The Impact of the Indian Gaming Regulatory Act on Gambling in the United States and the Role for State and Local Governments

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INTRODUCTION

The United States is in the midst of a gambling explosion. Although gambling regulation has been progressively liberalized since the Great Depression, the passage of the Indian Gaming Regulatory Act ("IGRA") in 1988 provided a major turning point in the growth of the gambling industry. Prior to IGRA, only two states permitted commercial casino-style gambling. Casino gambling now exists in 27 states, due primarily to IGRA and its economic and political dynamics.

In addition to jump-starting the casino gambling industry, IGRA has fundamentally altered the state/federal balance of power by substantially reducing the ability of states and local governments to control significant activities taking place within their borders. States can no longer draw a line between highly regulated and limited gambling for charitable purposes and unrestricted, around-the-clock casino gambling, even if only the former will benefit the state. And some states, long opposed to commercial casinos for public policy reasons, are now being forced to consider it as a competitive response to Indian gaming.

Large-scale casino gaming of any type, regardless of ownership, has significant impacts and places a tremendous strain on state and local communities. While gaming can bring a measure of economic growth, it also results in increased traffic, crime, social consequences such as problem gambling, changes in work force composition, demands on social services, and general impacts on the quality-of-life in a community.

These consequences are even more pronounced when Indian gaming is involved. Because the casino and associated facilities are located on tribal trust land, which is exempt from state and local regulation and taxation, communities cannot control casino development and its impacts, or rely upon taxation to raise revenue to cover the cost of any response to impacts. The result is a potential worst-case scenario for local governments – unrestricted growth that occurs beyond regulatory control, but has massive impacts on the very fabric of the community. Whether this worst-case potential is realized or avoided depends on a community's ability to recognize the issues early and to take effective actions in response.

While Indian casinos are often regarded as "inevitable" or unstoppable, there are, in fact, specific steps that state and local governments can take to protect their interests at virtually any stage in the development of an Indian casino. Which options are available depends upon the legal status of the tribe and the procedural point in the federal review process – the "Indian Gaming Continuum" – at the time the state or local government decides to initiate action. The purposes of this paper are to describe the evolution of Indian gaming and its implications for communities and to discuss the ways state and local governments can most effectively assert themselves to protect their interests. The goal is to protect community interests while at the same time providing the best opportunity for establishing cooperative, mutually beneficial relationships with Indian tribes.

DISCUSSION

A. The Pre-IGRA Gaming Scene

Although gambling has become increasingly socially acceptable during the last seven decades, the proliferation of casino gambling is quite recent. During the 1930s, 20 states legalized pari-mutuel betting on dog and horse races. Each decade since has seen additional states sanctioning the activity. Lotteries are even more recent. Almost every state now has some form of state lottery, but it was only 30 years ago that the first state – New Hampshire – legalized that activity.

Most credit Nevada for starting the trend toward legalizing casino gambling with its 1931 decision to permit high-stakes casino gambling. Before the 1988 passage of IGRA, however, only New Jersey, in 1976, had followed Nevada's lead. In every other state, casino gambling was allowed, if at all, under very limited circumstances and for charitable purposes. These charitable gaming statutes -- referred to as Las Vegas or Casino Nights laws -- reflect a determination by states that the benefits to be gained from using highly-regulated gambling as a fund-raising vehicle for charitable organizations outweighs the drawbacks of allowing casino-style gambling on such a limited basis.

1. The Start of Tribal Gaming

Although gambling was not unknown to Indian culture, tribes did not begin to take advantage of the liberalization of gaming laws until the 1970s. Following the enactment of the Indian Reorganization Act of 1934, Indian tribes began to develop tribal governments and constitutions. Like some states, tribes recognized that gambling provided a tremendous opportunity for economic development and a means of lifting tribes from poverty.

In 1975, the Oneida Tribe of New York State was the first tribe to open an Indian bingo operation. Within four years, the Penobscot Nation in Maine and the Seminole Tribe of Florida had opened their own bingo operations on Indian lands. Unlike states, however, these Tribes did not limit gambling to charitable purposes. Nor did these Tribes consider themselves to be constrained by state laws in structuring their gaming operations. Because of their status as sovereign nations, the Oneida, Penobscot and the Seminole Tribes believed that state gambling laws had no force on Indian lands.

States moved to check the spread of high-stakes bingo on Indian lands by attempting to enforce their gambling laws against the tribes. The Seminole Tribe's contest with the State of Florida is the first and most famous of these cases. At the time the Seminole Tribe opened its bingo facility, Florida law prohibited commercial gambling, but allowed charitable bingo. The Seminole Tribe's operations, however, clearly exceeded the limits established under Florida's charitable gaming exception.

Florida officials threatened to enforce the state prohibition against the Seminole Tribe under Public Law 280, by which Congress granted certain states criminal and limited civil

jurisdiction over activities on tribal lands. The Tribe responded by suing to enjoin the County from enforcing Florida's bingo statute on Indian land.[1]

The Fifth Circuit ultimately resolved the issue in the Tribe's favor in *Seminole Tribe v. Butterworth*, concluding that Florida's status as a Public Law 280 state did not empower it to enforce its law on Indian lands.[2] The court based its decision on a distinction now famous in Indian law: that Public Law 280 conferred criminal/prohibitory jurisdiction over tribal lands, but "grants civil [regulatory] jurisdiction to the states only to the extent necessary to resolve private disputes between Indians and private citizens."[3] Thus, a state's power on Indian lands depends on whether a state is attempting to enforce criminal/prohibitory laws or civil/regulatory laws. If the law falls into the latter category, the state is powerless to enforce the law on Indian lands. In the Fifth Circuit's view, Florida's charitable gaming exception was civil/regulatory in nature because it allowed charitable bingo, albeit in a highly regulated fashion.

The Fifth Circuit's decision opened the floodgates to tribal-run gambling establishments. Within one year of the court's decision, the Seminole Tribe's annual gross revenues reached $20 million from its three bingo sites. Within two years, there were over 180 bingo operations, and more than 20 of those grossed over $1 million annually.

2. A Shift in Federal Policy

Although the importance of *Seminole Tribe* was not immediately apparent, the decision has shaped the nearly three-decade debate over Indian gaming. Prior to *Seminole Tribe*, the federal government largely left the issue of gambling up to the states, who were free to determine what kinds and how much gaming would be permitted within state borders.

By the 1980s, however, the federal government's interest in tribal gambling rose as it realized the potential of gambling both to alleviate the deplorable economic conditions found on Indian reservations and to reduce federal funding to Indian tribes. In 1983, President Reagan promised to further tribal economic self-determination by encouraging tribes to adopt "innovative approaches . . . [to] overcome the legislative and regulatory impediments to economic progress," and affirmed "the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs."[4]

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[1] *See Seminole Tribe v. Butterworth*, 491 F. Supp. 1015 (S.D. Fla. 1980).

[2] 658 F.2d 310 (5th Cir. 1981).

[3] *See id.* at __ (citing *Bryan v. Itasca County*, 426 U.S. 376, 383 (1976)).

[4] Statement on Indian Policy, 1 Pub. Papers 96, 98 (Jan. 24, 1983).

The Bureau of Indian Affairs (BIA) implemented President Reagan's policy by encouraging tribes to open high-stakes bingo operations and by providing grants and guaranteed loans to help finance the construction of the necessary facilities. By 1986, almost 110 tribes conducted some combination of bingo and card games, and by 1987, Indian gaming establishments had total estimated gross revenues of approximately $ 225 million.

The Reagan Administration's support for tribal gaming operations only escalated state-tribal tensions. As early as 1983, federal legislation had been proposed, largely in response to *Seminole Tribe*.[5] While both federal and state governments were concerned about the possibility of organized crime infiltrating Indian gaming operations, the real conflicts occurred between the states and tribes. States objected to the idea of unregulated, untaxable casino gambling within their borders, whereas tribes viewed gaming not only as an economic necessity, but also a prerogative of sovereignty. In the meantime, other federal courts confronting the issue came to the same conclusion as the Fifth Circuit,[6] thwarting state attempts to enforce anti-gambling laws on tribal lands.

3. California v. Cabazon

Ultimately, the Supreme Court acted before Congress, as is frequently the case in Indian issues. In many ways, the Supreme Court's decision in *California v. Cabazon*[7] was a replay of the Fifth Circuit's decision in *Seminole Tribe*. The facts of the two cases are quite similar. The Cabazon and Morongo Bands of Cahuilla Indians had been conducting bingo and card games in a manner not conforming to California state law. When the State of California and Riverside County attempted to enforce state laws, the Bands instituted an action in federal court for declaratory relief.

Like the court in *Seminole Tribe*, the *Cabazon* Court relied on Public Law 280's civil/criminal distinction. The Court explained that the "shorthand test" for determining whether gaming is regulated as a civil matter or prohibited as a criminal matter is "whether the conduct at issue violated the State's public policy."[8] Because California did not prohibit gaming altogether -- as evidenced by its state-sanctioned lottery -- gambling did not violate the state's public policy, and laws concerning gambling were regulatory only. As such,

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[5] *See e.g.*, H.R. 4566, 98th Cong., 1st Sess. (1983) and H.R. 2404, 99th Cong., 1st Sess. (1985).

[6] *See e.g., Oneida Tribe of Indians v. Wisconsin,* 518 F. Supp. 712 (W.D. Wis. 1981); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982); and *Mashantucket Pequot Tribe v. McGoigan*, 626 F. Supp. 245 (D. Conn. 1986).

[7] 480 U.S. 202 (1987).

[8] *Id.* at 209.

Congressional interest in promoting Indian self-determination, according to the Court, outweighed California's concern for criminal activity associated with tribal gaming.

B. Congress Enacts IGRA to Address Tribal Gaming

After *Cabazon*, Congress finally responded to the decade-old battle between states and Indian tribes regarding gaming on tribal lands by enacting IGRA. IGRA was intended to be a political compromise that balanced the states' regulatory interests, which were largely dismissed in the *Cabazon* decision, with tribes' need to promote economic self-sufficiency. The Act's stated purpose is to promote the general federal goals of "tribal economic development, tribal self-sufficiency, and strong tribal government." IGRA ostensibly protects states' regulatory interests by establishing a compact process as a prerequisite for Class III gaming.

1. Structure of IGRA and State's Rights

IGRA divides gaming activities into three categories with a different regulatory scheme for each: ceremonial games (Class I), bingo-type games (Class II), and casino-type games (Class III). Class I games are those used primarily for religious and ceremonial purposes. IGRA permits Class I games by tribes without any regulatory or state oversight. Class II games include keno, bingo, pull-tabs, punchboards, and nonbanked card games – i.e., player vs. player with no house stake. To operate Class II games, a tribe must enact an ordinance that has been approved by the Chairman of the National Indian Gaming Commission (NIGC), and the affected state must permit such gaming for any purpose by any person, organization, or entity.

The most controversial aspect of IGRA -- and the primary topic of this paper -- is its treatment of Class III games. Class III games include video poker, video slots, blackjack, roulette, craps, chemin de fer, baccarat, poker, and all other house-banked card games. IGRA ostensibly attempts to acknowledge states' interests by restricting Class III gaming to those states that have permitted casino-type games, essentially seeking to match state public policy with tribal capability to conduct gaming.

If a state does allow some form of Class III gaming, a tribe may conduct Class III gaming, provided that the following conditions are met: 1) the tribe is federally recognized; 2) the tribe's gambling operations will occur on "Indian lands," as that term is defined in IGRA; 3) the tribe and the state must have negotiated a compact that has been approved by the Secretary of the Interior, or the Secretary must have approved regulatory procedures in lieu of successful compact negotiations; and 4) the tribe must have adopted a tribal gaming ordinance and gaming contract that has been approved by the Chairman of the NIGC. The compact itself should: 1) describe the regulatory role of the state; 2) identify any stake the state might have in tribal gambling; and 3) specify the games that may be played at tribal casinos.

2. Post-IGRA Case Law

Although the regulatory scheme created by IGRA appears fairly simple, balancing tribal and states' rights under IGRA has proven difficult and contentious. From the outset, questions regarding the relationship between IGRA and the *Cabazon* decision have been hotly debated. Tribes have asserted that the *Cabazon* decision was fully incorporated into IGRA, whereas states have vigorously contested that view, claiming that IGRA superseded *Cabazon*. The importance of that question cannot be over-estimated: if *Cabazon* were fully incorporated into IGRA, rather than superseded by it, then a very wide scope of gaming would be permissible under the Act.

Early decisions appeared to favor tribal arguments. The first major, post-IGRA decision – *Mashantucket Pequot Tribe v. Connecticut* – ultimately led to the construction of the largest casino in the world.[9] The Mashantucket Pequots sued Connecticut to force the State to negotiate a compact allowing certain Class III games that were permitted under Connecticut's Las Vegas Nights law. Connecticut argued that its limited authorization of "Las Vegas Nights" by charitable organizations did not amount to authorization for casino-type gaming on a commercial basis. Rather, Connecticut contended that the Pequots could conduct Class III gaming in accordance with State laws and regulations governing such gaming. The court disagreed, however, and concluded that IGRA requires states that permit casino-style gaming for charity to negotiate compacts with tribes that wish to conduct commercial gaming.

Wisconsin made a different distinction in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*,[10] arguing that IGRA allows Class III gaming only in states that expressly *permit* such gaming.[11] Because Wisconsin did not affirmatively permit Class III gaming, even under charitable statutes, the State argued that it was under no obligation to negotiate a compact with the Tribe. The Seventh Circuit rejected the State's argument, holding that because Wisconsin permitted a state lottery and pari-mutuel betting, and did not prohibit other forms of gaming, its public policy favored gaming. The court held that the State was consequently obligated to negotiate with the Tribe with regard to "any activity that includes the elements of prize, chance, and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law."[12]

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[9] 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

[10] 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992).

[11] See 25 U.S.C. § 2710(d)(1)(B).

[12] *Lac du Flambeau Band*, 770 F. Supp. at 488.

The Ninth Circuit has taken a step back from the Second and Seventh Circuits' expansive interpretations of IGRA. Given that the Ninth Circuit encompasses nine states in the West with approximately two hundred federally recognized Indian tribes; its position has a tremendous impact on Indian gaming. The Ninth Circuit decided in 1995 that:

> IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. . . . [A] state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.[13]

As these examples clearly illustrate, IGRA has left many issues unresolved, and litigation between states and tribes regarding gaming continues.

C. The Economic and Social Consequences of IGRA

Since the enactment of IGRA, casino gambling has mushroomed, despite clear state opposition. Between 1977 and 1988, of the 40 states that considered laws permitting casino gaming, *not one state* legalized it. Within nine years of the passage of IGRA, 225 tribes were operating casinos in 27 states and casino revenues skyrocketed. In 1987, tribal gaming generated $100 million, or six percent of the total amount of revenues generated by all forms of legal gambling. By 1996, industry revenues were estimated to approach $5.4 billion, and by 2000, gross revenues exceeded $10.6 billion. According to the BIA, 225 tribes have entered into agreements that permit gaming on reservation lands in twenty-seven states. There are now more than 89 Indian casinos and 170 high-stakes bingo operations. In California alone, 62 tribes have negotiated gaming agreements since March 2000.

This massive and extraordinarily fast growth in Indian gambling has had tremendous societal impacts. While initially intended as a means to redress tribal poverty, IGRA has had impacts far exceeding that which Congress intended. As of 2002, the only states *without* any form of legalized gambling were Tennessee, Hawaii and Utah. Forty-six states allow charitable gambling, 41 permit betting at racetracks, and 38 states and the District of Columbia operate lotteries. Twenty-seven states have Indian casinos and 11 states allow non-Indian commercial casinos. Six states allow electronic gambling devices such as slot machines at racetracks. The full impacts of the gambling revolution have yet to be measured.

1. IGRA Has Generated a Backlash

The backlash against IGRA and Indian gaming has been considerable. State and local governments are becoming increasingly assertive in their efforts to oppose or restrict such

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[13] *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1995) (citations omitted).

gaming. Numerous citizen's organizations, from local to national in scope, have been created for the purpose of opposing Indian gaming, Indian land expansion, or even the underlying concept of tribal sovereignty. Media attention has been brought to bear as well. A critical exposé on Indian gaming became a two-part series and, cover story for Time magazine in December of 2002. Numerous books have been written on the subject. Three of these books alone cast a critical eye on the Mashantucket Pequot gaming empire. These growing voices of concern have led to calls for federal legislative and regulatory reform and produced a proliferation of lawsuits and high visibility political disputes.

Nor has IGRA proved to be the general panacea to tribal poverty as promised. Indeed, it is a very mixed result.

There is no doubt that some tribes have hugely benefited from IGRA. The Mashantucket Pequot Tribe in Connecticut, for example, operates one of the largest casinos in the world. The casino's estimated gross revenue in 1999 was $1.3 billion dollars. Of that, the Tribe paid $175 million to the State. Each member of the Tribe receives a payment of at least $50 thousand per year, and some members are provided with free homes, medical care, and day care. Tribal members are also entitled to retirement payments and educational scholarships.

But overwhelming economic success can also cause tribal conflict. The Prior Lake Skakopee Mdewakanton Dakota's casino, for example, has turned 150 members of the tribe into millionaires. Although the Tribe does not release information on its profits, it is estimated that each tribal member receives payments in excess of $500,000 every year. Since the casino's success, many dozens of people have raised dubious claims seeking tribal membership. These claims have led to damaging disputes over who is entitled to control the tribe's gaming operation and have eroded the tribal government.

Other operations of more modest success doubtlessly provide economic opportunities in some Indian communities. In Michigan, for example, Indian tribes operate 8 Class III gaming operations that employ nearly 2000 workers and have an annual payroll estimated at $13.5 million. Minnesota's 17 casinos generate revenues estimated at $390 million, and more than 12,000 new jobs have been created. While approximately 37 percent of Minnesota's tribal gaming employees received state or federal welfare assistance prior to their employment, and another 31 percent were drawing unemployment compensation, welfare payments in counties with casinos dropped 14 percent between 1987 and 1991. Similar stories exist with Wisconsin and Washington tribes.

In addition, gaming tribes have made many significant contributions to charities, educational programs, health-care initiatives, and other worthy causes. These tribes have recognized the importance of sharing the fruits of their success and there clearly are many positive stories to tell as a result of Indian gaming.

Sharing casino profits among Indians, however, is very limited. Because of the favorable market locations of some Indian lands, certain tribes have been able to build and maintain massive and successful casinos, while other tribes, located in rural areas near no population centers, have no prospect for such success, despite significant economic need. IGRA does not require, and most gaming tribes strenuously oppose, any general revenue sharing, even though the needs of poorer tribes are great. For the poorly located and non-gaming tribes, IGRA offers nothing, and the general federal reductions in Indian funding are felt more profoundly. As stated in a 2000 series of articles by the Boston Globe,

> [Twelve] years after the federal government made gambling a staple of its Indian policy, the overall portrait of America's most impoverished racial group continues to be dominated by disease, unemployment, infant mortality, and school drop-out rates that are among the highest in the nation.[14]

IGRA has not resolved all woes existing on reservations, yet non-gaming tribes still experience the same public backlash as those who have been well-positioned to take economic advantage of IGRA.

2. Casinos Can Devastate Local Communities and Economies

While some Indian tribes have benefited from the passage of IGRA, local communities in which casinos have been built have been profoundly impacted. The quality of life in many local communities forced to host casino operations has seriously eroded, despite in many cases massive tribal contributions to the state coffers. With tribal casinos come extensive local traffic impacts as thousands of visitors flock to the casinos 24-7 year round. In addition to the obvious pollution problems such traffic creates, the travel delays associated with casinos can also have a significant impact on a region's economy – delays associated with Foxwoods and Mohegan Sun are estimated to cost a total of $64 million per year.[15]

The strain Indian casinos place on the surrounding communities is tremendous. For non-Indian casinos, it is estimated that for every dollar a community collects from gambling taxes, it must spend three dollars to cover new expenses, including police, infrastructure repairs, social welfare and counseling services.[16] Because local communities cannot tax

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[14] Michael Rezendes, Few Tribes Share in Casino Windfall, Boston Globe, Dec. 11, 2000 at A1, available at 2000 WL 3354974.

[15] Bridgeport Casino Traffic Impacts on the Southwestern Region of Connecticut, Final Report. July 2001. New York: Buckhurst, Fish, and Jacquemart, Inc.

[16] Sen. Frank Padavan, Rolling the Dice: Why Casino Gambling is a Bad Bet for New York State at ii (1994).

Indian operations, the strain is even more acute. A recent report issued by the Connecticut Office of Legislative Research noted that since Foxwoods Casino and Mohegan Sun opened, "index (serious) crimes have increased overall in Ledyard, Montville, Norwich, North Stonington, and Preston combined. Index crimes are murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft with the increases primarily on casino premises."[17] The General Accounting Office has noted that with primarily cash businesses like casinos, the opportunities for theft, embezzlement, and criminal infiltration dramatically increase.

Increases in compulsive addictions, including drug and alcohol abuse, elevated crime, increased neglect and abuse of children and spouses, and missed workdays are all associated with casino development. The costs to states for the prosecution and incarceration of problem gamblers, who comprise perhaps as high as four to five percent of the adult population, are estimated to be between $12,000 and $50,000 for each problem gambler.[18] As stated in a 1999 study by the National Gambling Impact Study Commission,

> [T]here is an encouraging breadth of agreement among Commissioners on many individual issues, such as the immediate need to address pathological gambling; *and on one big issue*: The Commissioners believe that it is time to consider a pause in the expansion of gambling . . . . The purpose of this recommended pause is to encourage governments to do what few have done to date: To survey the results of their decisions and to determine if they have chosen wisely.

At the heart of the problem is the fact that state and local laws do not apply on Indian lands. Not only are zoning, building, and environmental codes unenforceable on Indian lands, states have no power to regulate employment activity on Indian reservations. Therefore, any jobs created by casino development are not required to meet minimum standards established under state laws to protect employees. Moreover, the majority of casino jobs are low-wage, high-turnover positions.

State income taxes do not apply to Indians who live on reservations and earn their income from tribal enterprises. Businesses on nontribal land can have difficulty competing with businesses on Indian land, which enjoy these benefits. In fact, there is evidence that gaming draws money from established businesses. The employment gains in gaming may not be net increases but only shifts between industries as local business decreases. As Donald Trump has acknowledged, "people will spend a tremendous amount of money at the casinos, . . . money that they would normally spend on buying a refrigerator or a new car. Local

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[17] Connecticut Office of Legislative Research: Gambling Age in Connecticut, May 10, 2001. Number 2001-R-0477. <http://prdbasis.cga.state.ct.us>.

[18] Robert Goodman, The Luck Business 159 (1995) at 51.

business will suffer because they'll lose customer dollars to the casino."[19] Thus, while gambling can provide some benefits, those benefits are frequently more than offset by the impacts in the local communities.

3. Unintended Consequences of IGRA

All states, not just those with casinos, have been deeply affected by IGRA. Unfortunately, the nationwide rise of gambling has occurred in a worsening general economic environment that has devastated state budgets and left them struggling for revenues. Indian gambling competes with non-Indian lotteries, keno, dog and horse racing, and other state-sanctioned gambling. Because Indian casinos offer high-stakes gambling, revenues from those state-sanctioned activities have decreased. Many states which had previously been uninterested in gaming have now felt significant pressure to legalize non-Indian casino gaming as a means of competing with tribes for gambling dollars, and the ability to tax them.

New York is a good example. Prior to IGRA, New York did not permit commercial gambling. In 1994, one year after the Oneida Nation opened the State's first casino since the 1870s, the New York legislature approved a constitutional amendment to legalize commercial gambling. As stated by one state senator, "I always opposed [casino gambling] in the past, . . . but the fact is, it's really here and maybe we ought to let it happen."[20]

Although it considered a similar amendment, Connecticut rejected legalizing commercial gambling. In fact, in 2003, Connecticut even acted to repeal the charitable casino night law that had served as the legal basis upon which the Mashantucket Pequots and Mohegans were able to open their massive casinos. Connecticut took this action specifically to halt the development of any future casinos.

Even states that are not open to Indian gambling have been affected by IGRA. A non-gambling state is at a severe economic disadvantage if located near a gambling state. The non-gaming state not only loses revenues from taxing goods gamblers would have purchased in their states, it bears the social costs when the gambler returns home. It is for these reasons that gambling has moved quickly through six states in the Mississippi Valley region – Illinois, Indiana, Iowa, Louisiana, Mississippi and Missouri – each state fiercely competing with its neighbors by eliminating betting and loss limits.

D. An Effective Community Response to Gambling

In view of all of these developments, the question is: How should communities respond to the possibility of an Indian gaming operation? The most important short answer is

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[19] Philip Longman, Casino Fever, Part I, Fla. Trend, May 1994, at 30.

[20] James Dao, Legalizing of Casinos Gains in Albany, N.Y. Times, Feb. 7, 1994, at B5.

to *respond early*. The more considered answer is that how effectively a community responds to the prospect of Indian gaming depends almost entirely on: a) what point along the "Indian gaming continuum" the community intersects with the issue; b) how much the community learns about their options at that point; and c) how unified and firm the community is in carrying out the position it elects to take.

The Indian gaming "continuum" refers to the established series of procedural and legal steps and requirements that occur and must be satisfied along the way to opening the doors of a new Indian casino. If a local community, and its legal advisors, understand this continuum, and can identify their place on it with respect to a proposed casino, they can then design and carry out an effective strategy to pursue with maximum effect whatever objectives the community has, from total defeat of the casino to co-existence with it on agreed terms.

As noted earlier, there are several requirements that must be met before an Indian casino can be opened. First, a tribe must obtain federal recognition before it can engage in gaming under IGRA. Without federal recognition, Class III gaming is not an option. Second, Class III gaming must occur on Indian lands. Therefore, a tribe must either currently possess or obtain Indian lands for gaming to be permissible. Following those initial steps, which can take many years, a tribe must negotiate a State-Tribal compact under the procedures set forth in IGRA and under state law. Finally, a tribe must obtain approval of its gaming ordinance and gaming management contract from the NIGC before it can begin to operate a Class III casino. Each of these general requirements includes many specific and more detailed points; all of them are steps long the continuum that leads to a casino.

A community may become aware of and concerned about the possibility of an Indian casino at any point, even before a recognized tribe exists, or much later in the process. The key point is that, while an early response is better, community options for an effective response exist at virtually any point that the community decides to become active.

Understanding exactly what is occurring at the time the community becomes involved is crucial. This is often not an easy task, as both Indian law and gambling are usually issues of first impression for local governments. More than one tribe may be involved; distorted facts about the legal status of a tribal group may exist; or more than one element in the Indian gaming continuum may be active, such as a federal acknowledgment petition and simultaneous land claim activity. Our experience in working with communities is that careful fact gathering and legal analysis should generally precede the identification and choice of alternatives to respond. This can be termed the "reconnaissance phase" of a community response.

The remainder of this paper will identify the main stopping points along the Indian gaming continuum, what is required at these points, and the available alternatives for community response. A final word about the nature of an effective community response is important, however. Each community is different in its approach to a potential casino – some are opposed outright, others are to one extent or another open to such a development on acceptable terms, and still others struggle to find an effective position. The facts and legal

analyses derived from the reconnaissance phase inform the community, and the alternatives identified help promote choices about strategy, but indecision often remains. In each case – opposed, open, or undecided – the best approach almost always calls for an early and proactive community approach. This may mean requests for information filed with federal agencies, becoming a party to an acknowledgment proceeding, making agency or political contacts, submitting material to an open record, or other actions. Little is gained by inaction. Taking effective actions early at any point in the process improves the odds that a community may ultimately prevail in its position, even if that position is one of total opposition. At the same time, effective early actions also build important legal and political leverage for those communities interested in a negotiated outcome.

E. Elements of the Indian Gaming Continuum

1. Tribal Recognition Procedures

There are four possible routes through which tribes are federally-recognized: 1) by treaties; 2) by Congress; 3) by administrative decisions by the BIA; or 4) by the courts. Today, the vast majority of tribes seek recognition through the administrative process, and if recognition has not yet been obtained, the community will most likely be dealing with the administrative process.

a. Recognition Criteria

There are seven criteria that a tribe must demonstrate it meets to qualify for federal recognition by BIA action. Those criteria include:

a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.

b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

d) The group must provide a copy of its present governing documents and membership criteria.

e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or tribes, which combined and functioned as a single autonomous political entity,

f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe, and

g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.

b. Recognition Process

There are a number of steps in the tribal recognition process. The Indian group initiates the process by filing a letter of intent to petition for federal recognition. The BIA is required to acknowledge receipt of the letter within 30 days, file a notice of receipt within 60 days, and notify the Governor and Attorney General in the state that petitioner is located, as well as any other tribe or petitioner that may have potential interest.

Once the notice of intent is filed, and notice has been issued, the tribal petitioner provides BIA with documents and evidence supporting the seven criteria listed above. BIA conducts a technical assistance (TA) review when the petition is considered complete. Petitioners can either respond to the TA review with additional materials or proceed with active consideration using the materials already submitted. After the group responds to the TA review, and before the petition is placed on active consideration, BIA investigates the petitioner to determine if there is little or no evidence that the group can meet criteria under (e), (f), or (g). If the review finds that the evidence clearly establishes that the group does not meet one or more of these criteria, BIA can issue a proposed finding declining to recognize the tribe.

If BIA determines that criteria (e), (f) and (g) have been met, it will place the petition on the "ready, waiting for active consideration" list. When the petition is considered is determined by the date of BIA's notification to the petitioner that it considers the petition ready to be placed on active consideration.

BIA will notify the petitioner and all interested parties when the petition comes under active consideration. After reviewing the petition, BIA prepares a report summarizing the evidence, reasoning, and analyses that are the basis for the recommendation it makes to the Assistant Secretary-Indian Affairs. The Assistant Secretary then makes a proposed determination regarding the petitioner's status. A summary of this determination is published in the Federal Register. The timeline is one year from the time the petitioner is placed on active consideration.

Following the Assistant Secretary's proposed determination, there is a comment period (usually 180 days) during which the petitioner and any third party may submit arguments and evidence to the BIA. Following the close of the comment period, the petitioner has another 60 days to respond to public comments. BIA will then consult with the petitioner and third

parties regarding the timeline for consideration of arguments and evidence submitted during the response period.

BIA technical staff is to provide recommendation to Assistant Secretary within 60 days of the close of the consultation period. The Assistant Secretary makes the final determination, a summary of which is published in the Federal Register. The determination becomes final unless the petitioner, or a third party, files a request for reconsideration within 90 days.

The request for consideration is filed before the Interior Board of Indian Appeals. The board will consider requests for reconsideration that allege there is new evidence, that the evidence or research used to make the final determination is faulty, or that there is a reasonable interpretation of the evidence not previously considered. The Board has two choices: it can either affirm the decision or remand it to the Assistant Secretary for reconsideration.

If the Board affirms a decision, but finds request alleges other grounds, the request is sent to the Secretary of the Interior who has the discretion to request the Assistant Secretary to reconsider, after receiving further comments from the petitioners and interested parties. The Secretary will determine whether to request reconsideration within 60 days of receipt of all comments. The Assistant Secretary will issue a reconsidered determination stemming from either the Board's remand or the Secretary's request for reconsideration. At this point, the administrative process is complete. A petitioner or interested party may contest the decision in federal court.

c. Options for Communities

Communities joining the process at the recognition stage have the opportunity to ensure an accurate decision and to play a substantial role in the outcome. Federal recognition is a significant hurdle for an Indian group, and it is at this point that a community may have its best chance, by becoming active to shape the result. Participation from the outset ensures that the local community will have a voice in all that follows, including appeals and litigation, in the event that the petitioner gets past the recognition hurdle.

Tribal recognition is a factual inquiry. While legal and strategic guidance is helpful, the greater investment typically is in experts in genealogy, history and cultural anthropology, with a specialty in Indians from the relevant geographic area. These are often inquiries in which local governments can play an important substantive role through records and research. Areas that currently tend to generate the greatest controversy, for example, are whether the tribe has maintained existence of an Indian entity on a substantially continuous basis since 1900, meets the tests for continued social community and political activity, and can trace its ancestry to the historical tribe.

There is now widespread skepticism about the authenticity of many "tribal" recognition petitioners, a skepticism that while warranted in some cases, is deeply injurious to

other tribes. This skepticism arises because petitioners located in good casino markets attract non-Indian gambling financiers who bankroll the acknowledgment effort in exchange for lucrative gaming contracts. The BIA's federal recognition process has been under investigation, and last minute decisions by the Clinton Administration to recognize tribal petitioners have been reversed due to procedural irregularities.

Representative Shays of Connecticut has said, "Having a casino is like having a license to print money . . . The money is so significant that it can corrupt very quickly."[21] Likewise, Connecticut Attorney General Blumenthal has stated:

> The deficiencies and inequities of the present recognition process, now widely known, include the repeated failure to provide documents to interested parties, the arbitrary retroactive application of new internal procedures to pending petitions, and the relaxation of the mandatory criteria in contravention of the regulations and previous acknowledgment decisions. Whatever the merits of the BIA process when first adopted, it is completely and unacceptably inadequate now. Its flaws reflect such substantial questions of fairness, competence, and integrity that the present system simply cannot continue. My own experience with the current process supports such widespread complaints.

2. Land Acquisition Process

After a tribe has received federal recognition, the next step is for it to obtain land for development, which can occur in various ways, including land claims.[22] In many cases, the tribe will already have a certain parcel of land in mind that it wishes to develop. Because the federal recognition process is such a time-consuming and expensive process, tribes seeking to develop casinos will probably have already sought out financial backing (or backers will have

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[21] Sean P. Murphy, Decisions on Status of Tribes Draw Fire Bush Administration Reviews Parting Actions by Clinton Appointee, Boston Globe, Mar. 27, 2001 at A2, available at 2001 WL 3926281.

[22] In many cases, tribes will seek to acquire land, or create the legal and political setting in which they can do so, by threatening or filing land claims suits. The existence of the litigation places a cloud on recorded titles to the claimed land, possibly impacting the ability to sell, and certainly creating confusion and concern. The legal merits of the claim can require years on even decades for courts to resolve, but the pressure of the claims often create the dynamics for a settlement, confirmed by federal legislation which may award the tribe land in trust and other concessions leading to a casino. Communities facing claims should gain a clear understanding of the legal situation, invest in public education to avoid extreme public reaction, and deal actively with the threat or reality of claims.

sought out the unrecognized tribe). It is therefore likely that the tribe will either already own a parcel of land in fee or have an option to own a parcel of land.

Ownership of land in fee, however, is not sufficient for gambling purposes. IGRA requires gambling be conducted on "Indian lands." The tribe will therefore need to have the land it possesses placed in federal trust status. If the tribe already possesses trust land, important questions arise regarding when the land was placed in trust and whether the trust lands qualify as "Indian lands," as defined under IGRA. Controversy arises when efforts are made by some tribes to "export" gaming to off-reservation locations. Here, tribes with traditional land bases nonetheless engage in efforts to identify a favorable casino location elsewhere and then find a way to establish "Indian lands" in that location principally for the purpose of exploiting a potential gaming market.

It is this effort to establish off-reservation casinos that has been one of the lightning rod issues under IGRA. Some of the most controversial Indian gaming disputes have arisen in this context. While many parties do not contest the right of Tribes to develop on-reservation casinos, it is the blatant "site shopping" of some tribes and their financial backers that has given rise to the strongest and most legitimate state and community objections.

a. The Tribe Already Has Trust Lands

If the tribe already has a parcel of land held in trust that it wishes to develop, the main questions are whether that land qualifies as "Indian lands" under IGRA and when the land was acquired in trust.

i. The Trust Lands Were Acquired Before 1988

IGRA allows Class III gaming on "Indian lands" only.[23] IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation and 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."[24]

If the tribe possesses trust land that was acquired before the enactment of IGRA, the major issue is whether the tribe has exercised governmental power over the land. This question requires an assessment of tribal activities, including whether: 1) the lands are developed; 2) tribal members reside on those lands; 3) any governmental services are provided and by whom; 4) the tribe provides law enforcement on the lands in question; and 5) the land

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[23] 25 U.S.C. § 2710(d)(1).

[24] *Id.* § 2703(4).

is subject to other indicia as to who exercises governmental power.[25] The tribe must be able to point to concrete manifestations of that authority.[26] If the tribe has pre-1988 trust lands, the options available to local communities are limited. Local communities can challenge gaming development on such lands if the tribe has not exercised governmental authority over the land. Examples of cases where such challenges may be successful include circumstances where tribes have jointly managed one tribe's trust land and cases in which the land has gone entirely undeveloped, with no indicia of ownership and no efforts to improve or develop the lands. In addition, local governments can also raise environmental and other concerns to ensure that valid decisions are made that minimize adverse impacts. Often, these actions must be directed more to BIA than the tribe involved.

ii. The Trust Lands Were Acquired After 1988

Lands that were acquired in trust after the enactment of IGRA require a different analysis. Because the purpose of this prohibition is to protect state and local government interests, as well as those of other tribes in the area of the lands by preventing Indian tribes from shopping for good gambling markets, IGRA generally prohibits gaming development on lands acquired after 1988, unless those lands are located within or adjacent to the tribe's reservation. IGRA does, however, provide some exceptions where it does not perceive these dangers to exist.

Thus, a tribe can conduct gaming on lands acquired after 1988 if the land is: 1) part of a settlement of a land claim; 2) the initial reservation of a tribe acknowledged by the Secretary under the federal acknowledgment process; 3) the restoration of lands for a tribe that is restored to Federal recognition.

For the purposes of a local or state challenge, it is a fourth exception that provides the most traction. It is also the most likely scenario for a community group to encounter. IGRA also allows gambling on land if after consultation with the tribe, state and local officials, and officials of other nearby Indian tribes, the Secretary determines that: 1) a gaming establishment on the land would be in the best interest of the tribe; 2) it would not be detrimental to the surrounding community; and 3) the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

Under this provision, local communities and the state have significant power. A local community can produce evidence to BIA that the proposed development will have a detrimental impact to the surrounding community. Evidence supporting that contention can be easily gathered through the use of experts analyzing the environmental, sociological and

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[25] *Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 528 (D.S.D. 1993), *aff'd*, 3 F.3d 273 (8th Cir. 1993).

[26] *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702-03 (1st Cir. 1994).

economic impacts of development. In addition, the state can prevent development outright by refusing to concur with the Secretary's determination that gaming would not be detrimental to the surrounding community. Thus, local communities should invest in and make their strongest case to both the BIA and the state involved.

b. The Tribe Has Filed a Fee-to-Trust Request

If the tribe does not have land in trust, it will have to file a trust acquisition application. Although the process for obtaining land in trust is fairly straight forward, it can take years for a decision to be rendered.

Under the regulations, the tribe must file a written request identifying what parcel of land it would like placed in trust. Upon receipt of the request, BIA notifies the state and local governments having regulatory jurisdiction over the land that they have 30 days to provide written comments regarding the potential impacts of the acquisition on regulatory jurisdiction, real property taxes, and special assessments. The applicant is then given a reasonable amount of time to reply. For off-reservation acquisitions, BIA is to consider several factors, which include:

1) The existence of statutory authority for the acquisition and any limitations contained in such authority;

2) The need of the individual Indian or the tribe for additional land;

3) The purposes for which the land will be used;

4) The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

5) Jurisdictional problems and potential conflicts of land use which may arise;

6) Whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status;

7) The extent to which the applicant has provided information that allows the Secretary to comply with certain environmental laws;

8) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, with greater scrutiny (and greater weight to state and local government concerns) for land acquisitions far from a tribe's reservation; and

9) If the land is being acquired for business purposes, the tribe is also required to provide a plan that specifies the anticipated economic benefits associated with the proposed use.

Local communities should actively participate in any fee-to-trust request throughout the BIA review process. The regulations acknowledge the risk of "market shopping" created by IGRA by placing more rigorous review requirements on fee-to-trust applications for off-reservation lands. Indeed, this is an issue of increasing importance, as tribes located in more rural locations are attempting to obtain land in urban areas in order to exploit a more economically favorable gaming market.

As the regulations indicate, in cases where a tribe applies to have land placed in trust existing some distance from the tribe's reservation, the BIA is to scrutinize such applications. It is up to local community groups and the state to ensure that BIA is aware of their concerns. BIA is required to give greater weight to local and state concerns as the distance increases, and it is up to state and local community groups to vocalize those interests to ensure a role in the process.

These decisions by BIA are subject to numerous federal procedural laws, such as the National Environmental Policy Act, that require information, public involvement and environmental review. Such procedures present additional opportunities for local governments to protect their own interests, and build a record for possible appeal.

The need for sweeping revision to the trust acquisition process has been recognized by all parties, Indian and non-Indian. Extensive regulations developed by the Clinton Administration were rescinded by the Bush Administration before they became effective. New replacement regulations have not yet been proposed.

3. Negotiation of State-Tribal Compact

An integral part of IGRA is the State-Tribal compact. IGRA sets forth the process for negotiating the compact. At the outset, the tribe is to ask the state to enter into negotiations for the purpose of devising a compact outlining the gambling activities in which the tribe wishes to engage. Once the state has received the request, it is required to negotiate with the tribe in good faith. Before a compact is finalized, the Secretary must approve it and publish notice in the Federal Register. The compact itself can identify:

1) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

2) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

3) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable commercial activities;

4) remedies for breach of contract;

5) standards for the operation and maintenance of the gaming facility, including licensing; and

6) any other subjects that are directly related to the operation of gaming activities.

IGRA requires the state to negotiate a gaming compact in good faith. If the State does not, the Secretary of the Interior may step in to seek to resolve any dispute. If this fails, then the Secretary is to establish "procedures" that will operate in place of a state compact to govern gaming for the tribe.

States can, of course, seek to develop compacts that generally ameliorate the adverse impact of Indian gaming while maximizing its benefits for all concerned. One tool for this purpose concerns payments made to the State to cover the costs of impacts. Another is limitations on the nature and scope of gaming allowed. Local governments can play a role here, especially by taking steps to ensure that the state looks after its interests. In addition, in certain cases environmental review laws should apply to the action of compact approval, at the state or federal level. This proposition has been ignored to date by BIA, but is sure to become a factor in the future.

4. Approval of Tribal Gaming Ordinances and Management Contracts

Before an Indian tribe can engage in Class III gaming, IGRA requires the tribe's governing body to adopt a tribal gaming ordinance and submit to the NIGC's Chairman for approval. The Chairman shall approve a tribal ordinance, unless the Chairman determines that the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or that the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by certain persons identified in the Act.

As the NIGC has indicated, the separation of the regulation from the operation of tribal gaming activities is necessary for effective regulatory oversight. Often times, tribes negotiate contracts with outside gaming management companies. For such agreements to be enforceable, NIGC must first approve the contract. There are three separate steps to the approval process, which include: 1) legal and financial review of the management contract and all collateral documents; 2) compliance with environmental laws; and 3) finding of suitability of all companies and individuals with direct or indirect financial interest in the contract.

These requirements for approval of tribal regulatory ordinances and management contracts offer state and local governmental entities several opportunities for participation. The process for reviewing a management contract is extensive and includes thorough background investigations and strict limitations on the terms of the agreement. In addition, approval of gaming management contracts or tribal ordinances trigger the application of

environmental laws. Thus, even if community groups enter the process at this late stage, there is still opportunity for local governments to protect their interests by participating in the process.

F. Community-Tribe Agreements: A Potential Path to Success

In 1983, Congress enacted a law that granted tribal recognition and a reservation area to the Mashantucket Pequot Tribe in Connecticut. In that pre-IGRA era, the surrounding communities paid little attention to that law. When Congress enacted IGRA five years later, the prospect of Indian casinos in Connecticut still seemed remote, due to Connecticut's limitation of gaming to small-scale charities. Again, the local communities saw little reason to be engaged.

That reality changed dramatically in 1990, when the First Circuit Court of Appeals ruled that Connecticut's charity night gambling law cleared the way for full-scale, Class III Indian gaming. Within a year, the Mashantucket Pequots opened the first casino in the Northeast and began to reap huge profits, while at the same time undertaking an aggressive campaign to expand their trust lands beyond the Congressionally authorized reservation boundaries at the expense of the local communities and the State.

By that time, the consequences of IGRA in the hands of a powerful and wealthy Indian Tribe bent on expansion became painfully clear. The three small surrounding Towns – Ledyard, North Stonington, and Preston -- with a combined population that was less than the daily weekend visitation to the Mashantucket's casino, realized they had to take strong action to protect their interests. What ensued has been a ten-year long legal and political battle. In the process, the three Towns and the State successfully halted the Tribe's outward expansion, but only after protracted litigation. While the Tribe has reluctantly submitted its off-reservation development initiatives to State control and local jurisdiction, it still has refused to take the steps necessary to achieve long-term cooperation with the Towns and State. That approach has clearly hindered the Tribe's aggressive expansion plans, but it also has perpetuated a divisive and often contentious relationship between the Tribe and the surrounding non-Indian communities.

A different and far more promising model of how Indian gaming can coexist with local communities is apparent only ten miles away from the Mashantucket Reservation. There, the Mohegan Tribe, which received federal acknowledgment only 11 years after the Mashantucket Pequots, maintains an on-reservation casino rivaling, if not eclipsing, the Pequot's in size and profitability. It does so, however, against a backdrop of cooperation between the Tribe and the affected local government, the Town of Montville. While that difference in approach is in part the result of the Mohegan's more cooperative attitude, it also is the result of the Town's ability to foresee the course of Tribal development and act at an early point along the gaming continuum described above. Montville also had the advantage of witnessing the problems experienced by its neighboring towns and seeing first-hand how casino development under IGRA could impact local communities.

In the Mohegan's case, the Town of Montville became involved at the very outset of the Tribe's administrative acknowledgment process pending before BIA. By doing so, the Town could not only play a constructive role in the review of the evidence on tribal status, it also ensured that the local government would be directly involved in any subsequent government action relating to gaming and land rights. Montville then had three things its neighboring towns did not: 1) knowing what happened in the nearby towns; 2) a better basic relationship with the Tribe; and 3) a good legal and procedural position at a crucial point in the Indian gaming continuum. This position, in turn, led to the negotiation of a legally enforceable contract between the Tribe, after it received federal acknowledgment, and the Town. The resulting agreement addressed the Town's concerns regarding future development by the Tribe, secured a release of land claims, and built the foundation for a long-term relationship that has worked well for both the Town and the Tribe over the years. That agreement received ratification as a part of the Mohegan Land Claim Settlement Act, passed by Congress in 1994.

The Mohegan/Montville Agreement serves as a bellwether document in the era of Indian gaming. It provided benefits to the Tribe and the local community and serves as proof that a proactive strategy by local communities can be an effective tool for protecting municipal government prerogatives in the face of casino-driven tribal development activities. This approach has been used successfully by other communities, such as the 1999 agreement between the City of Coconut Creek, Florida and the Seminole Tribe, in subsequent years. The nature, scope and content of these agreements has continued to evolve.

In approaching the prospect for such agreements, local communities are wise to keep several important principles in mind.

The first and perhaps most important principle is to get involved early and effectively. The farther along the continuum the Indian gaming development proposal is, the more difficult it is to achieve a meaningful agreement. This is well-illustrated by the contrasting situation between the Mashantucket Pequots, where a successful casino had been established before the Towns were in a position to become active, and the Mohegan scenario, where the experience of neighboring communities made it clear to Montville that prompt action was needed early in the game.

The second principle is that it should not be assumed that casino development is a foregone conclusion. There are many tools available to local communities to oppose or influence such development, especially in unacceptable and off-reservation locations. It is possible to defeat, or substantially modify, undesirable casino proposals, no matter what their proponents may claim.

The third principle is that care must be taken in developing agreements with Indian Tribes, which are shielded by their sovereign status and have immunity from suit. Like any complex contract, local communities must be sure to develop agreements that not only address their key concerns but also cover all of the potential legal pitfalls that are inherent in a

contract with a powerful government entity. It is possible to level the playing field, but only if care is taken.

There is a growing body of experience for addressing the problems, and promise, associated with Indian gaming. Some of this experience is riven with discord and dispute, while other situations reflect success stories of emerging cooperative relationships. The clear message in all of these situations is that the one course that does not work for is acquiescence, inactivity, and acceptance that tribal land expansion and casino development is unstoppable. As these examples of Indian gaming development continue to proliferate, it can be hoped that a new status quo will emerge which ensures all that parties share in the benefits that accrue from properly sited casinos while avoiding the problems and detrimental effects in unacceptable locations.

CONCLUSION

Indian gaming is a remarkable phenomenon. Without question, its evolution has been controversial and has generated conflict and dispute. It also has produced many positive results. What remains to be developed fully and successfully is the middle ground – the point along the continuum where federal, tribal, state and local governments all come together to advance the best interests of the respective constituents through the act of compromise and cooperation.

To achieve this desired result, the parties that are today typically the weakest in the process – local governments and their citizen groups – need to assert their prerogatives and achieve a "chair at the table." If they do so effectively, there is every reason to expect a positive outcome for all concerned. The path to success has been forged by others, and strong proactive local leadership from the outset is the best insurance for community interests.

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