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WILL THE HOUSE WIN: DOES SOVEREIGNTY RULE IN INDIAN CASINOS?

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Abstract. The historical conflict of interest between states and American Indian nations has encompassed jurisdictional disputes ranging from land rights, water rights, and taxation to civil and criminal issues. Many of these political, legal and economic disputes currently center on Indian gaming on reservations within state boundaries. The tribes have been put in the position, yet again, of fighting to define and articulate the exercise of their perceived sovereignty rights vis-a-vis the rights of the states. The federal role, as designated trustee of the tribes, has been and continues to be, an ambiguous, dynamic one. This paper explores the history, current disputes and economic development potential generated by the passage of the Indian Gaming Regulatory Act (1988), with particular emphasis on tribes resident in the Great Plains.

Introduction

Since the passage of the Indian Gaming Regulatory Act (IGRA) in 1988 (25 U.S.C. §§ 2701–2721), the conflicts surrounding Indian gaming on reservation lands have intensified. Despite the fact that Indian gaming currently accounts for only 4% of total gambling profits in the U.S. (Anquoe 1994:A3) and provides much-needed revenues to promote economic development and employment opportunities for some of the poorest of the poor in American society (1990 U.S. Census), the opposition from state governments and established non-Indian gaming interests threatens to alter significantly or potentially eliminate this arguably viable avenue for tribal economic development. This paper examines the history and current debates surrounding Indian gaming from a perspective of inherent tribal sovereignty and the
attempts of Indian nations on the Great Plains to exercise those perceived rights.

Indian gaming is not universally promoted as the solution to economic problems by all tribes, nor even by all members of the tribes actively engaged in gaming. There are those like Chippewa novelist and poet, Gerald Vizenor, who question what is noble about a fight over revenue. He believes “[C]asino avarice is a mean measure of tribal wisdom” (Vizenor 1992:413). On the other hand, Oneida tribal member Rick Hill, current chair of the National Indian Gaming Association (NIGA) feels, “[W]e have been reduced to gaming, but I feel at this time it offers the only chance we have for economic self-sufficiency” (Denny 1992:35).

Inherent Tribal Sovereignty

The Indian gaming controversy revolves around questions of state and federal executive and legislative intent, played out at all levels of the judicial system. In particular, the definition and exercise of tribal sovereignty is essential to comprehending the current debates.

The concept and definition of Indian tribal sovereignty is a complex one. Indian nations contend that before contact with European colonial powers, they were self-governing, independent polities (Clinton 1992:605). Contemporary notions of inherent tribal sovereignty are based on the premise of sovereignty as evidenced by participation in treaty-making with the U.S. federal government under the auspices of the U.S. Constitution. Deloria (1994:648) explains,

... the movement of rights and benefits in a treaty is from the Indian nation to the United States. Thus, whatever is not specifically surrendered by the Indians at a treaty session is presumed to remain with the Indian nation. This doctrine protects the Indians against the implied erosion of status and rights. ... This doctrine also proves useful in making treaties relevant legal documents, since the treaty can be understood, like the United States constitution, as containing powers that are inherent and not articulated until they are needed.

Because the Constitution grants Congress power over treaty-making, the Supreme Court (Worcester v. Georgia, 1832) has interpreted Indian affairs to be exclusively under federal jurisdiction, regardless of the state a particular tribe might reside in. The courts have recognized that Indian nations within
the external boundaries of the United States are not true "sovereigns" but are more accurately described as "domestic dependent nations" (Cherokee Nation v. Georgia, 1831), which have self-governing functions but rely on the federal government for certain protections and services.

Federal Indian Policy

The Indian gaming dispute "nests" neatly within the larger context of the history of federal Indian policy. "Indian gaming" could be easily interchanged with any number of historical disputes regarding jurisdictional issues (e.g., Indian water rights or treaty rights). The recurring cycle of American Indian dispossession and the subsequent erosion of tribal sovereignty through time are well documented (Barsh 1988; Jorgenson 1978). The pattern of extending programs and policies to Indian nations which promise to enhance economic development opportunities only to have them "dashed" by subsequent reversals of policy are keenly familiar to Native Americans (e.g., the reversal of Indian "New Deal" policies by termination-era policies). Because of the legacy of this experience, many pragmatic tribal leaders are skeptical that "business as usual" will proceed indefinitely in the nation's Indian-owned casinos.

For the 547 federally recognized tribes, a paradox lies in determining whether the relative benefits of participation in federal programs (part of the federal/tribal trust obligation) are worth the risk of further undermining their sovereign status. For example, in 1935, the Cheyenne River Sioux of South Dakota wrote and adopted a constitution in order to qualify for economic aid under the Indian Reorganization Act (Wheeler-Howard Act of 1934). Although they desperately needed economic assistance, they refused to draft a constitution that conformed with Section 16 of the Act, which provides for the Secretary of the Interior's approval of the tribal council's powers. By resisting participation in this program, the Cheyenne River Sioux retained their "inherent sovereign powers of governance" (Wunder 1994:75).

Arguments over Indian sovereignty rights persist, and as in 1935, one critical issue is economic self-determination. This issue is critical because, as many tribes can attest, sovereignty rights without the resources to litigate and influence enforcement are elusive at best. Since economic self-determination has not been achieved, the controversy over the control of Indian gaming continues.
Public Law 280

One important facet of the Indian gaming dispute directly related to sovereignty is founded in federal statute P.L. 280 (Public Law No. 83-280, 67 Stat. 588), which was passed in 1953 as part of the federal termination policy. The original version of P.L. 280 was “the most successful legal attack on Indian rights and sovereignty since the adoption of the constitution” (Wunder 1994: 108). This statute granted five states (California, Minnesota, Nebraska, Oregon and Wisconsin) the mandatory right of criminal jurisdiction over offenses committed by or against Indians in Indian country and all civil causes of private action in state court that involved reservation Indians. The law restricted tribal rights in cases that conflicted with federal policy, treaty or executive agreements. If tribal and state laws conflicted, state laws took precedence. In addition, P.L. 280 permitted the other states the option to exercise civil and criminal jurisdiction without the consent of the Indian tribes.

In yet another classic reversal of federal Indian policy, Title IV of the Indian Bill of Rights (1968) revised P.L. 280 to prevent additional states from unilaterally deciding to take criminal or civil jurisdiction on reservations. Given this revision, states must have the consent of the affected tribe(s) before they can exercise criminal jurisdiction on reservations (Wunder 1994: 139). Title IV also set up the provision for retrocession of jurisdiction from the state level back to the tribe and/or federal government, by state request only. In essence, “retrocession” then was simply a reversal of jurisdiction which returned civil and criminal jurisdiction to pre-P.L. 280 status.

We need look no further than the Great Plains to sample the jurisdictional diversity possible under agreements resulting from P.L. 280 and retrocession under Title IV. In 1969, when Nebraska wanted to grant general retrocession to the Winnebago and Omaha tribes, the Winnebago felt they were not ready for it. Consequently, the courts decided that the state of Nebraska had to abide by the Winnebago’s decision. In 1971, the Omahas got retrocession, but the Winnebagos delayed their retrocession until 1986 (Nebraska Indian Commission 1984). The Santee Sioux Tribe of Nebraska is still negotiating with the state of Nebraska regarding the timing of their retrocession.

Jurisdictional confrontations in “optional” states added to the medley. In the early 1960s, attempts to extend state civil and criminal jurisdiction authorized by P.L. 280, were defeated in state referenda in both South Dakota and Wyoming by coalitions of tribal governments and non-Indian tax payers.
(Clow 1981). Tax payers were concerned because although P.L. 280 transferred jurisdiction, it did not provide for the transfer of additional federal monies to underwrite the new state obligations on the reservations (Clow 1981; Wunder 1994). In Montana, where state jurisdiction had been claimed under P.L. 280 (before Title IV), the state passed a law (1966) allowing retrocession only when sought by tribes (Wunder 1994:110). These diverse examples regarding Indian nations in the Great Plains illustrate why universal standards for American Indian law are so difficult to define.

Although amended, P.L. 280 is still law, and is still used as a supporting argument in suits seeking state jurisdiction of criminal gaming statutes in Indian country. P.L. 280 states were among the first to claim regulatory power in law suits over reservation bingo in the 1980s. In 1981, a court decision favoring the Wisconsin Oneida tribe (*Oneida Tribe of Indians v. Wisconsin*, 1981) began a decade of legal wrangling over state versus tribal control of Indian bingo and casino type gambling.

**Self-Determination**

Indian gaming has also been affected by the policy of self-determination adopted by the federal government after the abandonment of termination policy in the early 1960s. In fact, it is plausible to suggest that the policy of self-determination has actually encouraged tribes to view gaming as a viable economic development option, freeing tribal economies from the purse-strings of federal control. Federal intent to encourage tribal self-determination is illustrated in the following legislation: the Area Redevelopment Act (1961), the Economic Opportunity Act (1964), the Indian Civil Rights Act (1968), the Indian Education Act (1972), the Indian Self-Determination and Education Assistance Act (1975), the Indian Child Welfare Act (1978), the American Indian Religious Freedom Act (1978), the Indian Mineral Development Act (1988), the Indian Gaming Regulatory Act (1988), and the Native American Graves Protection and Repatriation Act (1990). Support for tribal self-determination has been advocated by every administration since the post-termination era. Beginning with the Kennedy administration through the current Clinton administration, all have made declarations that official federal policy would promote self-government ("limited" sovereignty) and increased tribal self-sufficiency.

Despite President Reagan’s apparent support for tribal sovereignty, which he characterized as a “government to government” relationship, Indian program funding suffered severe budget cuts under his administration. His
administration’s policy towards Indian issues has been compared to that of the termination years, i.e., “termination by accountants” (Morris 1988). Social service programs started in the 1970s, such as the National Health Service Corps, had generated significant tribal employment but had also perpetuated dependency on federal dollars. The build-up of federally funded economic and social programs on the reservations during the 1970s left the tribal economies particularly vulnerable to the Reagan-era budget cuts.

The down-sizing, and in some cases, elimination of these programs added to the already high rates of unemployment and further exacerbated the chronic poverty characteristic of Indian Country. Frank Ducheneaux, who served as counsel for Indian Affairs for the House Committee on Interior and Insular Affairs during this period, openly acknowledged, “[T]he Reagan cuts devastated the tribes” (Segal 1992:27). There was a desperate need for alternative sources of funding to replace the lost revenues and jobs. Gaming became a highly visible and viable alternative as more tribes began to recognize the potential of using gaming receipts to develop economic and social programs independent of the politics and budget wars characteristic of the federal government.

Legal History

Because of the special legal relationship of federally recognized Indian tribes with the federal government and the volumes of case law regarding Indian law, the mounting disputes over the regulation of gaming between the tribes and the states wound up in the judicial system. Opponents of Indian gaming (particularly the states and established gaming interests) hoped that previous legal decisions (McClanahan v. Arizona State Tax Commission, 1973; Oliphant v. Suquamish Tribe, 1978; Rice v. Rehner, 1983) which had undermined tribal sovereignty would sway the courts away from favoring the Indian legal position. However, courts generally reinforced the federal policy of self-determination, and the lawsuits brought over Indian gaming ultimately favored the tribes.

The basis for setting precedent for later gaming decisions and legislation favoring tribal sovereignty was developed in the 1970s. An important rule of statutory construction developed in 1976 (Bryan v. Itasca County) provided the cornerstone the courts needed to uphold sovereignty claims in gaming litigation. This statutory rule is based on drawing a distinction between the civil/regulatory and criminal/prohibitory nature of state laws. The Bryan rule was used in United States v. Marcyes (1977) by the U.S. Court
of Appeals, Ninth Circuit, when it was called on to interpret provisions in the Assimilative Crimes Act (ACA). The distinction between civil and criminal is important because the ACA allows state criminal law to apply in Indian Country even though "the accused is charged with a federal offense, prosecuted by federal officials, and tried in federal court" (Santoni 1992/93:390). In other words, under the ACA, state criminal provisions override tribal and federal jurisdiction. The use of such a rule becomes necessary in tribal cases because, "[W]ithout such a distinction, all state regulations that include penal provisions would be applicable on Indian reservations" (Santoni 1992/93:390). For P.L. 280 tribes, this also becomes an important distinction in Indian gaming suits.

When the courts addressed Indian gaming issues in the 1980s, states claimed they had criminal jurisdiction because of the penal nature of their gaming laws. With the application of the Bryan rule, if state statutes allow and regulate gaming (even if there are penal provisions) under any circumstances and by anyone, the state law is determined to be civil and not criminal, and therefore gaming on Indian lands without state regulation is permitted.

One of the first tribes to test the waters of the gaming debate were the Oneida of Wisconsin. The tribe had been running a bingo operation since 1976, when Alma Webster and Sandra Ninham began Sunday afternoon bingo in the tribe’s civic center. It was for a charity designed to raise funds to help pay the center’s utility bills (Hoeft 1993). In 1981, when it was clear that the bingo operation was generating significant revenue for the tribe, the state tried to enforce a gaming law that required state licensing by the operators. Wisconsin bingo law contained a penal provision, and therefore, as a P.L. 280 state, the state maintained it had criminal jurisdiction over Oneida bingo operations. The Oneida sought an injunction against state enforcement on the reservation. The tribe argued that because they were a “sovereign with a right to self-government” (Santoni 1992/93:388), they need not comply with the law. In a precedent-setting decision the court agreed. With an unemployment rate of 40 percent in 1976, the Oneida clearly needed the employment and the revenue bingo provided to pursue the federal policy goals of self-sufficiency (Hoeft 1993).

Since Indian gaming left untaxed revenue within state boundaries, the states were not willing to give up their attempts to regulate. In an era of serious state budget shortfalls, revenue generated by the burgeoning Indian gaming industry quickly became a target. By the mid-1980s, 113 tribal bingo operations were in operation, grossing $225 million annually (Segal 1992). Also
during this time, the scope of the games changed and casino gambling began to appear on the reservations.

In this period of state budgetary retrenchments, gambling receipts became a way to alleviate funding shortages, and the states did not want to compete with the tribes for scarce revenue. By 1987, there were 14 states which had highly restricted “Las Vegas night” operations for charity purposes, and bingo was legal in 43 states (Segal 1992). If the states could not directly eliminate the competition from Indian gaming, they wanted a share of the tribal revenues generated within their borders. The economic incentive behind control of gaming revenues became the strongest determinant of whether states would allow tribes to run unfettered gaming operations. It is, indeed, ironic that state and federal officials continue to argue against the development of tribally operated casino gambling when reduced economic dependency by the tribes could be the end result.

A common argument raised by governors and state attorneys-general has been that organized crime would infiltrate “unregulated” Indian country gaming. There is currently no evidence to substantiate these charges. In recent testimony (1994) before the U.S. Senate, Rick Hill (current Chair of the National Indian Gaming Association) stated, “[I]ndian gaming did not begin with organized crime as it did in Nevada. Moreover, the FBI, Justice Department and IRS have testified that there is no evidence to date of organized crime infiltration into Indian casinos” (Indian Country Today 1994c:C3). During pre-IGRA hearings, in a tongue in cheek dig at the federal government and the states, Phoenix attorney Glenn Feldman, representing tribal interests, remarked “[U]ntil there is a market for sand or sagebrush, the tribes must depend on bingo for revenue . . . their interest is in maintaining the integrity of the games” (Chalakee 1987:14).

A good example of the willingness of tribes to self-regulate is found in Oklahoma. In 1987 the Oklahoma tribes were running close to 20 percent of all Indian bingo operations in the U.S., and they were expanding rapidly. That year, fifteen tribes created the Oklahoma Gaming Commission as an offshoot to the United Indian Nations of Oklahoma Gaming and Taxation Committee. The Commission’s founding tribes believed sending a message that they operated under the ideas of ethical conduct and accountability was important, and if the pending IGRA legislation had favored regional control, they would have been ready for it (Chalakee 1987). They established a code of ethics, adopted a constitution, and selected officers and regional commissioners to oversee tribal gaming operations. Their faith in the effectiveness of pan-tribal interest groups has been confirmed by the organization of the National Indian
Gaming Association (NIGA), which launched a very successful public relations campaign in 1993 to limit more restrictive amendments to the IGRA. As of 1994, the Oklahoma tribes still do not have casino gaming because the official state position is that it is not allowed under state law. This is in spite of the fact that the state turns a blind eye to Las Vegas-style gaming that takes place “in non-Indian country clubs, hotels and fraternal organizations” (Indian Country Today 1994c:C1).

In a last ditch attempt to set a precedent for state regulation of Indian gaming, the state of California and Riverside County tried to apply the Organized Crime Control Act (OCCA) to the California-based tribes (Cabazon Band of Mission Indians et al. v. California, 1987), a balance test of federal interests over state interests. The state’s argument rested on the contention that the “[t]ribes involved in this case did not traditionally engage in tribally sponsored, high stakes commercial gambling operations catering primarily to non-Indian participants” and thus could not claim immunity from state law (Santoni 1992/93:393). The court decided for the tribe on all counts. An appeal to the Supreme Court in 1987 resulted in the Court affirming the Ninth Circuit Court’s decision.

Lawsuits became more numerous throughout the 1980s and the need for uniform federal legislation and regulation became more apparent. The Supreme Court’s decision (1987) to uphold the Cabazon decision set the legal precedent to open the floodgates for the development of legalized Indian casino gaming. During the 1980s, various bills designed to regulate gaming on Indian lands were introduced in Congress. These bills were put forth in an attempt to protect tribal, state and private gaming interests (Santoni 1992/93).

The Indian Gaming Regulatory Act (1988)

On October 17, 1988 Congress passed the Indian Gaming Regulatory Act (IGRA; 25 U.S.C.§§ 2701–21). The IGRA states “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity” (Santoni 1992/93:415). This act places considerable power in the hands of the states. Simply put, if states prohibit gambling, gambling on Indian lands is not allowed. This law, as it stands, is an affirmation of state’s rights.

The IGRA defined and gave directions for regulating three levels or “classes” of gaming in Indian country. Class I games are those traditionally
played at social gatherings or tribal games for minimum prizes. Bingo and non-banking card games for prizes constitute Class II games. The law grants exclusive tribal jurisdiction over Class I and Class II gaming on Indian lands. Class II gaming is also subject to certain provisions of the IGRA (see below). Most controversies involve Class III gaming, which includes all house banking games typically associated with casino gambling.

Under the current IGRA, the National Indian Gaming Commission (NIGC) was established to regulate Class II Indian gaming in favor of regulation by the Secretary of the Interior or the states. The Commission was given broad powers "to approve all tribal gaming ordinances and resolutions, to close gaming activities, to levy and collect fines, and to approve gaming management contracts for Class II and Class III gaming" (Santoni 1992/93:405). The IGRA does provide for self-regulation of Class II gaming activity after tribes have operated under certain requirements for a period of three years.

The most sensitive and controversial requirement of the law is the tribal-state compact that must be negotiated before any tribes can initiate Class III or casino gambling. In 1992, the NIGC issued regulations that define Class III games generally to include all house banking forms of gaming not included under Class II definitions, such as: casino games, pari-mutuel horse and dog racing, federally allowed slot machines, electronic gaming devices, and lotteries. Currently, the scope of Class III gaming is subject to tribal-state compact negotiations, not the federal courts. These individual compacts address regulatory as well as jurisdictional issues (Santoni 1992/93). The compact requirement provides that the State shall negotiate in "good faith" with the requesting tribe. The compact must be made with the state the tribal land is located in. Any failure of such "good faith" negotiation by the state shall be cause for action by the tribe and the IGRA grants jurisdiction to the U.S. district courts to resolve the dispute. If the State fails to show that it negotiated in good faith, the court may order the state and tribe to reach a compact and if it still is not done, the court may appoint a mediator to recommend a compact. Much of the litigation since passage of the IGRA has centered around the lack of definition Congress gave concerning the definition of "good faith."

Any Class III gaming not under tribal-state compact agreement is subject to federal jurisdiction in addition to the application of state laws pertaining to licensing, regulation or outright prohibition of gambling. In other words, if a tribal-state compact is not negotiated, the tribe, by default, falls under both federal and state regulation and jurisdiction. The compact
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requirement was written into the bill to enable tribes to establish a mutually acceptable compromise with the states which would ultimately free up casino operation from state and federal jurisdiction. However, there continues to be significant debate over how to interpret the provisions of the law. The tribes and the states contend that the jurisdictional and regulatory questions surrounding Class III gaming have not been adequately clarified. Because both Indian and non-Indian interests find significant fault with the law as written, the future of the IGRA in its present form is questionable.

Current Disputes

In current disputes over Indian gaming, familiar pre-IGRA arguments are being used to justify litigation in suits aimed at garnering state jurisdiction and control of Indian Class III gaming. States complain that despite the efforts of the NIGC and the passage of the IGRA, tribal casinos are being forced upon them. They believe that states' rights are being infringed upon, and they want the tribes to have only those specific games authorized under state laws and regulations. The tribes view this as yet another attempt to control tribal affairs.

The IGRA is clear on the issue of the scope of gaming: the state cannot regulate when type of game does not violate that state's public policy. Under the Indian Gaming Regulatory Act, the states already have a good deal of control, because unless they allow casino games as public policy within the state under any wording in their statutes, the tribes cannot run casino operations. In addition, negotiating a compact can be favorable to the state, particularly if the tribe is willing to negotiate revenue-sharing agreements with the state.

In 1994, unwarranted state allegations of organized crime involvement in Indian gaming operations stalled many compact negotiations nationwide. Senators John McCain (R-Arizona) and Ben Nighthorse Campbell (D-Colorado) questioned such allegations and state motives for wanting to have closer regulation of Indian gaming (Anquoe 1994:A3). In paternalistic arguments, the states have argued that Indian gaming should be regulated to "protect" the tribes. In 1994, the revenues from Indian gaming were estimated at $6 billion or 4 percent of total gaming industry revenues nationwide (Anquoe 1994). There were already 94 compact agreements in 19 states and uncounted stalled negotiations. Senator McCain maintains that "[T]ribal casinos are operating in a safe, well-conducted, well-regulated fashion.... Indian gaming is helping
tribes and allowing them the capacity to build schools, roads, medical facilities" (Anquoe 1994:A3).

The lack of uniform national standards are apparent and problems associated with tribal-state compacts have directly affected Indian tribes in the Great Plains. For example, since 1990 at least seven tribes in South Dakota have successfully negotiated compacts for slot machines, poker, blackjack, or video lottery operations (Santoni 1992/93). Despite this precedent, the Cheyenne River Sioux and the state of South Dakota have experienced considerable difficulty in negotiating over types of games allowed by state statute. Eventually, in 1994, the Cheyenne River Sioux capitulated to state demands and a compact was signed for a casino to be developed near Swiftbird, South Dakota (Little Eagle 1994).

The 1993 Kansas state legislature battled over an amendment to their constitution that would allow non-Indian casinos to be built next to three pari-mutuel racetracks in the state. State Senator Vidricksen argued that a Kansas City casino would create thousands of jobs and contribute additional state revenue (Truell 1993). At the same time, Kansas House members debated a state compact that would permit casino gambling on Indian reservations in the state. The legislators were willing to allow Las Vegas-style gambling to generate much needed revenue for the state coffers, but they were hesitant about the Indians competing with them over the revenue. The state of Kansas has yet to approve any of the pending tribal-state compacts, including proposed agreements from the Kickapoos and Sac and Fox.

The states are not the only parties that are testing the intent of the law. The Santee Sioux Tribe of Nebraska used a decision by Iowa’s state legislature to permit riverboat gambling on the Missouri and the Mississippi rivers to justify their bid to establish a land-based casino in Council Bluffs, Iowa (Green 1990). The Santee joined with Harvey’s Resort Hotel and Casino of Las Vegas, Nevada, to attempt the venture. The twist was that the Santee are not land owners in Iowa, but planned to purchase land to be taken into “trust” near Council Bluffs for the venture. Under federal regulations, in order for the land to be taken into trust, it must be approved by the Secretary of the Interior. Secretary Manuel Lujan had approved one such purchase in Wisconsin by the Forest County Potawatomis in 1991. However, he rejected the Santee Sioux plan to buy the land in “trust.” The Secretary, using a provision of the Indian Gaming Regulatory Act, determined that a casino would be detrimental to the surrounding community. He broadly interpreted “community” to encompass all surrounding communities, both Indian and non-Indian (Wunder 1994).
After the Council Bluffs deal with Harvey's fell through, the Santees have focused their efforts on establishing a casino on their reservation in northeastern Nebraska. They do not currently have a compact in their resident state of Nebraska because of ongoing disputes over the types of games allowed under state law. The state of Nebraska contends that Class III gaming is prohibited by Nebraska state law and, therefore, the Santee may only offer those types of games allowed under the narrow scope of state regulations (Indian Country Today 1994a). Under state law, Nebraska allows state-sponsored lottery, keno and pari-mutuel gambling. The Santees have argued that these categories of legalized gambling are Class III and therefore not fundamentally different from the casino-style gambling they seek for their reservation.

The Santee Sioux are keenly interested in establishing a casino because their economic development options on their rural Knox County, Nebraska, reservation are severely limited. They own approximately 20,000 acres of their 115,000 acre reservation. Much of the reservation land is marginally productive agriculturally (Meyer 1993). The Santees currently have approximately 2,260 enrolled members, of which only 760 are resident on their reservation (Meyer 1993). According to the 1990 U.S. Census, nearly 49% of American Indian adult males living on the reservation are unemployed and 41% of the entire reservation population lives below the poverty datum line, including 100% of female-headed households with children under the age of 5. Fully 69% of American Indian households on the Santee Reservation have an annual income of $14,999 or less; 33% of households earn less than $5,000 annually (1990 U.S. Census). The Santee Sioux view gaming as one of their best options currently available to achieve any kind of economic self-sufficiency.

Even though the Winnebago and Omaha tribes are also headquartered on reservations in northeast Nebraska, they own trust land in Iowa as the result of the changing course of the Missouri River. In 1992, both tribes successfully opened land-based casinos after negotiating compact agreements with the state of Iowa. Part of their agreement stipulates that their casino operations must abide by games and stakes the state allows on the legalized riverboat casinos (Wunder 1994:207).

The Omaha tribe is also currently involved in a jurisdictional dispute over their plans to establish an additional casino, a riverboat casino, which would be docked at Carter Lake, Iowa (between the cities of Omaha, Nebraska, and Council Bluffs, Iowa). Carter Lake, Iowa, is located geographically on the "Nebraska side" of the Missouri River. Consequently, both the
city of Omaha, Nebraska and the city of Carter Lake, Iowa claim ownership but neither holds a deed. The city of Carter Lake leased the land to the Omaha Tribal Nation (note that the land is not “trust” land), but the Omaha’s efforts to establish a riverboat casino were temporarily blocked by the city of Omaha, citing the Nebraska state prohibition against casino gambling. Attorneys for the cities have recently negotiated a settlement, which will clear the way for the Omaha tribe to develop their riverboat casino (Indian Country Today 1994d:A8), minutes from downtown Omaha, Nebraska.

A tactic recently employed by states to block Indian gaming under the IGRA is to claim sovereign immunity to tribally initiated gaming suits under the Eleventh Amendment. This amendment provides that states cannot be sued by other states or foreign states (which interestingly implies the recognition of tribal “sovereignty”). The states are apparently willing to acknowledge tribal sovereignty when it is convenient to argue their cause.

In June of 1994, Senators Daniel K. Inouye (D-Hawaii) and John McCain (R-Arizona) introduced a bill to amend the embattled Indian Gaming Regulatory Act in an attempt to stop the ongoing legal and political disputes. The amendments provide for increased federal control in the regulation of Class III casino gambling. To accomplish this, the new bill offers states the “option” of participating in tribal compacts, establishes minimum federal standards outlining the scope of Class III gaming, and changes the fundamental make-up of the NIGC. Amendments to the bill may offer some relief from jurisdictional disputes with the states and would, therefore, benefit the tribes who are currently experiencing difficulty negotiating state compacts, e.g., the Santee Sioux Tribe of Nebraska. However, the prospect of additional federal regulation of Indian gaming is receiving intense scrutiny from the tribes who already have state-negotiated compacts. For many of these tribes, maintaining the status quo effectively limits the degree of federal oversight, because they have already established “tailor-made” agreements with the states and do not currently experience any significant degree of federal regulation.

Economic Benefits

Is the underlying goal for the development of the Indian Gaming Regulatory Act, that of stimulating economic development for the tribes, close to reality? What benefits have already accrued? What are the long range plans for tribal revenues? How are different tribes handling the revenue generated? A review of the first six years of legalized Indian gaming under the IGRA suggests that the revenues generated by high stakes gambling for the
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tribes and surrounding communities are clearly beneficial, given controlled
growth and management.

The state of Minnesota was an early participant in negotiating compacts
with its 11 resident tribes. In 1991, Minnesota had 14 tribal casinos which
together grossed an estimated $900 million (Denny 1992:35). From Minne­
sota, examples of differing means of handling gaming revenues range from
those of three Dakota Sioux communities who give out monthly per capita
payments of $2000 to $4000, to the seven Ojibwa communities who have
chosen to invest their profits in “improving housing, health clinics, schools,
and sewer systems, as well as social service programs on or near the
reservations” (Denny 1992:37). Indian casinos and bingo operations are well
on their way to becoming one of Minnesota’s largest employers with well over
10,000 jobs.

As early as 1991, Rick Hill, the current chairman of NIGA, pointed out
that the long range goal of the Oneida Tribe in Wisconsin was to use gaming
revenues to fund other enterprises. Hill explains,

Some experts are saying that gaming has a 10-year life span before
the market is saturated. Our long-range goal is to diversify because
we know gaming isn’t going to be forever. We recently bought four
cattle farms in the area and we’re building a construction company
and a plumbing company. We’re involved in a joint venture with an
engineering firm to test air, water, and soil samples. Access to dollars
has really turned on the turbo boosters so that we can do more (In
Holmstrom 1991:8).

Hill estimates that 83% of the $73 million Oneida tribal budget is derived
from gaming, and that the operations provide employment for 200 tribal
members (in Holmstrom 1991:8).

The Omaha Tribe of Nebraska is reportedly making an average of $1
million a month from its casino operation near Onawa, Iowa (Lincoln Journal
Star, August 29, 1994). The tribal share of casino profits has been used to
make per capita payments to the 6,000 member tribe, retire nearly a $1 million
debt and to fund numerous programs. A tribal report describes some of the
programs the tribe has prioritized since the opening of their casino 17 months
ago, including “. . . a community development program, cable television
renovation, health center expansion, clothing vouchers, building an emer­
gency youth shelter, helping the food pantry and pest control, renovation of
the senior center and helping with a nutrition program” (Lincoln Journal Star,
Tribal funds have also been applied towards a hotel, motel and food-service training program. They also reportedly spent $500,000 on the tribal farm and a matching federal grant aimed at small-business development (Lincoln Journal Star, August 29, 1994).

As gaming revenues accumulate, many Plains tribes are placing a high priority on purchasing former reservation lands that had been sold or lost to non-Indians over the years (Hammel 1994). The rationale behind the land-consolidation efforts are twofold: expansion of the economic base to facilitate economic diversification strategies and the preservation of tribal identity by building and maintaining a strong reservation base. For many tribes, like the Yankton Sioux who operate the successful Ft. Randall Casino at Pickstown, South Dakota, the booming reservation economy has exacerbated the housing shortage for tribal members who are returning to the reservation for economic opportunities associated with the casino. The Yankton Sioux are actively engaged in land acquisition programs for housing and economic development purposes. In central South Dakota, the Lower Brulé Sioux Tribe is budgeting $400,000 a year for repurchase of reservation lands (Hammel 1994:9). John Blackhawk, Chairman of the Winnebago Tribe suggests that it isn’t realistic to assume the tribe will buy back all the non-Indian acreage, and how much is dependent on the price being asked by the landowners. In some instances, non-Indian landowners are reportedly asking highly inflated, above-market prices for acreages the “gaming” tribes are particularly interested in. The Winnebago Tribe of Nebraska currently owns approximately 25 percent of their 120,000 acre reservation; the Omaha Tribe owns only an estimated 27,000 acres, or 16 percent, of its 167,000 acre reservation (Hammel 1994:9).

The states and tribes are again at odds on this issue because the states are concerned about the loss of tax revenue which may result from the purchase of former tribal lands. Lands purchased by federally recognized tribal governments or enrolled tribal members are eligible to be taken into “trust” by the Secretary of the Interior. Trust lands are not subject to state and local property taxes and enjoy other protection not granted to non-Indian land owners. State and local officials are concerned that the potential loss of revenues will hurt rural fire districts and schools and are looking to the federal government for reassurance. Some roads in Thurston County, Nebraska (home of the Omaha and Winnebago reservations), are already being cared for by the tribes and the Bureau of Indian Affairs.

Other options opening up to the tribes are management and financial investment opportunities for Indian gaming operations outside their own reservations. Management opportunities with European casinos, e.g., Poland
Will the House Win? (Indian Country Today 1994b), and new Indian casinos in the U.S. are expanding as various tribes accumulate the capital and expertise to move into the lucrative arena of casino management beyond their own reservations. Foreign businesses are keenly interested in investment on reservation land for one of the same reasons that the states are so perturbed by Indian gaming operations: tribes are sovereign nations that pay little or no state or local taxes. The spectacularly successful casino of the Mashantucket Pequot Tribe of Connecticut was reportedly financed by foreign investors (Newton and Frank 1994:206).

Conclusion

Passage of the Indian Gaming Regulatory Act of 1988 has provided opportunities as well as posed dilemmas for contemporary American Indian nations. Many of the controversies surrounding the gaming debate have their basis in age-old jurisdictional disputes. These disputes involve state’s rights versus tribal rights, and the definition and exercise of inherent sovereignty rights within the federal system. In testimony before the Senate Indian Affairs Committee on May 17, 1994, NIGA chairman Rick Hill summed up the general state of affairs, “Through a tiring, but apparently politically necessary process, we endlessly must respond to mostly time-worn, pre-IGRA, unverified accusations against Indian gaming” (Hill 1994).

Since the inception of the formal political and legal relationship between the United States government and the governments of the various American Indian nations (1789), the tribes have been drawn into a perennial battle to protect as well as exercise their perceived sovereignty rights in the context of shifting federal Indian policies. Generally speaking, these policies have consistently included attacks on the economic, social and political fabric of American Indian tribes. Time and again, the Indian nations have adapted to the vagaries of Indian policy and have survived to fight yet another battle. A cynical observer might note that the bottom line, literally and figuratively, appears to lie in the careful calculation and recalculation by the government and other vested interests in the relative strength of Indian nations to resist continued encroachment. Henry J. Sockbeson, an attorney for the Mashantucket Pequot Tribe suggests, “Tribes have always asserted their sovereign status and their ability to govern themselves. You’re limited, however, by your financial ability to exercise sovereignty” (Indian Country Today 1994c:C1). Carefully managed casinos and gaming revenues have the potential to empower the tribes to endure the pitfalls on the road to tribal sovereignty.
Note

Citations and analyses of court cases used in this article are based on Santoni 1992/93:387–447. Any errors or misinterpretations of case law are the sole responsibility of the authors.

Cases Cited

Cherokee Nation v. Georgia, 30 U.S. 1, (1831).

References

Will the House Win?

Indian Country Today. 1994c. Tribes should be allowed to run own casinos, attorney says. June 15:C1.
Nebraska Indian Commission. 1984. The History and Legal Status of Nebraska Indian Tribes. Nebraska: Lincoln.
