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# A Comparative Analysis of Indian Gaming in the United States

WILLIAM V. ACKERMAN AND RICK L. BUNCH

The United States has witnessed a dramatic increase in legal gaming on Indian reservations since the 1987 landmark decision by the United States Supreme Court in *California v. Cabazon Band of Mission Indians*.[1] Currently there are 240 Indian tribes operating more than 400 casinos and bingo halls in 28 states. Total gaming revenues reached $26.7 billion in 2008.[2]

Following the *Cabazon* decision, various states and the Nevada gaming interests strongly encouraged Congress to take legislative action to limit and regulate Indian gaming. In 1988, after a major legislative battle between Indian tribes, states, and the non-Indian gaming industry, Congress passed the Indian Gaming Regulatory Act (IGRA). Since the passage of that legislation, Indian gaming has been carried out under the rules and regulations incorporated in the Federal Indian Gaming Regulatory Act.[3] Section 2701 sets out congressional findings regarding the need for the IGRA, in particular, the need for clear standards and regulations for the conduct of gaming on Indian lands and the promotion of tribal economic development, tribal self-sufficiency, and strong tribal government. Section 2701(5) provides tribes with "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." The IGRA requires Indian tribes to negotiate tribal-state compacts with the state in which they are located to govern the conduct of Class III gaming (section 2710[d]).

Previous research on Indian gaming in South Dakota discovered very restrictive and unfavorable tribal-state compacts that appear to border

on economic racism.[4] This article expands this previous research by exploring the influence of tribal-state Indian gaming compacts for the Indian casinos located in the contiguous United States. The purpose is to describe the current state of the Indian gaming industry. For the states that have Class III Indian gaming we document the number of casinos, numbers of gaming devices, and gaming revenues. We also provide an in-depth analysis of common practices in compact negotiation and how tribal-state compacts vary geographically. States are ranked based on the degree of control that they attempt to exercise over sovereign Native American tribes. Concern is raised over the growing interest by certain states to require greater revenue sharing from the tribes' gaming operations. We find that the IGRA does not fairly regulate Indian gaming and does not protect Native American sovereignty, and we suggest changes to provide a more equitable policy to deal with Native American gaming operations.

## THE GROWTH AND DIFFUSION OF INDIAN GAMING

In 1989 only Nevada and Atlantic City allowed casino gambling. Following the *Cabazon* decision, Congress passed the IGRA in 1988, and by 1994 ten states allowed casino gaming and twenty-five others had some form of tribal gaming.[5] Revenues from tribal gaming have demonstrated continuous increase. In 1988 tribal gaming generated $121 million. By 1998 this figure had increased to $8.5 billion and has increased continuously since to reach $26.7 billion in 2008 (fig. 1). These data have been compiled from gaming operation audited financial statements received by the National Indian Gaming Commission through May 11, 2009, and adjusted to reflect final annual revenues published in the *Indian Gaming Industry Report: 2009–2010*.[6] In 2008 there were estimated to be more than 440 Indian casino operations in 28 states. Twenty-four of these states operate Class III gaming and are the subject of this research.

## THE LOCATION AND ECONOMIC IMPACT OF INDIAN GAMING

Prior to *California v. Cabazon* the United States witnessed an increase in gaming, especially high-stakes bingo operations on Indian reservations. This increased activity began to attract the attention of the states and led to attempts to prohibit or control Indian gaming. The Semi-

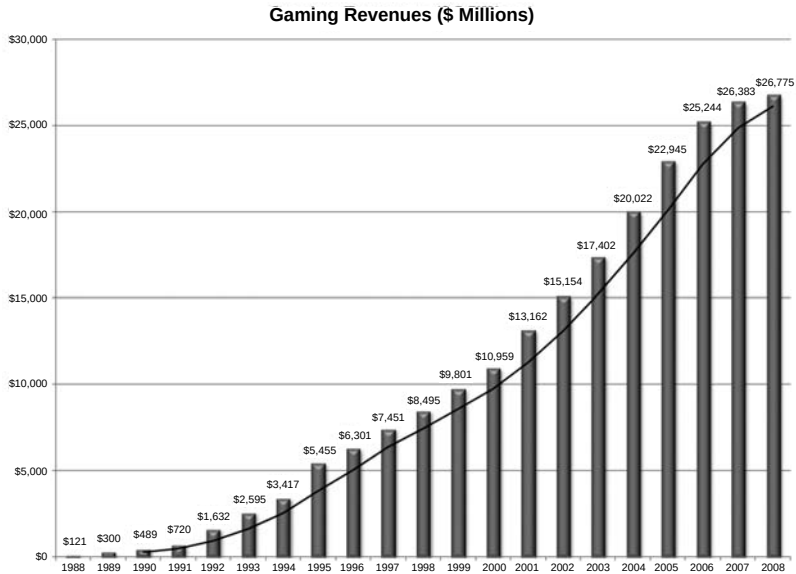



Fig. 1. Data compiled from the National Indian Gaming Commission through May 11, 2009. Data are adjusted to reflect final annual revenues published in Alan Meister, *Indian Gaming Industry Report: 2009–2010*.

nole Tribe in Florida and the Oneida Tribe in Wisconsin sought to open high-stakes bingo operations on their reservations. The states of Florida and Wisconsin attempted to block such activity on the basis that applicable laws in those states imposed limitations on the size of jackpots and the frequency of bingo games. The tribes argued that as sovereign nations they were not bound by such limitations and claimed that they could operate bingo games and regulate them under tribal law, deciding for themselves the dollar amount of prizes and how often games could be played.[7] Both suits ended up in federal court, and in both cases the tribes won.[8] The rulings in both cases hinged on whether the state's laws concerning gaming were criminal laws that prohibited gaming or civil laws that regulated gaming. Under Public Law 280, if the laws were criminal-prohibitory, they could be applied to activities on Indian reservations, but if they were civil-regulatory, they could not.[9] The courts ruled that because the states allowed bingo games in some form, the laws were civil-regulatory and thus did not apply to gaming operations on Indian reservations.

Concern over Indian gaming had been building in Congress during

the 1980s. In 1983 Arizona representatives Morris Udall and John McCain introduced a bill in the House of Representatives, H.R. 4566, with the intention of providing more federal oversight of gaming in Indian Country.[10] Hearings on Indian gaming began in 1984, and in 1986 a version of the current Indian Gaming Regulatory Act was proposed in Congress but not passed. After many hearings on Indian gaming, the conflict between tribal and state rights was made evident. The state's arguments against Indian gaming were based primarily on issues of organized crime, the loss of state revenue, and the belief that the federal government and the tribes could not effectively regulate gaming. Representative Bill Richardson of New Mexico argued in favor of state's rights. He suggested that his preference "would place all class III operations or high-stakes gambling under State control, with bingo supervised by the Federal Commission."[11] In sharp contrast, Representative John McCain emphasized the *Seminole Tribe v. Florida* case and the Supreme Court's decision to uphold the government-to-government relationship between the Native tribes of this country and the federal government, which inherently excludes state regulation of gaming on tribal lands. With respect to the state's argument for control of Indian gaming, McCain states:

> Traditionally, states and Indian tribes have been adversaries, as our committee hearings clearly demonstrated. State witnesses wanted state jurisdiction, regulations, enforcement, and taxation. However, no state witness testified that the state had a responsibility to Indian tribes for their health, welfare, or economic development.[12]

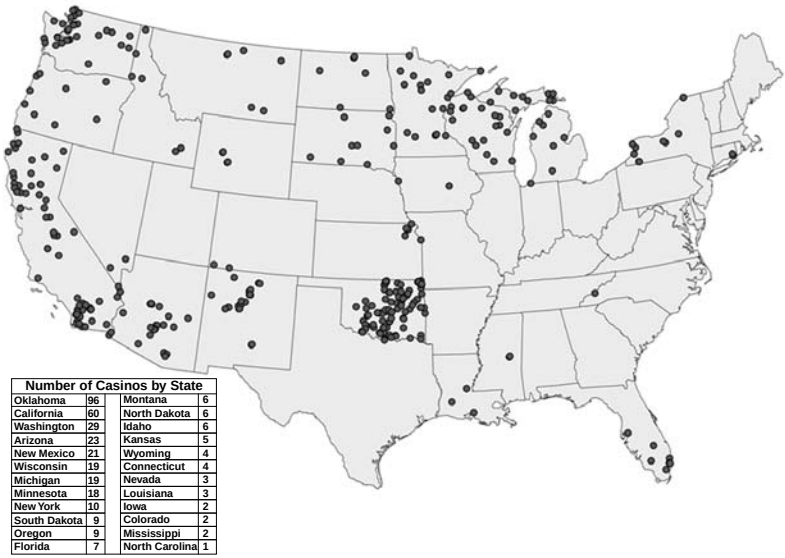
The *Cabazon* decision in 1987 was the catalyst for Congress to move quickly to pass legislation to provide oversight for Indian gaming and led to an immediate demand from the states and the Nevada gaming interests for Congress to take steps to limit and regulate Indian gaming.[13] At the time of the *Cabazon* decision in 1987, only five states prohibited all forms of gaming. In 1988 more than one hundred Indian tribes across the United States were operating bingo parlors with estimated total annual revenues of more than $100 million.[14] The *Cabazon* decision gave Indian tribes the right under federal law to operate gambling operations on their reservations without state regulation in states where such gambling was legal for any purpose. It should not be surprising that, given the financial success of bingo, several tribes were anxious to open full-

fledged casinos. Congress at that time was generally favorable to the expansion of Indian gaming as a means to help provide Native Americans with a source of income to improve the deplorable economic and social conditions on reservations where median family incomes were two and a half times below the national average and poverty rates were more than four times higher than the national average.[15]

When the IGRA legislation came up for discussion and debate in the Senate committee, the members actually proceeded to take a vote to recommend passage before the printed bill could be placed in front of them. On the floor of the Senate the major portion of the bill, the controversial portion that authorized the establishment of tribal-state compacts for regulation of Class III gaming, was added by amendment without debate. The bill was then maneuvered into a special status by process of unanimous consent whereby it could pass on a voice vote, a vote without individual senators having to go on record. In the House of Representatives there were no committee hearings on the bill, and it was passed by a nonrecorded voice vote. Final congressional action on the bill took place in the Senate just two hours before the 100th Congress adjourned.[16]

In spite of attempts by non-Indian gaming interests to limit competition from Native Americans and in spite of the tribal-state compact requirement, the passage of the IGRA quickly led to the development of large-scale, widespread casino gaming on Indian reservations. As of 2008 estimated Indian gaming and its ancillary operations generated 712,000 jobs, $27 billion in wages, $10.8 billion in federal, state, and local taxes, and $1.6 billion in direct payments to federal, state, and local governments. More importantly, nearly 70 percent of all tribes involved in gaming operations have devoted all of their revenue to tribal government services, economic and community development, neighboring communities, and charitable purposes. Just slightly over 30 percent of tribes distribute any per-capita payments to tribal members.[17]

Today Native Americans operate approximately 362 Class III gaming facilities in 24 states (fig. 2). The geographic distribution of these casinos is well represented in figure 2, and the pattern clearly favors the western and central United States. Significant concentrations of casinos are found in Oklahoma with ninety-six, followed by California with sixty, Washington with twenty-nine, Arizona with twenty-three, and New Mexico with twenty-one. The upper Midwest is also well represented



| Number of Casinos by State | | | |
|---|---|---|---|
| Oklahoma | 96 | Montana | 6 |
| California | 60 | North Dakota | 6 |
| Washington | 29 | Idaho | 6 |
| Arizona | 23 | Kansas | 5 |
| New Mexico | 21 | Wyoming | 4 |
| Wisconsin | 19 | Connecticut | 4 |
| Michigan | 19 | Nevada | 3 |
| Minnesota | 18 | Louisiana | 3 |
| New York | 10 | Iowa | 2 |
| South Dakota | 9 | Colorado | 2 |
| Oregon | 9 | Mississippi | 2 |
| Florida | 7 | North Carolina | 1 |

Fig. 2. Class III Indian casinos. Source: nationalatlas.gov, http://www.nationalatlas.gov/maplayers.html.

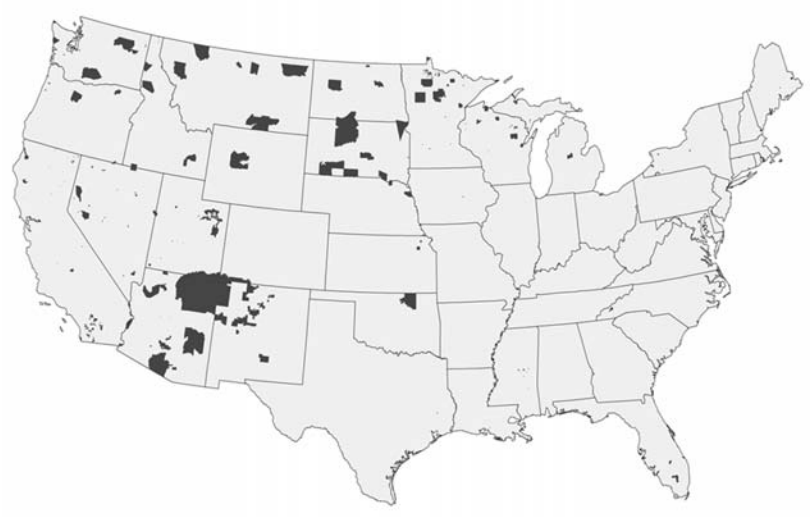


Fig. 3. Indian lands of the United States (includes only areas of 640 acres or greater). Source: nationalatlas.gov, http://www.nationalatlas.gov/maplayers.html.

by Michigan with nineteen casinos, Wisconsin with nineteen, and Minnesota with eighteen. The states of Oregon, Montana, North Dakota, South Dakota, Idaho, Wyoming, and Colorado have Indian gaming but with fewer casinos. The pattern is noticeably more sparse in the eastern United States, where only New York, Connecticut, North Carolina, Alabama, and Florida have Indian gaming.[18]

In evaluating this pattern, it should come as no surprise that there is a strong correlation between the states where Indian casinos are located and those that have Indian reservations (fig. 3). It is important to note that on figure 3 not all of the Indian lands are shown. Holdings of 640 acres or smaller are excluded from our map at the national scale. The occurrence of unmapped Indian lands is most apparent in states with several Indian casinos and little Indian lands (e.g., Oklahoma, Iowa, Connecticut, and to some extent California). Indian lands are concentrated in states west of the Mississippi River largely as the result of congressional action and the passage of the Indian Removal Act of 1830.[19] This act led to the forced relocation of thousands of Indian families from the Southeast to what is now Oklahoma. However, across the entire eastern United States the growth and expansion of the white population intensified demand for Indian lands in most areas. Through a process of invasion-succession driven by greed and racism and aided by Congress, white settlers were able to claim much of the fertile agricultural lands and resources of the relocated tribes.[20] This process, once set in motion, was difficult to stop. Basically, it came down to a situation where if any land occupied by Indians anywhere possessed resources valuable to whites, ways and means were found to remove the Indians and take the land.

## GAMING MACHINES, TABLE GAMES, AND REVENUES

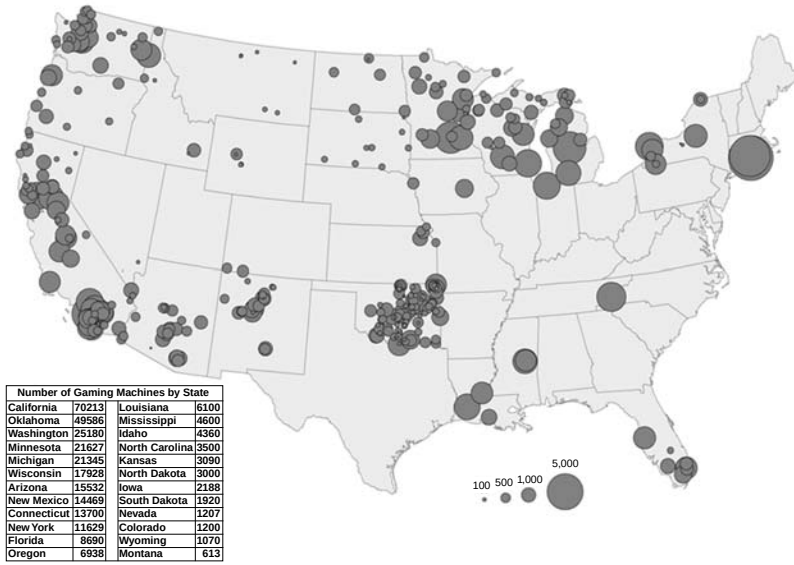
In our survey of Class III Indian gaming, we found a total of 309,685 Class III gaming machines distributed across 24 states.[21] There is a considerable concentration of gaming activity as measured by machine numbers (fig. 4). The top quartile (six states) of California, Oklahoma, Washington, Minnesota, Michigan, and Wisconsin account for 66.5 percent of all Class III gaming machines at Indian casinos. The bottom quartile, which includes Iowa, South Dakota, Nevada, Colorado, Wyoming, and Montana, has just 2.6 percent of machines. The data mapped

on figure 4 provide a precise visual image of the dominance of the top quartile states. In addition, the upper midwestern states of Minnesota and Michigan are quite apparent. Not surprisingly, there is good agreement between the pattern of Indian casinos on figure 2 and the numbers of machines on figure 4. However, there are also notable differences. Connecticut, which has only two casinos, has a total of 13,700 machines. North Carolina has one casino with 3,500 devices, and Louisiana has only three casinos but a total of 6,100 machines. In more heavily populated states where Indian lands are smaller in area, there are fewer but larger casinos.

The distribution pattern of table games varies slightly from that of gaming machines (fig. 5). The top quartile for table games includes California, Oklahoma, Connecticut, Washington, Arizona, and Michigan. The degree of concentration of table games is similar to that of gaming machines. The top quartile has 70 percent of all table games. The bottom quartile in table games includes North Carolina, Nevada, Colorado, Wyoming, Montana, and Idaho. These states have only 1.2 percent of the total. There is a difference in states comprising the top quartile of table games to those of gaming machines. Minnesota and Wisconsin drop out, and Connecticut and Arizona move up. Table games are clearly less common than gaming machines, which is very apparent in the upper midwestern states of Michigan, Minnesota, and Wisconsin.

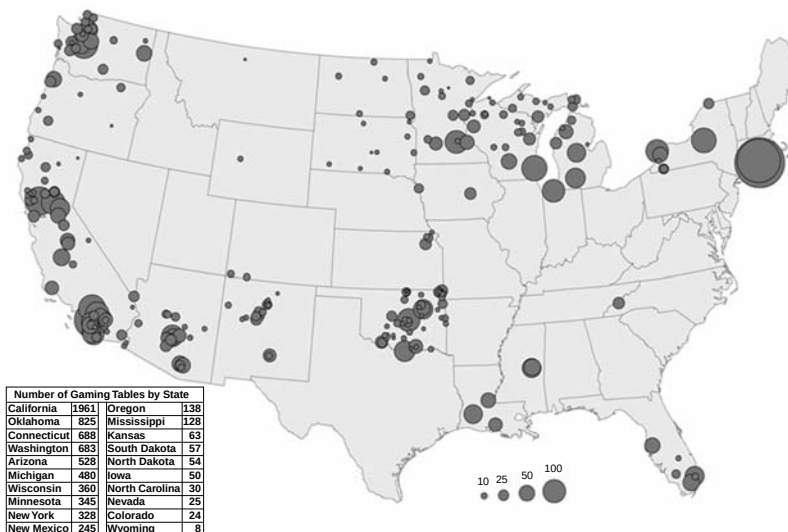
The substantial growth in Indian gaming revenues was described above and clearly demonstrated in figure 1. The National Indian Gaming Commission receives audited financial statements from all gaming tribes each year. As a result, the total gaming revenue data are considered accurate. However, the NIGC will not release results for individual tribes, as they are considered proprietary data. To determine the geographical distribution of tribal gaming revenues by state, we rely on data generated by Alan Meister, who has been publishing evaluations of Indian gaming since 2002.[22] Meister draws his data from publicly available and private sources. Some of his data are generated by proprietary gaming market models to estimate state gaming revenue. His combined state revenue totals match the aggregate national total available from the NIGC. This total comprises the best data available.

Indian casino gaming revenues by state are mapped in figure 6. These data demonstrate substantial concentration in overall gaming activity. The top quartile of states in revenue is comprised of California, Okla-




| Number of Gaming Machines by State | | | |
|---|---|---|---|
| California | 70213 | Louisiana | 6100 |
| Oklahoma | 49586 | Mississippi | 4600 |
| Washington | 25180 | Idaho | 4360 |
| Minnesota | 21627 | North Carolina | 3500 |
| Michigan | 21345 | Kansas | 3090 |
| Wisconsin | 17928 | North Dakota | 3000 |
| Arizona | 15532 | Iowa | 2188 |
| New Mexico | 14469 | South Dakota | 1920 |
| Connecticut | 13700 | Nevada | 1207 |
| New York | 11629 | Colorado | 1200 |
| Florida | 8690 | Wyoming | 1070 |
| Oregon | 6938 | Montana | 613 |

Fig. 4. Total number of gaming machines per casino by state. Source: Alan Meister, *Indian Gaming Industry Report: 2009–2010*.




| Number of Gaming Tables by State | | | |
|---|---|---|---|
| California | 1961 | Oregon | 138 |
| Oklahoma | 825 | Mississippi | 128 |
| Connecticut | 688 | Kansas | 63 |
| Washington | 683 | South Dakota | 57 |
| Arizona | 528 | North Dakota | 54 |
| Michigan | 480 | Iowa | 50 |
| Wisconsin | 360 | North Carolina | 30 |
| Minnesota | 345 | Nevada | 25 |
| New York | 328 | Colorado | 24 |
| New Mexico | 245 | Wyoming | 8 |
| Florida | 217 | Montana | 2 |
| Louisiana | 156 | Idaho | 0 |

Fig. 5. Total number of gaming tables per casino by state. Source: Alan Meister, *Indian Gaming Industry Report: 2009–2010*.


Fig. 6. Indian gaming total revenues by state. Source: Alan Meister, *Indian Gaming Industry Report: 2009–2010*.

homa, Connecticut, Arizona, Florida, and Washington. These six states account for 68 percent of all Indian gaming revenue. If we expand our range to include the top 50 percent of states, that is, twelve of the twenty-four that offer Class III gaming, they account for 91 percent of the total revenue.

There is a clear relationship between states with the most machines, tables, and gaming revenues. Decisions on the size of casinos and numbers of devices and table games are market driven, and the size of market is an important consideration. This is not true in every instance, because some states arbitrarily limit numbers of devices, table games, and types of games. However, as a general rule the relationship holds and is supported by these findings. Those states with small populations and more remote reservations are not as successful as those located proximate to larger concentrations of potential players. However, even in these isolated places gaming revenue adds to the overall welfare of Native Americans. Evidence of this is provided by the situation in Minnesota, where tribes in the state's rural northwest have only modestly successful casinos because of their remote locations and limited mar-

ket. Revenues generated by these smaller operations are used nearly exclusively to fund public services and improvements in reservation infrastructure and to combat unemployment and poverty.[23] In the less populated states of North Dakota and South Dakota smaller gaming operations are also helping with unemployment issues, as 80 percent of casino employees are Native Americans.[24]

## GEOGRAPHIC VARIATION IN GAMING COMPACTS

Our research involved reading and comparing gaming compacts by tribe and by state.[25] Results of this analysis revealed important differences between states in the degree of control exercised over Native American gaming operations. To evaluate the state-tribal compacts with regard to fair and equitable treatment of Native Americans, we developed a seven-category checklist. States were ranked on each category from 0 to 4, where 0 indicates a very permissive attitude and 4 a very restrictive attitude. The seven categories are as follows: (1) term of compact in years; (2) limits on number of gaming devices; (3) state-required revenue sharing, which for all practical purposes is a tax on revenue; (4) limits on types of games; (5) limits on number of gaming sites permitted; (6) amount of litigation between states and tribes; and (7) limits on size of bets. Similar rankings have been effectively employed by others to rank nations on levels of economic development and various risk indices.[26]

There are good reasons for including each of the seven categories. The term of the compact in years is critical, since short-term compacts limit the potential for tribes to secure long-term financing to build up-scale, high-quality facilities that will likely attract more business. For example, Minnesota's compacts do not include a set term. When Minnesota tribes were negotiating compacts they expressed concern that they would be unable to raise the necessary capital to develop their casino operations if the long-term future of their compacts was uncertain.[27] A limit on the number of gaming devices is seen as arbitrary and an unnecessary intervention by states into what should be a business decision left up to individual tribes. The language of the IGRA gives to the tribes the exclusive right to manage gaming on their sovereign lands. Taxes imposed by states on Indian gaming revenues are prohibited under the IGRA. In spite of that prohibition some states have negotiated revenue-sharing agreements with tribes in return for promises of no state competition

or guarantees of exclusivity for gaming in certain areas. The Bureau of Indian Affairs has permitted such agreements to be incorporated into tribal-state compacts and has given approval to them. However, in states that have revenue sharing the state's share of Indian gaming revenues is as high as 25 percent. States are evaluated on whether or not there is a requirement for revenue sharing, if there is a noncompetition agreement, and the percentage rate on revenue to be paid to the states. Limits on types of games imposed in compacts are considered counter to the language of the IGRA and are seen as a method to control Indian gaming and deny to tribes the right to manage gaming on their tribal lands. Attempts by states to limit the number of gaming sites on tribal lands run counter to the language of the IGRA and interfere unnecessarily with decisions that should be made solely by the tribes based on their best interests. The amount of litigation required to achieve a tribal-state compact or extensive litigation and delay in amending an existing compact is viewed as a blocking mechanism by the states. Such behavior is expensive and time-consuming for both sides and is also contrary to the "good faith" negotiation requirement of the IGRA. Finally, attempts by states to limit the size of bets to unreasonably low levels, for example, $5.00, are seen as a means to micromanage operations and to arbitrarily reduce the net revenue. Once again, bet limits should be a business decision exercised by the Native Americans using best business practices to optimize the performance of their casinos.

State rankings on each of the above categories were then summed to provide a classification of states from most permissive to most restrictive (table 1). States are mapped by score and provide a visual representation of the regulatory landscape resulting from the IGRA requirement for tribes to negotiate compacts with states (fig. 7). Based on the evaluation system, a state's score could range from 0 to 28, with 0 being most permissive and 28 most restrictive. State evaluation totals range from 1 to 28. States that are most permissive and have the most reasonable relations with their Native American tribes are Mississippi, Kansas, and Minnesota. The next three groupings with scores on the ranking system of 3 to 8 are considered better than average in their state-tribal relations. States in these categories include Colorado, Connecticut, Iowa, Louisiana, Michigan, Idaho, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Washington, and Wyoming. Increasingly restrictive states with scores from 9 to 19 include Montana, Arizona, and Califor-

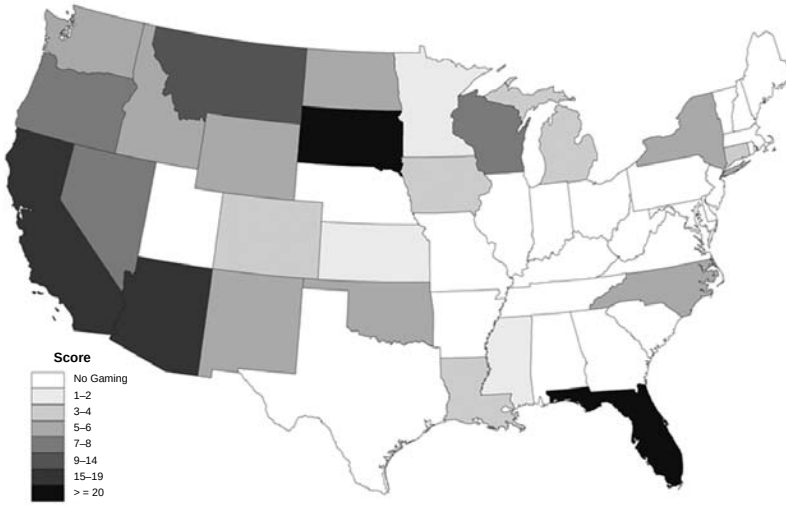



Fig. 7. Class III gaming compacts. Low scores indicate permissive states, while high scores indicate restrictive states.

nia. The most restrictive category includes South Dakota and Florida. South Dakota has especially restrictive compact term limits, severely limits numbers of devices, restricts types of games, severely restricts sites, and imposes bet limits. South Dakota has significant and unresolved litigation with the Flandreau-Santee Sioux stemming from the state's unwillingness to permit a proposed casino expansion and is using the tribal-compact requirement to block the proposed development.[28]

Florida is a special case, as the state has done everything in its power to block Indian gaming. As a result, we have ranked Florida the worst of all states with regard to fair and equitable compact negotiations. The IGRA requires states to negotiate in good faith with the tribes to reach a tribal-state compact. The Seminole Tribe of Florida, unable to reach agreement with the state for a compact, sued as per the language of the IGRA. Florida moved to dismiss the tribe's action on the grounds that it violated Florida's sovereign immunity. The district court denied Florida's motion, but the court of appeals reversed the district court and ruled that the Eleventh Amendment protected a state's sovereign immunity and that states could not be sued without their consent.[29] This case went to the United States Supreme Court, and in *Seminole Tribe v. Flor-*

TABLE 1. State Rankings—Permissive to Restrictive

| *State* | *Compact term* | *Device number limits* | *Revenue sharing* | *Limits on types of games* | *Limit on number of site* | *Litigation problems* | *Bet limits* | *Total score* |
|---|---|---|---|---|---|---|---|---|
| Mississippi | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 |
| Kansas | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 2 |
| Minnesota | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 2 |
| Colorado | 0 | 0 | 0 | 2 | 0 | 0 | 2 | 4 |
| Connecticut | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 4 |
| Iowa | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 3 |
| Louisiana | 3 | 0 | 1 | 0 | 0 | 0 | 0 | 4 |
| Michigan | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 3 |
| Idaho | 0 | 2 | 1 | 0 | 0 | 2 | 0 | 5 |
| New Mexico | 1 | 0 | 1 | 0 | 2 | 2 | 0 | 6 |
| New York | 2 | 0 | 3 | 0 | 0 | 0 | 0 | 5 |
| North Carolina | 3 | 0 | 0 | 0 | 2 | 0 | 0 | 5 |
| North Dakota | 3 | 0 | 0 | 0 | 0 | 0 | 2 | 5 |
| Oklahoma | 1 | 0 | 0 | 4 | 0 | 0 | 0 | 5 |
| Washington | 0 | 2 | 0 | 0 | 2 | 0 | 2 | 6 |
| Wyoming | 1 | 0 | 0 | 0 | 0 | 4 | 0 | 5 |
| Montana | 0 | 4 | 0 | 4 | 0 | 2 | 4 | 14 |
| Arizona | 3 | 2 | 1 | 2 | 2 | 4 | 2 | 16 |
| California | 1 | 2 | 3 | 4 | 2 | 4 | 0 | 16 |
| South Dakota | 4 | 4 | 0 | 2 | 4 | 4 | 2 | 20 |
| Florida | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 28 |

*Note:* The rating scale employed in this analysis is based on the following: strict limits are rated 4, above average 3, reasonable 2, lenient 1, and no limits 0. For revenue sharing, 20 percent or more is 4, 15–19 percent is 3, 8–14 percent is 2, 4–7 percent is 1, and no revenue sharing is 0. For compact length, less than 5 years is 4, 6–10 years is 3, 11–15 years is 2, 16–20 years is 1, and no term limit is 0.

*ida* and in a 5 to 4 decision the court upheld the decision of the court of appeals.[30] Attempts on the part of the Seminole Tribe to establish Class III gaming in Florida continued, and after nearly sixteen years of negotiations, including four governors, in November 2007 the Seminole Indian Tribe of Florida signed a gambling compact with Governor Charles Joseph Crist. On January 7, 2008, the United States Department of the Interior published notice of the Deemed Approved Compact between the Seminole Tribe of Florida and the state of Florida. The compact authorizes the Seminole Tribe to operate slot machines, any banking or banked card game, poker, any devices or games authorized under state

law to the Florida state lottery, and any new game authorized by Florida law. The term of the compact is twenty-five years.[31] However, this action led to new litigation. In *Florida House of Representatives v. Crist*, the Florida Supreme Court held that "the Governor does not have the constitutional authority to bind the State to a gaming compact that clearly departs from the State's public policy by legalizing types of gaming that are illegal everywhere else in the State."[32] As of this writing, the Seminole Tribe is conducting Class III games at all seven of its tribal gaming facilities in Florida. The speaker of the Florida House of Representatives in an October 21, 2009, letter to the chairman of the National Indian Gaming Commission requested the NIGC to order a shutdown of Seminole Class III gaming.[33] So the state that has proven to be the most restrictive in relationship to Indian gaming continues to orchestrate roadblocks in a continuing attempt to stifle economic progress for Native Americans. The Seminole Tribe will eventually win this battle.

> The State has been directed by the federal government to enter into compact negotiations, with the alternative being the issuance of procedures by the U.S. Department of the Interior. The Department of the Interior has already circulated proposed procedures that would allow the Tribe to operate Class III gaming, including unlimited slot machines, at all its current locations without the state receiving any revenue or ability to ensure customer protection.[34]

The state of Florida seems foolhardy to continue to fight this battle for two reasons. First, the state is going to lose. Second, under the signed compact Florida would receive substantial revenue sharing based on a sliding scale of from 10 percent to 25 percent on net revenue of Indian gaming.

The notable variation in tribal-state compacts revealed in this research raises the important issue of the fair and equitable treatment of all tribes across the United States with regard to tribal gaming activities. Inherent in these findings are questions of the efficacy of the IGRA to provide equal protection under the law to Native American tribes and to adequately protect tribal sovereignty.

## THE IGRA AND SOVEREIGNTY ISSUES IN INDIAN GAMING

It is Native American sovereignty and the guarantee of the "exclusive right to regulate gaming activity on Indian lands" that is the basis for

the existence of Indian gaming in the United States. However, that sovereignty is subject to strict congressional authority, and the position of Native Americans vis-à-vis states was weakened by the passage of the Indian Gaming Regulatory Act.[35] It is important to remember that the IGRA was passed in 1988 with the express purpose of promoting self-sufficiency for the tribes in order to ensure that Indians were the primary beneficiaries of gambling, establish fair and honest gaming, prevent organized crime and other corruption by providing a statutory basis for its regulation, and establish standards for the National Indian Gaming Commission.[36] In section 2701(5) of the act tribes are provided with "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."[37] Given the wording in *Cabazon* and echoed in section 2701(5) of the IGRA, no state that permits gaming should be involved in any way with the regulation of Indian gaming on tribal lands. Congress, however, contradicted its own legislation and greatly complicated the issue by requiring in section 2710(d)(3)(A) of the IGRA a tribal-state compact governing the conduct of Class III gaming activities. That requirement is evidence of substantial influence on this legislation by the states for a means to effectively control Indian gaming within their borders. Tribal-state compacts are also perceived as a congressionally approved attack on Indian sovereignty and a major concession to the states that in actual practice have permitted substantial state interference and control of Indian gaming. The inclusion of a provision for a tribal-state compact was, according to the Senate committee report, "the best mechanism to assure that the interests of both sovereign entities are met with respect to regulation of complex gaming enterprises."[38] Congress hoped that the compact requirement would encourage states and tribes to work together to accomplish acceptable policy making. According to the committee report, the bill

> does not contemplate and does not provide for the conduct of [casino-style] gaming activities on Indian lands in the absence of a tribal-state compact. . . . This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual government objectives, while at the same time, work together to develop a regulatory and jurisdictional pat-

tern that will foster consistency and uniformity in the manner in which laws regulating the conduct of gaming activity are applied.[39]

Some states quickly seized upon the compact requirement as a means to block Class III Indian gaming within their borders. Congress provided a remedy to this situation and enacted a provision that imposed on the states a duty to negotiate in good faith with the tribes to reach an acceptable compact. If a state failed to negotiate in good faith, the tribe could sue the state in federal court.[40] The senate committee report acknowledged an unequal balance between states and tribes created by the language of the IGRA and "elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standards as the legal barometer for the State's dealings with tribes in Class III gaming negotiations."[41] The granting to tribes the right to sue a state was challenged by some states as being a violation of their sovereign immunity. In the landmark *Seminole* decision the United States Supreme Court ruled that the Eleventh Amendment protected a state's sovereignty and that a state could not be sued by a tribe without its consent.[42] This decision further eroded Native American sovereignty and put Indian tribes in the unenviable position where a state could effectively prevent a tribe from engaging in Class III gaming simply by refusing to negotiate a compact. Some states appeared to take advantage of the Court's action, and no Class III tribal-state compacts were finalized for over two years following that decision.[43] Certainly, in the context of Indian gaming the IGRA tribal-state compact requirement is a clear concession to state sovereignty, taking precedence over tribal sovereignty. As a result, the tribes' right to conduct gaming is not absolute but limited by state public policy. Further evidence of the relegation of tribal authority to a position below that of state authority is provided by the fact that each state has the ability to entirely prohibit tribal gaming within its borders simply by making all gambling illegal.[44] This is true in spite of the fact that both Congress and the United States Supreme Court recognize tribes as sovereign entities.

There exists a legal avenue for Native Americans to overcome the devastating blow to tribal sovereignty resulting from *Seminole*. A legal precedent has been established whereby the federal government in its role as trustee for Native Americans can sue states that demand revenue sharing to negotiate a Class III gaming compact or fail to negoti-

ate in good faith.[45] As noted above, in *Seminole* the Court held that a state's sovereign immunity prevented it from being sued by an Indian tribe in federal court but did not extend this immunity to suits by the federal government.[46] In this case the Court held that the United States had the right to sue the state of Minnesota on behalf of the Chippewa Tribe. Additionally, in *Chemehuevi Indian Tribe v. Wilson* a district court ruled that the federal government has a mandatory duty to sue a state on behalf of an Indian tribe when the state refuses to negotiate a gaming compact under the IGRA.[47]

The sovereignty issue is of increased importance because Indian gaming revenues have exceeded the expectations envisioned by Congress when it passed the IGRA. Although the IGRA imposed strict limitations on state influence over tribal gaming, current national discourse on Indian gaming includes routine calls for increased revenue sharing and more state control.[48] At the federal level Senator John McCain in 2005 argued that, given the size and scope of the Indian gaming industry, it was time for Congress to review the IGRA and make changes in order to deal with an industry never anticipated to reach such size.[49]

As a result, Indian gaming today is under something of a siege. In Minnesota, a state that prides itself on having no compact term limits and no revenue sharing on Native American gaming, a recent move was made to force revenue sharing.[50] The argument is clearly summarized in two contrasting statements. The governor demanded a 25 percent share of tribal gaming revenue, stating, "We need to explore a better deal for Minnesotans and that's what we're going to do." In response the executive director of the Minnesota Gaming Association stated: "Every dollar that goes to the state is a dollar the tribes can't spend providing services to their own people."[51] In 2008 revenue from Minnesota Indian gaming was estimated to be $1.5 billion, funds that finance a number of important functions, including basic education, magnet schools, and community colleges, community health programs to care for the elderly, on-reservation medical service, and new housing, health clinics, and community and cultural centers.[52]

California has also begun to demand a greater share of tribal gaming revenue. In 2004 compacts were renegotiated with five tribes. The tribes were required to include a one-billion-dollar payment to the state to be financed over eighteen years—a payment in return for exclusivity from non-Indian competition.[53] In addition, at the end of the eighteen-year

term this agreement requires the tribes to make additional annual payments expected to be approximately $700 million. Subsequently, in 2005 California renegotiated existing compacts with the Quechan and Yurok tribes to require payments to the state ranging from 10 percent to 25 percent of net win based on a sliding scale.[54] However, the 25 percent contribution kicks in at the relatively low level of $200 million. The California case also highlights the differential treatment of tribes even within the boundaries of one state. Such actions further demonstrate the need for uniform treatment of Native American gaming compacts to better provide equal protection under the law for all tribes in all states.

To expose the fallacy in the state of Minnesota's argument for a share of Indian gaming revenue and California's requirement for a larger share of gaming revenues one needs only to recall two of the original major goals of the IGRA: (1) to promote self-sufficiency for the tribes and (2) to ensure that Indians are the primary beneficiaries of gambling. Not only is there no part of the IGRA that requires tribes to make payments to states, but such payments are strictly prohibited.[55] It is unfortunate that in their attempt to block state revenue sharing Minnesota tribes have been forced to divert monies to influence state political decisions. These donations totaled just over $1.8 million between 1996 and 2004 and represent monies taken away from needed tribal welfare and social programs.[56]

## DISCUSSION

In spite of the inherent problems of the IGRA noted above, the success of Indian gaming is accomplishing for the tribes precisely what the passage of the IGRA called for in 1988. Gaming is promoting well-being and self-sufficiency for large numbers of Native Americans on Indian lands across many parts of the United States. Native American gaming has become big business, increasing total revenues from $121 million in 1988 to $26.8 billion in 2008. As a result, it has become a major engine for economic development on Indian lands in several states and is transforming lives as today's most important tool of reservation economic development and tribal self-sufficiency.[57]

Given the growth of Indian gaming and the significant economic improvement generated on reservations, Congress should be doing everything in its power to guarantee the continued success of Native

American gaming operations and should pass enabling legislation to encourage expansion to other states. There are a number of issues that Congress needs to address to better enable Native American gaming operations to operate successfully. Currently, Native American sovereignty is under attack. Given the wording of the IGRA and certain court decisions addressed above, states now occupy a legal position superior to that of tribes. The IGRA is fatally flawed due to the requirement for a tribal-state compact. This is a legislative compromise that contradicts the language of *Cabazon* and is probably unconstitutional. A stronger condemnation of the act is clear in the words of William N. Thompson:

> A detailed reading of the Indian Gaming Regulatory Act of 1988 will be an uncomfortable undertaking, especially if you are not a lawyer. If you just read the text, you might be led to believe, as I do, that the Act is inconsistent, incomplete, vague, redundant, absurd, and unconstitutional.[58]

At the very minimum Congress should amend the tribal-state compact requirement found in section 2710(d) of the IGRA. If the IGRA were to be amended to require all gaming compacts to be between the United States Department of the Interior and the tribes, then tribal sovereignty would be truly respected, and states would be effectively removed from the process. Results of this research have uncovered significant geographical differences between states in the requirements for Native Americans to achieve a gaming compact. If the states were removed from the process and all gaming compacts were under the control of the Department of the Interior, there would be uniform and consistent regulations that would impact each tribe equally, thus providing each with equal protection under the law. There is legal precedent for such action. The Northern Arapaho Tribe in Wyoming, following five years of unsuccessful negotiations with the state for a gaming compact, filed an action in US District Court. The court ruled that the state failed to negotiate in good faith. As a result, the Northern Arapaho in Wyoming operate under a compact with the Department of the Interior.[59] The tribal-state compact requirement is a very negative aspect of the legislation that should be repealed because it also constitutes a direct and damaging assault on tribal sovereignty, opening the door for states to coerce Native Americans to operate their gaming facilities under arbitrary state-imposed rules and regulations and, in some cases, to share

revenues with states. Revenue sharing should not be permitted under any circumstances because section 2710(d)(4) of the IGRA states: "Nothing in this section shall be interpreted as conferring upon a state or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe."

In spite of this prohibition, the secretary of the interior has interpreted the IGRA incorrectly, in our opinion, to allow tribes to make payments to states in return for additional benefits beyond the right to operate Class III gaming. If states were removed from the compact process, the issue of payments to states would never have arisen. An example of the Department of the Interior's evaluation of necessary criteria to approve a tribal-state compact that includes a revenue-sharing agreement with a state is found in an August 19, 2003, letter from the department to the San Juan Southern Paiute Tribe of Arizona.

> The Department of the Interior (Department) has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming. To date, the Department has approved payments to a State only when the State has agreed to provide the tribe with substantial exclusivity for Indian gaming, i.e., where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State. The payment to the State must be appropriate in light of the exclusivity right conferred on the tribe.[60]

There seems to be an even more insidious aspect to approving compacts that permit payments to states for exclusivity in gaming. While this might seem on the surface to be a fair and reasonable agreement with the Indians, it has real potential to be misused. Under current law Native Americans are prohibited from operating Class III gaming in any state that does not legalize gambling. Given that law, an unlikely but possible scenario is for states that do not permit gambling operations other than those of Indians to coerce Indian tribes to pay a higher percentage of revenue to the states by threatening to pass a law to outlaw all gaming within the state and thereby destroy the Indian gaming industry.

There is also a clear and logical solution to this problem. Legisla-

tion should be passed to amend the IGRA to allow Indian tribes to have gambling on their reservations whether or not the state within whose boundaries they are located permits gambling. The Indian lands are tribal lands, not state lands. Indian tribes are sovereign entities. Such legislation would also allow tribes across the United States to have gambling on their lands if they so choose and would provide for equal protection for all tribes under federal law.

Given the success of Native American gaming, states are likely to continue the escalation of their assaults on what they perceive as a lucrative source of revenues to help balance state budgets. This should absolutely not be allowed. Failure to enact legislation recommended above will likely result in continued attacks on Native American sovereignty and more widespread attempts to demand tribal revenue sharing with states.

The history of negotiations between the United States, certain states, and Native Americans is not one of which this country should be proud. The erosion of Native American sovereignty and efforts by states to renegotiate compacts for the purpose of taking a larger share of Native American gaming revenues remind us of a quote attributed to Red Cloud, an important chief of the Oglala Lakota Sioux, in reference to dealings with the United States: "They made us many promises, more than I can remember, but they kept only one; they promised to take our land, and they did."[61]

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