INTRODUCTION TO INDIAN GAMING FOR THE MUNICIPAL LAWYER

By
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I. INTRODUCTION

The Renaissance of Federal Indian Law

This paper is presented in connection with the October 2003 International Municipal Lawyers Association Conference in Minneapolis, Minnesota. It is intended to provide a basic introduction to the law of Indian[2] gaming for the municipal law practitioner. Because of the extreme complexity of the subject, generalizations are unavoidable. Exceptions to the general rules usually exist in specific situations or geographical locations.

Interest in the law governing Indian affairs and in relationship of Indians with federal, state and local government has grown impressively since the late 1980's. Indeed, it may be fairly characterized as approaching an all-time high, at least since the Nineteenth century. Nevertheless, American lawyers are remarkably uninformed about this vast, complicated, but enriching area of the law. Indian law does not appear on state bar exams or as a required course in U.S. law schools. Although a growing number of state and local bar associations have added Indian law sections, complementing the active Federal Bar Association Section of Indian Law, most Indian law lawyers practice in relative obscurity, except perhaps in a few western states and portions of a few other states.

Indian Law and the Municipal Law Practitioner

Well over a century has elapsed since local governments have had much concern with Indian law. Early in U.S. history the federal government, like the European powers before it, treated with Indian tribes as sovereign nations. During those days of the young American republic, the role of local government in interacting with American Indians was primarily criminal law enforcement. To put it charitably, state government was, and often remains, largely focused upon issues pertaining to Indian land, Indian sovereignty, and state's rights. Clearly, times have changed. Indian casino gaming, hunting, fishing, and other land use issues are of great concern to local government. Archeological and anthropological discoveries, environmental policy, the acquisition of land by tribes, and the perimeters of criminal jurisdiction are among a growing list of concerns facing municipalities situated near Indian country.

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[2] "Indian" as used here refers to people descended from ancestors who lived in North America prior to the arrival of significant numbers of Europeans in the 16th century A.D. The term "Native American", while not offensive to most Indians, is nevertheless a recently devised term and still used primarily by people of European descent. Most Indians self identify with the tribe in which he or she is enrolled or descends from, and secondarily as "Indian".

A casual reference to the map yields surprising findings. Municipalities, and their suburbs, such as Boston, Chicago, Milwaukee, Minneapolis, New Orleans, New York, Los Angeles, Sacramento, San Diego and San Francisco, complementing the more obvious cities such as Phoenix, Tucson and Albuquerque, are unexpectedly discovering Indian communities within a short distance of their city limits. Today, any municipality near an Indian community must have access to legal counsel thoroughly familiar with Indian law.

II. BASIC BACKGROUND PRINCIPLES

Federal Indian and Tribal Law

The phrase *federal Indian law* refers to the law governing relations between Indians and the federal government. Because Congress has plenary power over Indians, federal law is of paramount importance. *Tribal law* denotes the internal law of the various tribes. Today, many Indian tribes have created well-functioning tribal courts, comprehensive civil and criminal codes and administrative regulations.

"Indian"

The term *Indian* takes on different meanings, depending on the purpose intended. Today it is commonplace for many to lay claim to Indian heritage through some real or supposed ancestor. But for most legal purposes it is *enrolled membership* in a federally or state recognized Indian tribe that is important, with ancestry an indirect factor only.

"Tribe"

Although, the basic unit of Indian self-governance is the tribe, there is no single, universally accepted definition of the tribal unit.[3] It is well settled that the ultimate decision to recognize a tribe is a political question, not subject to judicial review. *United States v Holliday*, 70 U.S. 407, 3 Wall. 407, 18 L.Ed. 182 (1865).

Congress delegated much authority over Indian affairs to the Department of Interior, which has promulgated extensive regulations. 25 C.F.R. Part 83 (1997) sets forth the Department's criteria for federal acknowledgement of tribes. The federal courts will review the Department's actions under the Administrative Procedures Act, if challenged as contrary to the Department's own regulations. The federal courts will also review a challenge to Department action as violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. *Cherokee Nation of Oklahoma v. Babbitt*, 117 F. 3d 1489, 326 U.S. App. D.C. 139 (D.C.Cir.1997).

The kinds of proofs an aspiring tribe ordinarily relies on include the opinions of scholars as to the distinct historical existence of the tribe, a history of "substantially continuous tribal existence" and "autonomous" functioning to the present day. 25 C.F.R. Section 83.11 establishes an Interior Board of Indian Appeals" to consider the Department's

[3] Some tribes, especially the larger ones such as the Navajo, whose reservation extends to parts of Arizona, New Mexico and Utah and is approximately the same geographical size as West Virginia, prefer the term "Nation".

determination whether to recognize in the first instance. The tribes recognized by the federal government are published annually in the Federal Register. See 25 U.S.C Section

479a-1 and Fed. Reg. 55270 (Oct. 23, 1997). Currently there are more than 300 federally recognized tribes in the continental U.S. and almost as many in Alaska alone.

Tribal Sovereignty

The U.S. Constitution grants to Congress the power to regulate commerce with the Indians. U.S. Const. art. I, Section 8, cl.3. This provision, known as the Indian Commerce Clause, is the source of most Congressional authority over Indian affairs.

In a series of decisions in the early Nineteenth Century, the Supreme Court of the United States laid the basic tenets of the legal status of tribes. In *Johnson v. McIntosh*, 21 U.S. 543, 8 Wheat. 543, 5 L.Ed. 681 (1823), Chief Justice John Marshall wrote that U.S. authority over the Indians existed by right of conquest. Indians, the Court held, had an aboriginal "right of occupancy" to the soil, which did not include a right of sovereignty. However, the European powers acquired sovereignty, to which the United States eventually succeeded by treaties, purchases and cession.

Eight years later, in *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831), the Supreme Court fashioned the famous description of tribes as "domestic dependent nations". The Court held that an Indian tribe is not a foreign state within the meaning of Article III of Constitution, but it nevertheless is a "state".

The relationship between the several states was the subject, in part, of *Worcester v. Georgia*, 31 U.S. 515, 5 Pet. 515, 8 L.Ed. 483 (1832). The Court held that Georgia state law had no force in Cherokee territory. In *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) the Supreme Court made clear that states courts lacked jurisdiction over civil cases brought by non-Indians against Indians in matters arising on an Indian reservation. This is a general principle regarding tribal members. State law still applies, even on reservations, to non-Indians. See *United States v. McBratney*, 104 U.S. 621, 14 Otto 621, 26 L.Ed. 869 (1881).

Indian tribes are sovereign states that preceded the Constitution. They do not derive their authority from the Constitution, as do the federal and state governments. For the first century of U.S. history, until 1871, the federal government entered into treaties with tribes. 25 U.S.C. Section 71. Unless abrogated by Congress, Indian treaties are of the same force and effect as any other treaty or federal law. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). The Supremacy Clause of the U.S. Constitution applies to existing Indian treaties, making such treaties supreme over conflicting state law. U.S. Const., art. VI, Section 2. *Worcester v. Georgia*, supra. Congress has authority to take away the attributes of sovereignty from the tribes. In effect, a tribe has all authority except that which Congress elects to take from it. Thus, official acts and legislation by a tribal authority need not be tied to a grant of power in the federal or a state constitution.

In holding that the Free Exercise clause of the First Amendment did not apply to an Indian tribe, the 10th Circuit noted that the tribes "have higher status than that of states". *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, (10th Cir.1959). As a result of the tribe's unique status in U.S. Constitutional law, many of the usual principles and rights of the Constitution have been held inapplicable to tribes. For example, the Fifth Amendment grand jury requirement of the U.S. Constitution does not apply to tribes *Talton v Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896). Similarly, the Fourteenth Amendment prohibition against a states denying a person due process and equal protection of law, does not prohibit such action by a tribe. But see the Indian Civil Rights Act, *infra*.

Sovereignty Immunity

One of the most fertile areas of litigation in Indian law concerns the doctrine of tribal sovereign immunity. As a general rule, the tribes, as sovereigns, enjoy sovereignty immunity. See e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978). A tribe may consent to waive immunity, *Big Spring v. U.S. Bureau of Indian Affairs*, 767 F.2d 614 (9th Cir. 1985); and Congress may waive a tribe's immunity for it. *Public Service Co. of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir.1994). Tribal immunity does not apply to actions filed by the United States. *United States v. Yakima Tribal Court of the Yakima Indian Nation*, 794 F.2d 1402 (9th Cir.1986).

Congress lacks the power under the Indian Commerce Clause of the Constitution to override the Eleventh Amendment immunity of the states from suit by an Indian tribe. U.S. Const. Amend. XI; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). However, just as in the case of the states, sovereign immunity is no bar to suit against individual tribal officers on the theory that the officer acted outside the scope of his or her authority. *Puyallup Tribe v. Department of Game, of State of Washington*, 433 U.S. 165, 96 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

Some tribes create "tribal entities" as specialized agencies to conduct business. These entities are not always given immunity, to maintain the tribal government's immunity yet permit suit against the entity, in hopes this will encourage non-Indian firms.

Not surprisingly, litigation often centers on whether a tribe has waived immunity in a given case. This is most likely to arise in commercial activities between a tribe or one of its agencies and private business enterprises. Tribes and businesses face a dilemma. Tribes are loathe to waive immunity due to a long history of economic and political oppression, yet they need private enterprises to bring development, modern equipment, jobs, and skills training to reservations.

On the other hand, private firms are reluctant to do business with tribes unless protected by state law and access to state courts. Although the businesses would have access to tribal courts, few non-Indian businesses find this adequate.

Public Law 280

The long sordid history of Congress' dealing with Indian tribes has included constantly shifting attitudes of domineering, isolating, patronizing, assimilating, and sheer indifference. In 1953 Congress passed 67 Stat. 588, 18 U.S.C. Section 1162(a), often called "Public Law 280". Minnesota, the site of the IMLA, 2003 fall conference, is a "Public Law 280 state" except as to the Red Lake Reservation. Neighboring states Wisconsin is a Public Law 280 state as to *all* of Indian country within the state.

In this Act Congress ceded much of its civil and criminal jurisdiction over tribes to five states: California, Minnesota (except civil actions arising in the Red Lake Reservation), Nebraska, Oregon (except civil actions arising on the Warm Springs Reservation) and Wisconsin (except for civil actions on the Menominee Reservation). Alaska (except for certain types of island cases) was added in 1958. In these states federal criminal and civil jurisdiction was substituted by state jurisdiction.

The Act originally provided that any state could choose to assume jurisdiction over a tribe without the consent of the tribe. In 1968 Congress amended the Act to expressly provide that states that had obtained jurisdiction over tribes could retrocede it to the federal government, and that any future assumption of authority by a state, required consent of the tribe. Public Law 280 also rendered inapplicable the Major Crimes Act, 18 U.S.C. Section 1153, and the General Crimes Act, 18 U.S.C. Section 1152 in the six states. See 18 U.S.C. Section 1162(c).

The Act did not prohibit tribal court *concurrent* jurisdiction. See *Native Village of Venetie I.R.A. Council v Alaska* 944 F.2d 548 (9th Cir.1991). Further, Public Law 280 did not end the federal trust obligation toward the tribes. In *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir.1979) the Ninth Circuit Court of Appeals held that the sovereign immunity of the tribes survived Public Law 280.

Criminal Jurisdiction

Criminal jurisdiction in Indian country is subject to a complex web of contradictory case law of widely varying age. Jurisdiction is sometimes exclusive, other times concurrent with tribal the federal, and state governments, depending on the status of the alleged criminal, victim, where the crime was committed, and the type of crime allegedly committed. Generally, a tribe has no criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978). However, a tribe probably has sufficient authority to exclude a non-Indian from its reservation. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982).

18 U.S.C Section 1152, the Indian Country Crimes Act, commonly referred to as the General Crimes Act governs crimes committed by:

- Indians against non-Indians and,
- Non-major crimes committed by Indians against non-Indians

The General Crimes Act applies to crimes committed by non-Indians against Indians, but expressly excludes crimes by Indians against Indians and crimes by Indians that have already been punished by the tribe. The Act operates to incorporate by reference "the general laws of the United States as to the punishment of offenses committed" in areas under exclusive federal jurisdiction, into Indian country. 18 U.S.C. Section 1152.

The Act necessarily incorporates 18 U.S.C. Section 13, the federal Assimilative Crimes Act, as one of the "general laws" of the United States. The Assimilative Act in turn incorporates into federal criminal law acts that would be crimes if committed in the state in which the federal territory is situated. A tribe has jurisdiction over crimes committed by Indians on the tribe's reservation, even of the defendant is a member of a different tribe. 25 U.S.C. Section 1301(2).

The most important effect of 18 U.S.C. Section 1153, commonly known as the Major Crimes Act, is the conferral of exclusive federal jurisdiction for certain enumerated crimes committed in Indian country. The crimes are murder, manslaughter, kidnapping, maiming, incest, assault with a dangerous weapon, assault with serious bodily injury, assault on minors under age 16, arson, burglary and robbery. The Supreme Court upheld Congressional power to extend federal criminal jurisdiction over Indian country. *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). The Major Crimes Act has been held to apply to crimes committed by Indians whether committed against Indians or non-Indians. *Ex Parte Pero*, 99 F.2d 28 (7th Cir.1938).

In Public Law 280 states, state law governs in Indian country as described above. A state, of course, has jurisdiction over crimes committed within its territory and *not* in Indian country, regardless of whether or not the defendant or the victim is Indian. The more difficult question is determining when a state has criminal jurisdiction within Indian country. Crimes committed by non-Indians against non-Indians *within* Indian country are subject to exclusive state court jurisdiction, not tribal court jurisdiction. 18 U.S.C. Section 1152; *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946), *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896) and *United States v. McBratney*, 104 U.S. 621, 14 Otto 621, 26 L.Ed. 869 (1881).

The rationale for this rule is that states are the real parties with an interest in enforcing criminal law between non-Indians. Tribes supposedly have little interests to advance between non-Indians. The fallacy of this rationale is apparent when asking why then, does a state enforce its criminal laws when a crime is committed by anyone who is not a citizen of that state against another non-citizen? The more likely rationale is that non-Indians do not wish to be subject to Indian law, even when the crime is committed in Indian country. Victimless crimes by non-Indians are subject to exclusive state jurisdiction. See *Solem v. Bartlett*, 465 U.S, 463, 104 S.Ct. 1161, 79 L.Ed. 2d 443 (1984).

The U. S. Court of Appeals for the Ninth Circuit held that state law enforcement officers may briefly stop a vehicle with a lawbreaker, determine if the person is a non-Indian or Indian and detain Indians for tribal authorities. *United States v. Patch*, 114 F.3d 131 (9th.Cir.1997). The Ninth Circuit also held that state authorities cannot enter reservations

to arrest Indians for state crimes. *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969). However, a "fresh pursuit" exception was upheld in *State v. Lupe*, 181 Ariz. 211, 889 P.2d 4 (Arix.App.1994). The exception is of doubtful applicability if an extradition agreement exists between state and tribal authorities. *City of Farmington v. Banally*, 119 N.M. 496, 892 P.2d 629 (N.M.App.1995). Tribal court criminal law jurisdiction essentially restricted to:

- Non-major crimes
- Committed by Indians against Indians on tribal territory.

The maximum penalty a tribal court may pronounce is one year in prison and a fine of five thousand dollars ($5,000). 25 U.S.C. Section 1302(7) (the Indian Civil Rights Act of 1968). A tribe may extend its jurisdiction "over all Indians", who commit crimes otherwise within the jurisdiction of a tribal court. 25 U.S.C. Section 1301(2). It should be noted, however, that some tribes enter in cross-deputizing agreements between nearby municipal, county or state law enforcement authorities, and tribal law enforcement officers.

Civil Jurisdiction

State court civil jurisdiction does not include civil actions by non-Indians against Indians for matter arising in Indian country. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959). Conversely, even though tribal courts enjoy more extensive jurisdiction in civil than criminal cases, civil jurisdiction over non-Indians is doubtful. *Strate v. A-1 Contractors*, 520 U.S. 428, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (involving a non-Indians in vehicular accident on a state highway right-of-way on a reservation). The Ninth Circuit has held this also prevent tribal court jurisdiction over civil actions by Indians against non-Indians in similar circumstances. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir.1997).

Generally, a civil matter against an Indian over an issue arising on a reservation must be brought in tribal court. There are often specialized rules governing who can practice law in tribal court, and a growing number of tribes administer their own bar exams. A tribal court does not have jurisdiction over a matter involving an Indian plaintiff and a non-Indian defendant, at least without the defendant's consent to jurisdiction.

Of course, just as any other person, an Indian can sue a non-Indian in state court over a matter arising off the reservation. Strate, *supra*. State courts may even hear civil actions between Indians, or between Indians and non-Indians, even if the dispute arose in Indian country, as long as the matter is completely unrelated to Indian interests. *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, 149 Ariz. 524, 720 P.2d 499 (1986). This makes perfect sense. For example, if a buyer wishes to sue a used car dealer over a "lemon" car obtained in a purchase off the reservation, there is no reason why a state court should be closed to the parties merely because they happen to be of Indian descent. See, for example, *Paiz v. Hughes*, 76 N.M. 562 417 P.2d 51 (1966).

Indian Lands

Indian reservations are created by various methods such as by treaty, by act of Congress, Presidential Executive Order or aboriginal occupancy. A single reservation may comprise a combination of methods, thus creating what can be an extremely confusing "quilt" of parcels with under differing status.

Often, the first question addressed in analyzing Indian law land issues is whether the land involved is, in fact, Indian land. "Indian country" is defined in 18 U.S.C. Section 1152 to encompass "all lands within the limits of any Indian reservation" and "all dependent Indian communities within the borders of the United States", as well as "all Indian allotments" that have not been extinguished. 18 U.S.C. 1152(a)-(c). Indian country is, thus, potentially much broader than just the geographical limits of a reservation.

Generally, title to reservation land is held in trust by the U.S. Secretary of the Interior. The Secretary is authorized to acquire additional tribal land. 25 U.S.C. Section 465, 25 C.F.R. Section 151.10 et seq. A few tribes, such as the New Mexico Pueblos and Tuscarora tribe of the Iroquois nation in New York hold fee title. Pueblo Lands Act of 1924, 43 Stat. 641. The Nonintercourse Act, 25 U.S.C. Section 177. Indian lands may be leased to non-Indians with the permission of the Secretary of the Interior. 25 U.S.C. Section 415.

A significant amount of tracts have been distributed into "allotments". Several statutes, particularly the General Allotment Act of 1887, 25 U.S.C. Section 331 et seq., known as the Dawes Act, created allotments. The system permitted the dividing up of communally held trust land into smaller parcels held in trust by individual Indians for a set period of years. At the expiration of the trust period, the parcel became freely alienable fee land. The result was the loss of untold millions of acres from Indians to non-Indians. In 1934 the Dawes era was ended. 25 U.S.C. Section 461. Some allotments still exist and are held by the U. S. in trust for individual allotment holders. Local governments cannot condemn an allotment without federal consent. *United States v Pend Oreille County Pub. Util. Dist. No.1*, 135 F.3d 602 (9th Cir.1998).

To establish a federal extinguishment of Indian title to land, Congressional intent must be clear and not merely implied. *United States v. Dann*, 706 F.2d 919 (9th Cir.1983). Extinguishment is not a compensable "taking" under the Fifth Amendment unless "recognized" (by federal treaty or statute) by Congress. 12 Stat. 765 (treaty lands); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955). However, a taking of Indian lands that was created by Executive Order is compensable. 25 U.S.C. Section 70a; 25 U.S.C. Section 1505. Since 1978 claims are filed with the U.S. Court of Claims. In the case of Alaskan Indians, Congress extinguished Indian title and created an entirely new system of ownership. 43 U.S.C. Sections 1601 et seq.

II. GAMING

Origins

The seminal legislation dealing with Indian gaming is the Indian Gaming Regulatory Act of 1988, 25 U.S.C. Sections 2701-2721. The Act was intended to be a comprehensive response to the Supreme Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed. 2d 244 (1987).

In *Cabazon Band of Mission Indians*, the Supreme Court addressed what had been a steadily growing, but by today's standards a small and loosely regulated gaming industry on a few reservations across the country. Two federally recognized California Tribes, the Morongo and the Cabazon Bands of Mission Indians, had been conducting bingo games, as well as other gaming activities, pursuant to an ordinance approved by the Secretary of Interior. Although the gaming at issue had been conducted solely on reservations, the participants were primarily non-Indians.

California, a Public Law 280 state, sought to apply its criminal provisions regulating bingo by exercising its broad jurisdiction under Section 280 over crimes committed by or against Indians in Indian country. The California statute in question, Cal. Penal Code Ann. Section 326.5 (West Supp. 1987), did not prohibit bingo, but restricted it to games operated by designated volunteer charitable organizations. Profits could only be used for specified charitable purposes and could not exceed two hundred and fifty dollars per game. Imposition of these provisions would have effectively terminated the gaming.

The Court followed the holding of the U.S. Court of Appeals for the Ninth Circuit in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F. 2d 1185 (1982), which distinguished between state "criminal/prohibitory" laws, and state "civil/regulatory" laws. Where a Public Law 280 state intends to generally prohibit gaming in its territory, it may also prohibit the same in Indian country within its territory. However, if it state permits gaming, even though it is subject to regulation, Public Law 280 does not support enforcement in Indian country.

After considering the state regulation of bingo, as well as a state sponsored lottery and horse racing betting, as well as the important federal interest favoring Indian gaming for economic development purposes, the Court concluded the gaming was not subject to California's penal code.

After the decision in *Cabazon Band of Mission Indians*, Indian gaming proliferated throughout the U. S. It should be noted, however, that contrary to popular imagination, less than half of tribes in the U.S. maintain gaming operations. Many tribes, especially those that do not occupy land close to major urban centers, do not operate gaming centers. A few, well-placed and highly publicized gaming operations, such as the Mohegan and Pequot casinos in Connecticut, have created the impression that all tribes are involved in gaming and benefit from its profits. This impression is unfounded.

The Indian Gaming Regulatory Act of 1988

In response to the *Cabazon Band of Mission Indians* decision, the ensuing frenetic growth of Indian gaming, and impressive financial investment from non-Indian and even non-American sources, Congress enacted the Indian Gaming Regulatory Act of 1988. The express policy of the Act was to:

- Provide a statutory basis for Indian gaming to promote economic development. 25 U.S.C. 2702 (1)
- Shield Indian gaming from organized crime and other corruption. 25 U.S.C. 2702 (2)
- Create a National Indian Gaming Commission with authority to regulate Indian gaming. 25 U.S.C. 2702 (3)

To accomplish this, the Act permits a state to prohibit Indian gaming only if the state otherwise prohibits all forms of gaming within its borders. If a state permits any form of gaming, such as state sponsored lotteries, bingo, or horse racing, then it must permit Indian gaming, and bargain in good faith to reach comprehensive gaming pacts with tribes desiring to establish gaming operations within the state.

In the Act, Congress made several findings acknowledging the reality of Indian gaming for economic development, that although the Secretary of Interior had authority to review gaming contracts there existed no guiding standards in the law, reaffirming a strong national policy favoring tribal economic development, and expressing the exclusive right of tribes to regulate Indian gaming subject to federal law. 25 U.S.C. 2701 (1) – (5).

The Gaming Act defines "Indian lands" as including all reservations and any lands to which title is held in trust by the U.S. for benefit of any tribe or individual, or held by any tribe or individual subject to U.S. government alienation restrictions and over which a tribe has governmental powers. 25 U.S.C. 2703 (4) (A) - (B). At least one court has held that land does not have to be located within a reservation to be considered "Indian lands" within the meaning of Subsection 4. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F. 3d 273 (8th Cir. 1993).

Indian tribe is defined in the Act as any tribe, band nation, or other organized group or community of Indians recognized as eligible by the Secretary of Interior for special programs and services provided by the U.S. to Indians *and* recognized as having self-government powers. 25 U.S.C. 2703 (5) (A) - (B).

The Act next divides gaming into three classes of conduct, summarized as follows:

1. Class I: "social gaming" for prizes of minimal value or traditional Indian forms of gaming related to tribal ceremonies or celebrations. 25 U.S.C. (6). This type of activity is within the exclusive regulatory jurisdiction of the tribes and not even subject to the Act, other than by way of exclusion. 25 U.S.C. 2710 (a) (1)

2. Class II: bingo (whether electronic, computer or otherwise), card games authorized by the state or not explicitly prohibited by the state anywhere in that state if played in conformity with state law requirements. 25 U.S.C. 2703 (7) (ii). Expressly excluded from Class II are "banking card games, including baccarat, chemin de fer, or blackjack" and any electronic games of chance, such as slot machines. 25 U.S.C. 2703 (7) (B). Also excluded by a grandfather clause were card games played in Michigan, North Dakota, South Dakota and Washington by a tribe on or before May 1, 1988. 25 U.S.C 2703 (7) (C)

   There have been number of cases over the classification of different games. For example, a "Pick Six lotto" game was held to not qualify as a Class II device, but rather subject to Class III tribal state compact requirements in *Spokane Indian Tribe v. United States*, U.S. 972 F.2d 1090 (9th Cir. 1992). Similarly, keno was found to be a Class III game in Shakopee Mdewakanton Sioux Community v. Hope, 16 F. 3d 261 (8th Cir. 1994).

   Tribal regulation of Class II gaming is permitted by 25 U.S.C. 2710 (b), if two prerequisites are satisfied. First, the gaming must be located in a state permitting such gaming for any purpose by any person, organization or entity and not otherwise prohibited by federal law. Second, the tribal governing body must adopt an ordinance or resolution approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. 2710 (b) (1) (A)–(B). Statutory standards for the Chairman's approval, restricting the use of revenues, requiring annual and specialized audits, and mandating public health considerations in gaming facility construction, are set forth in 25 U.S.C. 2710(b) (2).

   25 U.S.C 2701 (b) (3) (A)-(C) permits "per capita" payments to tribal members if there is tribal plan to allocate revenues that is approved by the Secretary of the Interior, and the interests of minors and legally incompetent persons are protected. Per capita payments are subject to federal taxation. 25 U.S.C. 2710 (b) (3) (D)

3. Class III gaming activities include "all forms of gaming that are not" Class I or Class II. 25 U.S.C. 2703(8). Class III gaming is lawful only if it is authorized by an ordinance or resolution that is adopted by tribal government, it meets other statutory requirements, and it is approved by the Chairman of the National Gaming Commission. Further, the activity must be located in a state permitting such gaming for any person, organization, or entity, and is conducted in conformance with a tribal-state compact. 25 U.S.C. 2710 (d)(1)(A)-(C).

   25 U.S.C. 2710 (d) (3) creates the now-famous "Tribal-State compact". Any tribe conducting or wishing to conduct Class III must request that the state enter into negotiations to develop a compact. The state, upon receiving notice of a desire to negotiate from a tribe, must negotiate in "good faith" with the tribe. 25 U.S.C. 2710 (d) (3) (A). The approval of the Secretary of the Interior, *and the publishing*

of that approval in the Federal Register, is required for a compact to take effect. 25 U.S.C. (d) (3)(B)

The Tribal – State compact may include provisions concerning the application of civil and criminal laws and regulations of the tribe or state "directly related to, and necessary for, the licensing and regulation" of the gaming. 25 U.S.C. 2710 (d) (3) (C). The application of criminal and civil jurisdiction between the state and tribe "necessary for the enforcement of" such laws and regulations, the assessment of amounts by the state "to defray the costs of" regulation, the taxation by a tribe in amounts comparable to any state assessments, breach of contract remedies, operation standards for the gaming facility and any other subjects related to operations of gaming activities may also be included in the compact. 25 U.S.C. (d) (C) (i) – (vii)

25 U.S.C 2710 (5) expressly requires that the subsection should not be interpreted to impair a tribe's right to regulate Class III gaming, except to the extent it is inconsistent state laws and regulations made applicable by a compact then in effect.

The U.S. District Courts are given jurisdiction over any cause of action by a tribe alleging a state has refused to negotiate, or failed to negotiate in good faith. The District Courts also have jurisdiction over a state's action against a tribe to enjoin Class III gaming allegedly in violation of an existing compact and any action initiated by the Secretary of Interior to enforce statutory provisions authorizing the Secretary to appoint a mediator. 25 U.S.C. (d) (7) (iii).

Thus, the Act statutorily establishes tribal regulation of Indian gaming on Indian land if the gaming is not otherwise prohibited by federal law and is conducted in a State that does not prohibit gaming. 25 U.S.C. Section 2710(5). The National Indian Gaming Commission, is created by the Act, to regulate the higher stakes gaming permissible under the Act. A tribe cannot establish gaming on lands away from its reservation or acquired after 1988 by the Secretary of Interior for the tribe. However, newly recognized tribes, restored lands, or by the Secretary of Interior's approval. See 25 U.S.C. Section 2719, *Keweenaw Bay Indian Community v. United States*, 136 F.3d 468 (6th Cir.1998).

The constitutionality of the Gaming Act has been challenged and upheld. *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 FR. 3d 273 (8th Cir. 1993)

Good Faith and the Seminole Tribe Decision

On the request of a tribe, the Act requires a state to negotiate in good faith with a tribe to establish gaming. 25 U.S.C. Section 2710(d)(3). However, the Supreme Court had held that the provision of the Act that permitted a tribe to sue a state for failure to negotiate in good faith violates the Eleventh Amendment of the U.S. Constitution, unless a state consents to be sued. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed. 2d 252 (1996).

There appears to be little recourse in the Act for a tribe to force a state to negotiate in good faith. However, a tribe still has at least three possible options. First, it can try to convince or force the federal government to represent the tribe under its general trust obligations toward Indians. In *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. (N.D. Cal. 1997) a federal district court granted a tribe's request for declaratory relief that the federal government has a "mandatory duty to prosecute" an action against a state to enforce a tribe's rights to negotiate with a state pursuant to the Gaming Act. Wilson, 987 F.Supp. 804 at 809, but see *United States v. 1020 Electronic Gambling Machines*, 38 F.Supp. 2d 1213 (ED Wa. 1998) holding the U.S. has no fiduciary duty to sue a state on behalf of a tribe for failure to negotiate in good faith.

Second, the tribe can bring an action in *state* court against the state, to enforce the state's duties under the Act. The Eleventh Amendment only deprives the federal courts of jurisdiction over such suits, not stat courts. Third, a tribe may exercise political options such as statewide resolutions, referenda, initiatives or other available measures. Of course, the tribe can try to lobby the state legislature. In many, if not all of these cases, the tribe will face an uphill political battle and often evoke political opposition.

IV. CONCLUSION

The subject of Indian gaming is obviously a large, complicated affair, when considered in connection with Indian law. The relatively new age of the Act means that case law is still in early stages of development. Accordingly, the foregoing is intended to be only an introduction.