

The Indian Gaming Regulatory Act (IGRA) and the Rights of States

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IGRA and the Rights of States

Executive Summary

This paper examines the laws passed affecting the rights of states related to Indian gambling prior to and after the passage of the Indian Gaming Regulatory Act of 1988 (IGRA). Special attention is given to these laws as they affect the 11th Circuit, in which Alabama is located.

Before IGRA, most legal decisions regarding Indian gaming on tribal lands hinged on two cases: *Seminole v. Butterworth* (1979) and *California v. Cabazon Band of Mission Indians* (1987). In both cases, tribes were allowed to establish high-stakes bingo operations because the states in which they were located—California and Florida—regulated, rather than prohibited gambling. While these cases did not create the concept of gambling on Indian reservations, they regulated it to the extent that certain steps must be followed before any gambling can legally take place.

IGRA gives Native American tribes the privilege of matching any existing form of “Class III” gaming—the term for games such as craps, blackjack and various types of slot machines—on tribal lands by negotiating a compact with the host state. Thus, if the state legalizes any game of chance, Indian tribes could petition the state for a compact allowing gambling on their lands. It is this legislative provision that has been a continuing source of controversy.

If a state has a policy of complete prohibition against Class III gaming, then federally-recognized tribes within the borders of the state may not initiate such gambling. However, if the state has no completely prohibitive policy against Class III gaming, then the federal courts have held that the state may not prohibit gambling on reservations. This ruling has been the source of considerable controversy, since some states subject to it—like Alabama, which already has Class III gaming in the form of pari-mutuel wagering—consider it an infringement on their own sovereignty. In turn, tribal lawyers have accused the state of refusing to cooperate with the compacting process created by IGRA and to negotiate in good faith with the tribes.

At the time of this writing, 76 cases in Federal Court mention IGRA. This report describes cases related to the rights of states in five categories: (1) constitutionality; (2) construction with other law; (3) state regulation or control; (4) permitted gambling activities; and (5) 11th Amendment suits.

Conclusion

At present, Alabama appears to be able to exercise its sovereign right to prohibit Class III gaming that is not already regulated or present in the state. Former Alabama Attorney General Bill Pryor and other states’ attorneys general have publicly stated that the Secretary of the Interior has no authority to allow Indian gambling. The Siegelman administration also issued an executive order prohibiting any agency of the state from entering into any compact or agreement with the Poarch Creeks “to allow or facilitate in the establishment of any type of gambling prohibited by Alabama law.” The same order also called upon the Department of the Interior to deny the Poarch Creeks any contract that would lead to their establishing Class III gambling facilities in the state. However, because the U.S. Supreme Court refused to overturn the 11th Circuit Court’s ruling that the Secretary of Interior could make Class III regulations for Alabama and Florida, it is possible that some future Secretary could impose Class III gaming against the wishes of states within the 11th Circuit.

IGRA and the Rights of States

Background

In order to provide a regulatory framework for Indian gambling, Congress passed the Indian Gaming Regulatory Act of 1988 (IGRA). IGRA provides a statutory basis for the establishment and regulation of Indian gambling, including the need for clear standards and regulations for the promotion of tribal economic development, self-sufficiency, and strong tribal government.¹

Native Americans have a unique form of sovereignty, protected by the U.S. Constitution and subsequent laws and treaties. Differing perspectives on the nature and extent of Native American sovereignty — in particular, the relationship of Indian tribes to the state governments in which they reside — lie at the heart of nearly all disputes over Indian gambling.

At its essence, IGRA gives Native American tribes the privilege of matching any existing form of “Class III” gaming — the statutory term for games such as craps, blackjack and various types of slot machines — on tribal lands by negotiating a compact with the host state. Thus, if the state legalizes any game of chance, Indian tribes could petition the state for a compact allowing gambling on their lands. It is this legislative provision that has been a continuing source of controversy.²

According to IGRA, if a state has a public policy of complete prohibition against Class III gambling, then tribes within the borders of the state may not initiate such gambling. However, if the state has no completely prohibitive policy against Class III gambling, then the federal courts have held that the state may not prohibit gambling on reservations. This ruling has been the source of considerable controversy, since some states subject to it — like Alabama, which already has Class III gambling in the form of pari-mutuel wagering — consider it an infringement on their own sovereignty. In turn, tribal lawyers have accused the state of refusing to cooperate with the compacting process created by IGRA and to negotiate in good faith with the tribes.

This paper examines the history of laws passed affecting the rights of states related to Indian gambling prior to and after the passage of the IGRA. Special attention is given to these laws as they affect the 11th Circuit, in which Alabama is located.

Indian Gambling Cases Before IGRA

Seminole v. Butterworth. In 1979, the Seminole tribe of Florida became the first federally recognized Indian tribe in the United States to operate a high-stakes bingo operation on a reservation.³ While the state of Florida had already legalized bingo for nonprofit entities, the Seminole’s bingo operation did not comply with a variety of state laws governing their operation and prize limits. Like other states, Florida is a Public Law 280 state,⁴ which means Congress has

¹ Iowa General Assembly, Legislative Services Bureau, “Legislative Guide to the Indian Gaming Regulatory Act,” Cornell College and League of Women Voters of Iowa, December 1996.

² National Gambling Impact Study Commission *Final Report*, www.ngisc.gov/reports/fnrpt.html, and the National Indian Gaming Association, www.indiangaming.org.

³ “Midwest Indian Tribes Flex Washington Muscle in Successful Drive to Sink Rival Gaming Project,” *Wall Street Journal*, 12 July 1996, p. A12.

⁴ 67 Stat. 588, 1953 as amended.

granted the state the authority to enforce the state's criminal laws on reservations. When the sheriff of Broward County — the site of the bingo parlor — threatened to shut the business down, the tribe sued to prevent the action.

In the first important decision in a modern Indian gambling case, the U.S. Court of Appeals rejected the arguments of the State of Florida.⁵ The Court found that the relevant question was whether gambling, or more specifically bingo, was prohibited or merely regulated in Florida. If it was prohibited, then the state could act within its rights of Public Law 280 to prevent gambling on Indian lands. However, since Florida already allowed charitable bingo within certain parameters, then bingo was regulated rather than prohibited within the state and was a civil rather than a criminal issue, and the tribe was allowed to continue their operations.

The Cabazon Case. In 1986, the Cabazon and Morongo Bands of Mission Indians in California were at odds with the State of California and Riverside County over the profitability and legality of their high-stakes bingo and card games business. As sovereign entities and pursuant to ordinances approved by the Bureau of Indian Affairs (BIA), the tribes believed they had the right to administer their gambling operations independent of state and municipal restrictions.

In an attempt to stop the tribes, California noted that the state allowed only certain games under strict limits to help nonprofit organizations raise revenue. High-stakes bingo was prohibited, it was argued, because the presence of large amounts of cash could attract organized crime.⁶ Moreover, the County of Riverside sought to impose two of their ordinances prohibiting draw poker and other card games.

On February 25, 1987, the court (this time the U.S. Supreme Court) made its ruling. As with the earlier *Seminole* case, “the logic of *Cabazon* revolved on the question of whether California’s laws regarding bingo operations were civil or criminal law. The court decided that California’s laws regarding bingo were in fact, not criminal, but civil/regulatory, because California did not prohibit all bingo operations. In addition, the Supreme Court pointed to California’s many other state sanctioned forms of gambling such as the state lottery and held that the tribes were free to conduct their games free from the state and county restrictions.”⁷

The Court decided that California and Riverside County could not enforce their anti-gambling laws on the Indian reservations involved in the case. While the federal government had given California the right to enforce criminal prohibitory laws on Indian reservations within the State when it passed Public Law 280, the State and County anti-gambling laws were not criminally prohibitory.⁸ Moreover, while the Court held that California and Riverside County could not ban bingo and card games, the decision does not say that such games are beyond regulation by other entities. In fact, the Court said, “the Federal Government has the authority to forbid Indian gambling enterprises.”⁹

⁵ Robert P. Morin, *Indian Gaming in the United States: A Permanent or a Transitory Method of Economic Development* (Reno, NV: Department of Political Science, University of Nevada, 1994), p. 2.

⁶ Richard Wilson, “Indian Gaming in California.” Public Law Research Institute, UC Hastings College of the Law, 2004, www.uchastings.edu/plri/spr96tex/indgam.html.

⁷ Michael R. Jump, “Native American Law,” n.d., www.bloomington.in.us/~mjump/pathfinder.htm.

⁸ *Ibid.*

⁹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), <http://laws.findlaw.com/us/480/202.html>.

The *Cabazon* decision opened gambling on reservations for Indian tribes across the United States if the state already allowed various forms of gambling by state law. It is important because it implies that any state allowing gambling is powerless to prevent tribes from conducting the same business. While *Cabazon* did not create the concept of gambling on Indian reservations, it regulated it to the extent that certain steps must be followed before any gambling can legally take place.¹⁰

Origins of the Indian Gaming Regulatory Act

The *Cabazon* decision left the tribes free to establish gaming operations in many states, yet no national guidelines or policies existed to regulate the new industry. Several attempts to adopt regulatory legislation had been made earlier, though, and the degrees of regulation proposed were as varied as the motivations behind their sponsors. “Some states and the Department of Justice had voiced concern about the possibility of contamination of Indian gaming by organized crime; the Department of Justice opposed the creation of a federal gaming body to regulate gaming on Indian lands; and the Senate Select Committee on Indian Affairs, reporting the measure that was to become...IGRA, ‘attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land.’”¹¹

In 1983, Rep. Morris K. Udall (D-AZ) introduced H.R. 4566, one of the first pieces of federal legislation to regulate Indian gambling. H.R. 4566 did not prohibit or restrict any gambling rights held by Indians, but rather made any gambling activities on reservations subject to approval and licensing by the Secretary of the Interior. The bill died in committee.

In 1985, several pieces of legislation were proposed to establish some kind of regulatory order for Indian gambling. On April 2, Rep. Udall introduced another bill, H.R. 1920, to Congress. The bill, known as the “Indian Gambling Control Act,” was similar to his first attempt. Two days later, Sen. Dennis DeConcini (D-AZ) introduced the “Indian Gambling Control Act” in the Senate, which was similar to Udall’s bill but established local Indian gambling commissioners for each district of the Bureau of Indian Affairs. These commissioners could give consent for tribal gambling, rather than requiring Secretary of the Interior’s formal approval.¹²

On May 7, Rep. Norman Shumway (R-CA) introduced the “Indian Country Gambling Regulatory Act” (H.R. 2404). This bill granted the Secretary of the Interior the right to approve tribal gambling on the condition that the gambling was within the public policy of the state in which the reservation was located. It also required the Secretary to consult with the governor of the state concerning the state’s public policy. Moreover, H.R. 2404 was the forerunner for the logic later used by the Supreme Court in *Cabazon* by requiring any state that allowed nonprofit, charitable gambling or state gambling to also allow Indian tribes within that state the same form of gambling.¹³ In the end, though, both bills died soon after their introduction.

¹⁰ Robert G. Frey, “Indian Casinos: Significant Court Rulings,” Presentation made to the National Coalition Against Gambling Expansion (Nashville, TN), September 29, 2001.

¹¹ M. Maureen Murphy, “Indian Gaming Regulatory Act: Judicial and Administrative Interpretations,” Congressional Research Service, Report for Congress, September 7, 1993, p. CRS-10.

¹² Jump, n.d.

¹³ *Ibid.*

In 1987, a third bout of legislation was introduced to codify Indian gambling prior to the Supreme Court's decision regarding *Cabazon*. On February 19, 1987, six days before the *Cabazon* decision, three senators introduced S. 555. After the Supreme Court's decision in *Cabazon*, Rep. Mo. Udall (D-AZ) introduced H.R. 2507. Sen. John McCain (R-AZ) and two others then introduced S. 1303, which was similar to H.R. 2507. The Senate Select Committee on Indian Affairs finally emerged with a compromise proposal, the "Indian Gaming Regulatory Act," which passed both houses in 1988.¹⁴

Important Provisions in IGRA

How Tribes Can Gamble

The first important element in IGRA identifies the tit-for-tat conditions in which a tribe can attempt to establish its own gambling operations. At 25 U.S.C. §2701, the Act states:

[I]ndian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.¹⁵

What is important about this provision is what is absent. "While this provision seems to reflect the *Cabazon* ruling, this codification effectively ignores the Public Law 280 rationale behind *Cabazon*. Instead, the statute seems to indicate that even the laws in non-Public Law 280 States may influence gaming on Indian reservations."¹⁶

Which Tribes Can Gamble

According to IGRA, the only Indian tribes recognized by the Act are those that are self-governing and federally recognized. "This definition effectively limits not only which tribes may engage in Indian gaming but also where."¹⁷ In Alabama, only the Poarch Creek Tribe is federally recognized.

Where Tribes Can Establish Gambling Operations

While it is possible for an Indian tribe to establish gambling operations off existing reservation lands, it may only do so under certain circumstances, such as when a tribe no longer has a reservation and attempts to acquire land adjacent to its former reservation land.¹⁸ All other attempts to establish gambling operations on acquired lands off reservation property require the mutual agreement of the tribe, the Secretary of the Interior, and the state in which the land is located. Since 1988, only three applications for off-reservation casinos have been approved by both the Secretary of the Interior and the governor of the state in question, two have been denied, and five did not have concurrence by the governor.¹⁹

¹⁴ *Ibid.*

¹⁵ Indian Gaming Regulatory Act, 25 U.S.C. §2701 (5), (1988).

¹⁶ Jump, n.d.

¹⁷ *Ibid.*

¹⁸ Iowa General Assembly, Legislative Services Bureau, "Legislative Guide to the Indian Gaming Regulatory Act".

¹⁹ Tom Hartman, U.S. Department of the Interior, Bureau of Indian Affairs, Office of Indian Gaming Management, February 23, 2005, personal communication.

In 1995, Alabama's Poarch Creek Indians unsuccessfully attempted to purchase the Mobile Convention Center in order to construct a casino there, sparking concerns over the ability of tribes to purchase land off of their reservations — in some cases, even in another state — to establish a casino. The legalization of gambling on tribal lands, however, may not be the end of attempts by Indian tribes to expand their gambling operations. In Wisconsin and other states, tribes have sought to have all Indian-owned land declared tribal land. Because of this situation, IGRA now allows new lands contiguous to tribal land to be used for gambling upon application to the Department of the Interior. In other words, a federally recognized tribe could purchase property contiguous to its own anywhere in a state, have it declared tribal land, and construct casinos at will, contingent on a tribal-state compact already being in place.

Established the National Indian Gaming Commission (NIGC)

The NIGC is established under §2704-§2708 of the Act. The commission has a variety of powers authorized by IGRA, including the following powers given its chairman:

- Issuing orders of temporary closure of gambling activities;
- Levying and collecting civil fines;
- Approving tribal ordinances or resolutions regulating Class II gambling and Class III gambling as provided in §2710; and
- Approving management contracts for Class II gambling and Class III gambling as provided in §2710(d)(9) and §2711.²⁰

Established Different Types of “Gambling” on Indian Reservations

IGRA established three classes of gambling on Indian land, each with its own degree of regulation:

Class I. The first level, “Class I gaming,” is defined in the Act²¹ as traditional Indian gaming and social gaming for minimal prizes, with the regulatory authority for it vested exclusively in tribal governments.²²

Class II. The second level, “Class II gaming,” is described in the Act²³ as bingo and the following games if played at a bingo location: pull tabs, punch board, tip jars, instant bingo and other games similar to bingo. Class II gaming also includes card games played against other players instead of against the house or a person acting as the bank. Banking card games, slot machines and any electronic games of chance are specifically prohibited.²⁴ The authority to operate and regulate Class II gaming rests with the Tribe as long as the state in which the Tribe is located permits identical gambling for any purpose and the Tribe adopts a gambling ordinance approved by the National Indian Gaming Commission (NIGC).²⁵ Although states usually heavily regulate and restrict such games, many of those state restrictions do not always apply to the tribe. For example,

²⁰ *Ibid.*

²¹ Indian Gaming Regulatory Act, 25 U.S.C. § 2703(6), (1988).

²² National Indian Gaming Commission, “Indian Gaming Regulatory Act Overview,” www.nigc.gov/nigc/laws/igra/overview.jsp.

²³ Indian Gaming Regulatory Act, 25 U.S.C. § 2703(7)(A), (1988).

²⁴ *Ibid.*, § 2703(7)(B).

²⁵ NV, National Indian Gaming Commission, “Indian Gaming Regulatory Act Overview,” www.nigc.gov/nigc/laws/igra/overview.jsp.

although Class II card games must be played in conformity with state laws and regulations on hours of operation and limitations on wager or pot sizes, state limits do not apply to bingo at a tribal reservation facility.²⁶ IGRA restrictions, however, still apply.

Class III. “Class III gaming” as defined by the Act²⁷ is all other gambling not provided for in either Class I or Class II gambling. This would include most casino games, such as slot machines, black jack, craps, baccarat, roulette and their electronic counterparts. The NIGC Web site states the following conditions for a Tribe wishing to conduct Class III gambling:

- The particular form of Class III gaming that the tribe wants must be permitted in the state in which the tribe is located;
- 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; and
- The tribe must have adopted a tribal gaming ordinance that has been approved by the Chairman of the Commission.²⁸

Concerns regarding the possibility of organized crime infiltrating a cash-rich tribal gambling operation, as well as the state receiving little or nothing in return for allowing casino-style gambling on Indian lands,²⁹ have made the prospect of Class III gambling controversial in many states. Given these concerns, it was Congress’ intent that states and tribes cooperate in such a way to mitigate these possibilities and arrive at compromises in which both parties would benefit. While mutually favorable compacts have been established in a number of states, there have also been several cases in which negotiations have been unsuccessful, or in which a state has refused to negotiate with a petitioning tribe. In these cases, IGRA has guidelines for resolving the deadlock, but they are not exhaustive.³⁰ A summary of these guidelines follows. A fuller account is in Appendix A.

Tribal-State Compact Creation

After a federally recognized Indian tribe wanting Class III gambling asks the state to negotiate a compact, the tribe and state have 180 days to agree on the compact’s terms. If the state and tribe reach no agreement by the end of the 180-day period, the tribe may elect to file suit in federal district court, claiming the state has not negotiated in good faith.

If the court agrees with the tribe, it must order the state and tribe to finish a compact within 60 days. If they fail to do so, each must submit its last best offer to a court-appointed mediator, who must choose the one that better conforms to IGRA and other federal laws.

²⁶ Roger Dunstan, “Indian Gaming,” in *Gambling in California* (California State Library, California Research Bureau Reports, January 1997), www.library.ca.gov/CRB/97/03/Chapt4.html.

²⁷ Indian Gaming Regulatory Act, 25 U.S.C. § 2703(8), (1988).

²⁸ National Indian Gaming Commission, “Indian Gaming Regulatory Act Overview,” www.nigc.gov/nigc/laws/igra/overview.jsp.

²⁹ In 2003, Indian gambling operations raked in \$14.1 billion in revenue while paying no state income tax. Source: Christiansen Capital Advisors, LLC., *The Gross Annual Wager of the United States: 2002*, www.cca-i.com (8 April 2004).

³⁰ Wilson.

If the state accepts the mediator's proposal, it becomes the compact.³¹ If the state does not accept, the Secretary of the Interior must prescribe procedures (1) consistent with the proposed compact the mediator selects and the provisions of IGRA and relevant state laws and (2) under which Class III gaming may be conducted on the Indian lands over which the tribe has jurisdiction.³² The procedures are a legal substitute for a negotiated tribal-state compact.

The Secretary must publish notice of approved compacts (or procedures, where applicable) in the Federal Register. The compact and procedures have the force of federal law.³³

The Law after IGRA

How Much Law is There?

At the time of writing, 76 cases in Federal Court mention IGRA. The U.S. Code – Annotated lists eight categories for these cases: (1) constitutionality of the Act; (2) construction with other law; (3) state regulation or control; (4) state-operated gaming activity; (5) permitted gaming activities; (6) negotiated compacts; (7) suits under the 11th Amendment; and (8) sovereign immunity. As applicable, cases related to the rights of states in six of these categories are elaborated upon below.

Constitutionality

*Cheyenne River Sioux Tribe v. State of South Dakota.*³⁴ Beginning with the Flandreau Santee Tribe in June 1989, six of South Dakota's nine federally recognized tribes had established Class III gaming compacts with the state by August 1992. When the Cheyenne River Sioux Tribe requested the state to negotiate a gaming compact with them in August 1991, the state allegedly offered them a compact with similar terms and conditions used in its first compact with the Flandreau Santee Tribe and subsequently adopted by all other petitioning tribes. According to the tribe, modifying the "model" compact in favor of the Cheyenne River Sioux would cost them certain concessions, such as expanded state criminal jurisdiction.

The tribe objected, citing its population and geographic size were significantly larger than that of the Flandreau Santee Sioux Tribe, and that its isolated geographic location and more established tribal government made it unlike other tribes in the state. Moreover, the tribe alleged the state refused to negotiate higher betting limits, the inclusion of keno and other games permitted by state law, and approval of off-reservation gambling sites closer to the state's population centers.

In August 1992, the tribe filed suit against the state, alleging it had failed to negotiate in good faith. The state also filed suit, claiming the tribe's actions a violation of the Eleventh Amendment.³⁵ On appeal, the court decided the state could, in good faith, refuse to negotiate with a tribe on a tribe's operation of traditional keno and bet limits (which were established by state law); and the suit against the state was not barred by the Eleventh Amendment.³⁶

³¹ Indian Gaming Regulatory Act, 25 USC § 2710(d)(7)(B)(vi), (1988).

³² *Ibid*, § 2710(d)(7)(B)(vii).

³³ Chad Hills, "Tribal-State Gaming Compacts (IGRA, 25 USC)," *Gambling Quick Facts*, Focus on the Family, March 5, 2004, www.family.org/cforum/fosi/gambling/facts/a0031061.cfm.

³⁴ 3 F.3d 273 (8th Cir. 1993).

³⁵ *Ibid*, p. 275.

³⁶ *Ibid*, p. 273. Since the reversal of the Seminole decision in 1996, the state's contention that the tribe's suit was a violation of the Eleventh Amendment would fare better if the case were retried.

Construction with Other Law

U.S. v. Burns.³⁷ In 1987 and 1988, James Burns and 10 other persons were arrested for, among other things, conducting an illegal gambling business, unlawfully using and possessing gambling devices within Indian territory in New York, and knowingly advancing or profiting from them. The defendants challenged the jurisdiction of the court, citing the sovereign nature of Indian territories. Moreover, the defendants cited a specific treaty signed by the United States in 1789 and the Iroquois confederacy, in which the confederacy ceded jurisdiction of robbery and murder to the United States. In five subsequent treaties, however, the confederacy gave no other grant of authority to the United States, suggesting the federal court lacked jurisdiction over these crimes.³⁸

The court ruled that: (1) state and federal courts had concurrent criminal jurisdiction; (2) IGRA did not preempt federal gambling statutes existing before the Act's enactment; (3) state offenses referred to in the indictment could serve as a basis for a federal charge of engaging in illegal gambling business; (4) the federal gambling statute dealing with the possession of gambling devices within Indian country did not violate equal protection; and (5) the reservation in question was "Indian country" for the purpose of federal gambling statutes.³⁹

Passamaquoddy Tribe v. State of Maine.⁴⁰ After a decade of disputes with the State of Maine over tribal land claims, the Passamaquoddy and Penobscot Tribes negotiated a settlement with the State with federal guidance in 1980.⁴¹ In return for surrendering their land claims and submitting to state jurisdiction, the tribes received title to its designated lands, federal recognition as an Indian tribe, and millions of dollars in federal subsidies.⁴² In addition, the State of Maine protected itself from future federal intrusion upon its decision with the Settlement Act declaring:

The provisions of any federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine...shall not apply within the State of Maine, unless such provision of subsequently enacted Federal law is specifically made applicable within the State of Maine.

In 1988, part of IGRA's provisions for tribal gambling were that, unless a state imposed an outright ban on all Class III gaming (and Maine does not), it must negotiate a compact with terms and conditions under which the tribe can introduce Class III gaming on Indian lands.

After seeing the success of several Indian tribal gambling operations, the Passamaquoddy Tribe decided to establish their own Class III gaming site. The state refused, and the tribe sued, claiming IGRA superseded the state's Settlement Act. In February 1996, the federal district court decided that IGRA did not apply to Maine, and denied relief to the tribe.

³⁷ 725 F.Supp. 116 (N.D.N.Y. 1989).

³⁸ *Ibid*, pp. 118-120

³⁹ *Ibid*, p. 116.

⁴⁰ C.A.1 (Maine) 1996, 75 F.3d 784.

⁴¹ For information on the Maine Indians Claims Settlement Act of 1980, see 25 U.S.C. §§ 1721-1735.

⁴² 25 USC § 1733.

State Regulation or Control

*State ex. rel. Nixon v. Coeur D'Alene Tribe.*⁴³ As part of its gambling compact with the state of Idaho, the Coeur D'Alene Tribe established an Internet lottery and offered the game to residents in 36 states. The State of Missouri sued the tribe and UniStar Entertainment (its Internet contractor), in two separate cases seeking to prohibit operation of the lottery because Internet gambling is illegal in Missouri. In its defense, the tribe claimed IGRA preempted states' attempts to regulate or prohibit gambling on its lands. The state moved to remand the case, arguing the tribe's lottery was not gambling on "Indian lands" within the meaning of the Act⁴⁴ and therefore was not within the scope of IGRA preemption.

In the first case, the Western District of Missouri dismissed all claims against the tribe as barred by the doctrine of tribal immunity. In the second case, the Eastern District of Missouri transferred venue to the Western District of Missouri, denying the state's motion for an immediate preliminary injunction. The state appealed, and the Eighth Circuit Court rejected the tribe's contention that the court lacked jurisdiction and concluded that the district court improperly defined the preemptive scope of the IGRA in denying the State's motion to remand.

In sum, "Although [IGRA] completely preempts states' attempts to regulate or prohibit gaming activities on Indian lands, it does not preempt states' attempts to regulate or prohibit gaming activities on non-Indian lands."⁴⁵

*Confederated Tribes of Siletz Indians of Oregon v. United States of America.*⁴⁶ This case held that IGRA's provision excluding newly acquired Indian property was unconstitutional. The Court ruled that under the Act's provisions providing for exceptions to the general rule against allowing gaming on newly acquired Indian lands within a state, the governor of the state was required to concur with the federal government decision to grant an exception. According to the presiding judge, the provision was in violation of the Appointments Clause and the general separation-of-powers doctrine. Therefore, he declared §2719(b)(1)(A) unconstitutional and cut it from the Act.

*Coeur D'Alene Tribe v. State of Idaho.*⁴⁷ The State of Idaho, in what some claim was an attempt to limit Indian gaming, changed its constitution, outlawing many previously allowable forms of gaming. The tribes involved believed that the law prior to these changes should be applied for purpose of negotiating the Act. In 1994, the court held that present state law and not past state law controls the matter of what must be negotiated between a state and a tribe under the Act. It also held that if a state law authorizes a certain form of class III gaming, it is compelled to negotiate with the Indian tribes for that form of gaming. It is not compelled to negotiate for any class III gaming that it prohibits. Lastly, the court found that the State of Idaho needed a state-tribal compact to run its class III lottery on Indian reservations under the Act.

⁴³ C.A.8 (Mo.) 1999 F.3d 1102.

⁴⁴ Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4), (1988).

⁴⁵ *Ibid.*, § 2701, p. 257 (1988).

⁴⁶ 841 F. Supp. 1479.

⁴⁷ 842 F. Supp. 1268.

Permitted Gambling Activities

Lac du Flambeau v. Wisconsin.⁴⁸ In November 1988, only one month after IGRA became effective, the Lac du Flambeau Tribe of Lake Superior Chippewa Indians submitted a request for tribal-state compact negotiations.⁴⁹ In the compact, the tribe petitioned the state for a variety of casino games, including blackjack, roulette, craps, slot machines and poker. Because Wisconsin did not permit any of these games — it only operated a lottery and allowed pari-mutuel wagering — the state refused to negotiate. The tribe then sued the state for failing to negotiate in good faith.

As with *Cabazon*, the issue between the tribe and the state centered around the nature of the state “permitting” the same or similar gambling for any purpose and/or by any person, organization or entity. In this case, though, Class III gaming was at issue, not Class II as in *Cabazon*. As in California, “the question of whether Wisconsin ‘permits’ the gaming activities at issue [was] not whether the state has given express approval to the playing of a particular game, but whether Wisconsin’s public policy toward Class III gaming [was] prohibitory or regulatory.”⁵⁰

The court concluded the state was required to negotiate with the tribe because the activities it had objected to were “permitted” under Wisconsin law within the meaning of 25 U.S.C. § 2710(d)(1). Specifically, since the state removed all remaining constitutional prohibitions against gambling when it amended its constitution in 1987 to allow a lottery, the state policy toward gambling had become more regulatory than prohibitory in nature. Thus, the court ordered the state to negotiate with the Lac du Flambeau Tribe over “any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law.”⁵¹

Alabama has already regulated one type of Class III gaming: pari-mutuel wagering. However, since Alabama has not repealed the constitutional bar on lotteries, that particular aspect of *Lac du Flambeau* should not be a problem.

Rumsey Indian et al, v. Pete Wilson.⁵² In contrast to *Lac du Flambeau*, the *Rumsey* case arrived at a different conclusion as to what kinds of legal Class III gaming are “permitted” on Indian lands. In the early 1990s, several California tribes asked the state to negotiate a compact permitting the operation of certain types of gambling that California law did not specifically authorize. The court summarized the issue as follows:

“Desiring to engage in additional activities (the “Proposed Gaming Activities”), several tribes asked the State of California (the “State”) to negotiate a compact permitting the operation of certain stand-alone electronic gaming devices and live banking and percentage card games. The State refused to negotiate with the tribes, asserting that the Proposed Gaming Activities were illegal under California law.”⁵³

⁴⁸ 770 F.Supp. 480 (W. D. Wis. 1991), Cert denied, 113 S. Ct. 91, (1992).

⁴⁹ Although they are not mentioned in the request, the Sokaogon Chippewa Community was a party to the negotiations that were carried out with the plaintiff as well as other Wisconsin tribes. Source: 770 F.Supp. 480 (W.D. Wis. 1991), p. 483.

⁵⁰ 770 F.Supp. 480 (W.D. Wis. 1991), p. 486.

⁵¹ *Ibid*, p. 488.

⁵² 64 F3d 1250 (1995), 99 F3d 321 amended on denial of rehearing (1996).

⁵³ *Ibid*.

In IGRA, Section 2710(d)(1)(B) states that Class III gaming can be located on Indian lands “only if such activities are...located in a State that permits such gaming for any purpose by any person, organization or entity.” In this case, the court found that the term “permits” was not ambiguous therefore did not require further interpretation. The decision rendered by the 9th Circuit Federal Court of Appeals was clear:

“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. Instead, the statute says only that, if a state allows a gaming activity ‘for any purpose by any person, organization, or entity,’ then it also must allow Indian tribes to engage in that same activity (25 U.S.C. S 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.”⁵⁴

11th Amendment Suits

*Seminole Tribe of Florida v. Florida et al.*⁵⁵ According to IGRA, states have a duty to negotiate in good faith with a tribe toward the formation of a compact,⁵⁶ and a tribe may sue a state in federal court in order to compel performance of that duty.⁵⁷ In practice, however, when tribes sued states in federal court for failing to negotiate in good faith, states often defended themselves on grounds of sovereign immunity. No less than four circuit courts — the Eighth, Ninth, Tenth and Eleventh — have addressed the issue of whether tribes could sue states in federal court under IGRA.⁵⁸

When the Seminole Tribe of Florida petitioned the State of Florida to establish a compact allowing them Class III gaming, the State and its Governor refused. The tribe sued, alleging the State’s failure to negotiate in good faith. Florida and its Governor, moved to dismiss tribe’s complaint on the ground that the suit violated Florida’s sovereign immunity from suit in federal court. The District Court denied the motion, but the Court of Appeals reversed, finding that the Indian Commerce Clause did not grant Congress the power to abrogate the States’ Eleventh Amendment immunity⁵⁹ and that *Ex parte Young*,⁶⁰ does not permit an Indian tribe to force good faith negotiations by suing a state’s governor.

When the case was appealed to the Supreme Court, it upheld this decision, making it standing constitutional law. In delivering the opinion of the Court, Chief Justice Rehnquist stated:

We hold that notwithstanding Congress’ clear intent to abrogate the States’ sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), may not be used to enforce 2710(d)(3) against a state official.

⁵⁴ *Ibid.*

⁵⁵ 116 S.Ct. 1114 (1996).

⁵⁶ Indian Gaming Regulatory Act, § 2710(d)(3)A, (1988).

⁵⁷ *Ibid.*, § 2710(d)(7).

⁵⁸ Daniel Twetten, “Public Law 280 and the Indian Gaming Regulatory Act: Could two wrongs ever be made into a right?” *Journal of Criminal Law and Criminology*, Summer 2000, v. 90, p. 1317.

⁵⁹ The Eleventh Amendment presupposes that each State is a sovereign entity in our federal system and that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a State’s] consent.”

⁶⁰ 209 U.S. 123. Decided in 1908, *Ex Parte Young* allows state officials to be sued separate from the state if it was believed he had violated the Constitution.

This court decision was of great importance as it gave states more power over Indian gambling expansion within its borders and protection through the 11th Amendment from individual lawsuits without state consent. Since *Seminole*, Indian tribes have not been able to confront states unwilling to negotiate the licensing of Class III gaming facilities.⁶¹

The Court, however, refused to overturn the 11th Circuit Court's ruling that the Secretary of Interior could make Class III regulations for Alabama and Florida. Technically, therefore, the Secretary could impose Class III gaming against the states' wishes, but only within the jurisdiction of the 11th Circuit.

Two months later, the Bureau of Indian Affairs published an "Advance Notice of Proposed Rulemaking" (ANPR) in an attempt to break this gridlock. The key element of the ANPR is a provision that would allow the Secretary of the Interior to approve a tribe's request to operate gambling facilities, even if the state and tribe had been unable to agree on a compact.

When Secretary of the Interior Bruce Babbitt issued proposed regulations in April 1999, Alabama and Florida immediately filed suit. Conflicting bills were introduced in Congress — to explicitly give or to take away the Secretary's power — but none has passed both houses. Before he left office, Babbitt said he would leave the decision up to the courts.

Conclusion

At present, Alabama appears to be able to exercise its sovereign right to prohibit Class III gaming that is not already regulated or present in the state. Former Alabama Attorney General Bill Pryor and other states' attorneys general have publicly stated that the Secretary of the Interior has no authority to allow Indian gambling. The Siegelman administration also issued an executive order prohibiting any agency of the state from entering into any compact or agreement with the Poarch Creeks "to allow or facilitate in the establishment of any type of gambling prohibited by Alabama law." The same order also called upon the Department of the Interior to deny the Poarch Creeks any contract that would lead to their establishing Class III gambling facilities in the state. However, because the U.S. Supreme Court refused to overturn the 11th Circuit Court's ruling that the Secretary of Interior could make Class III regulations for Alabama and Florida, it is possible that some future Secretary could impose Class III gaming against the wishes of states within the 11th Circuit.

Some supporters of Indian casinos argue that IGRA has limited their ability to conduct unlimited gambling on tribal lands. While tribal sovereignty may extend over its members, it extends to others only to the extent Congress is willing to broaden its scope. Clearly defining the scope of Indian gambling rights and improving regulation of Indian casinos will go a long way toward maintaining good faith relationships between tribal and state governments.

⁶¹ Twetten.

Appendix A: IGRA Legal Account — Tribal-State Compacts and Tribal Gaming Ordinances (25 USC § 2710(d)(3)(A))

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State [unless the state-tribal compact specifies any state control].

Federal Court Actions

(7) (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(7)(B)(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court — [will consider reasons why state has not entered negotiations and determine the legitimacy of the reasons].

Mediation

(7)(B)(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

[The mediator then chooses between the two proposals and submits their choice to the State and Indian Tribe. If the State consents to the mediator-selected proposal within 60 days, the proposal is treated as a Tribal-State compact.]

Procedures Prescribed by the Secretary [of the Dept. of the Interior]

(7)(B)(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary

[of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures...which are consistent with the proposed compact selected by the mediator...under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

Secretarial Approval of Tribal-State Compacts

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe [within 45 days].

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates — (i) any provision of this chapter, (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.