Cherokee Nation v. Georgia* (30 U.S. 1 1831) and *Worcester v. Georgia* (31 U.S. 515 1832). These three cases developed the following principles which still the comprise federal Indian policy:

- Congress will have plenary power over the Indian tribes. Indian policy is generally in the federal jurisdiction. The notion of individual state policy was thrown out.
- States are to be excluded from the federal-Indian relationship. This is still a factor today. For the most part, state laws do not apply on Indian reservations.
- Tribes will retain all sovereignty that is not expressly taken away by the Congress. Consequently, tribes retain their sovereignty on reservations.

Policy Shifts. One of the constitutional responsibilities of the United States Senate is to ratify treaties. Prior to 1871, the Senate had all the power regarding Indian lands and Indian affairs. In 1871, desiring a share of responsibility for federal Indian lands, the

House wrote into an appropriation act that from then on, there would be no new treaties with the Indian tribes. The existing treaties were left intact.

The General Allotment Act. In 1887, Congress passed the General Allotment Act (*United States Statutes at Large* 24:388-91). The Act sought to turn the Indians into farmers by dividing up reservations into parcels called allotments. Not unpredictably, the allotment system was a disaster and Indians lost millions of acres of land under it. Furthermore, during the turn of the century and into the early parts of the 20th Century, epidemics became rampant and the population of Indians decreased significantly. Additionally, Indian tribes faced significant poverty.

The Indian Reorganization Act. In 1934, the Roosevelt Administration initiated the Indian Reorganization Act (Act of June 18, 1934, ch. 576, Sec. 1, 48 Stat. 984). It was an attempt to remedy the dire situation of the tribes which had been caused by the policies of the United States government. Through the Indian Reorganization Act, the federal government once again acknowledged the sovereign status of tribes. It changed policy by putting land in perpetual trust as opposed to making land alienable—which was the case in the General Allotment Act. Indian lands could no longer be sold. In general, the United States was viewed as the trustee of Indian land and resources.

Termination and Restoration. In 1953, Congress passed House Concurrent Resolution 108 which terminated tribal status for some tribes. Most tribes were not “terminated” in this era, but the policy was aimed at ending the special relationship between the United States and the tribes. The policy was a failure. Congress has been restoring those terminated tribes since 1970—when policy shifted again.

Public Law 83-280 (P.L. 280) was another part of the termination policy that dealt with tribal jurisdic-

tion. Indian tribes have jurisdiction over misdemeanors. If an Indian steals from the tribal store, he is prosecuted in tribal court. If there is a major crime such as murder, the case is prosecuted in federal court. P.L. 280 gave five states—Oregon, California, Nebraska, Minnesota and later, Alaska, substantial criminal and civil jurisdiction over Indian lands. Through P.L. 280, these states were allowed the same power to enforce criminal laws within Indian lands as within the rest of the state.

In 1976, through the powers of P.L. 280, Minnesota was attempting to tax an Indian on a reservation. It became a lawsuit, *Bryan v. Itasca County* (426 U.S. 373 1976). The case went up to the U.S. Supreme court and the Minnesota tax was struck down.

Indian Gaming Today

Indian Bingo. After this court decision, a group of tribal attorneys from some of the P.L. 280 states noted that in California, for example, bingo was legal. Bingo pot limits were regulated by the State of California. Since bingo was not criminally prohibited in California, bingo would be permissible on Indian reservations in California. Since the pot limits are part of the civil regulatory of the tribes, the lawyers noted that reservations could have \$10,000 pot limits or \$100,000 pot limits.

Indian bingo was started, mainly in California and Florida, and continued for several years. It soon attracted the attention of tribes in other states. It was inevitable that the issue of Indian gaming would be brought before the U.S. Supreme Court.

The Cabazon Decision. In 1987, a case reached the U.S. Supreme Court, *California v. Cabazon Band of Mission Indians* (480 U.S. 202 1987). The Cabazon tribe in California had a very lucrative gaming enterprise, which the State of California was trying to regulate. The Supreme Court ruled that the tribes actually

had the right to have gaming on their reservations. A dichotomy was created under the Cabazon Decision—if something was not prohibited by the state, the tribes could also do it on their reservation. This is true, especially if the action is civilly regulated.

Congress then began to look at various ways to regulate Indian gaming. It was finally decided to pass legislation that would provide an overall macro regulation. The Indian Gaming Regulatory Act (P.L. 100-497) was passed in 1988. Senator Daniel K. Inouye (D-HI), Senator John McCain (R-AZ), and Representative Morris K. Udall (D-AZ) were primarily involved in the drafting of the Act.

The Act basically divided Indian gaming into three different classes:

- Class I gaming are games of nominal amounts—games of tradition that went along with tribal ceremonies. Class I is the exclusive province of Indian tribes.
- Class II is mainly bingo, pull tabs, certain types of card games and some other smaller games. Class II is regulated by a newly-created commission called the National Indian Gaming Commission (NIGC). The commission has certain authorities with regard to reviewing management contracts for all tribes, looking at the background of key employees for all tribes, and monitoring bingo and pull tabs. The commission was given the authority to impose civil fines and to close casinos that were not in compliance with the Indian Gaming Regulatory Act.
- Class III gaming was a very interesting compromise. Throughout most of American

Indian history, states had not been allowed into the province of federal tribal relations. In 1988, a compromise was struck whereby Class III gaming (everything that is not Class I or Class II which, generally speaking, is full-scale casino gambling) would be regulated by a compact that would be agreed upon by both the tribes and the states.

The compact—even the term was a compromise—was an agreement between sovereigns. Negotiations were required to define what was to be criminally prohibited in the states—what the tribes can have as far as gambling is concerned and what is civilly regulated. These negotiations and the resulting terminology created an incredible amount of litigation. Originally, the Act was written stating that if there was an impasse, it would be decided in federal court.

In 1996, the Seminoles had another case against the United States. This case, *Seminole Tribe of Florida v. State of Florida* (000 U.S. U10198 1996), concerned what happens when there is an impasse. The State of Florida believed that under the 11th Amendment of the U.S. Constitution, the Seminoles could not take Florida to federal court. The Supreme Court agreed with the State of Florida. Consequently, when there is an impasse and the state does not wish to negotiate anymore—there is no further legal outlet.

In the Seminole case, the Supreme Court ruled that the secretary of the interior could promulgate regulations. If there was an impasse, the secretary could ascertain what was prohibited in the state and give the tribes a reasonable method of obtaining a compact. The secretary has attempted to publish procedures which involve a lot of mediation. In appropriation acts in 1997 and 1998, Congress precluded those regulations from going forward. Consequently, where there

are impasses, such as in states like California and Florida, there are difficulties.

Regulation of Indian Gaming

Indian gaming is regulated in a tripartite approach that was developed by Congress in 1988. However, it does not work well in every state. Regulation of Indian gaming is generally handled in the following manner:

- The tribes regulate Class I gaming.
- NIGC regulates Class II gaming which is primarily bingo and pull tabs.
- For Class III gaming, under the compact, states may create a gambling commission. The commissions also have the right to enter the reservation and, under certain circumstances, look at appropriate books and examine the tribes' internal controls.

For the most part, Indian gaming is regulated by the tribes at the reservation level. When the Act was passed in 1988, Indian gaming was only a \$100 million industry. I do not know if Congress had contemplated that this was going to become about a \$7 billion industry.

NIGC has a staff of less than 40 people. It regulates about 186 tribes in 28 states and about 300 gaming facilities. Last year, Senator Ben Nighthorse Campbell (R-CO), who is the only Native American in the Senate and who is the chairman of the Senate Indian Affairs Committee, put an amendment into Department of the Interior appropriations which allowed the Commission to basically do two things:

- Collect monies from Class III gaming, which is about a \$6 billion industry. We previously

were only collecting monies from the Class II operations—which is about a \$600 million industry. All of the regulation of the big casinos at the federal level was being financed by little bingo operations. The Commission does a great deal of gaming regulation for Class III tribes (the big casinos). It reviews their management contracts—which are generally very complex—and looks at their background investigations. Senator Campbell allowed us to collect fees from the big operations.

- Previously, the cap (the level of fees that could be collected) was \$1.5 million. That allowed the maintenance of a very small staff. The cap has been raised to \$8 million. This allows a somewhat larger staff. NIGC has a very good regulatory group out there regulating, but it is overtaxed.

NIGC has recently increased its enforcement activities and has been closing facilities. Over the past year, 10 casinos (which were in noncompliance with the Indian Gaming Regulatory Act) have been closed. The Commission has also increased the number of fines which could be imposed.

Instead of increasing fees, NIGC initiated two sets of regulations. In one section of the Act, provision is made for self-regulation of casinos. That would seem to allow potentially frivolous regulation by tribes. Actually, the regulation was written to raise the bar quite high. If a tribe is going to be self-regulating, it must have excellent internal control systems. Among other things, they must have an independent regulatory body. It has to be the cream of the crop to be determined “self-regulating.” This also does not mean NIGC necessarily has a complete hands-off approach concerning regulation. It just has a lessor regulatory presence.

NIGC has drafted minimum internal control standards in conjunction with the National Indian Gaming Association. These standards are very controversial. Some tribes consider the NIGC standards too strict. We disagree. NIGC traveled to Nevada and Atlantic City and examined their standards. Essentially, when somebody puts a dollar down in a casino, there are either cameras or personnel constantly watching that dollar until it goes to the bank. People are watching the people who are watching. The Commission established internal control systems with regard to keno, bingo, table games, machine games and all games played on reservations.

Some of the tribes are viewing this as too onerous and too intrusive into their sovereignty. Some are as-

serting that NIGC does not have this authority under the Indian Gaming Regulatory Act. My position is that we have broad authority and NIGC should be doing this. This regulation is currently pending in the Commission.

My view is that the best way to preserve and protect this industry is to regulate it well. It is an important aspect of economic development for tribes. The hope of the tribes, as time goes by, is for gaming be a cornerstone for economic development on reservations, and to have other industries develop around that cornerstone. Gaming is not my favorite form of economic development but, for a lot of tribes, it is the only thing that has worked.