Task Force to Amend the Maine Act to Implement the Indian Land Claims Settlement In Accord with the Joint Resolution SPO622 LR 2507, Item 1, 129th Maine Legislature

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CIVIL JURISDICTION EXAMPLE: RAISING GOVERNMENTAL REVENUE THROUGH GAMING

Federal Indian Law

Tribal Nations possess inherent sovereign authority to conduct and regulate economic development activities on tribal lands to the extent that right has not been eliminated or limited by treaty or federal statute.[1] Many Tribal Nations across the United States, including the Penobscot Nation, began to conduct commercial bingo and other games in the 1970s pursuant to this inherent authority. Such games were generally conducted under tribal law and were entirely outside of state regulation.

In 1987, the Supreme Court upheld the legitimacy of these early gaming operations through its landmark decision in *California v. Cabazon Band of Mission Indians*[2], which concluded that gaming could be conducted under the auspices of tribal sovereignty and in a manner not subject to state criminal or regulatory jurisdiction. In response, Congress passed the Indian Gaming Regulatory Act (IGRA), which limited but affirmed tribal sovereignty in the field of gaming and adopted a unique tribal-state-federal framework to balance each sovereigns' respective interests in the area.[3] The purpose of IGRA, as stated by Congress is "to promote tribal economic development, tribal self-sufficiency, and strong tribal governments."[4]

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[1] *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (tribes retain "sovereign" authority to control economic activity within their reservations and trust lands); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (tribes have inherent sovereign authority "to undertake and regulate economic activity within the reservation").
[2] 480 U.S. 202 (1987).
[3] Upon enacting IGRA, Congress restated the holding of *Cabazon*:

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

25 U.S.C. § 2701(5).
[4] 25 U.S.C. § 2701(4).

Contrary to common misunderstandings, the net proceeds that Tribal Nations obtain through gaming are not "commercial profits"; they must be used to fund tribal governmental services such as health, housing, and education.[5] Thus, the generation of tribal governmental revenues from gaming is no different than a state's operation of a lottery, a horse racing track, or a liquor store. Tribal Nations invest these governmental revenues in governmental services and economic development, delivering well-documented benefits to both Indians and non-Indians in their communities. (Indeed, unlike states, gaming is critical source of revenue for Tribal Nations because most tribes lack a tax base.[6])

(Please see JONATHAN B. TAYLOR, THE ECONOMIC & COMMUNITY BENEFITS OF TRIBES IN WASHINGTON (2019) for a discussion of the benefits that gaming brings to tribes and local economies. A copy has been to Task Force staff for distribution.)

Classes of IGRA Gaming

There are three forms of gaming that are permitted under IGRA, each with different applicable regulatory overlays. Class I gaming primarily includes social or traditional games played for minimal prizes or in connection with tribal ceremonies or celebrations.[7] Class I games are under the exclusive jurisdiction of Tribal Nations.[8] Class II gaming includes bingo games "whether or not electronic, computer, or other technologic aids are used in connection therewith"[9], as well as certain, non-banked card games[10] that are not

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[5] 25 U.S.C. § 2710(b)(2)(B).

[6] As Justice Sotomayor, quoting Professor Matthew Fletcher, recently explained:

> Tribes are largely unable to obtain substantial revenue by taxing tribal members who reside on non-fee land that was not allotted under the Dawes Act. As one scholar recently observed, even if Tribes imposed high taxes on Indian residents, "there is very little income, property, or sales they could tax." Fletcher, *supra*, at 774. The poverty and unemployment rates on Indian reservations are significantly greater than the national average. As a result, "there is no stable tax base on most reservations." Fletcher, supra, at 774.

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 812–13 (2014)

[7] 25 U.S.C. §2703(6).

[8] *Id*. at § 2710(a)(1).

[9] *Id*. at § 1703(7)(A)(i).

[10] Banked card games involve players playing against the house, as opposed to other players, and include baccarat, blackjack, and chemin de fer. *See* William C. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL 348 (2d ed 2015).

prohibited by and are conducted in conformance with state law.[11] Tribal Nations and the National Indian Gaming Commission (NIGC), a federal agency, have regulatory oversight over Class II gaming, to the exclusion of states.[12] IGRA stipulates that Class II gaming must be conducted pursuant to tribal law but only "within a State that permits such gaming for any purpose by any person, organization, or entity".[13]

Finally, IGRA defines Class III gaming as including "all forms of gaming that are not class I gaming or class II gaming."[14] Class III gaming is often equated to "Las Vegas-style gaming" and includes slot machines, roulette, craps, and banked card games, such as blackjack.[15] Class III gaming may only be conducted in "a State that permits such gaming for any purpose by any person, organization, or entity" provided that the gaming is regulated by tribal law and is conducted in accordance with a tribal-state gaming compact that must be approved by the United States Department of the Interior.[16] Tribal Nations and states can negotiate a range of issues as part of their Class III gaming compacts, including the allocation of criminal and civil jurisdiction as necessary for the regulation of gaming, revenue sharing, relevant public health matters, and remedies for breach of contract.[17] Regardless of the "class" of gaming, IGRA stipulates that Tribal Nations must hold the "sole proprietary interest [in] and responsibility for" operation of all gaming conducted under the law.[18] This means that tribally-owned casinos cannot be sold to non-tribal parties.

The Positive Impact of IGRA Gaming on State Economies

In 2017, revenues from tribally-owned gaming operations nationwide totaled approximately $32.4 billion from 494 gaming operations, owned by 242 Tribal Nations.[19] Significant portions of this overall amount is shared with state and local governments through direct payments and revenue sharing agreements. For example, in 2014, approximately $16 billion of the Indian gaming industries' revenues were shared with state and local governments, entirely pursuant to tribal-state gaming compacts or similar

[11] 25 U.S.C. § 2703(7)(A)-(B).
[12] *Id*. at § 2710(b)(1).
[13] *Id*.
[14] *Id*. at § 2710(b)(3).
[15] AMERICAN INDIAN LAW IN A NUTSHELL at 350.
[16] *See* 25 U.S.C. § 2710(d).
[17] *Id*. at § 2710(d)(3)(C).
[18] *Id*. at § 2710(b)(2)(A).
[19] National Indian Gaming Commission, "2017 Indian Gaming Revenue Increase 3.9% to $32.4 Billion" (June 26, 2018) (available at https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion).

inter-governmental agreements.[20] Direct payments to local and state governments are generally made to defray the cost of gaming on neighboring governments and in return for valuable market exclusivity.[21]

Status Quo in Maine

Maine has been home to tribal gaming since well before *Cabazon* and IGRA[22] but the Tribal Nations of Maine have yet to achieve the rights of economic development afforded by either. Maine has thus far enabled out-of-state corporations to proceed with for-profit gaming enterprises and rejected efforts by the Tribes to generate governmental revenues and attending local economic through gaming.[23]

While the Tribal Nations have sought to establish gaming operations under state law, state lawmakers and voters have repeatedly rejected tribal attempts to expand beyond bingo halls, even as voters approved the creation of gaming opportunities for non-tribal commercial interests. Today, Maine is home to two casinos that are owned by out-of-state corporations: Hollywood Casino Bangor[24] and Oxford Casino[25]. As the State of Maine commissioned WhiteSands report notes, both casinos were established pursuant to state referendums that were "overtly funded by commercial casino interests".[26] These publicly-traded corporations do not reinvest their revenues *locally* in government services and further economic development but instead export those dollars to corporate shareholders *outside of Maine*. Tribal Nations, however, would keep all of these gaming revenues local, circulating and creating ripple effects in the state economy.

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[20] Alan Meister, Ph.D., "The Economic Impact of Tribal Gaming: A State-by-State Analysis", (Sept. 2017) (prepared for the American Gaming Ass'n).
[21] *See* 25 U.S.C. § 2710(b)(2)(B)(v); AMERICAN INDIAN LAW IN A NUTSHELL at 366-67.
[22] The Penobscot Nation established "Original Indian Bingo" on Indian Island in 1973. *See* Penobscot Nation timeline *available at* https://www.penobscotculture.com/index.php/tribal-timeline (last visited Aug. 27, 2019).
[23] In *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983), the Maine Supreme Judicial Court held, contrary to the Supreme Court's ruling in *Cabazon*, that Tribal Nations do not have inherent sovereign authority to generate governmental revenues through reservation gaming operations. *See id* at 482-487.
[24] Hollywood Casino Bangor is owned by Penn National Gaming, Incorporated, a national operator of casinos and racetracks based in Pennsylvania. *See generally*, https://www.pngaming.com/.
[25] Oxford Casino is owned by and operated by Churchill Downs Incorporated, which has a portfolio of gaming properties that spans multiple states. *See generally*, http://www.churchilldownsincorporated.com/.
[26] WhiteSand Gaming, "Market Feasibility Study: Expanded Gaming in Maine (Final Report) (Aug. 2014).

Maine law currently permits Tribal Nations to operate high-stakes bingo upon the approval of a license application by the state's Gambling Control Unit.[27] Significantly though, Maine law restricts the operation of such high-stakes games to no more than 27 weekends per year.[28] In addition, Tribal Nations may, in conjunction with a high-stakes bingo game, be authorized by the Gambling Control Unit to sell "lucky seven" or similar tickets that are purchased from a machine and that offer the purchaser a chance to win a prize, provided that the tickets are only sold two hours before and two hours after a high-stakes bingo game.[29]

Needless to say, if locked out of the benefits of IGRA, Tribal Nations in Maine have no real prospects of obtaining the related economic development benefits from gaming to fund tribal governmental services.

In sum, the Wabanaki Tribal Nations' proposed changes to the MIA would facilitate gaming-related economic development for the benefit of the Wabanaki communities, their neighbors, and the state, as a whole. The revenue generated from tribal gaming in Maine would stay in Maine and would benefit tribal and local economies for years to come.

[27] 17 M.R.S.A. § 314-A(1).
[28] *Id*. at §314-A(3).
[29] *Id*. at § 314-A(1-A).