A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the "Governor's Veto" for Gaming on "After-Acquired Lands"

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The recent explosive growth of the Indian gaming industry and judicial decisions analyzing a portion of the governing statute point to an inherent flaw in the mechanism provided by the Indian Gaming Regulatory Act (IGRA) for the establishment of off-reservation gaming enterprises. This Note argues for a reform of the so-called "after-acquired lands" provision of IGRA, which would remove the governor's concurrence requirement and place the decision to allow Indian gaming off-reservation into the negotiating process between states and tribes, as another term to be negotiated between sovereigns. Such a reform would allow states and tribes alike to extract their best possible respective deals, while at the same time ensuring maximum respect for state and tribal sovereignty. The Note concludes by proposing statutory language to accomplish this task.

I. INTRODUCTION

The Indian gaming industry has exploded in scope from its beginnings in the late 1970's as a collection of small enterprises to a full-fledged industry, generating tens of billions of dollars in revenues annually. It is indeed a whole new game, in both economic and non-economic terms. Despite its tremendous success, however, Indian gaming is still very controversial. Many non-Indians see
Indian casinos as a manifestation of the worst kind of race-based exceptionalism, an option available solely to the 4.1 million Americans who identify themselves as Indians.\textsuperscript{3}

In this way, the success of Indian gaming arguably threatens accepted notions of Indianness,\textsuperscript{4} under which "Indians act appropriately when they market their traditions and their past, and they act inappropriately when they attempt to break into the big league of white entrepreneurship, such as the gambling industry."\textsuperscript{5} "Appropriate" industries are organic farming, fishing, light manufacturing and "the production and marketing of Native American art."\textsuperscript{6} As well, the media convey images of Indian tribes across the country wallowing in gambling dollars and driving non-
inversion of the usual public eagerness for new investment and more jobs, opposition to the casino industry is, if anything, picking up strength, particularly where casinos already exist. It is a situation Mayor Anthony M. Masiello of Buffalo knows well. . . . "What is shocking to me is that if you had any other company that was going to employ 2,500 people and pay them $30,000 a year and up and generate millions of dollars in private investment, people would be falling all over them," Mayor Masiello said in an interview. "I don't know what the big deal is."

\textit{Id.}


4. The fluidity of this accepted notion is remarkable. Indians have often been seen as the poorest of the poor; now they are nearly uniformly seen as wealthy, flush with casino cash. Tribal chairman Déron Marquez states that "[n]obody was interested in us until we began to make money . . . . Our neighbors want us to be like 'Dances with Wolves,' but we'd rather be accountants and lawyers." David DeVoss, \textit{California Gambling: Heap Big Casinos in Residential Neighborhoods}, Wkly. Standard, Sept. 15, 2003, at 18. \textit{See also Jerry Unseem, The Big Gamble; Have American Indians Found Their New Buffalo?}, Time, Oct. 2, 2000, at 22 ("The gambling boom has added a new stereotype to an already overstuffed quiver of Indian myths and clichés: the rich Indian.").


Native American Indians have for decades experienced poverty, alcoholism, lack of education, dismal business success and high unemployment rates. Thus, there are many who view casino gaming as a 'once in a lifetime' opportunity for tribes to establish parity with the white culture that values everything in economic terms. But there is a growing concern that the cultural values and traditions of the Native American Indians will be compromised.

Indian competitors in the casino industry in places like Las Vegas and Atlantic City out of business with their unfair advantages. The Indian gaming debate is truly multifaceted and far-reaching.

Indian Country is frequently the setting for the power struggle inherent in federalism, as states challenge federal authority over the formerly fully sovereign Indian nations occupying reservations. States often "assert their sovereign rights in defiance of the

8. In answering whether the Cherokees were to be considered a separate nation, Chief Justice John Marshall noted that

[t]hey have been uniformly treated as a state since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community .... The acts of our government plainly recognize the Cherokee nation as a state; and the Courts are bound by those acts .... They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—Meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian.


The next year, the Court declared that

[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial .... The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.


9. The Constitution itself was, in part, an attempt to reconcile the conflict between the power of states and the federal government with respect to the Indian tribes. See THE FEDERALIST NO. 42, at 206 (James Madison) (Terence Ball ed., 2003). Madison criticized the failings of the Articles of Confederation with respect to clearly setting forth the relational scheme between the tribes and the state and federal governments, claiming that

[t]he regulation of commerce with the Indian tribes [in the new Constitution] is very properly unfettered from the two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits .... And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with compleat
Indian gaming is often the ground for conflict, and in that connection, this Note examines, with respect to the Indian Gaming Regulatory Act's (IGRA) "after-acquired lands" provision, the extent to which state governors should be able to exercise power over tribal gaming outside reservation boundaries. This Note argues that states are overreaching in their efforts to restrict off-reservation gaming, and that overreaching must be restrained and re-channeled in a way more closely aligned with IGRA's original paradigm. Tribal-state gaming compacts under IGRA were meant to be analogous to contracts rather than a continuation of the "hodge-podge of personal grudges, ad-hoc policies, inconsistent judicial decisions, and a general exercise of ignorance about Indians" known as federal Indian law. A renewed recognition of this principle would greatly benefit both tribes and states.

This Note proposes that IGRA's "after-acquired lands" provision be amended by removing the state governor's concurrence requirement. This would leave the location of Indian casinos, along with any other conditions the parties choose to address, up to the compacting process, supervised by the Secretary of the Interior.

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13. A compact is "[a]n agreement or covenant between two or more parties, esp. between governments or states." BLACK'S LAW DICTIONARY 274 (7th ed. 1999). See also infra note 69.
14. See 25 U.S.C. § 2710(d)(8) (2000) (stating that the Secretary of the Interior has the duty to review and approve proposed tribal-state compacts). See also Tsosie, supra note 5, at 38:

In fact, Indian natural resource disputes typically involve three levels of government—state, federal, and tribal—and the conflicts over sovereignty and power that this entails. Indian tribes are politically the least powerful of these sovereigns, primarily because, unlike the states, they have no formal representation in Congress. Moreover, the federal government, which is entrusted with protecting the tribes, often has multiple conflicting responsibilities that interfere with its duty to the tribes, although the tribes have no protection from this. In fact, the Supreme Court has interpreted this inevitable conflict of interest as excusing the government from following the 'fastidious standards of a private fiduciary' when exercising its trust responsibilities to the tribes. Indeed, the government's duty to the American public may frequently override its duty to the Indian tribes. This conflict between domestic sovereigns raises issues of federalism, such as the extent of the federal government's power to adjudicate state and tribal interests through legislation, and whether tribal interests can fairly be adjudicated through the political process or by federal or state
Following this introduction, Part II recounts a brief history of Indian gaming. Part III introduces IGRA, including the classes of gaming and compacting provisions, and ends with an explanation of the "after-acquired lands" provision itself. Part IV analyzes recent case law dealing with this provision, arguing that the cases point up the "after-acquired lands" provision's constitutional and policy flaws. Part V sets out concrete proposals for reform and Part VI concludes that § 2719 of IGRA must be amended to remove the constitutional infirmities and update the compacting framework to reflect the new contours of the Indian gaming industry.

In spite of all the controversy, Indian gaming is "perhaps [the] most strategic" economic choice tribes have made, and an advantageous choice for tribal economic development due to "the low strain on natural resources and the high profit margin." Gaming furthers tribal self-determination "inasmuch as [the tribes] economically support themselves with their own resources and are not dependent upon federal subsidies." Though controversial, support for Indian gaming in Congress remains strong.

This Note operates under the assumption that tribes aggressive and savvy enough to open negotiations with states for class III gaming compacts are active and skilled negotiators, and should be allowed to bargain freely with states in pursuit of their economic goals. As will be shown, allowing states to continue to use the "governor's veto" as a means to escape a disadvantageous deal does not comport with the underlying freedom of contract assumptions of IGRA or of the "treaty federalism" paradigm.

courts. For example, tribal water rights are typically adjudicated in state court by judges who are generally elected to office and serve a non-Indian constituency that may be quite hostile to Indian claims. Given these concerns, negotiated settlements may be more responsive to providing an adequate balance of power between states and tribes.

Id.

16. Id.
17. Id. at ix.
19. "Treaty federalism" refers to the notion that the tribes are currently in a position, vis-à-vis the United States, approximating the situation that existed during the treaty-making period, wherein they were able to define their relationship with the federal government by treaty. The emergence of tribal-state gaming compacts, water use agreements, child welfare agreements, and cooperative law enforcement compacts, among others, testify to the usefulness of this label. Professor Richard Monette has explained treaty federalism as
Congress enacted the IGRA in an effort to prevent state government overreaching in disputes over gambling on reservations. The IGRA was a balancing act, but some of its provisions have become untenable under the intense heat of political, media, and legal scrutiny. Although IGRA's underlying motivation was the creation of a "separate sphere" of sorts for Indian gaming by segregating casinos on reservations, that philosophy nears inadequacy. "It is quite clear that back in 1988, when gaming bills were under consideration, Congress did not envision the explosion of Indian gaming or the acrimonious litigation it would spawn." As tribal gaming makes the transition from a reservation-based industry to one restricted only by access to markets, flaws in IGRA are revealed.

These proposals help tribes exercise full sovereignty, but they also protect state sovereignty, since both parties would be free to approach the compacting process with more to offer and more to gain than the current process allows. It would also ensure that states allowing gambling will have to deal with Indian gaming on its own terms and with a view toward expanding the potential benefit for each side, rather than holding out for all or nothing and using the "governor's veto" as a deus ex machina when confronted with disadvantageous terms. By expanding the possible outcomes for tribes and states with these proposals, IGRA could finally approach its potential as a real force for broad-based tribal economic development. Although gaming economies are not the

the relationship between the Union, Indian tribes and their citizens. Tribes were once entirely free from incursion by our Union and its states, their spheres of sovereignty as impermeable as any other international sovereign. Simply put, they no longer are. . . . [T]he first implication of this is, within our federal system, the Union, states and tribes do not constitute three distinct sovereigns but two distinct planes of sovereignty. The tribes share the sovereign plane not with the Union but with the states. Second, the 'interactive' relationship between the Union and the tribes reflects the relationship between the Union and the states. Third, like the Union/state relationship, the Union/tribe relationship has provided a means for experimenting with federalism, at times testing its elasticity to the point of subversion. Fourth, the relationship between the states and the tribes should reflect the relationship between two states as sovereigns within the same system, on the same plane, whose sovereign spheres do not overlap but influence each other through the federal political processes.


ideal way to start,22 gaming appears to be the most powerful transformative force to appear in Indian Country in generations.23

As gaming flourishes across Indian Country, more tribes seek to enter urban markets, and states try to contain Indian gaming.24 States are in a precarious position, balanced between their desire for increased revenues from Indian gaming and their historic tendency to "jealously try to protect other gaming industries who struggle to compete for entertainment dollars."25 Often faced with staggering budget deficits, states see Indian gaming revenue as a source of easy money. Tribes and states alike have much to gain by increasing the market access Indian gaming establishments enjoy.

22. See David W. Marston, America Bets on Gambling, DETROIT NEWS, Mar. 31, 2001, available at: http://www.detnews.com/2001/hometech/0104/09/hs-f30-206337.htm (on file with the University of Michigan Journal of Law Reform) (quoting former President Clinton's statement, made during his presidential candidacy, that "[g]ambling is a lousy basis for an economy"). Notwithstanding the essential truth of that statement, the fact remains that no other economic venture in Indian Country has come close to the profitability of gaming. Perhaps the President's statement should be understood as a prognostication regarding the sustainability of tribal gaming; he would find many in agreement.

23. The economic development of some tribes is attributable to revenue sources other than gaming. Two notable examples are the Confederated Salish and Kootenai Tribes' operations and Mississippi Choctaw Tribe's enterprises. In 1999, "the Choctaw became the first Indian tribe to move operations offshore when its Chahta Enterprise—an assembler of wiring harnesses for cars—opened a 1,700 worker factory in Mexico. 'We're running out of Indians,' a tribal official explained at the time." See Unseem, supra note 4. Also, the Ho-Chunk Nation in Nebraska is an example of a newly prosperous tribe that began with a gaming economy and successfully made the transition into non-gaming sources of revenue.

24. Foes of Indian gaming often premise their opposition on the social costs imposed by gambling generally. However, it is instructive that most of the energy of these groups (such as Stand Up for California) is expended in fighting Indian gaming, and not the gambling industry generally. See STAND UP FOR CALIFORNIA website, available at: http://standup.quirknet.com/indian_gambling (on file with the University of Michigan Journal of Law Reform) (containing small sections on charitable gambling, off-track betting, and internet gambling, but aiming mostly at Indian gaming issues). Some residents of rural areas, where Indian reservations are usually located, object to the increased traffic and police presence in their communities. Some, like Pete McCloskey, resident of the Capay Valley where the Rumsey Band of Wintun Indians are operating their Cache Creek Casino (the largest in Northern California) have concluded that the only way to save the Capay Valley is to legalize gambling statewide, so that the mostly urban gamblers can stay closer to home. 'If gambling becomes legitimate all over the state, I don’t think you will find people living in the city coming out to these previously unspoiled communities,' he said.


With so much at stake, the negotiation environment surrounding Indian gaming is increasingly rich for all concerned. With a few exceptions, such as in California and Connecticut, Indian reservations are generally not attractive markets for gaming. In fact, the National Indian Gaming Commission’s (NIGC) numbers show that most tribes enjoy modest success, since most reservations are rural and isolated. Geographic isolation, strained state budgets, and a growing Indian gaming industry create the current controversy over off-reservation gaming: “states that are interested in the potential of revenue sharing with tribes [are] encouraging tribes to focus selecting gaming location[s] on new lands based solely on market potential.” In this environment, off-reservation casinos are becoming increasingly prevalent. Casinos in Milwaukee, Wisconsin; Marquette, Michigan; and Airway Heights, Washington have been in operation for several years, and are the only off-reservation casinos to have made it through the approval process in the past fifteen years. Very recently however, the Seneca Nation concluded an agreement with the state of New York involving off-reservation sites, fueled by the state’s hunger for increased revenue and the long-standing desire for economic development in the economically-depressed Buffalo/Niagara Falls area. Unfortunately, while examination of off-reservation gaming is increasing, IGRA currently does

26. See Gavin Clarkson & Jim Sebenius, Tribal-State Negotiations: Applying the Lessons from Foxwoods (unpublished, on file with the author) (analyzing the negotiating dynamic between the state of Connecticut and the Mashantucket Pequots, both “at the table,” and “away from the table,” to develop a framework for analysis of other tribal-state compacting).

27. California presents great chances for the success of tribal gaming operations because it has locations relatively close to the population centers of San Diego, Los Angeles, and San Francisco. The casinos run by the Morongo and Barona Bands of Mission Indians and the Sycuan and Viejas Bands of Kumeyaay Indians have done quite well as a result.

28. Connecticut, of course, is home to the largest casinos in the world, owned by the Mashantucket Pequot and Mohegan Indian tribes, respectively. Each of these casinos grosses over one billion dollars annually. Again, the reason for this tremendous success is the fact that they are in relatively close proximity to Boston, New York, and Philadelphia. See Clarkson & Sebenius, supra note 26.

29. See NIGC, supra note 1.


31. See Oversight Hearing on the Indian Gaming Act Before the S. Comm. on Indian Affairs, 108th Cong. (2003) (statement of Aurene M. Martin, Acting Assistant Secretary—Indian Affairs, Department of the Interior) [hereinafter Martin Statement]. The primacy of proximity to markets to the success of Indian gaming operations is lost on no one. See Courtenay Thompson & Jeanie Senior, Decision on Casino Site Will Deal New Hand, Oregonian, Oct. 24, 1999, at C1 (quoting Spirit Mountain Casino Chief Executive Bruce Thomas: “All tribes by historical circumstance are remote, so why wouldn’t another tribe that doesn’t have a market it likes seek a better market’ ”).

32. See Martin Statement, supra note 31.

33. Id.

34. See generally Clarkson & Sebenius, supra note 26.
not allow for the sort of compacting that will be needed as the industry changes.

Two recent cases, Confederated Siletz Tribes of Or. v. United States and Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, illustrate the increasing interest in gaming on "after-acquired lands," as well as the infirmities of the statute, constitutionally and as a matter of policy. This Note argues that these cases were wrongly decided, since they failed to recognize that the "after-acquired lands" provision of IGRA is unconstitutional under the Appointments Clause and the separation of powers doctrine. From a policy perspective, keeping the "after-acquired lands" provision maintains a sharply unbalanced bargaining environment for Indian gaming in light of the Supreme Court’s decision in Seminole Tribe of Florida v. Florida: “[s]tonewalling states are now virtually immune

35. 841 F. Supp. 1479 (D. Or. 1994) aff’d but criticized, 110 F.3d 688 (9th Cir. 1997), amended on denial of reh’g, cert. denied, 522 U.S. 1027 (1997).
36. 259 F. Supp. 2d 783 (W.D. Wis. 2003), No. 03-2323, 2004 WL 909159 (7th Cir. 2004).
37. The constitutionality of the analogous ability, under 25 U.S.C. § 465, of the Secretary to take land into trust off-reservation was considered in South Dakota v. United States Dep’t of Interior, 69 F.3d 878 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996), mandate recalled, opinion vacated, 106 F.3d 247 (8th Cir. 1996) (upholding the ability to take off-reservation land into trust for tribes under 25 U.S.C. § 465 as a valid exercise of the Executive power).
38. This has, in fact, been a concern throughout the history of the Act. In the run-up to the enactment of IGRA, the Justice Department voiced concern about an analogous provision of one of IGRA’s predecessors, S. 1303, which would give individuals not appointed in accordance with the Appointments Clause, Article II, section 2, clause 2, the authority to waive a federal statute. In order to avoid the constitutional problems inherent in such a situation, [the bill] should be revised to begin ‘Subject to the approval of the Secretary,’ a change that would ensure that implementation of this part of the statute remains in the hands of a properly appointed federal officer.

S. REP. No. 100-446, at 3102 (1988). Needless to say, this course was not taken.
39. 517 U.S. 44 (1996). For a strong doctrinal attack on Seminole Tribe, see Laura Fitzgerald, Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe, 52 VAND. L. REV. 406 (1999). Professor Fitzgerald notes that the Court in Seminole Tribe “preserv[ed] the power to grant itself jurisdiction where Congress is constitutionally barred,” by claiming “the institutional right, where private lawsuits challenge state interest, to have not just the last word but the only word on the scope of its constitutional authority.” Id. at 482.

The decision can also be challenged on the grounds that it is evidence of the unprincipled inconsistency in the construction and application of the commerce clause. The Court noted in Seminole Tribe that “the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity, [because] the power to regulate interstate commerce ‘would be incomplete without the authority to render states liable in damages.’” 517 U.S. at 59 (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (citations omitted)). Given this, it remains unclear why the “Indian Commerce Clause” power should be considered any less complete absent an equivalent power to render states liable in damages.
to legal challenges.  

Tribal-state gaming compacts were meant to be negotiated on an even field for mutual benefit, and tribes and states should be able to freely bargain in good faith on the points in which they are most interested. Congress should therefore amend IGRA by removing the “after-acquired lands” provision.

II. A BRIEF HISTORY OF INDIAN GAMING

A. Introduction

Indians have historically been the poorest members of American society. Unfortunately, they remain so, and the evidence is not solely economic: “Native Americans have a poverty rate 2 1/2 times the national average, a suicide rate nearly twice as high, and an alcoholism rate six times greater.” Indian gaming has helped ease reservation poverty to some extent. Nationwide, Indian gaming is expected to be a $15 billion industry in 2004, accounting for 36% of national gaming revenues. The growth has been tremendous: as recently as 1998, Indian gaming accounted for just 15% of the nationwide gambling market. Often called the “new buffalo,” tribal gaming has brought tremendous prosperity to some Indian tribes. Managed well, gaming income can fund tribal govern-

41. U.S. Census data for 1990 show that the median American Indian family’s income was $21,619, as compared with the national median income of $35,225. Also, a staggering 27.2% of American Indian families live in poverty, versus 10% of the national population. When individuals rather than families are compared, the discrepancy grows even larger: 13% of the national population lives in poverty, as compared with 31.2% of the American Indian population. See U.S. Census, SELECTED SOCIAL AND ECONOMIC CHARACTERISTICS FOR THE 25 LARGEST AMERICAN INDIAN TRIBES: 1990, available at: http://www.census.gov/population/socdemo/race/indian/ailang2.txt (on file with the University of Michigan Journal of Law Reform).
42. Unseeom, supra note 4.
44. See Mason & Nelson, supra note 6, at 57.
45. The name might prove apt, since gaming provides the livelihood that the old buffalo did:

The recent trend of casino gambling on Indian lands has been likened to the mythical return of the buffalo. The great beast that once darkened the plains and provided Indians with sustenance has returned in the guise of slot machines, blackjack tables, roulette wheels and bingo cards. Many Indian nations in the United States have gained political clout from high stakes casino gambling. More importantly, gaming proceeds have raised impoverished nations from the depths of despair.
ments according to tribal priorities and in response to tribal needs. Perhaps, in this area, federal policy "has finally provided tribes with a path to meaningful self-sufficiency." Gaming is not a panacea, but given impetus by "[a] combination of Republican presidents promoting a 'New Federalism' . . . and Democratic congresses that were sympathetic to the causes of ethnic and racial minorities," it is a step on the road to true self-determination, the goal of the federal government for over 30 years.

Indian tribes are not the only beneficiaries of tribal gaming. The economies of surrounding communities prosper as well, since

Sherry M. Thompson, Comment, The Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States and Canada, 11 Ariz. J. Int'l & Comp. L. 520, 521 (1994). Gaming, like the old buffalo, seems to be under constant attack. Only time will tell if the new buffalo will go the way of the old one.

46. Written Testimony of Chairman Herman A. Williams, Jr., Tulalip Tribes of Washington, Before the S. Comm. on Indian Affairs (July 9, 2003).

47. In fact, for many tribes, like the Salish-Kootenai of Montana, IGRA can be charitably characterized as a modest success: "As a result of the myriad competitive factors, [such as widespread legalized gambling in Montana and the remote locations of tribal casinos,] gaming revenues are only a small part of the Salish-Kootenai Tribes' annual $24 million budget, providing only 7 percent of the total income." Tom Zoellner, Montana: The Last, Worst Place for Indian Gaming, INDIAN COUNTRY TODAY, Aug. 11, 2003, available at: http://indiancountry.com/?1060605635 (on file with the University of Michigan Journal of Law Reform).

48. Mason & Nelson, supra note 6, at 59.

49. President Nixon stated:

The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . . . This . . . must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community.

Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363 (1970).

50. For example, in California, for the year ending July 2003, tribal government employment grew by 17.8%. See Louis Sahagun, Indian Gambling Looks Beyond the Reservations, L.A. Times, Aug. 25, 2003, at A1. Furthermore, about 90% of the 40,300 workers employed by tribal gaming operations are non-Indian. Id. See also Research Department of the Hotel Employees and Restaurant Employees International Union, AFL-CIO for the Coachella Valley Coalition for Responsible Sovereignty, Tribal Casinos and Their Impact on a California Community: A Focus on the Palm Springs Area in the Coachella Valley and the Casino Operations of the Agua Caliente Band of Mission Indians 1 (Feb. 2003) [hereinafter H.E.R.E. Report], stating:

Tribal casinos are providing unprecedented financial security to numerous Indian communities throughout the state. The casinos have created thousands of jobs. In many areas, these casinos are both the largest and fastest growing employers and, in some cases, are providing both good wages and affordable family healthcare for employees. The number of jobs in Indian casinos expanded 12.1% in California last year, while statewide employment grew by only 0.7%.
Indian gaming creates jobs in construction and the service sector. The gaming industry can provide a "ripple effect" of supplier and vendor jobs, which naturally accompany the relatively large businesses such as the hotel and casino operations now often seen in Indian Country.\textsuperscript{51} Also, tribal members with per capita payments\textsuperscript{52} to spend will largely do so off-reservation, in nearby cities and towns. Property values near tribal developments will increase, and tribes will be able to provide the infrastructure and policing services that counties and towns formerly provided.

\textit{Id. See also} Tom Wanamaker, \textit{Is It 'Revenue Sharing' or 'Extortion'?}, \textit{Indian Country Today}, July 18, 2003, \textit{at} http://indiancountry.com/?1058545812 (on file with the University of Michigan Journal of Law Reform) ("A University of Connecticut study performed in 2000 said that directly or indirectly, the [Mashantucket Pequot] tribe is responsible for 43,000 jobs in that state; the tribe directly employs 11,000 people.").

\textsuperscript{51} See Lou Michel, \textit{Senecas Asking to Buy Convention Center}, \textit{Buff. News}, June 15, 2003, \textit{at} C1 ("We bring a lot economically to Buffalo. We're going to generate 2,500 to 3,000 jobs. I cannot stress enough the economic spin-off effects," [Seneca President Rickey L.] Armstrong said. 'More people will be coming to the city using restaurants, hotels and going to [watch] the [Buffalo] Sabres [hockey team].").

\textsuperscript{52} Many tribes that have gaming operations distribute some percentage of their profits to their members as "per capita" payments. The exact amount is the subject of wild speculation among non-Indians and foes of Indian gaming. In truth, large per capita payments are the exception rather than the rule, for several reasons. First, many tribes are reluctant to distribute per capita payments when the tribe requires the funds for critical infrastructure needs and debt service. Even if infrastructure or debt service are not issues, IGRA itself limits the uses of casino income. The Act states:

\begin{quote}
net revenues from any tribal gaming are not to be used for purposes other than—to fund tribal government operations or programs; to provide for the general welfare of the Indian tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund the operations of local government agencies.
\end{quote}

25 U.S.C. § 2710(b)(2)(B) (2000). Also, any plan to make per capita payments to tribal members must be approved by the Secretary of the Interior. \textit{See} 25 U.S.C. § 2710(b)(3) (2000). Finally, many tribes simply do not, as a matter of fact, generate the tremendous sums of casino revenue created by the likes of Foxwoods and Mohegan Sun. For example, the Confederated Tribes of the Grande Ronde of Oregon paid out $2,800 to each of its 4,500 members in 1999. \textit{See} Jeff Hinckle, \textit{Per Caps}, \textit{Am. Indian Rep.}, Mar. 2001, \textit{at} 13. Further evidence of the per capita payment discrepancy is that "[t]he Fort McDowell Indian Community of Arizona and the Saginaw Chippewa of Michigan both reportedly issued about $30,000 in per caps to their respective members in 1999. Meanwhile, the 2,100 members of the Confederated Tribes of Umatilla of Oregon saw annual bonuses of $825, thanks to their Wildhorse Resort." \textit{Id.} In fact, of the 330 tribal gaming facilities in operation in 2002, only 41 had revenue of $100 million or more. \textit{See} National Indian Gaming Commission, \textit{Tribal Gaming Revenues}, \textit{available at:} http://www.nigc.gov/nigc/nigcControl?option=TRIBAL\_REVENUE (on file with the University of Michigan Journal of Law Reform). Those 41 operations were responsible for nearly $9.4 billion, or almost 65%, of total Indian gaming revenue in that year. \textit{Id.}
Indian casinos have sprung up only in the past quarter century, but gaming has long been a part of many Indian cultures: "[I]n traditional Indian gambling stories, good gamblers are pitted against evil opponents, associated with Euro-American culture, traditional social vices, and traditional tribal enemies." One commentator notes that "Blackfeet accounts describe how Na'pi (Old Man) brought the hoop and arrow game ... Blackfeet continue to play traditional betting games." In fact:

References to games are of common occurrence in the origin myths of various tribes. They usually consist of a description of a series of contests in which the demiurge, the first man, the culture hero, overcomes some opponent, a foe of the human race, by exercise of superior cunning, skill, or magic. Comparison of these myths not only reveal[s] their practical unity, but disclose[s] the primal gamblers as those curious children, the divine Twins, the miraculous offspring of the Sun, who are the principal personages in many Indian mythologies. ... Their virgin mother, who appears also as their sister and their wife, is constantly spoken of as their grandmother, and is the Moon or the Earth, the Spider Woman, the embodiment of the feminine principle in nature. Always contending, they are the original patrons of play, and their games are the games now played by men.

Culin describes stick games, bone games, and hand games, from all corners of North America. Further, the persistence of traditional gaming is recognized in federal law. Indian gaming is, in some respects, a new manifestation of an ancient cultural practice.
Traditionally, tribal gaming was a not-for-profit, individual social activity, but by the 1970s tribes had begun to open small bingo parlors on their reservations. As these bingo operations became more successful, states sought to extend their laws over reservation lands to regulate, prohibit and/or tax tribal bingo operations. Students of federal-Indian law again told themselves, "Plus ça change": "[b]ecause of local ill feeling, the people of the states where [the Indians] are found are often their deadliest enemies." A new front in the continuing battle between tribes and state governments had been opened.

There is no evidence that any of the games described were imported into America at any time either before or after the Conquest. On the other hand, they appear to be the direct and natural outgrowth of aboriginal institutions in America. They show no modifications due to white influence other than the decay which characterizes all Indian institutions under existing conditions.

Id. See also Lawrence LaPoint, Gaming: The Inherent and Legal Right of Indian Nations, SEATTLE TIMES, Oct. 15, 1995, at B5.

59. Clarkson & Sebenius recount the history of the Oneida and Seminole tribal gaming enterprises: after a 1975 fire on the Oneida Reservation, the tribe "decided to 'raise money for [their] own fire department the way all fire departments raise money: through bingo.'" Clarkson & Sebenius, supra note 26, at 18 (quoting Dennis McAulliffe, Jr., Casinos Deal Indians a Winning Hand, WASH. POST, Mar. 5, 1996, at A1). See also Sioux Harvey, Winning the Sovereignty Jackpot: The Indian Gaming Regulatory Act and the Struggle for Sovereignty, in Mullis & Kamper, supra note 15, at 14; W. Dale Mason, Indian Gaming: Tribal Sovereignty and American Politics 43 (2000).

60. See Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310 (5th Cir. 1981) (applying Bryan v. Itasca County test to Florida's bingo law, holding that Florida had no regulatory jurisdiction over the tribe, and therefore could not prohibit Indian gaming on the Seminole reservation).

61. See United States v. Kagama, 6 S.Ct. 1109, 1114 (1886); see also Gavin Clarkson, Bull Conner Would Have Been Proud, HARTFORD COURANT, July 20, 2003, at C3. As one commentator aptly notes, "[t]he states have been alone among the sovereign levels of government in their widespread dislike, even resentment, of tribal gambling." Mason & Nelson, supra note 6, at 71. Students of Indian law can be excused for expressing cynicism where judges characterize states, vis-à-vis tribes, as "motivated to maximize the public good... [not standing in relation to tribes in a] 'conflicting and even antagonistic [manner],' and whose motivations [are not] self-serving." Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, No. 03-2323, 2004 WL 909159 (7th Cir. 2004) (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)).


A brief review of some of the prior skirmishes in this ongoing battle reveals that they often follow a pattern. The conflict generally begins as a dispute between the Tribe and the States, with the Tribes primarily interested in preserving their autonomy and the States primarily interested in gaining control of the economic assets under tribal control. While the States' principal concern has usually been their ability to share in the material wealth generated on tribal lands, they have often argued in terms of abstract notions of tribal and state sovereignty and the proper relationship between the federal and state governments in deciding those issues.
Florida may have been Indian gaming's modern birthplace, but the Supreme Court first considered the issue when resolving a controversy in California. The Court decided that states could not ban or regulate the conduct of Indian gaming operations on reservations without explicit congressional consent. In applying its earlier decision in *Bryan v. Itasca County,* the Court found that Public Law 280 granted certain states criminal jurisdiction over Indian lands, but did not grant general civil jurisdiction. Because California's attempted regulation of the Cabazon and Morongo Bands of Mission Indians' gaming operations was civil and regulatory rather than criminal and prohibitory, that state's laws did not apply on reservations. True, California had an interest in preventing the conduct of gambling by unscrupulous persons, the Court said, but the federal interest in tribal self-sufficiency was stronger: "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously

Posed between the two main entities in this conflict is the federal government, whose plenary power over the Tribes and supremacy over the States enables it to resolve each particular conflict according to its desires. However, the federal government's resolution of these skirmishes is usually not the result of a thoughtful balancing of the Tribe's sovereignty and the State's economic concerns, but rather depends on larger, more global events which prompt the federal government to be more or less respectful of state rights on a variety of issues.

Although the exact details of this pattern are not followed in every tribal-state dispute, the general outline has become so familiar it is arguable that the course of federal Indian policy is usually not determined by whether the nation is more interested in preserving tribal sovereignty than in promoting local economic interests or vice versa, but instead on the general political climate of federal-state relations at the time. When state and local control is a popular and accepted concept at the federal level because of events unrelated to Indian policy, federal policy generally favors State economic interests over tribal cultural or sovereignty interests. Conversely, the Tribes have their best chance of enlisting federal support, and therefore prevailing in a particular dispute, when the federal government is unwilling to trust the States on other non-Indian issues.

*Id. See also* Professor Tsosie's analysis of the history of tribal-state conflicts over natural resource allocation, *supra* note 5.


64. *Bryan v. Itasca County,* Minn., 426 U.S. 373 (1976) (finding that Public Law 280 did not confer general, regulatory power to states over Indian reservations).

parallel the federal interests in making this happen. The states' interests had to give way. Due to the Bryan/Butterworth/Cabazon line of cases, tribes had exclusive control over reservation gaming. They were understandably loath to allow any state interference in this exclusivity, and as a result, did not contribute to Congress' consideration of IGRA.

III. THE INDIAN GAMING REGULATORY ACT (IGRA)

A. Enactment and Purpose of IGRA

The states' response to Cabazon was immediate agitation in Congress for legislation to prevent the expansion of Indian gaming. The result was the Indian Gaming Regulatory Act of 1988, the Act which regulates all Indian gaming today and provides the framework for the negotiated gaming agreements between tribes and states.

66. 480 U.S. at 219.
67. Senator John McCain (R, Ariz.) noted in his additional remarks regarding IGRA:

It is with great reluctance that I am supporting S. 555 as reported by the Committee. I characterize my support as reluctant because I believe a different and more favorable result for Tribes could have been achieved. Unfortunately, Tribes never banded together and offered their own gaming proposal. They also never found a consensus for supporting any particular legislative solution. Some would say that Tribes were united in calling for no gaming legislation, but such a position ignores the whole debate, and, more importantly, it provides no support to those Members of Congress who have attempted to craft legislation which would be sensitive to tribal concerns. The issue has never been: should there be federal regulation of Indian gaming? Four years of continuous debate on Indian gaming should lead even the most casual observer of the legislative process to realize that legislation was inevitable. The focus of debate has always been on what standards and regulations should govern the conduct of gaming on Indian reservations and lands.

S. REP. No. 100-446, at 3103 (1988).
68. 25 U.S.C. § 2701 et seq. (2000). In fact, S. 555, the bill that became IGRA, was under discussion at the same time the Supreme Court heard oral arguments in Cabazon. It seems clear that Congress's speedy action on IGRA was motivated, at least in part, by the potential willingness of the Court to support a regime of tribal gaming nearly unfettered by state regulation.
69. Referred to in IGRA as "tribal-state gaming compacts," presumably the terminology is meant to provide an analog to contract law. Individuals and entities enter into contracts (legally enforceable agreements); states enter into compacts (agreements between sovereigns). To some extent, then, the concepts of contract law should be kept in the background of all tribal-state compact negotiations. See also Note, Intergovernmental Compacts in Native American Law: Models for Expanded Usage, 112 HARV. L. REV. 922, 924 (1999):

A compact is a negotiated agreement between two sovereign entities that resolves questions of overlapping jurisdictional responsibility, such as law enforcement, or resolves certain substantive matters, such as water rights. . . . Compacts differ from
The IGRA was meant to achieve "a principal goal of Federal Indian policy [which] is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." Under IGRA, "Indian 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 policy, prohibit such gaming activity." Congress intended with IGRA to regulate Indian gaming, in an "attempt to balance the competing interests of Indians, states, and the federal government in the conduct of gaming activities on Indian lands." Congress views Indian gaming "as an economic activity that Indian tribes can develop, [and of which the tribes] should be the primary beneficiary." Created under Congress' "Indian Commerce" power, the IGRA completely preempts state regulation of Indian gaming on Indian land, and has withstood constitutional challenge. The Act is also widely seen as an attempt to allay concerns that organized crime would find a haven on Indian lands.

normal contracts because they may be more enforceable, and because contracts, unlike compacts, do not normally resolve issues of legal entitlement or jurisdiction between sovereign entities . . . compacts are more closely related to treaties in that they set political policies for tribes and states, and therefore have inherent value even beyond their stated goals. Unlike treaties, however, compacts can be superseded by federal law and do not involve transfers of entrusted property without federal oversight.

Id. 70. 25 U.S.C. § 2701(3) (2000).
71. 25 U.S.C. § 2701(5) (2000). Note also that "neither Cabazon nor IGRA forces a state to allow forms of gambling that it does not wish to allow. States have the right to bar unwanted types of gambling from tribal and nontribal lands by refusing to legalize any form of gambling, as Tennessee, Utah, and Hawaii have done." MASON & NELSON, supra note 6, at 77.
74. See U.S. CONST. art. I, § 8, cl. 3.
75. See Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990); see also Legislativ History of S. 555 (stating that IGRA is to be construed to completely preemp the field of Indian gaming); State ex rel. Nixon v. Coeur d'Alene Tribe, 164 F.3d 1102 (8th Cir. 1999) (stating that although IGRA completely preempts state control over Indian gaming on Indian land, it does not prevent state from regulating Indian gaming on non-Indian land); Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996) (stating that IGRA satisfies "complete preemption" exception to the "well-pleaded complaint" rule since Congress intended to regulate Indian gaming with a comprehensive regulatory scheme). But see Oneida Tribe of Wis. v. Wisconsin, 951 F.2d 757 (7th Cir. 1991) (finding that although the United States has oversight over Indian gaming, states may exercise some control over class II and class III gaming under IGRA).
reservations, often seen as lawless enclaves.\footnote{76} It is still true that "[f]ears of organized crime being drawn to Indian country, virtually all with no factual basis, sustain calls for doing away with this successful form of Indian economic development."\footnote{77} However, as Senator John McCain (R., Ariz.) stated in 1988, "in fifteen years of gaming activity on Indian reservations there has never been a clearly proven case of organized criminal activity\footnote{78} associated with Indian gaming. Yet, the specter of organized crime still hovers over the Indian gaming industry.

The Department has found no evidence of a systematic infiltration of Indian gaming by elements of organized crime. There have been isolated incidents of organized crime attempting to infiltrate Indian gaming.\ldots. The Office of the Inspector General reported that the Criminal Division, the Federal Bureau of Investigation, and the Office of Tribal Justice said that while there is an increasing potential for organized crime involvement due to growth of Indian gaming revenues, there is a lack of evidence that such involvement has occurred.\footnote{Id.}

Again, one would think that any potential for infiltration by organized crime, in hundreds of Indian casinos, would yield more than one footnote in one law review article, citing to a single magazine article in the period from 1986 to 1996. In fact, the situation in Connecticut shows that just the opposite conclusion should be drawn: Indian casinos in that state have gotten the corrupt players out of the game. The only plausible conclusion is that these claims, though trumpeted widely, are wholly without merit and should be buried with little ceremony.\footnote{77} \textit{Getches}, supra note 7, at 741.\footnote{78} See \textit{Sen. Rep. No.} 100-446, at 3108 (Aug. 3, 1988); see also Rob McDonald, \textit{Chips are Down for Card Rooms; Northern Quest's Fast Start Hurting Other Gaming Facilities}, \textit{Spokesman-Review} (Spokane, WA), May 22, 2001, at A1 (reporting that the crime rate in the City of Airway Heights, the location of the Kalispel Tribe's off-reservation casino, did not change in the first quarter of that casino's operation).
1. The Definition of Gaming Under IGRA—The IGRA divides Indian gaming into three classes. Class I gaming encompasses traditional games used in ceremonial and social settings, and it is completely outside the scope of any but tribal regulation and control.\(^7\)

Class II gaming is defined by IGRA as “the game of chance commonly known as bingo . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo.”\(^8\) Card games are also included in Class II gaming if they are specifically allowed or not specifically forbidden by the state “and are played at any location in the State.”\(^9\) Card games under Class II must also be “played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes.”\(^10\)

Class III gaming consists of all gaming that is neither Class I nor Class II.\(^11\) This is the area of most contention, since it is the most profitable class of gaming. Class III gaming includes so-called “Vegas-style” games, such as house-banked card games, roulette, slot machines, and the like, and is only possible under a governing tribal-state compact.\(^12\)

Once a tribe has passed a tribal gaming ordinance authorizing gaming on its lands, and the NIGC has approved that ordinance, the tribe may contact the state to request to enter into negotiations for a gaming compact.\(^13\) Under IGRA, states are required to “enter into negotiations with the [requesting] Indian tribe for the purpose of entering into a Tribal-State compact . . . in good faith.”\(^14\) If the state does not negotiate, or negotiates in bad faith, IGRA gives tribes a cause of action, accruing after 180 days have passed from the original request, to compel negotiation.\(^15\) If the tribe and the state negotiate, they have 60 days to come to an agreement.\(^16\)

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82. Id.
they cannot agree, they are to forward their "last, best" offers to a
mediator who will choose the best proposal, and present it to the
parties for further consideration. 89 If the parties agree to the pro-
posal, it will be treated as an approved Tribal-State compact. If they
cannot agree to the proposal, it is forwarded to the Secretary of
the Interior, who can accept it or reject it and promulgate regula-
tions that will govern the specific case. 90

As noted supra, Congress backed up the good faith negotiation
requirement on states with a federal cause of action. However, the
Supreme Court eviscerated it, holding that it was an unconstitu-
tional abrogation of the sovereign immunity of state governments,
guaranteed by the 11th Amendment. 91 The apparent limiting fac-
tor in the Court's analysis was the fact that the IGRA was passed
under Congress' Indian Commerce Clause power.

To reach this result, the Court overruled its earlier decision in
Pennsylvania v. Union Gas 92 to "reconfirm that the background
principle of state sovereign immunity embodied in the Eleventh
Amendment is not so ephemeral as to dissipate when the subject
of the suit is an area, like the regulation of Indian commerce, that
is under the exclusive control of the Federal Government." 93 The

90. See 25 U.S.C. § 2710(d)(7)(A)(vii) (2000); see also 25 C.F.R. § 291.11(c). This latter
provision has survived, despite the objections of commentators that it exceeds the powers of
the Secretary of the Interior. See, e.g., Rebecca S. Lindner-Cornelius, The Secretary of the In-
terior as Referee: The States, the Indian Nations, and How Gambling Led to the Illegality of the Secretary
Congress can abrogate state sovereign immunity under the Eleventh Amendment because
"the power to regulate interstate commerce would be 'incomplete without the authority to
render States liable in damages.'"). The Court also has stated that

the Interstate Commerce and Indian Commerce Clause have very different applica-
tions. . . . [W]hile the Interstate Commerce Clause is concerned with maintaining
free trade among the States even in the absence of implementing federal legislation
. . . the central function of the Indian Commerce Clause is to provide Congress with
plenary power to legislate in the field of Indian affairs. . . . The extensive case law
that has developed under the Interstate Commerce Clause, moreover, is premised on
a structural understanding of the unique role of the States in our constitutional sys-
tem that is not readily imported to cases involving the Indian Commerce Clause. . . .
[T]he fact that States and tribes have concurrent jurisdiction over the same territory
makes it inappropriate to apply Commerce Clause doctrine developed in the context
of commerce 'among' States with mutually exclusive territorial jurisdiction to trade
'with' Indian tribes.

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (internal citations omit-
ted).
93. Id. at 72.
cause of action for the failure of states to bargain in good faith was accordingly severed from the Act.

2. The National Indian Gaming Commission (NIGC)—IGRA also created the National Indian Gaming Commission to exercise oversight over Indian gaming enterprises by approving class II and III gaming ordinances, management contracts and class III gaming compacts. The NIGC is composed of three members, two of whom must be members of a federally recognized tribe. The NIGC is required to meet quarterly. Although the NIGC has been the focus of many reform proposals, it is not implicated in this Note’s analysis.

C. IGRA’s “After-Acquired Lands” Provision

One goal of the IGRA, from the perspective of the states involved in lobbying for the Act, was to curtail the expansion of Indian gaming operations. This was done with the so-called “after-acquired lands” provision:

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired . . . after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of an Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988.

There are, however, two alternative exceptions to this rule. The first of these is that:

Subsection (a) of this section will not apply when—

the Secretary, after consultation with the Indian tribe and the appropriate state and local official, including officials of nearby Indian tribes, determines that a gaming establishment

on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.98

The second alternative exception consists, in turn, of three elements. Indian land off-reservation may be used for gaming if it was acquired as part of a land claim settlement, if it is the initial land of a newly recognized tribe, or if the land is obtained pursuant to a restoration of tribal status.99 The first exception, section 2719(b)(1)(A) of the IGRA, "as currently written, gives the governor power to effectively veto the secretary's determinations regarding gaming activities on after-acquired land off the reservation."100 The propriety of this power, however, has been, and continues to be, tested in federal courts,101 which have employed questionable reasoning in upholding the provision.

99. See 25 U.S.C. §§ 2719(b)(1)(B)(i)-(iii) (2000). A tribe is "restored" to federal recognition if that tribe's relationship with the federal government had been "terminated." This was the disastrous policy of the federal government from 1945 to 1961:

A turnaround in congressional policy toward Indians resulted in the dramatic departure from the reforms spearheaded by John Collier that began in the early 1940s. There were calls from Capitol Hill to repeal the IRA [Indian Reorganization Act] and to move away from the encouragement of tribal self-government as official federal policy.

GETCHES, supra note 7, at 204. The termination of a tribe resulted in an end to its recognition as a government; the tribal land base and assets were to be distributed to its members. This was accomplished by House Concurrent Resolution 108, August 1, 1953. In order for a terminated tribe to resume functioning as a governing entity, it must endure formal restoration procedures overseen by the BIA. Tribes that have never been considered governmental entities can be recognized as such by the BIA's Branch of Acknowledgment and Research—an expensive process that can take years.

Mr. [Eric] Eberhard, a former staff member of the Senate Committee on Indian Affairs who practices law in a Seattle firm with many tribal clients, said costs have been driven up by the sheer number of groups seeking to become tribes and the scarcity of experts to back their claims. "It has never been inexpensive, but prior to the advent of gaming it was reasonable to say it cost between $100,000 and $200,000," he said. "Now it runs in the millions of dollars because there is a finite pool of experts available to assist them, and so they go to tribes who have developers who can pay them."

100. Thomas Gede, Indian Gaming: The State's View, in Mullis & Kamper, supra note 15, at 75.
101. See supra note 35.
IV. RECENT CASE LAW ON THE "AFTER-ACQUIRED LANDS" PROVISION

A. Confederated Tribes of Siletz Indians of Oregon v. United States

The Confederated Tribes of Siletz Indians of Oregon asked the Secretary of the Interior to take 16 acres of land into trust status in 1992 so that they could develop a gaming operation in downtown Salem, Oregon, nearly fifty miles from their reservation on the Oregon coast. Many parties opposed the proposal, and Oregon Governor Barbara Roberts (D) stated in April of 1992 that she did as well, on grounds that it would be injurious to the City of Salem, Linn County, and the State of Oregon. By the fall of 1992, however, the Tribes had garnered approval for its project at the agency and Portland regional levels of the BIA. In October of that year, Governor Roberts notified the Department of the Interior that she did not approve of the project. By November, however, the Secretary of the Interior had issued findings that the project would in fact be in the best interest of the Tribes, the surrounding tribes, and the local community. The Secretary formally asked Governor Roberts for her concurrence in these findings, which she refused to provide. In December of 1992, Secretary Bruce Babbitt denied the Tribes' request for acquisition and conversion to trust status for the parcel of land at issue, citing the "after-acquired lands" provision of the IGRA and the lack of a governor's concurrence. The Tribes then brought suit in federal district court, claiming that the so-called "governor's veto" provision of the IGRA was unconstitutional as a violation of both the doctrine of separation of powers and the Appointments Clause of the Constitution. The District Court agreed.

102. See Deloria & Wilkins, supra note 10, at 7:

The heritage of the European/Euro-American claim of legal title to Indian lands has remained constant from 1492 until the present day. The nomenclature used to discuss Indian land rights has changed a bit, and we now describe Indian lands as being held 'in trust' by the United States, a euphemism that simply avoids the necessity of remembering that Indians, with some rare anomalies, are not thought to own the legal title to their lands and can be dispossessed by the U.S. government at any time.

To the district court, the IGRA's plain language compelled the understanding that a lack of concurrence by the governor of the state in which the gaming operation is proposed is fatal to the Secretary's ability to take the land in question into trust: "[I]n fact, the 'but only if' restrictive language precludes the Secretary from granting an exception to § 2719(a) without satisfying this final step." The court held that "the language of § 2719(b)(1)(A) is unmistakably plain and, therefore, conclusive: If the Secretary cannot obtain the Governor's concurrence, the Secretary's determination in favor of granting an exception dies." Yet, this analysis of the plain language was not conclusive.

The Tribes also claimed that the "governor's veto" violates the Appointments clause. "governor's veto." The Appointments clause states that the President "shall . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for." At issue under this clause was whether Governor Roberts was acting in the manner of an officer of the United States, was placed into IGRA's regulatory scheme and was tasked with deciding a matter of federal law and policy when she considered whether to concur with the Secretary's determination of the positive effects of the proposed gaming operation. The district court decided that she was, relying upon the Supreme Court's decision in Buckley v. Valeo, in which "Congress, in effect, unconstitutionally empowered the Governor to act as if she were an officer of the United States appropriately appointed by Congress to 'serve' pursuant to federal statute and to exercise significant authority over federal government actions through a congressional grant of power." The District Court held that by empowering, without appointing, an officer (in this case, Governor Roberts) to exercise a substantial degree of power under federal law, Congress acted outside the bounds of its Constitutional power.

With respect to the claim that the "governor's veto" violates the separation of powers doctrine, the court noted that "[t]he core concern of the Appointments Clause is to ensure that executive power remains independent." The federal system depends, in part, upon assurances that the legitimate exercise of power by each

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104. 841 F. Supp. at 1484.
105. Id.
109. Id. at 1487.
branch will be undisturbed by the others. In this case, however, Congress created a scheme whereby the Executive branch could not exercise the full extent of its powers, instead relying upon the state governors to concur with the Secretary’s determination as the last act necessary to carry out the Executive’s power. In short, the court saw “a statute in which Congress delegates to a state official the power to veto a favorable determination by an official of the Executive Branch who was legislatively charged with making that determination.” The statute “grants the Governor the power to negate the DOI’s determination if it is favorable,” which the district court held clearly intruded upon the powers of the Executive branch.

Accordingly, the court ordered the offending “governor’s veto” provision severed from the IGRA. However, the district court’s remedy encompassed the entire “after-acquired lands” provision. This order made moot the Tribes’ application to take land into trust, since, under the district court’s severance order, there was no longer an exception to the ban on gaming on lands acquired after October 17, 1988. This situation formed the basis for the Tribes’ appeal.

The Ninth Circuit Court of Appeals reversed the district court’s decision on both issues. The court first held that the governor’s veto does not violate the separation of powers doctrine, since it “does not undermine an executive function, [but] merely places restrictions on the Executive’s ability to choose which land is to be taken into trust for gaming purposes—a legislative function.” The provision also passed muster under the Appointments Clause, because “the authority vested in the state governors through IGRA [did] not rise to the level of that of an officer of the United States.” The Ninth Circuit’s decision was incorrect on both counts.

1. The Separation of Powers Claim—On the separation of powers question, the court held that since Congress and not the Executive branch has the power to make determinations regarding Indian land, and since Congress has in fact done so by delegating that power to the Secretary of the Interior, there was no violation of the

110. Id. at 1488.
111. Id.
112. Id. at 1490.
113. Confederated Tribes of Siletz Indians of Or. v. United States, 110 F.3d 688, 696 (9th Cir. 1997).
114. Id. at 697.
doctrine of separation of powers. The court stated that while the Supreme Court has not enumerated a list of factors to be consulted in examining such claims, courts must consider "(1) the governmental branch to which the function in question is traditionally assigned, and (2) the control of the function retained by the branch."116

After noting that Congress has the power both to acquire and dispose of federal property and to legislate in the area of Indian affairs, the court relied upon the notion of "contingent legislation" as embodied in J.W. Hampton, Jr. & Co. v. United States117 to show that Congress had validly delegated its power in this area:

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent upon future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement because [i]he power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect on the expression of the voters of a certain district.118

The argument is that Congress delegated to Interior the power to make an exception to the "after-acquired lands" ban, contingent upon the governor's consent. The power to take land into trust for an Indian tribe off its reservation for gaming purposes is dormant, in a sense, until the governor of the state concurs with the Secretary's determination of benefit to the tribe and the surrounding community. This implies that the governor's action is simply ministerial and does not involve any actual decision-making or policy-making.

This cannot be the case; the Secretary's determination hinges decisively upon the governor's concurrence. To say that this is an example of "contingent legislation" is to state half the case; left unstated is that Congress has, in fact, delegated to the Secretary of the Interior the power only to act in accord with the wishes of a state official. Here, the state governors, substituted by Congress for

115. Id. at 694.
116. Id. (internal citations omitted).
117. 276 U.S. 394 (1928).
118. 110 F.3d at 695 (quoting 276 U.S. at 407) (emphasis added).
the Secretary of the Interior, run the Department of the Interior for purposes of land-into-trust determinations under § 2719. The Ninth Circuit sought support for its questionable ruling in this case in a 1939 decision regarding tobacco marketing restrictions119 and a 1935 case regarding oil refining.120 Neither of these cases provide compelling support for the court’s decision.

The Currin case, in contrast to the “after-acquired lands” provision at issue here, conditioned the imposition of federal regulation on the two-thirds vote of the affected tobacco farmers. Before the vote, the federal government did not regulate the tobacco market in question under the Commerce Clause in any way. These were local markets, not otherwise subjected to federal oversight under the Interstate Commerce Clause. After an affirmative two-thirds vote of the affected farmers, the market was subjected to federal regulation and inspection. By contrast, the “after-acquired lands” provision, and the larger statute of which it is a part, provides complete federal preemption over the field of Indian gaming. A lack of concurrence by the governor of a state does not render the regulation a nullity; Currin would control if the governor of the affected state could refuse to have IGRA apply to her state, or if the legislature could simply exempt itself from IGRA in its entirety absent a Currin-like vote for inclusion.121 Not only was the tobacco market in Currin free from federal regulation absent a vote, but the party voting in consideration of the issue was the same party potentially subject to regulation. By contrast, under the “governor’s veto” situation, more than one party is affected by the proposed regulation. The question in Currin was whether some local tobacco markets could constitutionally be regulated as interstate commerce upon an affirmative consenting vote of those tobacco merchants; no such question is at stake in Siletz. Currin, therefore, provides no support for the court’s decision.

Panama Refining dealt with whether Congress may constitutionally delegate legislative power to the executive branch. In holding that it can, the Court stated that the provision at issue

119. Currin v. Wallace, 306 U.S. 1 (1939). This case was cited with approval by Lac Courte Oreilles Band, No. 03-2323.
120. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
121. This is the position of the state of Maine, which has argued that it could exempt itself from IGRA, despite the Supremacy Clause and Indian Commerce Clause issues. See Passamaquoddy Tribe v. Maine, 897 F. Supp. 632 (D. Me. 1995), aff’d, 75 F.3d 784 (1st Cir. 1996). The court held that IGRA did not implicitly repeal portions of the Maine Indian Claims Settlement Act of 1980, which requires that federal Indian laws specifically apply in Maine. Id.
is brief and unambiguous. . . . It does not qualify the President's authority by reference to the basis, or extent, of the state's limitation of production. . . . It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in § 9(C) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. 122

However, in the present case there are limits to the Secretary's power, and Congress has prescribed criteria for, and has required findings as a prerequisite to, the Secretary's actions. Congress has very strictly delegated to the Secretary the authority to take land into trust for gaming purposes in an exception to IGRA's ban on gaming on "after-acquired lands." The present case, therefore, is distinguishable from Panama Refining, since it does in fact "qualify the President's authority" by qualifying the authority of the Secretary of the Interior, the President's delegate.

The upshot of the foregoing cases, cited for the proposition that the "governor's veto" does not violate the doctrine of separation of powers, is that

the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety. 123

This is just to the point. With reasonable standards in place, the exercise of delegated power by the Executive branch is not an exercise of legislative power. Here, the decision to deviate from the ban on gaming on "after-acquired lands" is done by the state governors, who are not governed by any standards in their determination of whether to concur with the Secretary's evaluation. 124 Justice Cardozo elaborated the point: "to uphold the

122. 293 U.S. at 415.
123. 293 U.S. at 440 (Cardozo, J., dissenting).
124. Wisconsin Governor McCallum stated that he would have found no basis, in any event, for concurring with the Secretary's determination, simply by virtue of his stand on Indian gaming in Wisconsin. See Brief for Appellant at 43, Lac Courte Oreilles Band of Lake
delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed." Here, the discretion is properly exercised by the Secretary, in determining that the off-reservation gaming will not harm the surrounding community and will benefit the applying tribe. It is the frustration of that discretion (more to the point, the potential for the standardless frustration of that discretion) via the "governor's veto," that makes the provision invalid under the separation of powers doctrine.

The court also erred by focusing on the duration and frequency of the "governor's veto," and by splitting the governor's actions conceptually between federal effect and state authority. The point here is that the governors in fact act, regardless of the duration or frequency. That the governors are called upon to implement federal law and policy "on an episodic basis" also does not logically compel the result that the Act is free from constitutional infirmity.

As to duration, Printz v. United States shows that the Supreme Court does not care for the time-splitting favored by the Ninth Circuit. In deciding that county sheriffs could not be "commandeered" for federal purposes despite the fact that they were to do so for the limited time during which the federal enforcement scheme was impending, the Court in Printz disfavored the view that the Act "places a minimal and only temporary burden upon state officers," due to the time limitation.

2. Appointments Clause Claim—In framing the question whether § 2719 violates the Appointments Clause, the Ninth Circuit stated that the inquiry was "whether, under this statute, the Governor is performing duties reserved for officers of the United States." To decide this question, the court pointed to the Supreme Court's two-part test in Buckley v. Valeo: "whether the Governor exercises 'significant authority' under IGRA, and whether IGRA vests in the Governor 'primary responsibility' for determining the applicability of IGRA's exceptions."

Attempting to distinguish Buckley v. Valeo, the Ninth Circuit likened state governors to judges, by stating that the act of making

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Superior Chippewa Indians of Wis. v. United States, No. 03-2323, 2004 WL 909159 (7th Cir. 2004).

125. 293 U.S. at 434 (Cardozo, J., dissenting) (emphasis added).
126. Id.
128. Confederated Tribes of Siletz Indians of Or. v. United States, 110 F.3d 688, 697 (9th Cir. 1997).
129. Id.
decisions regarding the applicability of laws does not render judges "officers" within the meaning of the Appointments Clause. On this view, state governors would not be federal officers, either. However, judges decide controversies; they decide what law applies, and then apply it. They do not execute the laws, except in the limited sense of imposing criminal sentences based on the facts of particular cases. By contrast, governors, as executive officers, are called upon daily to ensure the smooth functioning of their states, by "taking Care that the Laws [are] faithfully executed." 130

The second source of distinction is equally unavailing. The court stated that qui tam relators also make significant decisions regarding the operation of federal law, yet are not considered "officers" under the Appointments Clause. There is no similarity here, because without the ability to act somewhat autonomously, the qui tam power under the False Claims Act 131 would be a nullity. Absent the power to act without the approval of the federal government to bring suits, qui tam relators would not be able to exercise their raison d'être. By contrast, state governors are still fully empowered even if they are not allowed to exercise the veto under IGRA. Qui tam relators are clearly distinguishable from state governors.

Pointing to United States v. Ferry County, in which the taking of land into trust for an Indian tribe in Washington State was contested on grounds that Buckley v. Valeo was inapplicable since it dealt with federal officials, rather than local officials, 132 the court raised another arguable point of distinction. However, logic dictates that if Congress may not delegate power within the federal sphere of action, as in Buckley, then, a fortiori, it may not do so with respect to local officials outside that sphere. Further, the Supreme Court has since decided Printz, which accomplishes just the result that Ferry County held could not be done: striking down as violative of the Appointments Clause the delegation of federal power to local officials. 133 In light of Printz, Ferry County does not support the "governor's veto." For this reason, the Siletz decision should be reconsidered in the light of new precedent.

130. U.S. CONST. art. II, § 3, cl. 4.
133. 521 U.S. 898.
The Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, the Red Cliff Band of Lake Superior Indians of Wisconsin, and the Sokaogon Chippewa Community, Mole Lake Band of Lake Superior Chippewa Indians (hereafter "the Tribes"), "seeking to advance their tribal and economic development," associated "for the purpose of establishing a jointly owned and operated off-reservation gaming facility in a lucrative location." The Tribes asked the Secretary of the Interior to take land into trust for them so that they could convert a horse racing facility in Hudson, Wisconsin into a casino. The track was chosen "because they believed its proximity to the metropolitan areas of Minneapolis and St. Paul and easy accessibility to Interstate Highway 94 would ensure a broad customer base." Wisconsin Governor Scott McCallum did not concur with the Secretary's decision, apparently "citing various policy and philosophical bases unrelated to the statute's two-factor standard." Accordingly, the Secretary did not approve the land into trust application for off-reservation gambling, citing the "governor's veto."

The Tribes then brought suit in federal District Court, making essentially the same claims as those in Siletz: that the "governor's veto" violated the Appointments Clause, and that it was an unconstitutional delegation of power under the separation of powers doctrine. They also claimed that it violated both the Tenth and

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134. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, No. 03-2323, 2004 WL 909159 (7th Cir. 2004).
135. Id.
137. Id.
138. See Brief for Appellant at 2, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, No. 03-2323, 2004 WL 909159 (7th Cir. 2004).
139. See MASON & NELSON, supra note 6, at 73:

In 1997, when [Interior] Secretary Bruce Babbitt rejected an application by three Chippewa tribes to purchase a Wisconsin dog track located between Milwaukee and Chicago and convert it into a casino, he was charged with having succumbed to political pressure from five other tribes that opposed the application and that together donated around $300,000 to the Democratic party. After a nineteen-month investigation, an independent counsel appointed to look into the matter exonerated Babbitt.
Fifth Amendments and that it was a breach of the trust doctrine.\textsuperscript{140} This Note will consider the decision in the district court with respect to the Appointments Clause and separation of powers issues only.\textsuperscript{141}

1. Separation of Powers Claim—The district court held that the "governor's veto" does not violate the separation of powers doctrine. In doing so, the court fundamentally understated the case:

In giving a say to the governors of states in which the Secretary of the Interior is considering taking lands in trust for Indian gaming, Congress was not giving state officials authority to execute congressional legislation \ldots{} It was doing nothing more than giving the governors an opportunity to be heard on matters that affected the interests of their citizens.\textsuperscript{142}

Having simply "an opportunity to be heard" would not allow state governors to force the Secretary to make one decision or another. The court’s statement is belied by the practical effect of the governors’ acts. For the court's statement to be true in the strict sense, the governors would only be able to comment on the land-into-trust decision, with no conclusive impact on the decision. The court essentially held that the Secretary of the Interior still has the ultimate power to make her own determinations regarding off-reservation gaming. This holding views the governor’s determination as little but an advisory opinion. However, as the district court in \textit{Siletz} pointed out, and as the plain language of the Act makes clear, the land-into-trust application for gaming operations off-reservation simply cannot go forward absent the governor's concurrence. This is far more than simply "an opportunity to be heard on matters" which affect the state's citizens. It is control over the process itself.

2. Appointments Clause Claim—The court also held that the "governor's veto" does not violate the Appointments Clause because the provision at issue empowers state governors with an "authority [that] \ldots{} is neither significant enough to require appointment as a federal officer nor exercised pursuant to the laws of the United States."\textsuperscript{143} Here, the court misapplied the law.

\textsuperscript{140} The court found no breach of the trust doctrine "because [IGRA] was enacted by Congress pursuant to the federal government's plenary power over Indians." 259 F. Supp. 2d at 787.

\textsuperscript{141} However, the breach of trust claim, and the District Court's ultimate conclusion as to that claim, deserves further scrutiny.

\textsuperscript{142} 259 F. Supp. 2d at 793.

\textsuperscript{143} \textit{Id.} at 796.
The **Lac Courte Oreilles** court also focused on **Buckley v. Valeo**, specifically, the test that "[t]he appointments clause applies to (1) all executive or administrative officers; (2) who serve pursuant to federal law; and (3) who exercise significant authority over federal government actions." The court stated that "[t]he governor of Wisconsin was never appointed as a federal officer and he is not one in fact." However, the **Buckley** test does not deal with federal officers, but with "all executive or administrative officers . . . who serve pursuant to federal law." There can be no doubt that a state governor is an "executive or administrative officer," nor can it be seriously argued that the governor's concurrence requirement does not arise under federal law, since IGRA is a federal statute. The real point of debate, then, is over what constitutes "significant authority."

The **Lac Courte Oreilles** court agreed with the Ninth Circuit's ruling, noting that "[t]he governor does not have the sole authority to enforce the Indian Gaming Regulatory Act." However, "sole authority" is not the governing test from **Buckley**. The question is whether an officer exercises, pursuant to federal law, "significant authority." In deciding whether to take land into trust for a tribe to open a casino, where all other factors have been considered and all other parties concur, a governor's refusal to concur derails the entire process. This is "significant authority" over the decision to take land into trust for a tribal gaming operation. It is, in fact, decisive authority over this question that is vested in the state governor. Contrary to the District Court's holding, this provision of IGRA does not survive scrutiny.

The other justification brought forth by the **Lac Courte Oreilles** court is that state governors act under state law, which renders the federal effect of the governor's action irrelevant for constitutional analysis. This cannot be the case, for surely the state governor understands, when asked by the Secretary of the Interior whether he concurs with the Secretary's determination, what the consequences of his decision will be. Surely the governor also understands that while this decision will affect state government and the state's people, the framework for that decision, and the reason he is making it in the first instance, is a provision of federal law. There is also no logical reason state governors cannot be supposed to act pursuant to federal and state law concurrently. For example, consider police

144. *Id.* citations omitted).
145. *Id.*
146. *Id.* (emphasis added).
147. *Id.*
officers: they can surely arrest someone who violates a federal law, while still discharging their state law responsibilities.

3. Seventh Circuit's Treatment of the Issues on Appeal—The Tribes appealed the district court's decision to the Seventh Circuit Court of Appeals, which decided the case on grounds nearly identical to the Ninth Circuit in Siletz. The centerpiece of the Tribes' appeal with regard to the separation of powers issue was the Supreme Court's decision in INS v. Chadha. That case involved "Section 244(c)(2) of the Immigration and Nationality Act, which authorized either House of Congress, by resolution, to veto the Attorney General's decision to suspend the deportation of a particular alien." Since it "prevent[ed] the Executive Branch from accomplishing its delegated function," the statute in Chadha was invalidated on grounds that it violated the separation of powers doctrine.

The Seventh Circuit attempted to distinguish the case before it from Chadha by stating that the "governor's veto" provision of IGRA, unlike the statute in Chadha, can't be said to have "wrested final decision-making power away from the Executive Branch over an issue that had been legislatively entrusted," to the Secretary of the Interior, "thereby directly impeding the Secretary from accomplishing the function delegated." However, the court also noted that "unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under § 2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the operation of a gaming establishment." Since the Secretary has the sole authority to take land into trust for Indian tribes, and since the governor of a state can prevent this action, it logically follows that in this situation, Congress has enabled state governors to "directly impede [the Secretary] from accomplishing the function delegated." In that sense, the Tribes were correct in their reliance upon Chadha.

The Seventh Circuit's reasoning here suffers from a crippling formalism. While it is strictly true, at least in a ministerial sense, that "only the Secretary of the Interior may execute the § 2719(b)(1)(A) exception to IGRA's general prohibition of gam-

149. Supra note 35 (citation omitted).
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
ing on after-acquired land,\textsuperscript{155} left unstated is that the Secretary simply may not even consider whether to take land into trust for gaming purposes unless and until the appropriate state governor gives his or her approval. In practical terms, then, it is simply not true that "IGRA does not empower any governor to perform [the] function"\textsuperscript{156} of taking land into trust for gaming purposes. For all practical purposes, it cannot be said that IGRA "does not require or even permit any governor to execute federal law."\textsuperscript{157} Manifestly, it does; without the governor's concurrence, no land may be taken into trust for gaming purposes where the land at issue does not fall into the other exceptions to the "after-acquired lands" gaming ban.

With respect to the Appointments Clause issue, the Seventh Circuit noted that "a governor's role under §2719(b)(1)(A) is limited to satisfying one precondition to the Secretary of the Interior's authority,"\textsuperscript{158} to allow gaming despite the "after-acquired lands" ban. Again, only half the case is stated, since in many cases, this precondition is dispositive of the issue. At least in this respect, it is simply untrue that state governors "do not enjoy power under §2719(b)(1)(A) to enforce or administer federal law."\textsuperscript{159} For land-into-trust determinations under 2719(b)(1)(A), the governor's concurrence is a necessary prerequisite to evading the ban on gaming on "after-acquired lands," and in fulfilling this necessary step, state governors assist in the administration of IGRA, a federal law.

\textit{C. U.S. v. Printz}

While \textit{Chadha} is useful to the analysis of §2719(b)(1)(A), the "governor's veto" provision of IGRA is properly analyzed under the Supreme Court's decision in \textit{U.S. v. Printz}\textsuperscript{160}. The case concerned a 1993 amendment (The Brady Act)\textsuperscript{161} to The Gun Control Act of 1968,\textsuperscript{162} which required county sheriffs to implement federal law

\begin{flushleft}
\textsuperscript{155} \textit{Id.} \\
\textsuperscript{156} \textit{Id.} \\
\textsuperscript{157} \textit{Id.} \\
\textsuperscript{158} \textit{Id.} (slip op. at 17). \\
\textsuperscript{159} \textit{Id.} \\
\textsuperscript{160} 521 U.S. 998 (1997). \\
\end{flushleft}
concerning checks on gun purchasers until federal enforcement took effect. The Court there held that the Appointments Clause did not allow the federal government to use sheriffs in this way:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.163

The intended duration of the challenged statutory scheme was noted as well by the *Printz* Court. Justice Scalia, writing for the Court, notes at the outset that "it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."164 The temporary nature of the sheriffs' role in the federal gun control scheme under the Brady Act was not a mitigating factor in *Printz*.

The "governor's veto" here is in fact a stronger *Printz*-type case in that respect. Here, the governors are permanently required to make conclusive determinations bearing upon federal law and policy, either by action or by silence. As in *Printz*, state governors are charged with an essential duty in a comprehensive federal scheme. This case does not have what might be seen as *Printz*'s mitigating factor: the temporary nature of the "conscription." Here the state governors are tasked with a role in a federal regulatory scheme which extends into the indefinite future. This conscription, as in *Printz*, is unconstitutional.

The sheriffs under the Brady Act "are empowered to grant, in effect, waivers of the federally prescribed 5-day waiting period for handgun purchases."165 Under the "governor's veto" provision, the state governors are similarly empowered: state governors under § 2719(a) have the power to prevent or allow the Secretary of the Interior to deviate from the ban on gaming operations conducted on lands acquired, with the noted exceptions, after 1988. While the subject matter of *Printz* is very different from the Indian gaming statute that is the subject of this Note, the rule the Court sets

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163. 521 U.S. at 935.
164. *Id.* at 904 (emphasis added).
165. *Id.* at 904–05.
forth, based squarely on the Court's precedents, describes a situation strikingly similar to the "governor's veto" provision of § 2719(a).

The Printz Court distinguished between statutes "which require only the provision of information to the Federal Government," and those showing "the forced participation of the States' executive in the actual administration of a federal program." The "governor's veto" could be characterized as either a "provision of information" to Interior or as a "forced participation" in IGRA's regulatory scheme. However, a mere "provision of information" would have no conclusive effect on the outcome; here, there are consequences to the governors' actions in the context of § 2719(a). The governor's concurrence has a conclusive effect on the decision to take land into trust for gaming purposes under IGRA. The "governor's veto" provision reduces the Secretary of the Interior's role to a "rubber stamp" approval of the application. Unfortunately, both the Ninth and Seventh Circuits erred on this point, which the Seventh Circuit impliedly admitted by conceding that the state governors can play a dispositive role in this federal regulatory scheme even by "gubernatorial inaction." As a matter of law, it is simply untrue that § 2719(b)(1)(A) "neither imposes on the States nor depends on them for the implementation of federal law." As shown by the letter and the operation of IGRA, the Secretary of the Interior's determinations regarding an exception to the ban on tribal gaming on "after-acquired lands" depend inescapably upon the action of state governors.

V. A Proposal for Reform: Enhanced Default Compact Terms

At its best, the tribal-state compacting provision of IGRA created a framework for contracting between two interested parties that happen to be sovereigns. However, giving one party veto power

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166. See, e.g., New York v. United States, 505 U.S. 144 (1992) (holding that the "take title" provision of the Low Level Radioactive Waste Policy Amendments Act of 1985, which provided that states must either accept ownership of waste or regulate according to Congress's instructions, was beyond Congress's enumerated powers and was inconsistent with the Tenth Amendment, as it would have either "commandeered" states into a federal regulatory scheme, or simply required states to implement federal legislation).

167. 521 U.S. at 918.

168. Supra note 35 (slip op. at 21).

169. Id.
over the eventual deal undermines this paradigm of limited freedom of contract and lessens the potential effectiveness of IGRA as a means of tribal economic and cultural advancement. Each sovereign, tribal and state, is in a stronger position for being able to negotiate any terms relevant to Indian gaming operations. If the tribe and the state simply cannot agree to the scope and site of gaming operations off-reservation, the compact will not include an off-reservation gaming provision. But if, as is increasingly the case, the state and the tribe can reach agreement on this issue, off-reservation gaming can commence on terms favorable to both parties.

A. The Proposed Reforms

The first reform proposed would significantly amend IGRA at § 2719(b)(1)(A). The language proposed is as follows:

Subsection (a) of this section will not apply when—

the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community; and

the governing Tribal-State gaming compact specifically provides for gaming operations on lands outside the exterior boundaries of the Tribe's reservation.

The "governor's veto" would be removed from the Act, since there would be no need for protection of either party in the compacting process, other than a general, procedural oversight exercised by the Secretary of the Interior to remove any taint of fraud, duress or unconscionability in the compact negotiation process. Investor and party expectations would be preserved, and the compacting process would gain a considerable degree of predictability for all concerned.

This reform would also ensure that the question of off-reservation gaming would not normally even come before the Secretary; unless the parties had agreed on the issue, off-reservation gaming development simply would not occur. However, this reform would
reward foresight on the part of both tribes and states that bargain on this point. The ultimate decision on this issue, as is currently the case for approval of compacts generally, would rest with the Secretary, who would balance the interests of various parties. This more closely aligns with the Act's original intent.

Another necessary reform is a more specific expression of a cause of action for litigation connected to off-reservation gaming. Tribes require a specific "breach of compact" action broader than the current one, which states that "[a]ny Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—... (v) remedies for breach of contract." This proposal would require deleting subsection (v), and adding a subparagraph (D) to § 2710(d)(3):

All Tribal-State gaming compacts negotiated under subparagraph (A) shall provide remedies for breach of the terms of the compact, including, if applicable, a federal cause of action for failure of the State governor to concur in the Secretary's determination under 25 USC § 2719(b)(1)(A) where off-reservation gaming is provided for in the approved Tribal-State compact governing the gaming operations in question.

The mandatory language is required, because, in its absence, a tribe could set up class II gaming off-reservation, evading the compact requirement for class III gaming. The proposed amendment would also exclude class I gaming from the "after-acquired lands" restriction, and all land-into-trust decisions would also still be subjected to the threshold inquiry whether the land is

171. The alternate language regarding the governor's concurrence would only be necessary in the event that the first reform is not in place.
172. There is a growing body of case law regarding 'scope of gaming' disputes and so-called "class 2.9" gaming. The issue in these cases revolves around the language in the statute referring to technologic aids. Some tribes have set up class II machines that very successfully mimic class III machines, removing the need for a Tribal-State compact. See, e.g., United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000) (stating that an electronic terminal linking players in a networked bingo game classified as class II, rather than class III, because it was a "technologic aid" to a bingo game, rather than an "electronic facsimile" of a game of chance); Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633 (D.C. Cir. 1994) (stating that games wholly incorporated into electronic or electromechanical versions are excluded from class II); Spokane Indian Tribe v. United States, 972 F.2d 683 (9th Cir. 1992) (stating that games were not merely electronic aids to increase the number of players, but were electronic facsimiles of games of chance, and hence were excluded from class II category).
to be used for gaming, instead of other forms of development or community use.

Another useful reform would introduce an implied, limited waiver of state and tribal sovereign immunity from suit for claims arising under the compact's terms. There is no point in negotiating a contract with no remedies, either express or implied, on which to rely. While both states and tribes might find this proposal unsettling, it is a necessary reform, and one increasingly in use in a wide array of tribal business dealings with non-tribal actors.

The final reform proposed here is the alteration of language in the beginning of IGRA. The new language recognizes the intention for the Act to become a set of "background" or default terms for Tribal-State compacting, which would be added to the statement of the policy of the Act, in 25 USC § 2702(4)—(5):

(4) to provide the background terms in the formation, and remedies for breach, of Tribal-State gaming compacts to ensure that gaming compacts are formed on balanced terms and free from duress in the pursuit of State policy goals and Tribal economic self-determination; and

(5) to reflect the understanding that Tribal-State gaming compacts under this chapter are to be considered as negotiated agreements between sovereigns in all respects.

These proposed reforms would avoid the Seminole Tribe issue, because the remedies noted in the compact would be freely waived by the state, rather than abrogated by Congress. The limited waiver of sovereign immunity as an implied term in every compact also furthers this interest. The remedy itself is up to the parties; creativity could be used to great effect by the parties, since the proposal does not specify the exact remedy but only that there be one provided. The remedy could be a federal or state cause of action, a durational waiver or suspension of revenue-sharing payments or state regulatory controls, among many other possibilities. Finally, the Secretary of the Interior's continuing duty to review and approve any compact would probably be held to include a review of the sufficiency of the remedy.

At present, few compacts provide for the possibility of off-reservation gaming. A practical result of the enactment of these proposals would be that compacts across the country would likely come up for renegotiation by tribes eager to locate gaming facilities on land taken into trust off their reservation and closer to more lucrative markets. There would be a price for this privilege,
of course, the exact price to be settled upon by the parties. Once the compact language is agreed upon, and the site is selected, the Secretary would then engage in the current two-step determination of benefit to the tribe and lack of detriment to the surrounding community, as a check on the fairness of the bargaining process.

This proposal also would not allow a tribe to evade the terms of its compact with State A by seeking to place land off-reservation in State B into trust for the purposes of gaming. The tribe in this hypothetical would still need a gaming compact with State B. The statute's language ("Class III gaming activities shall be lawful on Indian lands only if such activities are—... located in a State that permits such gaming for any purpose ... and [are] conducted in conformance with a Tribal-State compact.")\(^{173}\) would still control.

States may want to bargain for a provision that restricts any off-reservation land-into-trust attempts to land within the borders of the state, to channel the collateral economic effects of the tribe's development to those places the state wants to develop under its own planning. An example of this is the Seneca Compact's designation of the Buffalo/Niagara Falls area as the site for tribal gaming.\(^{174}\) The lesson from the Seneca compact in this respect is that when the tribes and states start to think of each other as business partners, at least with respect to gaming compact negotiations and implementation, each party benefits from a greater degree of flexibility and creativity in structuring the deal. The status quo stifles economic development and precludes states from "getting a piece of the action." It makes little sense to cut a state off from such opportunities on a theory of unfettered state's rights.

These reforms, enacted together, would present the best outcome for the tribes. In addition to the reduction of uncertainty, these reforms of the compacting process would increase the "de facto" sovereignty of tribes, as they get closer to functional, rather than merely theoretical, self-sufficiency.\(^{175}\) The IGRA must evolve to accurately reflect the changing situation in the Indian gaming industry, and these reforms would make this happen.


\(^{174}\) See supra note 24.

B. The Recent Seneca Compact and Secretary Norton's Objections

One example of the motive force of this paradigm is the recent compact negotiations between the Seneca Nation and the State of New York. There, the parties expressly placed off-reservation gaming sites within the terms of their compact, by including one site at Niagara Falls, and one in the Buffalo, New York area. This was done because, in the astute calculation of the Senecas, there was no on-reservation site that would place the future gaming facility near a viable market for gambling; by contrast, the Buffalo and Niagara Falls locations would provide strong customer bases for a future gaming facility. In line with this provision, the Senecas sought, and obtained, "geographic exclusivity" in a 25-mile radius (effectively excluding the Tuscarora Indian Nation and Tonawanda Band of Seneca Indians) and within defined boundaries as to potential competitors. These provisions formed the basis for the revenue sharing agreement between the State and the Nation, on a graduated scale.

However, when the compact was submitted to the Secretary of the Interior for approval, Secretary Norton chose to take no action, thereby treating the compact as approved. The stated reason for inaction was her concern "that elements of this Compact may be used by future parties to proliferate off-reservation gaming development on lands not identified as part of a Congressional settlement but instead on lands selected solely based on economic potential, wholly devoid of any other legitimate connection." Stating that she is "extremely concerned that the principles underlying the enactment of IGRA are being stretched in ways Congress never
imagined when enacting IGRA, a and based on her belief that "IGRA does not envision that off-reservation gaming would become pervasive," Secretary Norton decided to allow the Seneca Compact to come into force without expressly approving it. She also stated that her determination on land-into-trust applications, absent a settlement act (such as the unique one under which the Senecas claimed) would likely differ substantially.

Secretary Norton’s concerns are problematic. First, the lack of foresight of the drafters of IGRA is clear, since it is fair to say that no member of Congress foresaw the incredible success that Indian gaming would become. It does not follow from that, however, that Congress therefore meant to restrict gaming to the fewest and most isolated areas possible. After all, a provision for off-reservation gaming, and specifically for secretarial waiver of the general ban on such gaming was present in the Act from the beginning. The Act was meant to promote tribal economic development; on that view, a particular parcel of land “selected based solely on economic potential,” cannot be more “legitimately connect[ed]” to the tribe’s development and future vitality. The irony of the fact that the Secretary of the Interior, the trustee-delegate of the United States for the Indian tribes, suggests that an economic motive for site selection for off-reservation gaming facilities is illegitimate should prompt serious discussion of the Secretary’s true motives and concerns.

Another problematic aspect of the Secretary’s statement is the fear that Indian gaming would become “pervasive.” Presumably, Seventeen of 22 tribal gambling operations in Washington State are in rural areas, located on land that Native Americans were forced onto. (The Northern Quest in Airway Heights is a rare exception of an off-reservation tribal casino.) Such land is generally bereft of the resources needed to build a sustainable economy. Therefore, tribal options for creating jobs and raising revenue for basic services are limited. Gambling has been the best way for tribes to surmount the disadvantages handed them.

Unfair Advantages Were In The Cards, SPOKESMAN-REVIEW (Spokane, WA), Oct. 9, 2003, at B4. 185. Comments like this bring to mind the quotation from Professor Tsosie, supra note 5, regarding the perceived authenticity of the various fields of tribal economic endeavor. Secretary Norton seems to feel that a legitimate connection to the parcel of land for which trust status is sought is not economic, but traditional, spiritual, or some ineffable ‘connection to the land.’ In truth, tribes have economic needs; it is rational that they seek out the best avenues for providing for those needs, regardless of archaic and stereotypical images of Indians as anachronisms.
she has no problem with every tribe owning a casino, as long as they only occupy reservation land. Perhaps the real concern is that casinos will become pervasive in urban areas, where they would compete with non-Indian gaming and entertainment enterprises. While it may be true that "the principles underlying the enactment of IGRA are being stretched in ways Congress never imagined," that is appropriate to the circumstances. The Indian gaming industry (not even an industry in 1988) operates in ways and on a scale that Congress didn't foresee when it enacted IGRA.

Secretary Norton's comments point to the need for an amendment to IGRA recognizing that market forces in the Indian gaming industry have overtaken the force of coerced segregation of tribal businesses on reservations. Secretary Norton's concerns seem to be echoed by others, who find it "unseemly" that a tribe would attempt to enter into commercial dealings via contracting with commercial gambling operators on off-reservation land.\textsuperscript{186} As this Note has demonstrated, there is nothing "unseemly" at all about a government entity utilizing what means are at its disposal to provide for essential government services in the absence of sufficient resources. States do this, in part, by authorizing lotteries; tribes do this, in part, by authorizing casinos. It is worth asking why tribal casinos are vociferously condemned and state lotteries are not, since each serve the same, equally important, function: the provision of governmental revenues.

\textbf{C. The Public Policy Rationale for Reform}

Finally, there is a strong public policy rationale for the proposed change. If, as this Note argues, it is time to allow tribes and states to negotiate on a nearly unfettered basis regarding the terms of class III gaming, off-reservation siting included, it is apparent that the field for negotiation should be level, in order to allow both parties the maximum freedom to contract regarding off-reservation gaming. Two major problems with failing to make a reform such as this immediately spring to mind.

First, unless an amendment in line with the suggested proposal is adopted, tribes would have no effective remedy for a "breach of compact" action, since the federal right of action in IGRA for a "breach of contract," at least with respect to off-reservation gaming, conflicts with the "governor's veto" provision. If the economics

\textsuperscript{186} See \textsc{Mason \& Nelson, supra} note 6, at 78.
of the deal changes, or if a new governor chooses not to abide by the terms of the compact regarding off-reservation gaming, a tribe has no independent recourse. A tribe may be able to persuade the federal government to sue on its behalf, as trustee, but it is uncertain whether they would prevail in that task, since, as has been amply demonstrated recently in the District Court for the District of Columbia, the Secretary of the Interior's commitment to her responsibilities as trustee-delegate is, charitably put, open to question.

Another problem could exist where the signatory to the compact and the governor are not identical. Some controversy has arisen over the validity of compacts negotiated and signed by a state governor without the ratification or consent of the legislature, as mandated by law in some states. Since the distribution of

188.

It would be difficult to find a more historically mismanaged federal program than the Individual Indian Money (IIM) trust. Generations of IIM trust beneficiaries have been born and raised with the assurance that their trustee, the United States, was acting properly with their money. Just as many generations have been denied any such proof, however. 'If courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined.'

Notwithstanding all of this, defendants, the trustee-delegates of the United States, continue to write checks on an account that they cannot balance or reconcile. The court knows of no other program in American government in which federal officials are allowed to write checks—some of which are known to be written in erroneous amounts—from unreconciled accounts—some of which are known to have incorrect balances. Such behavior certainly would not be tolerated from private sector trustees. It is fiscal and governmental irresponsibility in its purest form.

The United States' mismanagement of the IIM trust is far more inexcusable than garden-variety trust mismanagement of a typical donative trust. For the beneficiaries of this trust did not voluntarily choose to have their lands taken from them; they did not willingly relinquish pervasive control of their money to the United States. The United States imposed this trust on the Indian people. As the government concedes, the purpose of the IIM trust was to deprive plaintiffs' ancestors of their native lands and rid the nation of their tribal identity. The United States reaped the 'benefit' of this imposed program long ago—sixty-five percent of what were previously tribal land holdings quickly opened up to non-Indian settlement. But the United States has refused to act in accordance with the fiduciary obligations attendant to the imposition of the trust, which are not imposed by statute.

Id. at 6 (emphasis added) (citations omitted).

189. See, e.g., Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284 (D.N.M. 1996), aff'd, 104 F.3d 1546, cert. denied, 522 U.S. 807 (finding that the state constitutional separation of powers doctrine prevented the governor from binding the state to a Tribal-State gaming compact); Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37 (D.D.C. 1993), rev'd, 43 F.3d 1491 (stating that the governor's inability to bind the state to a compact invalidated the
duties between the branches of state government is purely a matter of state law and policy, it is conceivable that the legislature would be the body to approve the compact, thereby binding the state to the deal. However, if an off-reservation casino comes into play, the governor (who may have opposed the deal in the first place, while being powerless to stop the legislature from approving it) would be the one holding all the cards, as the person whose concurrence would be necessary for the land to be taken into trust. Allowing this situation to persist undermines the parties' expectations, and could prevent future investment in some of these ventures.

VI. Conclusion

There is considerable controversy over Indian gaming and especially the operation of Indian gaming facilities outside reservation boundaries. Foes of IGRA, Indian and non-Indian alike, have characterized it as a destructive, addictive, and unsustainable method of economic development. There are methods states can use to prevent the emergence of Indian gaming in their states other than the "governor's veto," such as restricting or banning gambling in their state altogether. 190 Under the Supreme Court's Seminole Tribe decision they can simply refuse to negotiate at all. Yet, if the parties decide to bargain over Indian gaming, they should be able to put all their cards on the table, in pursuit of their best possible deal, which may include off-reservation gaming facilities. The contractual model set forth here simply adds another bargaining tool by adding more potential elements to the negotiating process. The proposed reforms would allow all sides to achieve their aims, while still fostering the respect for sovereignty each side requires. As it becomes increasingly apparent that Indian gaming is driven more by market proximity than reservation boundaries, and as Indian gaming strives to meet the demands of those markets, it should be apparent to states and tribes that the "governor's veto" should be abandoned in favor of a framework for off-reservation gaming which is solely addressed by the Tribal-State gaming compact's terms.

compact, despite the Secretary's actions treating the compact as approved); State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995) (finding that IGRA's compacting provisions do not empower governors to act beyond their powers under the state's constitution and the state's separation of powers doctrine).

190. See Mason & Nelson, supra note 6, at 78.
The impediments to the success of Indian gaming, conducted on reservations or off, are surmounted not by coercion but through cooperation. Tribal casinos cannot survive and prosper without the infrastructure and the market that non-Indian communities have to offer. Non-Indian communities cannot afford to address the social and economic concerns they have without favorable treatment from Indian gaming operations. Both sides have much to offer and much to gain. Currently, IGRA does not reflect this dynamic, but rather places states in a dominant position with respect to off-reservation gaming. This arrangement stifles the growth and diversity of tribal economies, and prevents states from truly benefiting from tribal economic development. Amending IGRA to remove the “governor’s veto” would have significant positive impacts on Indian and non-Indian communities.

The question of off-reservation gaming will not go away. As of the summer of 2003, there were eight land-into-trust applications for gaming pending at Interior, with many more expected, including at least one interstate off-reservation application. Potential off-reservation sites in close proximity to population centers continue to be identified. Current off-reservation locations are being expanded as their potential becomes clear. Given the incredible effects of Indian gaming money across the country, it is incumbent upon Congress to provide both states and tribes the maximum set of compact terms possible, to both achieve the purposes of the Act, and to provide states with strong reasons to bargain with tribes. Amending IGRA by removing the “governor’s veto” and adding both the possibility of negotiating

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191. See Martin Statement, supra note 31; see also Indianz.com, Kansas Tribe Buys Land in Ancestral Reservation, available at: http://www.indianz.com/News/archive/000108.asp (on file with the University of Michigan Journal of Law Reform) (reporting that the Prairie Band Potawatomi Nation, a tribe in Kansas, has purchased ancestral land in the state of Illinois, upon which it may pursue gaming operations); Indianz.com, NIGC Rules Against Oklahoma Tribe’s Casino in Kansas, available at http://www.indianz.com/News/archive/000900.asp (on file with the University of Michigan Journal of Law Reform) (reporting that the NIGC ordered a class II gaming operation in Kansas City, Kansas to shut down because the tract of land on which the casino sits is not within the tribe’s “last reservation”); Memorandum from Maria Getoff, Staff Attorney, to Phil Hogen, Chairman, NIGC, “Legality of Gaming under the IGRA on the Shriner Tract owned by the Wyandotte Tribe,” at 13 (Mar. 24, 2004) (on file with the author).


off-reservation location provisions in tribal-state gaming compacts and an explicit cause of action for “breach of compact” would accomplish these worthy aims.