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INDIAN GAMING REGULATORY ACT SYMPOSIUM

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REFLECTIONS ON IGRA 20 YEARS AFTER ENACTMENT

Virginia W. Boylan[†]

On October 17, 1988, President Ronald Reagan signed the Indian Gaming Regulatory Act ("IGRA" or "Act") into law as Public Law 100-497.¹ Because the 20th anniversary of the passage of IGRA is nearing, and because of my close involvement with the Senate Committee on Indian Affairs ("Committee") as the staff attorney responsible for this legislation, I wanted to put my thoughts in writing before they become too stale and while some people may still be interested in my recollections. This article is intended to give an insider's memory of the events leading to passage of the Act and a summary of the key issues debated in Congress and how these issues were ultimately resolved. I have tried to remain focused on "what we knew then" and, except for a few glimpses into the future, have tried not to get sidetracked by lengthy discussions of issues that arose after the Act was passed.

I. PERSONAL REFLECTIONS

In 1979, I began my career in Indian law with the Committee under the Chairmanship of Senator John Melcher (D-MT). When I joined the staff, Alan Parker, an attorney from the Chippewa Cree Tribe of the Rocky Boy's Reservation in Montana, was Staff Director of the Committee. Alan left shortly thereafter, but returned in 1987 to serve for four more years under Chairman Daniel K. Inouye (D-HI). Peter S. Taylor was General Counsel to the Committee for nearly the entire time I was privileged to work on the staff and left just a few months before I joined the private sector in 1993. My counterpart on the House side was Frank Ducheneaux, an attorney from the Cheyenne River Sioux Tribe. For the first years of my career on the Committee, Frank Ducheneaux was the Indian counsel to the House Interior and Insular Affairs Committee under the Chairmanship of Morris "Mo" K. Udall (D-AZ).

[†] J.D., Catholic University, 1979. Deputy Staff Director and Senior Counsel, United States Senate Indian Affairs Committee, 1979-1993. Since 1993, the author has engaged in the private practice of Indian law in Washington, D.C.

1. 25 U.S.C. §§ 2701-2721 (2006); regulations are at 25 C.F.R. §§ 501-577 (2009).

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fails, to select a mediator who will choose from among the proposed compacts the one that best conforms to the Act.³⁸ If the state still refuses to proceed, the Secretary is authorized to issue procedures under which class III gaming may be conducted.³⁹ Thus, although Congress did foresee the reluctance, and even outright refusal, on the part of some states to negotiate with tribes in good faith, it did not foresee that the system for federal court review of cases brought by tribes against states under the Act would be deemed unconstitutional.

1. The Seminole Case

Although Committee staff of both the House and the Senate discussed the constitutional implications of authorizing tribal suits against states, the law at the time appeared to support use of the Commerce Clause for this purpose. The Supreme Court, however, in the case of the *Seminole Tribe of Florida v. Florida*, held that Congress could not use the Commerce Clause power to defeat the state's Eleventh Amendment immunity from suit.⁴⁰

Essentially, states are still required under federal law to bargain in good faith with tribes that petition states to negotiate a class III gaming compact, but the primary mechanism requiring them to do so was eliminated by the *Seminole* decision. The two remaining options are the issuing of procedures by the Secretary for the operation of class III games, or the United States, as the superior sovereign, filing suit against a state on behalf of a tribe to enforce the provisions of the Act. Attempts by the Secretary to impose class III procedures have met with lawsuits in Florida, Nebraska, Alabama, and Texas.⁴¹ No suit has yet been filed by the United States on behalf of a tribe against a state. The issue remains clouded even though most states have entered into class III compacts that have benefited both tribes and states.

E. Section 20 of IGRA--Gaming on After-Acquired Lands and the Off-Reservation Issue

Some senators expressed considerable concern about the possibility that tribal governments might acquire land in or near metropolitan areas on

38. *Id.* § 2710(d)(7)(B)(iii-vi).

39. *Id.* § 2710(d)(7)(B)(vii).

40. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 44-45 (1996).

41. *See, e.g., Seminole Tribe*, 517 U.S. at 44-45; *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 563-65 (8th Cir. 1998); *Alabama v. United States*, 630 F. Supp. 2d 1320, 1130-31 (S.D. Ala. 2008); *Texas v. United States*, 362 F. Supp. 2d 765, 769-71 (W.D. Tex. 2004), *rev'd*, 497 F.3d 491 (5th Cir. 2007).

which they might open bingo or even casino facilities. Senator Howard M. Metzenbaum (D-OH), in particular, was concerned that a tribe might conduct gaming in downtown Cleveland. These concerns gave rise to Section 20 of IGRA, which generally prohibits gaming on any lands acquired in trust by the Secretary after the date of enactment (October 17, 1988).⁴² Understanding that tribes without a land base and tribes not yet recognized would be treated unfairly under this provision, Congress provided in Section 20 several exceptions to the ban on gaming on after-acquired land, both on-reservation and off-reservation and for new and restored reservations.⁴³ The intent was to ensure that all tribes were treated similarly and fairly. Congress even provided that tribes in remote areas might be able to conduct gaming in the community if the community was supportive and the governor of the state concurred in a Secretarial two-part determination that gaming on the land would benefit the tribe and its members and would not be detrimental to the surrounding community.⁴⁴ This was seen as providing an economic opportunity for tribes that would otherwise be left out of the benefits of gaming and is discussed below under “The Off-Reservation ‘Two-Part Determination’ Exception.”

1. The Landless and On-Reservation Exceptions

IGRA provides for exceptions to the ban on gaming for tribes that had no reservations on October 17, 1988, and also includes exceptions for lands located within or adjacent to existing reservations and lands located on former reservations of tribes in Oklahoma and other states.⁴⁵ In the years since enactment of IGRA, there have been *14 parcels of land* acquired in trust under these exceptions, none of which has been controversial.⁴⁶

2. The Off-Reservation “Two-Part Determination” Exception

IGRA authorizes what has become known as the “two-part determination” exception to the prohibition on gaming on after-acquired lands.⁴⁷ The two-part determination allows a tribe that had Indian land at the

42. 25 U.S.C. § 2719 (1988).

43. *Id.*

44. *Id.* § 2719(b)(1)(A).

45. *Id.* § 2719(a).

46. National Indian Gaming Commission, Indian Land Opinions, <http://www.nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx> (last visited Mar. 1, 2010).

47. *See* 25 U.S.C. § 2719(b)(1)(A).

time IGRA was enacted to acquire land outside its reservation for gaming purposes but *only if* the Secretary determines that gaming on the off-reservation land is (1) in the best interest of the tribe; and (2) not detrimental to the surrounding community.⁴⁸ To receive final approval of land in trust for gaming purposes, the governor of the state in which the land is located must concur in the Secretary's determination.⁴⁹ The governor's concurrence authority amounts to a veto or approval. Since 1988, *four tribes* have acquired land in trust under this two-part determination.⁵⁰

3. The Land Claim Exception

Congress also authorized an exception for lands "taken into trust as part of a settlement of a land claim."⁵¹ Congress was cognizant of the need to put tribes with legitimate land claims on an equal footing with other tribes and to treat lands acquired in settlement of such claims (whether the original lands or lands in lieu of the original lands) as eligible for gaming since the original lands would have been eligible had they not been illegally alienated. Since 1988, *only one tribe* has acquired land for gaming under a congressionally approved land claim settlement act, the Seneca Nation of Indians ("SNI") in New York.⁵² A recent challenge to the SNI gaming on land in Buffalo that was acquired with settlement act funds resulted in a court decision that the settlement act is, in fact, not really a settlement of a land claim, so the land does not qualify for gaming under this Section 20 exception.⁵³ In a recent twist, the SNI and Interior refer to the settlement act's language that grants the SNI as the right to take land into restricted

48. *Id.*

49. *Id.*

50. The four Tribes are the Forest County Pottawatomi Tribe, Wisconsin (1990); the Kalispel Tribe, Washington (1997); the Keweenaw Bay Indian Community, Michigan (2000); and the Fort Mojave Indian Tribe, California (2008). *Off-Reservation Gaming: Land into Trust and the Two-Part Determination: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 4 (2006) (statement of George Skibine, Acting Deputy Assistant Secretary, Policy and Economic Development for Indian Affairs, Department of the Interior).

51. 25 U.S.C. § 2719(b)(1)(B)(i).

52. *See Land Eligible for Gaming Pursuant to the Indian Gaming Regulatory Act: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 12 (2005) (statement of George Skibine, Acting Deputy Assistant Secretary, Policy and Economic Development for Indian Affairs, Department of the Interior); National Indian Gaming Commission, Indian Land Opinions, <http://www.nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx> (last visited Mar. 19, 2009).

53. *See Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 326 (W.D.N.Y. 2007).

fee.⁵⁴ Given that IGRA discusses only “land taken into trust” by the Secretary, they argue that the IGRA ban on gaming on after-acquired land does not apply to land held in restricted fee status.⁵⁵ The House recently rejected efforts by two tribes to have bills enacted by Congress to confirm the tribes’ land claim settlements with the state of Michigan.⁵⁶

4. The Initial Reservation and Restored Lands Exceptions

Congress addressed the issue of tribes newly recognized by the Secretary pursuant to the federal acknowledgment process⁵⁷ that would not have trust lands on October 17, 1988 and that would not be restored to recognition by Congress, by the courts, or by administrative action.⁵⁸ Congress, therefore, sought to treat these new tribes fairly by mitigating the harsh consequences of the Section 20 ban on gaming on after-acquired land by providing the additional exceptions in Section 20 to permit these tribes the opportunity to acquire and conduct tribal gaming on at least one parcel of land without the concurrence of the governor of the state.⁵⁹ But, of course, to conduct gaming on these lands, a tribe must have an approved tribal-state compact so states have a major role to play in any case.⁶⁰ These exceptions were intended to put restored and newly recognized tribes on an equal footing with tribes that had federally protected tribal land on the date of enactment of IGRA. Since 1988, the Department of the Interior has acquired 18 parcels of land that have been put into trust for gaming for 14 restored tribes and four newly recognized tribes.⁶¹

54. See Letter from Philip N. Hogen, Chairman, Nat’l Indian Gaming Comm’n, to Maurice A. John, Sr., President, Seneca Nation of Indians (July 2, 2007), available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/senecanationny/senecanation070207df.pdf>.

55. See *id.*

56. Jonathan Oosting, *House Rejects Michigan Casino Bills*, MICHIGAN NEWS, June 25, 2008, available at http://www.mlive.com/news/index.ssf/2008/06/house_rejects_michigan_casino.html.

57. 25 C.F.R. § 83 (2009).

58. 25 U.S.C. § 2719(b)(1)(B)(ii)–(iii) (1988). It is noted that most if not all recognition acts of Congress do direct the Secretary to take land into trust for the tribe that is subject to the act.

59. *Id.*

60. *Id.*

61. National Indian Gaming Commission, Indian Land Opinions, <http://www.nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx> (last visited Mar. 19, 2009).

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Despite the relatively low numbers, the controversy over these Section 20 acquisitions has been significant.⁶² Unfortunately, the United States does not provide funding to landless tribes to assist them in acquiring lands to serve as a locus for tribal governmental activities, including economic development. Because other funding sources seldom are available to new and restored tribes for land acquisition for economic development, gaming development is often the only form of tribal economic development with a sufficient rate of return to attract third-party investors to assist landless tribes with achieving meaningful self-government and economic self-sufficiency. The unintended impact of IGRA on recognition and restoration has caused much concern among members of Congress and among recognized tribes that may face gaming competition from new and restored tribes.

The regulations governing the acquisition of land in trust require the Secretary to consider how state and local governments are affected and to weigh possible harms against the benefits to the tribe and the promotion of federal policies favoring tribal self-determination.⁶³ Moreover, the regulations require tribes to comply with the provisions of the National Environmental Policy Act, and, therefore, tribes are required by law to work with local governments to identify and mitigate potential adverse social, economic, and environmental impacts on local communities.⁶⁴

Under current regulations, the Department and the NIGC require a tribe to show historic and contemporary ties to the land for the land to qualify for either the restored land or the initial reservation exception.⁶⁵ Because a restored tribe must show a temporal nexus between its restoration and the acquisition of the land, and because a Secretarial reservation proclamation is required for a newly recognized tribe, a new or restored tribe will have only one chance to conduct gaming without having to go through the two-part test and to receive the governor’s concurrence.

F. Department of the Interior: Review of Compacts, Revenue Sharing with States, and Tribal Revenue Allocation Plans

Congress delegated to the Secretary certain regulatory responsibilities under IGRA, primarily approval of tribal-state compacts and tribal revenue

Gaming Comm’n, to 2, 2007), available at rdinances/senecanation

MICHIGAN NEWS, June 25, at casino.html.

st if not all recognition be that is subject to the

Land Opinions, ult.aspx (last visited

62. Six of the tribes are in California, three in Oregon, four in Michigan, and one in Oklahoma.

63. 25 C.F.R. § 151.3 (1980).

64. *Id.*; see 42 U.S.C. §§ 4321–4347 (2006).

65. 25 C.F.R. § 292 (2008).