

Findings



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Indian Casino Gambling

What Can We Expect in the Future?

By Stephanie Mansur, J.D.

Gambling in America has skyrocketed over the last several decades to become one of our country's fastest growing addictions. As James Popkin comments in a U.S. News & World Report article, "Today, the Bible belt might as well be called the Blackjack Belt."¹ Gambling casinos have spread from two states to 24 states since 1988 and 37 states now have state run lotteries.² It is shocking that in this year alone, Americans will bet more than \$550 billion on legal gambling operations—an increase of 3,200% since 1976.³ However, even more startling is the fact that Indian gaming has become "the fastest growing segment of our nation's gaming industry."⁴

Federal Authorization

The Indian Gaming Regulatory Act, passed by Congress, which gives Native Americans the right to set up gambling facilities on their reservations has also increased our nation's gambling habit. Currently, 280 Indian gambling establishments are actively operating in 28 states across America.⁵ 115 Indian nations have compacts approved by the Secretary of the Interior authorizing casino style games such as blackjack, slot machines and even off track betting.⁶

Traditionally North Carolina has not been affected by the gambling fever succumbed to by other states. Year after year, the General Assembly has refused to pass legislation for a state-run lottery and never authorized casino gambling within state borders.⁷ But North Carolina is no longer immune to the ever-growing Indian gaming. Despite a strong anti-gambling stance, North Carolina citizens now face the problem of having casino gambling thrust upon them without a vote of the legislature.

Major Gambling Expansion

While casino gambling has been going on for several years on a smaller scale, on November 13, 1997, the Cherokee Harrah's Great Smokey Casino opened its doors to the public. Located in Cherokee, North Carolina, the casino, estimated to cost over \$82 million, will be operated by Harrah's Entertainment Inc. Harrah's, renowned for its gambling establishments in Las Vegas and Atlantic City, operates more than 15 casinos nationwide. The 175,000 square foot casino will offer over 1,800 video-based games featuring blackjack, poker and craps. The new operation will include three restaurants, a day-care facility and an entertainment area with room for 1,500 seats.⁸

The expansion of Indian gambling, as well as the gambling itself, is a controversial issue that divides citizens and tribal members alike. It is important to acknowledge that this issue poses several political, legal and moral dilemmas. This paper will examine the Indian Gaming Regulatory Act and its influence on state and Indian tribe relations; gambling in North Carolina; moral and ethical considerations; and the future of gambling and its impact on North Carolina.

Legal Background

Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988. This act recognized the right of Indian tribes across the United States to set up gaming facilities on their reservations. This act was in response to two important cases concerning the rapid growth of Indian gaming: *Seminole Tribe of Florida v. Butterworth* and *California v. Cabazon Band of Mission Indians*.^{9,10}

In the early 1980's, the *Seminole* case opened the doors for high-stakes bingo on reservations all over the country. The Court in *Seminole* concluded that bingo conducted

on Indian reservations fell under state statutes classified as regulatory rather than prohibitory, meaning gambling fell outside of the criminal provision of state law and that the state could not prohibit Indian bingo parlors within their borders.¹¹

Another significant court decision was the 1987 *Cabazon* case. The court opined that once a state has legalized gambling in any form, Indian tribes within that state can offer the same games on trust lands without any state restrictions or interference.¹² The decision was received with mixed reviews from the tribes and states. Most tribes saw this as an opportunity to reassert tribal sovereignty, while some states, especially those already sponsoring legalized gambling, opposed Indian-regulated gambling. Even the National Association of Attorneys General passed a resolution requesting some regulation on Indian gaming.¹³

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With all sides demanding action, on October 17, 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA). The act is intended to (1) promote tribal economic development, self sufficiency, and strong tribal government; (2) provide for a regulatory base to protect Indian gaming from organized crime; and (3) establish the Indian Gaming Commission.¹⁴

Three classes of gaming are defined in the act:

Class I: Social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals

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as a part of, or in connection with, tribal ceremonies or celebrations.

Class II: All forms of bingo, and other games similar to bingo, such as pull tabs, lotto, and card games that are explicitly authorized by state law, not including blackjack, baccarat, or chemin de fer.

Class III: All forms of gaming that are not Class I gaming or Class II gaming. This class includes casino gambling, slot machines, blackjack, poker, keno, and other gaming to be authorized by states under state-tribal compacts.¹⁵

Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes. Class II gaming is allowed if the state within which the tribe is located allows this type of gaming to anyone or under any conditions. Class III gaming requires a negotiated compact between the tribe and the state in which the tribe land is located. The National Indian Gaming Commission was established to approve the compacts and implement and oversee the provisions of the act.¹⁶

Problems With The IGRA and State-Tribe Relations

The IGRA was set up to be a compromise between Indian tribes and state governments. Tribes hoped to maintain tribal sovereignty and states wanted to protect their citizens from the corrupting influences of unregulated gambling.¹⁷ Neither side, however, was satisfied with the terms of the Act. The American Indians felt the IGRA violated tribal sovereignty by requiring tribes to negotiate compacts with states before being allowed to open casinos on their reservations. Indian leaders claimed that as far back as 1831, the Supreme Court ruled in *Cherokee Nation v. Georgia* that tribal nations had the legal right to manage their own affairs, including legal and political relationships with the federal government.¹⁸ On the other hand, some states asserted that the Act was too broad, allowing Native American groups to operate illegal games without recourse to state law or the input of state citizens. Other states contended that the Act did not provide them adequate authority to prevent infiltration of organized crime and to protect its citizens from immoral or fraudulent activities.¹⁹

State governors took the lead and began to negotiate compacts with those tribes that wanted to participate in Class III gaming on their reservations. Most states were cooperative in negotiating casino compacts. Some resisted however, claiming

that a tribe was asking for more than the state was obligated to give under the IGRA, or that the state was protected under the 10th and 11th Amendments of the United States Constitution.²⁰

First, the states asserted that the IGRA violated the 10th Amendment by commanding them to enforce a federal regulatory program. The states' 10th Amendment argument was based on the Supreme Court decision in *New York v. United States*.²¹ The 10th Amendment reserves to the states those powers not granted to the Federal Government under the U. S. Constitution. States have also brought 10th Amendment challenges in *Ponca Tribe v. Oklahoma* and *Cheyenne River Sioux Tribe v. South Dakota*.^{22,23} Unfortunately for the states, this argument has thus far failed, and the federal courts have upheld the IGRA against the states' 10th Amendment challenges.

Recently, states have also begun to claim an 11th Amendment defense. The 11th Amendment affirms that the states, being sovereign, are immune from suit in federal court by citizens of another state or

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foreign nation. On March 27, 1996, the U.S. Supreme Court ruled in *Seminole Tribe of Florida v. Florida* that states cannot be sued in federal court for refusing to engage in "good-faith" negotiations with Indian tribes. This was viewed as a big victory by the states who could now limit tribes' ability to expand gambling. Although the *Seminole* decision does not threaten gaming compacts already in place, it does question the ability of the Indians to open new gambling establishments. Following the *Seminole* ruling, National Indian Gaming Commission director Tom Acevedo stated, "The question is, in the long run, when some of these compacts have to be renewed, whether *Seminole* will impact them. For those tribes that have not compacted with the states, the ruling in effect acts almost like a moratorium on new gaming operations."²⁴

Indian Gaming in North Carolina

North Carolina has had its own share of trouble with the IGRA. It took 18 months and a lawsuit by the Cherokees before a

compact could be negotiated between North Carolina's governor James B. Hunt, Jr. and the Eastern Band of Cherokee Indians. In August 1994, a compact allowing Class III gaming on the Cherokee tribal lands was finally reached.²⁵ Before the compact was in place, the Eastern Band of Cherokee Indians along with seven other tribes filed a lawsuit in an attempt to bypass state approval for operation of Class III gaming as required under the IGRA. The court struck down the suit and held that the tribes must get an agreement from the state before operating Class III games.²⁶ Governor Hunt was an outspoken critic of gambling at that time but felt compelled legally to enter the compact.²⁷

The provisions of the compact set forth the conditions for which Class III gaming could be conducted on tribal lands.²⁸ The games authorized under the compact include: electronic video games, that involve the use of skill or dexterity; raffles, in which the cash prize can not exceed more than \$5,000 or merchandise valued more than \$25,000; or any other Class III games authorized by the state.²⁹ The compact also provides for regulatory control of the gaming operations and strict regulation of the types of equipment allowed in the casino.³⁰

Even with the compact in place, Cherokee gaming was not a sure bet. In early 1995, Governor Hunt's general counsel sent a letter to the Cherokee Chief, Jonathan "Ed" Taylor, requesting that the tribe "cease and desist" its gambling operation. A recent state Court of Appeals decision, in a case brought by Collins Coin Music Co. of North Carolina, raised questions as to the legality of the gaming equipment being used in the state, including those machines in the Cherokee casino.³¹ State laws require that all video-based games have an element of "skill" and "dexterity" in order for them to be legal. The Indians refused to close the casino, and stated in a letter from Chief Taylor that the tribe's equipment was perfectly legal under the terms of the compact signed with the state.³²

When North Carolina entered the compact in 1994, the Supreme court had not yet decided the *Seminole* case that said Congress could not compel states to enter into gaming compacts with Indian tribes. Many states, including North Carolina, felt they had no choice but to negotiate compacts with tribes in 1994. Although the *Seminole* case does not affect the Cherokee casino now, it may be a factor when the Cherokee gaming compact is set to expire.

The compact is in effect for a period of seven years from the date of the signing. It can be automatically extended for five year periods unless there are "changes in federal or state law that alters gaming permitted by the laws of the state."³³ The *Seminole* case poses a whole new series of questions regarding further expansion of Indian gaming, as well as the possibility that existing operations could be shut down when their compacts expire. The impact may soon be realized as compacts between Indian tribes and the state of Wisconsin are scheduled to expire in 1998.³⁴

Is Gambling the Answer?

American Indians have the highest unemployment, poverty and disease rates of any ethnic group in the country.³⁵ For many tribes, revenue from gambling is seen as the key to economic and cultural survival. There is little doubt that for some Indian tribes, gambling on tribal lands appears to have been an economic success. Annual revenues have reached \$5.4 billion, exceeding the federal budget for Indian assistance programs by \$2 billion.³⁶ The Foxwoods Casino, operated by the Mashantucket-Pequots in Connecticut, is the most profitable casino in the country. The five year old casino grosses over \$1 billion annually.³⁷ Tribes have turned to casino gambling because most claim to have few viable economic development options. A spokesman for the Foxwoods casino stated, "Gambling is a powerful tool for Indians to reclaim power, dignity, and even land."³⁸

Many tribe members, as well as non-Indians, are concerned about the prospect of casino gambling as the answer to economic problems. Despite the success of Foxwoods and other Indian gaming operations, not all Indians are getting rich. Some tribes have even been forced to close their doors due to financial difficulties. The Hualapai Indians closed down their casino in 1995, and in 1996, the Kaibab-Pauites Indians had to shut down gambling operations entirely.³⁹ The only way for these casinos to stay in business "is to develop a tourism industry that brings in out-of-state visitors."⁴⁰ As more and more states and tribes enter the gambling market, the gross revenues begin to decline for all those involved.⁴¹ Some of the biggest tribes, like the Navajos, continue to live in near poverty on their lands in Arizona, Utah and New Mexico. These Indians are some of the poorest in the country. Unemployment runs around 50 percent and 73 percent of them make less than \$9,000 a year.⁴² The Navajo join over 300 other tribes that do not engage in

gambling operations, but many are considering the possibility.⁴³

The Moral Question

With the lucrative revenues available from the gambling industry, many people forget why gambling is a moral dilemma. When serious gambling begins, it rarely affects just one person. Family homes are lost, savings accounts are depleted, college and retirement funds are emptied and many families are faced with bankruptcy. Financial troubles are not the only problems that come from gambling. A recent study found that domestic violence increased 69 percent in Mississippi after casino operations began just a few years ago. In the same study, it was reported that 37 percent of pathological gamblers have abused their own children.⁴⁴

Another recent study defined "pathological gamblers as those who lose an average of \$4,013 a year on betting, and problem gamblers as those who lose \$699 a year. The two groups represent just 4.11 percent of the gambling age population but accounted for 52 percent of total U.S. casino gross revenues."⁴⁵ Many experts feel that the more socially acceptable and accessible gambling becomes, the more likely people are going to try it and become hooked.⁴⁶

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Today, there are millions of adult compulsive gamblers all across this country.⁴⁷ As study after study was conducted, a significant amount of research "showed that the expansion of legalized gambling destroys individuals, wrecks families, increases crime and ultimately costs society more than the government (or the Indians) makes."⁴⁸ It is a sad commentary when the gambling industry is making a living on the mentally ill and no one, especially the government, will step in and stop it.

Faced with rising evidence and public awareness of the problems associated with gambling addiction, some casino companies began hiring consultants to train employees how to spot problem gamblers by their behavior and appearance. Many mental health care workers that treat problem gamblers question the gaming industry's motive. Some feel that the casinos could do

more by developing programs for addicts and family members or even refund money to the problem gambler. Harrah's, the company operating North Carolina's Cherokee Casino, has sponsored these types of programs and spent approximately \$146,000. Professor William N. Thompson, of the University of Nevada at Las Vegas commented, "I commend Harrah's because it is a start, but they are the biggest player in dealing with compulsive gambling, and \$146,000 is just a pittance."⁴⁹

The debate surrounding Indian casino gambling is likely to continue as opponents and proponents try to balance the presumed gains—such as job creation and Indian self-sufficiency—against the devastating economic and social consequences—such as compulsive gambling, increased crime and the break-up of families.⁵⁰ Gambling addiction is a serious disease and presents very real problems. Only time will tell for sure which way the scales will tip.

The Future of Gambling and Its Impact on North Carolina

Americans are finally waking up to the notion that gaming may not be the answer. "Legalized gambling is never large enough to solve any social problems," says gambling law professor Nelson Rose.⁵¹ Opposition to gambling now spans the political spectrum uniting liberals and conservatives.⁵² This was evident when both Democrat and Republican members of Congress helped push the National Gambling Impact and Policy Study Commission into law. In August 1996, President Clinton signed the bill, which set up a nine-member panel to study gambling in American society. The final report will be due after an intensive two year study. It is hoped that this study will provide insight and information about the future of gambling in America and the many questions surrounding Indian gaming. Bernard Horn, director of the National Coalition Against Legalized Gambling, has worked hard to get this study made into law. He cautions, "A national study will not solve the gambling problem, but it could be a turning point for the public, much like the 1964 Surgeon General's report on the hazards of smoking."⁵³

Battles are being waged against the gambling industry in states all over the country. States are passing legislation, conducting ballot referendums and filing court suits.⁵⁴ Their efforts are paying off as no state legalized slot machines or casino gambling in 1994, 1995 or 1996. In addition, the Supreme Court decision in

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Seminole Tribe of Florida v. Florida casts doubt on the expansion of Indian gaming and raises questions about its future.⁵⁵

North Carolina can play a big role in the fight by joining ranks with other states opposing Indian gambling as well as uniting supporters and lawmakers on the issue. Laws can be changed. An important point to remember is that Indian gaming can only operate in states that allow the types of gambling the tribes want to conduct. If the North Carolina General Assembly outlawed all forms of gambling, including charity bingo and the video games in bars and convenience stores, serious doubts could be raised as to whether any group, including the Cherokee Indians, could operate gaming facilities in the state.

It is obvious to see that there is no "quick fix" or easy solution to the problem of Indian gambling. Indian sovereignty complicates straightforward laws as we know them for our local, state and federal governments. The next few years will be critical as Americans battle to determine the fate of gambling in this country. The war against gambling is raging; but like all wars—victories are won, one battle at a time. ¶

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