

YOU CAN'T GET THERE FROM HERE: IGRA NEEDS REINVENTION INTO A RELEVANT STATUTE FOR A MATURE INDUSTRY

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I. INTRODUCTION

In 1988, Congress created a legislative compromise with the enactment the Indian Gaming Regulatory Act (IGRA).¹ The statute sought to appease conflicting positions on Indian gaming. Several states wanted to impose state law on the gambling then taking place on Indian reservations. The states with land-based casino gaming interests did not want what they viewed as unfair competition from Indian casinos.² Indian land-based gaming that was not subject to state law was viewed by the tribes as consistent with their sovereignty.³

Passage of IGRA divided gambling into three “classes,” each to be regulated at different levels of scrutiny by different federal, state,

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1. 25 U.S.C.A. § 2701-21 (West 2010).

2. The term “land-based” gaming is used to differentiate the casinos and casino gambling discussed in this paper from Internet casinos and Internet gaming law which is not within the scope of this article. “Land-based” means “existing in a physical place rather than as a website.” MACMILLAN DICTIONARY, MACMILLAN PUBLISHERS LIMITED (2010), available at <http://www.macmillandictionary.com/dictionary/british/land-based>.

3. See National Indian Gaming Commission, *Indian Land Opinions*, <http://www.nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx> (last visited April 3, 2010) (providing theories of various tribes regarding why gaming not subject to state law). The Commission uses both the terms “reservation” and “Indian Lands” as follows:

Indian tribes may only game on Indian lands that are eligible for gaming under the IGRA. Such lands must meet the definition of “Indian lands” at 25 U.S.C. § 2703, which requires that the land be within the limits of a tribe’s reservation, be held in trust by the United States for the benefit of the tribe or its member(s), or that the land be subject to restrictions against alienation by the United States for the benefit of the tribe or its member(s). Additionally, the tribe must have jurisdiction and exercise governmental powers over the gaming site.

Id.

or tribal governmental entities.⁴ This division was based on the nature of the game bingo and other Class II games as played at the time.⁵ Slot machines and all other gambling, including house-banked traditional casino games, were put in a residual category, Class III, and only made legal as authorized by a tribal/state compact.⁶

Congress has never amended IGRA since it became law.⁷ Innovations in gaming technology and market demands have made the IGRA Class II and Class III categories of gambling a hopeless anachronism.⁸ Nevertheless, the IGRA classes still determine what type of gambling can take place on Indian land.⁹ Class II gaming can be regulated by tribes who have no obligation to pay a share of proceeds to the state.¹⁰ Class III Indian gaming can only be operated under a negotiated tribal/state compact.¹¹ Negotiated tribal/state compacts for Class III gaming usually include an agreement by the tribe to contribute to state revenue from the proceeds of the operation.¹²

4. See 25 U.S.C.A. §§ 2703(6)-(8) (West 2010) (providing definitions for different Classes of gaming).

5. See S. Rep. No. 100-446, at 3071 (1988) (discussing division of act based on the nature of certain games).

6. See 25 U.S.C.A. § 2703(8) (West 2010) (defining Class III as containing “all forms of gaming that are not Class I gaming or Class II gaming”); see also 25 C.F.R. § 502.11 (2010) (“House banking game means any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win.”).

7. See 25 U.S.C.A. § 2701 (West 2010) (providing date passed).

8. See Courtney J. A. DaCosta, Note, *When “Turnabout” is Not “Fair Play”*: Tribal Immunity Under the Indian Gaming Regulatory Act, 97 GEO. L.J. 515, 549 (2009) (proposing necessary reforms for IGRA).

9. See *id.* at 521-22 (providing background and describing Congress’ purpose in passing IGRA).

10. See Wendy J. Johnson, *Tribal Gaming Expansion in Oregon*, 37 WILLAMETTE L. REV. 399, 411 (2001) (explaining states have limited jurisdiction).

11. See *id.* at 412 (describing procedural steps for Class III gaming).

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10, cl. 3 (emphasis added). IGRA provides for the Secretary of the Interior to approve tribal/state compacts. See Johnson, *supra* note 10, at 412.

12. See Steve J. Coleman, Note, *Lottery Logistics: The Potential Impact of a State Lottery on Indian Gaming in Oklahoma*, 27 AM. INDIAN L. REV. 515, 537 (2003) (describing how impact of giving proceeds to state revenue affected Oklahoma).

Moreover, the tribal-state compacting process allows the State to control its own destiny in terms of revenue production. . . . In addition to allowing the State to control the size of its “piece of the pie,” tribes are benefitted in the form of increased employment, improved education and health care, and decreased member reliance on welfare.

This article proposes amendments to the IGRA that would retain the federal policy of encouraging economic opportunities in the gaming industry for all tribes, but recommends a replacement of the obsolete differentiation between Class II and Class III gambling with a more enforceable, quantitative standard that still allows tribes to operate certain gaming without a tribal/state compact.¹³

II. BACKGROUND

Gambling in America is older than the Mayflower.¹⁴ Wagering on sports and games was part of many Native American cultures before European immigration.¹⁵ Additionally, gambling was brought to the colonies by the European settlers.¹⁶ Even though most early American colonies accepted gambling as a gentlemen's social pastime and a convenient way to raise money for education and revolution, other colonies, like those settled by the Puritans,

Id. (citation omitted).

13. See *NIGC Announces 2008 Revenues*, National Indian Gaming Commission, (June 3, 2009), <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleases-Main/PR113062009/tabid/918/Default.aspx> (reporting 2008 gaming revenues before House).

Commission Chairman Phil Hogen, speaking at the annual conference of the North American Gaming Regulators Association, reported that 2008 gross gaming revenue exceeded the industry's 2007 revenues by more than \$500 million. Gross gaming revenue totaled \$26.7 billion, an increase of 2.3% over the prior year

....

The data indicates that gaming revenues are not distributed equally among the gaming tribes. Facilities with annual revenues of less than \$100 million constitute over 80% of the more than 400 operations, while fewer than 20% of the operations generate about 70% of the \$26.7 billion in revenues.

Id. While IGRA clearly states that there is no authority given to a state to impose any tax on an Indian tribe, nothing prevents a tribe from agreeing to the imposition of a payment to the state from gaming proceeds in the negotiations for a tribal/state compact. See 25 U.S.C.A. § 2710(d)(4) (West 2010).

14. See Ed Crews, *Gambling: Apple-Pie American and Older than the Mayflower*, THE COLONIAL WILLIAMSBURG J., Autumn 2008, available at <http://www.history.org/Foundation/journal/Autumn08/gamble.cfm#webex> (providing history of gambling in Colonial Williamsburg).

15. See Michael E. Wheeler, *One White Buffalo, Why Not Three?: Native American Gaming in the Lone Star State*, 26 MISS. C. L. REV. 147, 148 (2007) (providing concise history of Native American gaming or gambling); see also Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 580-82 (1997) (outlining brief history of Native American gaming and religious or social events).

16. See William E. Horwitz, Note, *Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?*, 14 CARDOZO ARTS & ENT. L.J. 153, 158-59 (1996) (claiming that non-Indians were invited to participate in Indian games and vice versa).

did not allow gambling.¹⁷ The patchwork quilt that is legal gaming in the United States today developed from this divergence of opinion about gambling and from each state using Tenth Amendment residual powers to enact various gambling laws.¹⁸

The Tenth amendment has been interpreted to mean that “all is retained which has not been surrendered”¹⁹ The regulation or prohibition of gambling within a state has been regarded as a matter of state police powers.²⁰ As a result of this broad state authority, there are several states that allow most types of gambling, two that ban gambling entirely, and all manner of different legal treatment of gambling in between.²¹

By 1931, Nevada had legalized full casino gambling.²² By 1976, New Jersey, which had the first modern successful state lottery, had also legalized casino gambling in Atlantic City.²³ For ten years, these two jurisdictions enjoyed the distinction of being the only two

17. See Crews, *supra* note 14 (continuing account of gambling history in early American colonies and describing dynamic with Indians and different European religions).

18. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)

19. United States v. Darby, 312 U.S. 100, 124 (1941).

The amendment states but a truism that *all is retained which has not been surrendered*. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. *Id.* (emphasis added).

20. See Marvin v. Trout, 199 U.S. 212, 224 (1905) (“The power of the state to enact laws to suppress gambling cannot be doubted.”).

21. See Steven Andrew Light & Kathryn R.L. Rand, *The Hand That’s Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 414-15 (2009) (noting explosion of interest in gambling in tribes and states); see, e.g., 15 U.S.C.A. § 3001(a)(1) (West 2010) (acknowledging that “states should have the primary responsibility for determining what forms of gambling may legally take place within their borders”). The two states that have banned gaming entirely are Utah and Hawaii. See HAW. REV. STAT. ANN. § 712-1221 (West 2010) (outlawing gambling and describing penalties for statutory violation); UTAH CODE ANN. § 76-10-1101 (West 2010) (outlining several illegal forms of gambling in Utah). Since lotteries were the most prevalent form of gambling in the United States for a long period of time, individual state constitutions may use the term “lotteries” as a generic term to cover and prohibit “any game of chance, lottery or gift enterprise.” UTAH CONST. art. V, § 28. Some state constitutions mention specific forms of gambling that are prohibited. See, e.g., NEV. CONST. art. 4, § 24 (prohibiting lotteries).

22. See Roberts, *supra* note 15 at 585 (crediting end of regulation in 1931 to Great Depression).

23. See *id.* at 586 (exploring rationale that New Jersey used gambling as type of urban development); see also Tose v. Grete Bay Hotel & Casino, Inc., 819 F. Supp. 1312, 1319 (D. N.J. 1993) (providing concise history of gaming in Atlantic

legalized casino gaming jurisdictions in the United States. It was not until November 1988 that the next legalized gambling jurisdiction came about when South Dakota amended its state constitution to permit controlled stakes gambling.²⁴ Nevada and New Jersey's use of casino-gambling proceeds to fund state government created a domino effect; states quickly began sanctioning and even operating widespread gambling in a variety of forms.²⁵ Currently, every state, except Utah and Hawaii, allows gambling in some form.²⁶

Generally, gambling has been left to the states to accept or reject. During the nineteenth and first half of the twentieth centuries, Congress took a position against gambling by using its federal power over interstate commerce.²⁷ As soon as any new technology was developed, Congress would pass prohibitory legislation concerning its use for gambling.²⁸ For example, upon the establishment of the U.S. Mail and the inventions of the telegraph and radio, all these methods of communication became the subject of federal prohibition that curtailed gambling in interstate commerce.²⁹

Congress also used anti-gambling statutes as an approach to organized crime prosecutions.³⁰ As recently as the 1960s and 1970s, a series of federal organized crime statutes were passed by Congress that forbade criminals from making wagers using wire

City); N.J. CONST. art. IV, § 7 (providing that residents voted for amendment to state constitution).

24. See Brooke Delores Swier, Comment, *Gaming Goldmines Grow Green: Limited Gaming, Good Faith Negotiations, and the Economic Impact of the Indian Gaming Regulatory Act in South Dakota*, 54 S.D. L. REV. 493,505 (2009) (reporting that legislature approved measures to legalize video lottery).

25. See Horwitz, *supra* note 16, at 157-58 (describing state legislatures embracing lotteries to fund state operations).

26. See Haw. Rev. Stat. ANN. § 712-1221 (West 2010) (banning gambling in all its forms in Hawaii); see also Utah Code Ann. § 76-10-1101 (West 2010) (outlawing several forms of gambling in Utah).

27. See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 176 (1999) (describing Congress' policy and attitude toward gambling.) "[Congress] not only discouraged the operation of lotteries and similar schemes, but forbade the dissemination of information concerning such enterprises by use of the mails, even when the lottery in question was chartered by a state legislature."

28. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993) (upholding constitutionality of legislation from Congress banning gambling advertising by broadcast radio).

29. See *Greater New Orleans Broad. Ass'n*, 527 U.S. at 176-78 (outlining Court's history of finding federal legislation banning advertising for gambling constitutional).

30. See Roberts, *supra* note 15, at 594 (commenting that both New Jersey and Nevada passed legislation to stop organized crime which led to federal legislation).

technology,³¹ traveling across state lines in furtherance of a gambling enterprise,³² and transporting wagering paraphernalia.³³ The passage of the Organized Crime Control Act of 1970 which included the Illegal Gambling Business Act³⁴ and the Racketeer Influence and Corrupt Organizations Act of 1970 (RICO) completed the series designed to “eradicate organized crime by attacking the sources of its revenue, such as syndicated gambling or bookmakers.”³⁵ The federal purpose of these criminal statutes was focused on the disruption and reduction of organized crime operating across multiple states. The statutes have resulted in multi-state federal organized crime prosecutions, while the prosecution of intra-state illegal gambling enterprises has been left to the states.³⁶

As the twentieth century moved toward its end, federal legislation on gambling turned from being strictly prohibitive to being simply regulatory. While there has been federal legislation prohibiting wagering on amateur sports,³⁷ there have also been statutory amendments to allow interstate lotteries upon a compact among states involved³⁸ and to liberalize interstate wagering on horseracing.³⁹

31. See Jeffery R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 5, at 393-415 (2002); see, e.g., The Wire Act, 18 U.S.C.A. § 1084 (West 2010) (outlawing wire transfers). The Wire Act is currently relied upon by the U.S. Justice Department to prohibit gambling over the Internet. See Antonia Cowan, *The Global Gaming Village: Interstate and Transnational Gambling*, 7 GAMING L. REV. 4 (2003).

32. See Rodefer, *supra* note 31, at 401 (detailing Travel Act); see, e.g., 18 U.S.C.A. § 1952 (West 2010) (outlawing traveling across state lines in furtherance of illegal activity).

33. See Rodefer, *supra* note 31, at 402 (detailing Travel Act); see, e.g., 18 U.S.C.A. § 1953 (West 2010) (outlawing transport of gambling implements).

34. See Rodefer, *supra* note 31, at 403 (discussing both acts); see, e.g., 18 U.S.C.A. § 1955 (West 2010) (prohibiting illegal gambling businesses).

35. See Rodefer, *supra* note 31, at 404 (quoting act); see 18 U.S.C.A. §§ 1963, 1964 (West 2010) (providing criminal penalties and civil remedies for violations of RICO).

36. See *United States v. Pacheco*, 489 F.2d 554, 559 (5th Cir. 1974) (finding that federal government, relying on its authority over interstate commerce, had jurisdiction over cross-state gambling). Section 1955 left the states with control of enforcement efforts against smaller gambling operations that did not meet the minimum jurisdictional requirements, though such businesses might be identical to the others in every respect except size: “The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions.” *Id.*

37. See Rodefer, *supra* note 31, at 397 (discussing wagering on amateur sports).

38. See *id.* (detailing statutory amendments).

39. See *id.* (detailing statutory amendments).

A. The Structure As Built by IGRA

The nationwide expansion of legalized gambling took place as the state matter it is, without federal prohibition or comprehensive federal gambling regulatory policy except for IGRA.⁴⁰ In passing IGRA, without offense to the Tenth Amendment, the federal government acted not under its broad inter-state commerce power, but rather, Congress enacted IGRA based on the federal government's relationship to Native Americans as "domestic dependent nations".⁴¹

Compared to the direct involvement of state or tribal regulators under IGRA, the NIGC's role is very different.⁴² The federal involvement is not the kind of close partnership between the indus-

40. The IGRA provides in Congressional findings that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands." 25 U.S.C. § 2701(5). In the Declaration of Policy, the statutory language is: "to provide a statutory basis for the regulation of gaming *by an Indian tribe . . .*" 25 U.S.C. § 2702(2) (emphasis added). The tribes draft their own gaming ordinances that are subject to Chairman of the NIGC's review for conformity with IGRA. NIGC also publishes a model gaming ordinance available on its website. Obviously sensitive to IGRA's language giving the tribe regulatory responsibility, the NIGC repeatedly differentiates its own role as one of "oversight." See Frequently Asked Questions, <http://www.nigc.gov/AboutUs/FrequentlyAskedQuestions/tabid/943/Default.aspx> (last visited March 30, 2010).

41. Philip J. Prygoski, *From Marshall to Marshall, The Supreme Court's Changing Stance on Tribal Sovereignty*, ABA MAGAZINE (1995) available at <http://www.abanet.org/genpractice/magazine/1995/fall/marshall.html>. Three cases are known as the Marshall Trilogy: *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*. 21 U.S. 543 (1823); 30 U.S. 1 (1831); 31 U.S. 515 (1832). In *Johnson v. McIntosh*, Chief Justice Marshall found that Indian tribes could not sell their Indian Land to non-tribal members or entities without the consent of the federal government. 21 U.S. at 543-62 (discussing facts of case). The Supreme Court determined that tribal sovereignty and the concomitant right to convey its land had been weakened by the immigration from Europe and the development of the United States. See *id.* at 567-78 (discussing Court rationale). In the second case in the trilogy, *Cherokee Nation v. Georgia*, the Court ruled that Indian tribes were "domestic dependent nations" existing in a state of "pupilage." Their relationship to the United States resembles that of a ward to his guardian." 30 U.S. at 10-13. Statements like these lead to the trust relationship between the federal government and the Indians, which had been the justification for federal government's intrusion in what could be considered strictly tribal affairs. In the last of the trilogy, *Worcester v. Georgia*, the Court found that the Cherokee and their lands were a distinct from the state of Georgia. 31 U.S. at 561-63. Chief Justice Marshall established the policy that the states have no regulatory or taxing authority in Indian country. See *id.* at 592-94 (discussing Chief Justice Marshall's opinion on regulation authority in Indian country).

42. For example, the NIGC does not issue or revoke gaming credentials. The tribal gaming governmental entity has that responsibility within its jurisdiction. The NIGC does not have a testing laboratory of its own but rather relies on independent testing laboratory results obtained by the tribes. The NIGC has no role in the negotiations for a tribal/state compact. States where gambling is legal have policy in place concerning these functions.

try and the regulators that has been so effective in Nevada, New Jersey and other states based on those models. Although there does not seem to be any substantive difference between the words as used in other federal regulatory contexts, the NIGC is careful to call its part as one of “oversight” rather than “regulation.”⁴³ The NIGC determines types of gambling and directs the types to the appropriate regulatory entities. Rather than setting out a comprehensive gaming regulatory policy itself, an option perhaps unavailable given the Tenth Amendment, the IGRA set forth a federal gaming oversight system for Class II that is much like training wheels on a bicycle.⁴⁴ The federal Class II oversight requires fully reliable tribal regulation that must achieve a regulatory equilibrium on its own while the federal system hovers nearby in case of a miscalculation. The direct responsibility for Class II gaming regulation is the tribes with NIGC oversight.⁴⁵ For Class III, the tribes and the states share responsibility for regulation pursuant to the terms of the tribal/state compact and the NIGC has an even more minor role in Class III operations.⁴⁶

43. *Congressional Quarterly, Inc., Capitol Hill Hearing on Draft Legislation, Before the Senate Committee on Indian Affairs, Regulation of Indian Gaming*, 110th Cong. 1 (2007) (testimony by Philip N. Hogen, Chairman of the National Indian Gaming Commission), available at http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=ccf51ba7-e82a-4f2a-9cbc-e1fb5b5e7d10.

44. *See Id.*

45. *See* Frequently Asked Questions *supra* note 40 (discussing Indian gaming regulation). As the NIGC explains in its Frequently Asked Questions, the tribes and the states regulate while the federal government provides “oversight,”:

Who regulates Indian gaming? Indian tribes are the primary regulators of Class II gaming. Regulation of Class III gaming may be addressed in the Tribal-State compacts and varies by state with the tribes remaining the primary regulator in most states. Both Class II and Class III gaming are subject to the provisions of the IGRA and oversight by the NIGC.

Id. When New Jersey was a novice to casino gaming, it did not develop its state regulatory law in a vacuum but looked to Nevada’s regulatory laws and then expanded it. States that have legalized casino gaming more recently have had both models, Nevada’s and New Jersey’s, to pick and chose which to adopt into their own regulatory scheme.

46. *See Congressional Quarterly, supra* note 43, at 10.

Typically, the regulatory role a particular state undertakes in its compact was taken from and modeled on that state’s experience with the regulation of its own legalized gaming at the time the compact was negotiated. Where such states develop effective regulatory programs, the need for NIGC oversight is greatly reduced. For example, in states where the tribal-state compacts call for regular state oversight, institute technical standards and testing protocols for gaming machines and establish internal control requirements, the tribal-state compacts call for regular state oversight, institute technical standards and testing protocols for gaming machines and establish internal control requirements, the NIGC’s oversight role will be limited. This is the case, for example, in Arizona. Some states

Given each state's unique position on gambling and the provisions of IGRA, it is not a surprising result that each state that compacts with one or more tribes for Class III gaming uses different levels of scrutiny for gambling regulation and imposes different restrictions.⁴⁷ There are states that have Class III gambling regulatory law that provides careful and effective regulatory scrutiny. Other states barely show an interest in gaming operations except to note their share of gambling proceeds.⁴⁸ Thus, there are major Indian Class III casinos operating with reliance on tribal regulation and state oversight and, except for a review and approval of the compact by the Secretary of the Interior, a very limited federal role. The result is uneven regulation.⁴⁹

Moreover, the goal of economic opportunity through the operation of gambling has eluded the vast majority of tribes.⁵⁰ The promise of IGRA to the neediest of Indian tribes, that is, a promise of *maximum flexibility as to the* current technology, simultaneous games, and participation between and among reservations, has not been kept. One of the reasons for this failure is the weak and now completely outdated gaming division in IGRA.⁵¹ Attempting to implement IGRA's statutory language, that is, to differentiate the most recent bingo based gaming devices from a slot machine hobbles tribes' efforts to make use of the latest and most lucrative gaming

such as Michigan and North Dakota, however, have assumed a minimal regulatory role. In some cases, compacts have become little more than a revenue sharing agreement between the state and the tribe. Consequently, under circumstances where the states do not have a significant regulatory presence, the NIGC must be in place to undertake a broader range of oversight and enforcement activities.

Id.; see also *Colo. River Indian Tribes v. the Nat'l Indian Gaming Comm'n*, 466 F.3d. 134, 2006 U.S.App. Lexis 25980 (holding NIGC exceeded authority over Class III gaming when seeking to audit Class III operation) available at <http://www.nigc.gov/ReadingRoom/PressReleases/PR20092005/tabid/159/Default.aspx>

47. See IGRA, 25 U.S.C. § 2710(d)(3)(B) (providing Secretary of Interior, not NIGC, to approve tribal/state compacts, before effective).

48. See *Congressional Quarterly*, *supra* note 43.

49. See *id.* at 7 ("Since the passage of IGRA, 232 tribes have executed Class III compacts with 22 states and the allocation of regulatory responsibility, if addressed at all, is as diverse as the states and the tribes that have negotiated them.")

50. See *Congressional Quarterly*, *supra* note 43.

51. See www.regulations.gov/search/Regs/home.html#docketDetail?R=NIGC-2007-0011 (last visited March 30, 2010) (listing regulations and 148 responses from tribes to attempts by NIGC to develop Classification regulations, i.e., regulations to differentiate Class II from Class III gaming). The comments were generally opposed to the Classification regulations and the proposal was later withdrawn. See *NIGC Sets Aside Class II Clarification*, NAT'L INDIAN GAMING COMM'N, <http://www.nigc.gov/ReadingRoom/PressReleases/PR92062008/tabid/839/Default.aspx> (last visited March 30, 2010) (discussing Class II clarifications).

devices (Class III). This confrontation between the law and the technology is not an accident.

Today's gaming industry has responded to IGRA's ephemeral terms with innovation. The industry has taken the irresistible challenge set up by IGRA's provisions or lack of provisions, to circumvent any effort to separate Class II from Class III on their way to introducing the most entertaining and lucrative gaming devices ever invented. New devices appeal to patrons with their themes, graphics and music, and offer the rush of the fast play of a slot machine. The most current devices have been deliberately designed to make a differentiation between a Class II bingo device with technological aids and a slot machine facsimile an exercise like admiring the emperor's new clothes.

The well-meaning federal effort to pin down bedrock law as to the essential elements of bingo, is one that perhaps even lawyers would admit has been permanently and purposefully obfuscated by directed engineering. As I. Nelson Rose, the law professor and eminent writer on gaming law issues, said in reference to the technological squeeze of bingo into a slot machine in his article, *Technically Not Slot Machines*, "There are too many interested parties who want to, and need to, use modern technology to design around outdated laws."⁵²

III. THE UNITED STATES GAMBLING ENVIRONMENT IN THE 1980s

A. The Tribes

By the early 1980's, some federal financial support of Indian social programs had been reduced.⁵³ Many tribes were suffering financial hardships.⁵⁴ As a means to provide tribal employment and income, a few Indian tribes were operating low stakes or high stakes bingo, or both, on Indian land.⁵⁵ Primarily, these efforts at gambling operations to provide economic opportunities for their

52. I. Nelson Rose, *Technically Not Slot Machines* (May 22, 2004), available at <http://rose.casinocitytimes.com/article/technically-not-slot-machines-11575>

53. See H. R. 99-488, 99th Cong., (1986) ("The proliferation of tribal gaming operations was also encouraged by President Reagan's Indian Policy Statement which encouraged the tribes to reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government.").

54. See INDIAN GAMING AND THE LAW, 21-8 (William R. Eadington ed., 1998).

55. See 25 U.S.C. § 2703(4) ("Indian lands means-(A) All land within the limits of an Indian reservation; and (B) Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.").

members featured bingo and related games.⁵⁶ A few tribes offered card games only, or a combination of bingo and cards games.⁵⁷ There were no “full casino” gaming operations, meaning an operation that included slot machines and house-banked casino games, as are known today in Indian Country.⁵⁸

Congress was under considerable pressure from several states to prohibit tribal-based gambling. In reaction to Indian gaming, state governments took the position that state law should have jurisdiction on Indian lands within the state. The state governments expressed that attitude in the form of litigation against the tribes and their sovereignty.⁵⁹ These states argued, among other positions, that tribal gaming enterprises would become infiltrated by organized crime. A balance was needed between the states’ concerns and the tribes’ interests in using gaming to promote economic development on their reservations.⁶⁰

56. *See id.*

57. *See id.* at 4 (“In 1979, the Seminole Tribe in Florida won the right to offer high stakes bingo.”)

58. *See* INDIAN GAMING AND THE LAW, *supra* note 54, at 4 (“For the small number of tribes operating high stakes games, bingo, in 1988, brought in over 110 million in gross win.”); *see also* S. Rpt. No. 99-493, 99th Cong. 2d Sess., Sept. 26, 1986, to accompany H.R. 1920 at 30-31.

59. *See The Economics of Indian Gaming*, NAT’L INDIAN GAMING ASS’N, http://www.indiangaming.org/info/pr/press-releases-2009/NIGA_08_Econ_Impact_Report.pdf.

Today, Indian gaming is a visible exercise of the sovereign authority of tribes. Tribal Sovereignty existed long before the first Europeans made landfall on what subsequently became known as America. Indian nations were actively governing their own citizens when the 13 colonies began organizing what would become the United States. The U.S. Constitution acknowledges Tribal Sovereignty in both the treaty and the Indian commerce clauses. Signed in 1778, the first United States treaty with an Indian nation affirmed the right of Tribal self-governance.

Id.

60. *See generally* Prygoski, *supra* note 41 and the accompanying text.

The Indian Commerce Clause (Article I, 8, clause 3) is the main source of federal power over Indian tribes and has been the primary vehicle used by Congress to recognize and define tribal sovereignty. In addition, the Court has ruled that Congress, as the legislative body of the nation, has an intrinsic power to deal with the Indian nations that reside within the borders of the United States.

Presidential power over the Indian tribes is centered on the ability to enter into treaties, a power that was used in the early years of federal Indian law to secure tribal acquiescence to the demands of the encroaching waves of European settlers. (In 1871, Congress passed legislation that ended the practice of the United States entering into treaties with Indian tribes.)

Prygoski, *supra* note 41.

There was a disagreement among the circuits as to the imposition of state law on gaming on Indian reservations.⁶¹ The Ninth Circuit agreed with the tribes that Indian sovereignty allowed such gaming on Indian lands.⁶² The Sixth Circuit did not.⁶³ Litigation on the subject, *California et al. v. Cabazon Band of Mission Indians et Al.*, was underway when the Congressional debate on the establishment of a federal structure for Indian gaming began in the Ninety-Eighth Congress in 1983.⁶⁴

B. The States with Commercial Casinos

Both Nevada and New Jersey started gambling operations pursuant to an enacted gaming regulatory law with comprehensive and expensive controls based on a two-tiered regulatory structure with prosecutorial, judicial and quasi-legislative functions.⁶⁵ With these states as examples, other states wanted to enjoy state proceeds from gambling. Eventually, more states legalized commercial gaming using a similar comprehensive regulatory scheme as deemed effective in Nevada and New Jersey.⁶⁶ The reasoning behind this considerable regulatory effort was that since the commodity of gambling is large amounts of cash, steadfast gaming regulation was required.⁶⁷

61. See *California v. Cabazon*, 480 U.S. 202 (1987); see also *United States v. Dakota*, 796 F.2d 186 (6th Cir.1986). "In Dakota, the United States sought a declaratory judgment that a gambling business, also featuring the playing of blackjack, poker, and dice, operated by two members of the Keweenaw Bay Indian Community on land controlled by the community, and under a license issued by the community, violated the [Organized Crime Control Act] OCCA. The Court of Appeals held that the gambling business violated Michigan law and OCCA." *Cabazon*, 480 U.S. at 202

62. See *Cabazon v. California*, 783 F.2d 900 (9th Cir.1986).

63. See *id.*

64. See S. Rep. No. 100-446, at 3 (1988), available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/Senate%20Rept%20100-466.pdf>.

65. See N.J. STAT. ANN. § 5:12-1; see also NEV. REV. STAT. Chapters 462-66; see also NEV. REV. STAT. § 463.140 (1959).

66. An example of "comprehensive" gaming regulation is that, immediately after passage, New Jersey's Casino Control Act required almost a thousand state regulators in two different agencies, a regulator presence on the gaming floor whenever the casino was opened, and employees in any position in a casino hotel, even one as far removed from the casino floor as a dishwasher, had to have a gaming credential which meant no convictions related to theft nor "moral turpitude. All this regulated 12 casinos in one small town. Subsequently, these restrictions were eased.

67. See S. Rpt. No. 99-493, 99th Cong. 2d Sess., Sept. 26, 1986, to accompany H.R. 1920, Minority Views, 32; see also Reid, Harry, *The Indian Gaming Act and the Political Process*. Also see Dunstan, Roger, *Gambling in California*, January 1997, XI. Gambling and Crime, CRB-97-003, available at <http://www.library.ca.gov/crb/97/03/Chapt11.html>.

The availability of cash, even in the best regulated jurisdictions, can and sometimes will erupt into corruption and crime.

For the most part, the regulatory structure in legal state jurisdictions, established as part of the state's law enforcement agencies that could and would function as legal and operational law enforcement, was expected to change as the environment of gaming changed.⁶⁸ Since the initial adoption of a regulatory scheme, in virtually every legislative session since the enactment of the regulatory laws, the statutes in New Jersey and Nevada have been amended to address issues that arose in the ordinary course of business and, most importantly, to respond to emerging technology and market conditions.⁶⁹

The states' interests in commercial gaming, then dominated by Nevada and New Jersey as the only legal jurisdictions, understood that the outcome of the pending *Cabazon* litigation might cause what they considered an unfair advantage for Native Americans. Unless federal law provided otherwise, gambling operations that took place on Indian land might avoid state tax. Because commercial casinos had significant state taxes to pay for their right to operate in a state, commercial casino interests saw Indian gambling⁷⁰ without a state tax as unfair competition to their own operations.⁷¹

68. See 25 U.S.C.A. § 2706 (2006) (noting original language of IGRA). The original language of IGRA, as enacted, recognized this need for ongoing revision. The IGRA, 25 U.S.C. § 2706(c) required a report with minority views to be filed every two years that included recommendations for amendments to the Act. See 15 U.S.C.A. § 2051 (1972) (explaining how provision was excluded from IGRA in 1995 by Termination of Reporting Requirements Act as provided by § 239(a) of such Act). The provision states:

a) Termination. (1) In general [*Caution: See notes to this section for provisions to which this paragraph does not apply.*]. Subject to the provisions of paragraph (2) of this subsection and subsection (d), each provision of law requiring the submittal to Congress (or any committee of the Congress) of any annual, semiannual, or other regular periodic report specified on the list described under subsection (c) shall cease to be effective, with respect to that requirement

Id.

69. In conversation with author, Daniel Henegan, Public Information Officer for New Jersey Casino Control Commission estimates that Casino Control Act, adopted in 1976 has been amended at least 37 times by fulltime New Jersey Legislature.

70. See Roger Dunstan, *Gambling in California*, January 1997, IV. Indian Gaming, CRB-97-003, available at <http://www.library.ca.gov/CRB/97/03/Chapt4.html>.

71. See James Quinn, *American's Gambling \$100 Billion in Casino's Like Rats in a Cage*, THE MARKET ORACLE, Oct. 11, 2009, <http://www.marketoracle.co.uk/Article14128.html>.

IV. *CALIFORNIA ET AL. V. CABAZON BAND OF MISSION INDIANS ET AL*

In *Cabazon*, two Indian Tribes in California were conducting reservation bingo games and poker and other card games that were open to the public. California and local government sought to apply statutes governing the operation of bingo games and the playing of draw poker and other card games to the tribal operation. The Tribes filed an action for declaratory relief in Federal District Court, which entered summary judgment for the Tribes, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed. California filed an appeal. Both proponents and opponents of Indian gaming felt pressure to resolve their differences and develop a federal Indian gaming plan before the Supreme Court imposed one as the result of the pending litigation. Nonetheless, the legislative stand-off was preventing a statutory solution.

The long-awaited Supreme Court *Cabazon* decision was handed down on February 25, 1987.⁷² The Supreme Court held that unless state law concerning gaming was prohibitory and criminal, not merely regulatory and civil, state law did not preclude gaming on Indian reservations. Therefore, Indian reservations were governed by sovereign Indian law except for criminal state and federal law. The Court stated: "to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted since the asserted state interest is not sufficient to escape the pre-emptive force of the federal and tribal interests apparent in this case."⁷³ The *Cabazon* decision limited state control over Indian land. Unless state law prohibited an activity entirely as criminal, rather than merely regulating it, state law had no jurisdiction on Indian reservations.⁷⁴ After *Cabazon*, if Utah, for example, prohibited all types of gambling, even church bingo, it was clear that no type of gambling could take place on Indian land in Utah. However, if California allowed charity bingo gambling within the state to take place under regulated circumstances, any Indian tribe in California could operate bingo on its Indian reservation regulated by tribal law.

72. *Cabazon v. California*, 783 F.2d 900 (9th Cir.1986).

73. *Id.* at 214-22.

74. *See id.* (explaining application of IGRA). The provisions of IGRA that require a tribal/state compact for Class III gambling establish the voluntary agreement of the tribe to the application of certain state law. *Id.*

V. THE COMPROMISE

Congress adopted the IGRA, (P.L. 100-497), on Oct. 17, 1988.⁷⁵ The credit, or the blame depending on your point of view, for the enacted IGRA, has been given to Senator Daniel K. Inouye (D. Hawaii), Daniel J. Evans (R. Washington), Morris Udall (D. Arizona), and Harry Reid (D. Nevada).⁷⁶ The Act compartmentalizes different forms of gamble based on a belief that certain forms of gambling presented a greater danger to society than others.⁷⁷ Indian gambling was divided into Classes, I, II, and III. The idea was to fit every category of gambling squarely within Class I or Class II, or in the residual class, Class III.

75. Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2475 (1988).

76. See INDIAN GAMING AND THE LAW, *supra* note 54 at 7, 17, 23.

77. See 25 U.S.C. § 2703. The definitions provides in pertinent part;

(6) The term "CLASS I GAMING" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "CLASS II GAMING" means -

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that -

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "CLASS II GAMING" does not include

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

...

(8) The term "CLASS III GAMING" means all forms of gaming that are not Class I gaming or Class II gaming.

(9) The term "NET REVENUES" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

25 U.S.C. § 2703.

Class I gaming is defined as social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations that are not subject to IGRA.⁷⁸ This Class I definition and the provision in 25 U.S.C. 2710 (a)(1) that leaves this type of gambling within the exclusive jurisdictions of the tribes has proved to be the easiest of the categories to administrate since there has not been any significant controversy as to what activities are in Class I, nor what constitutes “minimum value.” There are no proposals herein to change Class I gambling or the tribes’ exclusive jurisdiction of that type of gambling.

The Class II definition and the language of 25 U.S.C. § 2710 (a)(2) provide that this class of gaming is still under tribal jurisdiction but subject to the provisions of the IGRA meaning that the NIGC has responsibility for the enforcement of the provisions of the IGRA that apply to Class II gambling. The IGRA definition attempts to provide both what Class II gaming is and what Class II gaming is not.

The affirmative requirements describe the game commonly known at bingo in 1988 and even provides for the possible use of technological aids for the playing of bingo. Section (111) of the IGRA Class II definition muddies the water by naming other games allowed if played in the same location as bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo and other “games similar to bingo.”⁷⁹ The IGRA also allows certain card games in the Class II category if approved in the state, if played according to state laws and regulations.⁸⁰

The main feature of Class II Indian gaming is that it requires no state approval for gaming, no compact, and no sharing of gaming revenue with any state government. The tribe must adopt a tribal gaming ordinance that approved by the Chairman of the NIGC.⁸¹ The negative provisions of the ordinance resemble grandfathering provisions, establishing that traditional casino games banked by the house, electronic, or electromechanical fac-

78. See 25 U.S.C. § 2710(b)(2) (1988).

79. See 25 U.S.C. § 2710(b)(2) (1988).

80. These are non-banked card games (such as poker and other card games in which players bet against each other rather than against the house) and the dealer (the “house”) is not a player but collects a vigorish (a “vig”) or percentage of play from the players for providing the location, table and dealer.

81. See 25 U.S.C. § 2710(b)(2) (1988) (asserting that chairman shall make determinations for approving tribal ordinances for Class II gaming).

similes of any game of chance, or slot machines of any kind are not Class II gaming.⁸²

Legal Class III gambling is different. The tribe and the state must negotiate a compact concerning the nature and extent of the Class III gaming the tribe intends to conduct, and the manner in which that gaming will be regulated. The compact must be approved by the Secretary of the Interior through the Gaming Office of the Bureau of Indian Affairs.

The IGRA imposes upon states a duty to negotiate in good faith with Indian tribes to form Class III gaming compacts. The Act originally contained a provision allowing tribes to sue noncompliant states in federal court to force good faith negotiations. In 1996 The U.S. Supreme Court, however, struck down that provision in the case of *Seminole Tribe of Florida v. Florida*.⁸³ This case found that Congress did not have the authority, in regards to compact negotiations to allow tribes to sue states in federal court without the states' consent. Currently, if states do not negotiate in good faith, tribes may resort to other remedies, including petitioning the Secretary of the Interior to approve the tribes' Class III gaming activities.⁸⁴

As adopted, IGRA allows tribes to engage in gambling operations in Indian lands so long as the lands were acquired in trust by the Secretary of the Interior for the tribe before October 17, 1988, the date of the Act's enactment.⁸⁵ However, it imposes restrictions

82. See 25 U.S.C. § 2703(7)(C)-(F) (stating specific provisions excluding certain states and time periods from regulation based on their prior history of gaming in this area); 25 U.S.C. § 2703(7)(B)(i) (excluding banking card games for definition of Class II gaming); 25 U.S.C. § 2703(7)(ii) (providing Class II gaming can allow card games "explicitly authorized" under state law).

83. 517 U.S. 44, 47 (1996) (holding congress cannot abrogate state's immunity from suit unless state consents to be sued, this power is not within Indian Commerce Clause of the Constitution). See U.S. Const., Art. I, § 8, cl. 3 (stating Indian commerce clause).

84. See § 2710 (d)(7)(B) (authorizing cause of action if states do not negotiate in good faith 180 days after attempting such negotiation).

85. See 25 U.S.C. § 2702 (1988) (noting declaration of Policy). Only federally recognized tribes have the right to operate casinos and to conduct other gaming activities under the IGRA. See *id.* Indian groups that are not officially recognized by the United States government do not have rights under the IGRA, nor do individual Indians. See *id.*

(5) The term "INDIAN TRIBE" means any Indian tribe, band, nation, or other organized group or community of Indians which —

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government. (emphasis added).

on two of the most important aspects of gambling. First, the form of the gambling, and second the usage of proceeds.⁸⁶ IGRA also provides for regulatory authority at various levels of scrutiny. Three different government sovereigns are responsible for this review depending on the type of gaming. They are: the tribal government independently, tribal government with federal oversight, and tribal government in conjunction with state government through tribal compact. The resulting state regulation varies depending on the specific agencies that each state brings to its compact negotiations. In limited situations, legislators even require input from local government and neighboring tribal governments.⁸⁷ In addition, federal agencies are involved with Indian gaming oversight.⁸⁸

A. You Don't Want to Watch Sausage or Legislation Being Made

Senator Harry Reid of Nevada, a legislator who was opposed to the Indian gaming by his own admission, authored a controversial provision of the bill that requires compacts to operate Class III casino gaming on Indian land.⁸⁹ Senator Reid, when discussing which attributes of IGRA were vital to passage the statute, referred to the categorizing of different types of gambling into classes as a straight forward, uncomplicated effort. He said:

There were two basic questions: how should different types of gaming operations be categorized or classified,

25 U.S.C. § 2703; *see also* 25 U.S.C. §2719(a) (discussing limitation and exceptions to Indian land being used for gaming). For a further discussion of the condition under which Indian land can be used for gaming, *see supra* note 3 and accompanying text.

86. *See* § 2710(b)(2)(B) (establishing how IGRA restricts purposes for which gambling proceeds may be used). The revenues generated by Indian gambling enterprises must be used only for purposes designated in the IGRA. *See id.* (noting restrictions on purpose of gambling). They can fund tribal government operations, provide for the general welfare of the tribe, promote tribal economic development, make donations to charitable organizations and to fund the operations of local government. *See id.* (stating allowed use of revenue).

87. *See* 25 U.S.C. § 2718(b) (1997) (providing exceptions to general provision in section (a) that prohibits gambling on Indian Lands acquired after date of passage of IGRA, October 17, 1988).

88. *See* 25 U.S.C. § 2713(a)(1) (1988) (noting IGRA placing authority to enforce provisions of IGRA in National Indian Gaming Commission (NIGC)). The NIGC is an independent agency in the Department of the Interior. *See* § 2710(b)(2)(B), (b)(3) (providing IGRA exception to approved purposes of gambling proceeds for per capita distributions to tribal members if distribution takes place pursuant to evaluated distribution plan that has been approved by Office of Gaming, Bureau of Indian Affairs, (BIA)).

89. *See* H.R. Rep. No. 99-488, *infra* note 92 at 18 (quoting Harry Reid speaking at North American Conference on Status of Indian Gaming held at University of Nevada, Reno, in 1997); *see also* Reid, *supra* note 67.

and what is the appropriate level of regulation for each class? Some discussions were relatively simple. Traditional Indian games of chance were to be left to the sole control of the Indian government. Also, bingo, with which Indian gaming operators have had years of experience, was to be left primarily in Indian hands as well with some federal oversight.

Other decisions were certainly more complicated It was understood that the *Cabazon* decision dealt directly with poker games on Indian lands, so percentage card games were included in Class II activities along with bingo. On the other hand it was generally agreed that casino style card games such as blackjack and baccarat, along with pari-mutuel betting and other casino style gambling including video and slot machines, should be subject to a tighter regulation required under Class III gaming operations.⁹⁰

As demonstrated by Senator Reid's comments, and common understanding, bingo is easy to categorize. Bingo did not need a complicated regulatory structure. The simple nature of the game and the experience many tribes had in operating bingo parlors lead to a generic understanding of bingo from childhood.⁹¹ There was little to no debate, however, about the elements of bingo, or the circumstances under which it was played, making it presumptively a more benign activity than other casino gaming.⁹² Presumably, there was a sufficiently common, and perhaps nostalgic, understanding of the difference between bingo and a slot machine. Legislators considered bingo as static; an easy element in the midst of the many difficult challenges to come in achieving a regulatory structure for Indian gaming. Slot machines, however, were only available in association with casinos, and were, thus, thought of as demanding higher regulatory vigilance as a more socially dangerous type of gambling.⁹³ In reality, because slot machines are the

90. Reid, *supra* note 67.

91. See Joseph L. Lester, *B-I-N-G-NO! The Legal Abuse of an Innocent Game*, 18 ST. THOMAS L. REV. 21, 25 (2005) (explaining evolving technology surrounding electronic bingo and how it has come to be dissimilar from traditional bingo).

92. See generally Indian Gaming Regulatory Act Pub. L. No. 100-497, 102 Stat. 2567 (1988) (regulating gaming on Indian land); Sen. Rep. No. 99-493 (1986) (Conf. Rep.) (describing Indian gaming regulation); H. R. Rep. No. 99-488 (1986) (Conf. Rep.); 134 Cong. Rec. 24016, 24016-37 (1988) (noting Indian gaming guidelines); 134 Cong. Rec. 25367-81 (1988) (discussing Indian gaming).

93. See NIGC, 25 C.F.R. § 502.4 (1993)

most lucrative form of gambling commercial gaming interests were concerned with protecting their exclusivity.

Despite all the reported conflicts and pressures on Congress from the various interest involved, the IGRA passed without debate on the Senate floor.⁹⁴ Professor Thompson described how IGRA came to pass without debate on the Senate floor:

[T]he making of the Indian Gaming Regulatory Act was typical of the worst kind of legislation. Most of the members of Congress were not involved in the process and they were quite happy not to be involved, either because the bill did not affect their state (or so they thought) or they sensed that conflict pressures coming from Indian interests, rival commercial gaming interests, state governments and law enforcement officials made it a no-win situation

Once on the Senate floor, the major portion of the bill — the major controversial provision — was added by an amendment without debate. That provision authored by Senator Harry Reid (D-Nevada) authorized the establishments of Indian tribe-state compacts for regulating Class III gaming on reservations. The senators, not wishing to burden their colleagues with dilemmas of decision-making, managed to maneuver the bill into a special status (by process of unanimous consent — therefore no expressed objection) whereby it could pass on a voice vote, a vote

Class III gaming means all forms of gaming that are not Class I gaming or Class II gaming, including but not limited to:

- (a) Any house banking game, including but not limited to —
 - (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
 - (2) Casino games such as roulette, craps, and keno;
- (b) Any slot machines as defined in 15 U.S.C. § 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance;
- (c) Any sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or
- (d) Lotteries.

Id.

94. See 134 Cong. Rec. 25369, 25376 (1988) (The SPEAKER pro tempore). The question is on the motion offered by the gentleman from Arizona [Mr. Udall] that the House suspend the rules and pass the Senate bill (S. 555) on which the yeas and nays are ordered. The vote was taken by electronic device, and there were — yeas 323, nays 84, not voting 24, as follows: So (two-thirds having voted in favor thereof) the rules were suspended, and the Senate bill was passed.

Id.

without individual senators having to go on the record

. . . .

Congress has given us the Act and now they talk about following its intent. There was no intent except to duck responsibility and produce something that looks like a decision. The law delegates and defers real decision-making; it is so vague and empty in parts that litigants, lawyers and judges will have little to guide them toward final resolutions of just what our national policy on Indian gaming should be

In the House of Representatives there were no committee hearings on the bill and it too received a non-recorded vote of passage. Final congressional action on the bill took place in the Senate just two hours before the 100th Congress ended.⁹⁵

VI. IGRA GIVES AND IGRA TAKES AWAY

In a report on the then pending IGRA bill, Senator Daniel K. Inouye, (D. Hawaii), wrote:

[T]he Committee intends in section 4(8XA)(i) that tribes have *maximum flexibility* to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict Class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide *maximum flexibility*. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their Class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games, participation between and among reservations can be made practical by use of computers and telecommunications technology. . . .⁹⁶

95. See INDIAN GAMING AND THE LAW, *supra* note 54.

96. S. Rep. No. 100-446, at 9 (1988) (emphasis added).

The language in the quote by Senator Inouye denoting “*maximum flexibility*” is an express rejection of restrictions on Class II games as it pertains to existing games. The sizes, levels of participation, current or future technology, the running of simultaneous games, and participation between and among Indian reservations, all encourage Indian gaming.

Bingo restrictions are mentioned in the same report. [A]s long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games. . . . In other words, such technology would merely broaden the potential participation levels and is *readily distinguishable* from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.⁹⁷

The drafters of the IGRA gave “technological aids” to Class II bingo and took away “facsimiles.” This was done ignorant of the fact that technology progressed to the point where an “aid” to bingo can be substantially the same as a facsimile of a slot machine. The term “readily distinguishable” in the legislative history as it applies to the difference between bingo and slot machines denotes that, when drafting of the IGRA, ordinary reasonable patrons could tell the difference between bingo machines and slot machines without the Ninth Circuit’s legal opinion.⁹⁸

A. Traditional Bingo

At the time of IGRA’s passage, bingo followed traditional game norms. Players played one game at a time, most often against numerous competing players, and were limited by the availability and size of rooms. Players used paper cards and sat at long tables. The game was to manually “cover” the numbers which were randomly chosen by a ball blower. The numbers were “called” until a winner covered all the numbers in a pre-established pattern on the card and declared “Bingo” to win.⁹⁹ Player involvement consisted of a

97. *Id.* (emphasis added).

98. *See* United States v. 103 Elec. Gambling Devices, 223 F.3d 1091, 1102 (9th Cir. 2000) (holding that whereas Johnson act forbids facsimiles of games of chance, “mere technological aids” to bingo do not qualify).

99. *See* Free Library, Types of Bingo Games, <http://www.thefreelibrary.com/Types+of+Bingo+Games-a01073778467> (last visited Mar. 31, 2010) (describing how bingo is played); *see also* I. Nelson Rose, *Bingo –without the B,I,N,G or O*, GAMBLING AND THE LAW, available at <http://www.gamblingandthelaw.com/bingo.html> (last visited April 9, 2010) (describing electronically aided bingo).

serious of actions, a pattern different than the way people conceptualize playing a slot machine.

No person could play bingo alone. The competition among the players was as an indispensable aspect of the game. For example, a winning pattern could lose its priority if the player “failed” to call bingo. The game was slow because multiple numbers had to be called before a winner was found and when bingo was called play was stopped so the win could be verified.

B. Traditional Slot Machines

Slot machines used to be stand alone boxes operated solely by the electro-mechanical components contained in the box. The player wagered and played against the gaming operator through the machine. A player competition was not necessary to play a slot machine. The only action required by a player was to feed money into the machine and pull or push an interface to activate the game. Play was over after one action and the player set the tempo of the game subject to restraints by the machine.

C. Current Bingo

In bingo facilities, paper cards have been traded for convenient electronic aids. These resemble up-right video screens that display bingo cards and other innovations and are called technological aids.¹⁰⁰ In other similar operations, the game of bingo is no longer recognizable in any traditional sense.¹⁰¹

The newest Class II electronic bingo games are programmed with mathematical calculations to mimic Class III slot machines.¹⁰² Industry sources claim that game winning patterns occur continu-

100. See, IGT.com, What makes Class III machines different from Class III slots?, <https://www.igt.com/Content/base.asp?pid=8.17.36.243> (last visited Mar. 31, 2010) (describing technological aids as they differentiate electronic bingo to resemble slot machine versus traditional bingo, this will differentiate from Class III standards allowing use in Class II gambling establishments).

101. See I. Nelson Rose, *Is it Bingo or a Slot Machine*, 7 GAMING L. REV. 2 (2003) available at <http://www.liebertonline.com/doi/abs/10.1089/109218803321629663?prevSearch=allfield%253A%2528%252C%2BI.%2BNelson%252C%2BIs%2Bit%2BBingo%2Bor%2Ba%2Bslot%2BMachine%252C%2B7%2BGaming%2BLaw%2BReview%2B2%2529&searchHistoryKey=>. (describing transformation of Bingo).

102. FRANK LEGATO, THE REEL DEAL: CLASS II: IS IT FAIR?, <http://www.casino player.com/archive/0602cp/reel.htm> (last visited Mar. 31, 2010) (discussing mathematically programmed bingo games which closely resemble slot machines); see Lester, *supra* note 91, at 31-32 (highlighting similarities between marketing factors of bingo-slots and regular slots, as well as similar additive nature of both machines, and concluding difference between Class II and Class III games is moot).

ously, about every twenty milliseconds. Anyone pushing the play button within that window is put in a game for a common ball draw. Every ball draw results in at least one winning bingo pattern. Players may complete a game with substantially less time and action than traditional bingo. Cover and calling a winning pattern can be automatic, without any direct player action. However, a few remnants of traditional bingo remain. There must be at least two players with no upper limit on the number of players.¹⁰³ The bingo slots, as an alternative to rolling pictures and symbols accompanied by music and noise, have the option to display a bingo card (although the slot machine-like graphics are much flashier and more appealing than a simple bingo card). The devices are manufactured and presented to players as bingo. They are classified as technological aids in Class II facilities, without a tribal-state compact.

Contained in supplementary information, published attendant to proposed regulation changes in 2007, then-Chairman Hogen of the NIGC described the circumstances:

Currently, the distinction between an electronic 'aid' to a Class II game and an 'electronic facsimile' of a game of chance, and therefore a Class III game, is often unclear. With advances in technology, the line between the two has blurred. When in IGRA, Congress defined 'the game of chance commonly known as bingo,' 25 U.S.C. 2703(7)(A), it could not have foreseen the technological changes that would affect all games of chance. Likewise, by allowing electronic aids to the game of bingo, Congress could not

103. See National Indian Gaming Commission, 25 C.F.R. § 502.7 (1992) (explaining when something is electronic computer or technological aid). This criterion is met when "[it] [i]s not a game of chance but merely assists a player or the playing of a game . . . [i]s readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and . . . [i]s operated according to applicable Federal communications law." *Id.*; see also National Indian Gaming Commission, 25 C.F.R. §502.8 (1992) (defining electronic or electromechanical facsimile).

Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine. *Id.*; see also National Indian Gaming Commission, 25 C.F.R. § 502.9 (1992).

Other games similar to bingo . . . game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

Id.

have foreseen that some vendors and gaming operators would be unable or unwilling to distinguish between Class II games, which tribes regulate, and Class III facsimiles, which require compacts between tribes and states. The Commission is concerned that the industry is dangerously close to obscuring the line between Class II and Class III. It believes that the future success of Indian gaming under IGRA depends upon tribes, states, and manufacturers being able to recognize when games fall within the ambit of tribal-state compacts and when they do not.¹⁰⁴

However clearly the NIGC understands the challenges presented by IGRA, the agency is bound to implement its less than clear provisions. Despite efforts by the NIGC to maintain the original but hapless statutory integrity in the segregation of gaming classes, enforcement litigation, and attempted regulatory amendment; increasingly complex legal analysis has not resolved ongoing conflicts. In testimony before the House Natural Resources Committee, Chairman Hogen discussed NIGC enforcement against the proliferation of what the agency considers un-compacted and therefore, illegal, Class III games:

I realized that the effort was unsuccessful. . . . By its nature, the enforcement actions were brought against a particular tribe for playing particular un-compacted Class III games. *I discovered that after all of the litigation was said and done, as soon as NIGC succeeded in demonstrating that a particular machine was in fact a Class III gambling machine, a machine with similar operating characteristics but a different name and cosmetic appearance would show up, and we would have to begin all over again with expensive and time consuming litigation. This employed lawyers, but it didn't help the tribes . . .*

Class II was the basis on which Indian gaming was built. Although an estimated 90% of this gross gaming revenue is generated by compacted Class III gaming, Class II remains significant to tribes throughout the country. . . .

Tribes play Class II games for a variety of reasons. For some tribes with Class III gaming compacts, Class II is a vital supplement, long enjoyed and preferred by some clientele. In other cases, some states refuse to compact with their tribes for Class III play, even though they allow Class

104. National Indian Gaming Commission, 72 Fed. Reg. 60483-01 (proposed Oct. 24 2007) (to be codified at 25 C.F.R. §§ 502-46).

III gaming activities elsewhere within those states or tolerate wide-spread illegal Class III activities in non-Indian Class II games gaming facilities. Tribes in that situation are left to make the most of Class II gaming. . . .

When the equipment automatically, electronically automates the play of the game and the players' participation in the game, the Commission believes that the play is no longer "outside" the equipment and that the electronic equipment can no longer be characterized as merely an aid. All player attention, discretion, and interface have been automated by the equipment.¹⁰⁵

VII. ONE EXAMPLE: METLAKATLA

The Metlakatla Indian Community in remote southeastern Alaska operates a small Class II gaming facility which is a source of revenue and jobs for the Community.¹⁰⁶ Ferry or airplane is the only way to access the Community of 1,469 persons. Unemployment ranges from fifty to eighty percent, higher than neighboring communities due to dependence on seasonal industries such as lumber and fishing.¹⁰⁷ Revenue from the Class II gaming operation funds essential tribal services. The State of Alaska and the tribe have not been able to negotiate a Class III tribal/state compact.¹⁰⁸

In spring of 2008, the Metlakatla Tribal Council believed an auto-cover feature, which automatically performs the action of covering the called-number in an electronic bingo game, qualified as a Class II bingo game. They also believed that linking their games to other Indian gaming locations would generate more income, create more jobs, and fund more essential tribal services. Consequently, they passed a resolution amending its previously approved gaming

105. Committee on House Natural Resources (2008), Statement of Philip N. Hogen, Chairman National Indian Gaming Commission, *available at* 2008 WL 467829 (emphasis added).

106. *See* In Re: Amendment to Metlakatla Indian Community's Gaming Ordinance, 1, *available at* <http://www.hobbsstrauss.com/uploads/file/Metlakatla.NIGC.Appeal.Brief.pdf> (describing Metlakatla Indians) [hereinafter Metlakatla Brief].

107. *See* U.S. Department of Agriculture Information on the Metlakatla Community, <http://www.rurdev.usda.gov/rbs/ezec/communit/metlakatla.html> (last visited Mar. 31, 2010) (discussing Metlakatla Indians); Jerry Reynolds, *Metlakatla Decision Still Haunts NIGC Chairman*, INDIAN COUNTRY TODAY, Jan. 12, 2010, <http://www.indiancountrytoday.com/politics/27096599.html> (describing Chairman Phil Hogen's comments as Chairman of National Indian Gaming Commission).

108. *See* Metlakatla Brief, *supra* note 106, at 1 (describing importance of gaming to sustainability of tribe).

ordinance, Resolution No. 08-24, to allow an automatic number-cover, called a “dab feature,” when a number comes up.¹⁰⁹

A submission was made to the NIGC for an amendment. Chairman Hogen denied the approval, declaring that the proposed amendment would create a “wholly electronic, fully automated game.”¹¹⁰ If this language is true, then this is not bingo under IGRA. Nor is it a “games similar to bingo.”¹¹¹ Therefore, it cannot operate without a compact. The Community appealed to the full Commission, but subsequently withdrew this appeal.¹¹²

Although the brief artfully avoids the issue, the underlying difficulty with the amendment was that all the game activity occurred with a single touch of a single button by the player. The device electronically determined the numbers, auto-dabbed the numbers and announced the game results. NIGC classification regulations proposed in 2007 that this one-touch characteristic be determinative when distinguishing between slot-machines and bingo-machines. Given the negative reception generated by the proposed standards, this simple “bright-line” classification was withdrawn.¹¹³ In the Metlakatla case, the NIGC’s efforts to draw a line between definitions of what constitutes bingo or a slot machine is equitable to Don Quixote’s battle with the windmills. The nature of IGRA itself has defeated the tribe before they even attempted to amend their gaming ordinance.¹¹⁴

109. *See id.* at 2 (passing resolution to clarify term “auto-dub,” feature designed to track player’s electronic bingo card).

110. *Id.* at 13.

111. *Id.* (quoting 25 C.F.R. § 502.8).

112. *See* National Indian Gaming Commission, *NGIC Announces Metlakatla Withdrawal*, <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleases-Main/PR98082008/tabid/876/Default.aspx> (last visited Mar. 31, 2010) (announcing withdrawal of gaming appeal noting commission plans to conduct cost benefit study on issues herein).

113. *See* National Indian Gaming Commission, *NIGC Sets Aside Class II Classification, Definition Regulations*, <http://www.nigc.gov/ReadingRoom/PressReleases/PR92062008/tabid/839/Default.aspx> (last visited Mar. 31, 2010) (announcing withdrawal of proposed regulations).

114. *See* Committee on House Natural Resources, *supra* note 105.

Class III slot machines earn more than Class II games do industry-wide. In Oklahoma, the economic impact study finds that Class III games, on average, earn \$145 per day and Class II games \$125. That \$20-a-day difference is significant. Our own calculations show that a tribe that converts 20% of its Class II games to Class III games each year for the next five years will be millions of dollars ahead, even counting the retail cost of new equipment and additional revenue sharing with the State.

Id.

VIII. PROPOSED REVISIONS TO IGRA

I suggest IGRA should be amended to put into action the following policies:

First, the attempt to maintain that bingo and slot machines are different should be abandoned. It is not possible to police such a requirement. Technology has all but erased any tangible difference and it is waste of resources and a burden on the judicial economy to continue to attempt to implement the existing requirement.

Second, because Class II casinos do not require tribes to pay state governments, so long as they acquiesce to some federal oversight, the current Class II classification should be maintained.

Third, the difference between a Class II casino and a Class III casino should be based on the financial size of the gaming operation. The NIGC already uses a financial tier system to assess fees. This same criterion could be used to distinguish between Class II and Class III operations.¹¹⁵

Fourth, there should be a presumption of eligibility for self-regulation.¹¹⁶ Any Class II casino in operation for three years without a major regulatory violation is a category already available in IGRA. This would result in a larger Class II category than there presently exists. The only difference is a portion would be self-regulating. A new un-compacted casino would receive federal oversight for three years and then, a rebuttable presumption of the capability for self regulation should arise absent a major violation.¹¹⁷

Fifth, when deciding if in this three year probationary period there has been a major regulatory breach only material violation should be considered. By material, I mean all violations except for violations regarding the timeliness of filing.

Sixth, state regulation should be harmonized by providing a minimum standard. Further, approval of tribal-state gaming compacts should be the responsibility of the NIGC, not the Department of the Interior.

115. See National Indian Gaming Commission 25 C.F.R. § 514.1 (discussing how NIGC already uses financial based system to categorize casinos into tiers 1-3 for purpose of assessing fees).

116. See Grand Ronde Gaming Commission, <http://www.grandrondegaming.org/achievements.html> (last visited Mar. 31, 2010) (announcing that after 21 years of IGRA Grand Ronde in Oregon, which operates Class II facility, received "self-regulation" status).

117. See National Indian Gaming Commission, 25 C.F.R. § 518.1 (1998) (describing who may petition for self regulation).

Finally, the Johnson Act should be amended to allow gaming devices at Class II casinos.

IX. CONCLUSION

The legislative history supports advanced technology in electronic bingo and condemns the “readily distinguishable standard.” The difference between a slot machine and electronic bingo devices is not in any practical sense “readily distinguishable.” Moreover, neither state nor federal officials have been successful in preventing slot-like electronic bingo devices from operating in the absence of a tribal-state compact.¹¹⁸

A system of classifying Indian casino gaming which better maintains the balance of power between federal, tribal and, state authorities must be developed. The majority of tribes have only seen moderate or little economic development under IGRA. For these tribes, the structure of Class II gaming must be maintained. The current definition of Class II gaming, however, should not. Indian gaming has grown into an annual \$26.7 billion dollar business.¹¹⁹ Although the vast majority of this gross gaming revenue is a result of compacted Class III gaming, Class II gaming still has an important role to play.¹²⁰ The ability to operate un-compacted and newly-established games as quantitative Class II gaming may be the only hope for some tribes to benefit from gambling.

118. See National Governor’s Association, The Role of States, the Federal Government, and Indian Tribal Governments with Respect to Indian Gaming and Taxation Issues, <http://www.nga.org/portal/site/nga/menuitem.8358ec82f5b198d18a278110501010a0/?vgnnextoid=2caa9e2f1b091010VgnVCM1000001a01010aRCRD&vgnnextchannel=4b18f074f0d9ff00VgnVCM1000001a01010aRCRD> (last visited Mar. 31, 2005) (noting governors policy 6.2.4 asserting importance of state-tribal compacts and that congress should increase federal regulation to enforce these).

119. See Posting of Gabe Galanda to Northwest Indian Law and Business Advisor, <http://www.nwindianbusinesslawblog.com/articles/tribal-economic-development/>, Jun. 15, 2009 (analyzing growth in Indian gaming industry).

120. See Committee on House Natural Resources, *supra* note 105 (noting that diversity of option for tribes is beneficial, this is characteristic of Class II versus Class III option).

