

NOTES

Ace in the Hole: Land's Key Role in Indian Gaming

*“Take a Chance, Make it Happen
Pop the Cork, Fingers Snappin’
Spin the Wheel, Round and Round We Go
Life is Good, Life is Sweet
Grab Yourself a Front Row Seat
Let’s Meet and Have a Ball
Let’s Live for the Wonder of it All
Meet me at Foxwoods!”¹*

I. INTRODUCTION

Indian gaming is big business.² In 2004, Indian gaming facilities grossed over \$19.4 billion and, since 1995, revenue increases have topped 10% each year.³ Currently, over 200 tribes operate more than 400 gaming facilities in twenty-eight states.⁴

1. FOXWOODS RESORT CASINO, THE WONDER OF IT ALL. Foxwoods, a premier Indian gaming resort located in Connecticut, proudly depicts the transition of its lands from forest to gaming mecca on its website: “The symbol of the Mashantucket Pequot Tribal Nation is a reflection of the past. The tree, perched on a rocky knoll and framed against a clear sky, represents Mashantucket, the ‘much wooded land’ where the people hunted and prospered” Foxwoods Resort Casino, The Mashantucket Pequots, at <http://www.foxwoods.com/TheMashantucketPequots/Home/> (last visited Aug. 2, 2005). It continues:

Mashantucket, in the mid-1970s, was little more than 200 acres of rocks and trees, and there hadn’t been a new home built there in more than 120 years The year 1992 marked the beginning of a new era for the Mashantucket Pequots, as the success of Foxwoods Resort Casino brought them the economic security they had been seeking.

Foxwoods Resort Casino, The Mashantucket Pequots, Tribal Members Reflect on the Dream, at <http://www.foxwoods.com/TheMashantucketPequots/History/TribalMembersReflectontheDream.htm> (last visited Aug. 2, 2005).

2. *Infra* notes 3-4 and accompanying text (providing revenue data for tribal gaming operations).

3. Erica Werner, *Revenues Soaring for Tribal Casinos—Indian Gambling Outstrips Las Vegas*, SAN JOSE MERCURY NEWS, Feb. 16, 2005, at A3 (heralding double-digit growth every year for past ten years); Press Release, NIGC Announces Indian Gaming Revenue for 2004 (July 26, 2005) (noting 2004 gaming revenues show 15.3 percent increase over 2003), available at <http://www.nigc.gov/nigc/documents/releases/PR-7-05-1.jsp>.

4. Werner, *supra* note 3, at A3 (discussing tribal gaming statistics); Nat’l Indian Gaming Comm’n,

Along with impressive numbers, Indian gaming presents complex legal, social, and economic questions to tribes, states and the federal government.⁵ Despite eye-popping growth, critics continue to debate whether gaming is truly advantageous for Indian tribes.⁶ Tribal sovereignty suffered at the hand of Indian gaming as tribes subjected themselves to increased federal and state regulation in order to conduct gaming.⁷ Casino development has also reshaped tribal identity, changing the way tribes perceive themselves.⁸ Economically, while some Indian casinos have cashed in, other tribes have seen only limited profits.⁹

Indian gaming affects cities and states, focusing non-tribal leaders' and residents' attention on Indian affairs.¹⁰ Owners of competing casinos and residents opposed to gaming in their communities bemoan the exploitation of legal loopholes by a new generation of Native Americans, termed "Casino Indians."¹¹ State governments have sought their piece of the action by

Gaming Tribes (listing gaming tribes by state), at http://www.nigc.gov/nigc/nigcControl?option=GAMING_TRIBES®IONID=0&SORT=1 (last visited Aug. 2, 2005).

5. See Kelly B. Kramer, *Current Issues in Indian Gaming: Casino Lands and Gaming Compacts*, 7 GAMING L. REV. 329, 333 (2003) (noting limited ways states must seek federal approval of revenue-sharing agreements with tribes); Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 461-71 (2003) (arguing tribal-state compacts invalid under federal legislation).

6. See generally Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523 (2003) (exploring intersection between tribal economic development and self-determination); Stephanie A. Levin, *Betting on the Land: Indian Gambling and Sovereignty*, 8 STAN. L. & POL'Y REV. 125 (1997) (exploring how tribal sovereignty intersects with and impacts Indian gaming success); Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47 (2002) (assessing tribal gaming's ability to address dire social conditions by region); Christian C. Bedortha, Comment, *The House Always Wins: A Look at the Federal Government's Role in Indian Gaming & the Long Search for Autonomy*, 6 SCHOLAR 261 (2004) (opining gaming one solution to societal and monetary problems facing modern tribes).

7. See *supra* note 6 (noting commentators' assessments of tribal gaming success).

8. Compare *infra* notes 10-11 and Part II.B.2 (describing media's critical presentation of Indian gaming), with *infra* note 193 and accompanying text (noting casino revenue's role in positively shaping tribal identity through developments including National Indian Museum).

9. Rand, *supra* note 6, at 74-78 (comparing limited success of North Dakota tribal gaming operations with enormous Connecticut tribal gaming revenues). Gaming proceeds, particularly for the most successful tribes, are allocated among tribal members in a variety of ways. Naomi Mezey, Note, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 725 (1996) (discussing Pequot profit distributions).

10. Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 262-63 (2004) (noting media and public fascination exemplified by pop culture references to Indian gaming on television).

11. Chris Powell, Editorial, *Pequot Museum May Feed Mistaken Guilt*, PROVIDENCE J., Jan. 2, 2001, at B4 (opining Pequot tribe of Connecticut essentially creation of Foxwoods casino). Some people view these Indians as departing from their cultural traditions to pursue purely prurient interests. Light & Rand, *supra* note 10, at 277-78 (explaining success of some gaming tribes often inconsistent with popular notion of Native Americans). Donald Trump is frequently quoted as observing that the Mashantucket Pequots, owners of Foxwoods Resort Casino, "don't look like Indians to me and they don't look like Indians to Indians." Light & Rand, *supra* note 10, at 277.

exercising regulatory powers as leverage to negotiate revenue-sharing agreements with tribal casinos.¹² In many states, Indian gaming operations compete with state-run lotteries.¹³ At the federal level, the regulation and promotion of tribal gaming remain hotly contested issues.¹⁴

Land is a universal theme in the diverse debate surrounding Indian gaming.¹⁵ Land has always been tribes' most precious asset, helping to define tribal identity.¹⁶ Once federally recognized, land possession creates the statutory right to operate a gaming facility, provided that certain other requirements are met.¹⁷ Success of Indian gaming operations ultimately depends on the geographic location of a particular facility.¹⁸

This Note begins by looking at land's current role as a regulatory prerequisite in the legal framework of Indian gaming.¹⁹ It next examines how the geography of tribal lands inspires both success and controversy as Indian gaming impacts the social and economic landscape of tribes, states, and the gaming industry.²⁰ The third part of this Note argues that land's sweeping legal, social and economic effects give land a key role in Indian gaming, and discusses how land can and should be used to improve Indian gaming policy.²¹

II. HISTORY

A. Land's Role in the Legal Framework of Indian Gaming

1. *California v. Cabazon*

Modern Indian gaming traces its origin to the United States Supreme Court's landmark 1987 decision *California v. Cabazon Band of Mission Indians*.²² The

12. Lent, *supra* note 5, at 456-61 (analyzing state revenue-sharing compacts in Connecticut, California, Wisconsin, Michigan, and New Mexico).

13. See *infra* notes 111-112 and accompanying text (discussing potential impact of Indian gaming on state-run lottery operations).

14. Light & Rand, *supra* note 10, at 272, 281-82 (identifying three levels of tribal gaming regulation and calling for improved federal regulation).

15. *Infra* notes 16-18 and accompanying text (noting examples of how land intersects with Indian gaming).

16. Bedortha, *supra* note 6, at 264-65 (highlighting connection between land ownership, tribal recognition and sovereignty, and United States nineteenth century expansion).

17. Kramer, *supra* note 5, at 330-31 (describing land requirements enunciated in Indian Gaming Regulatory Act).

18. Kramer, *supra* note 5, at 330 (noting importance of location in connection with Indian casino profits).

19. See *infra* Part II.A (exploring land's significance in major Indian gaming legal developments).

20. See *infra* Part II.B (discussing geography's paradoxical role in Indian gaming).

21. See *infra* Part III (arguing land critical to Indian gaming debate and suggesting appropriate means to achieve improved policy).

22. 480 U.S. 202 (1987). Commentators have extensively reviewed the significance of the *Cabazon* decision. See generally Richard L. Barnes, *Indian Gaming: Congress Sends the Tribes into a Constitutional Fray, but Did It Intend to?*, 64 MISS. L.J. 591 (1995) (describing how *Cabazon* made Indian gaming key to

Cabazon and Morongo Bands of Mission Indians operated bingo and card operations on their reservations, drawing customers from many surrounding, non-Indian communities in California.²³ When local officials sought to prohibit these gaming activities, the tribes filed a declaratory action, seeking to enjoin the county from enforcing ordinances prohibiting for-profit bingo and card games based on the theory that the restrictions violated tribes' sovereignty on their lands.²⁴

The *Cabazon* Court began its analysis by recognizing the long tradition of Indian sovereignty over tribal lands absent an express federal grant of authority to the states.²⁵ Finding no such express federal grant of authority over gaming, the Court struck down California's attempts to regulate Indian gaming on reservation land.²⁶ Ultimately, the Court decided that federal policies promoting tribal economic development trumped California's stated interest in curbing Indian gaming: controlling organized crime.²⁷ The Court even

power struggle between states and federal government); Reid Peyton Chambers, *Indian Law in the United States Supreme Court—Experiences in the 1980s and Predictions for the 1990s*, 22 AM. INDIAN L. REV. 601 (1998) (placing *Cabazon* in context of major Supreme Court decisions affecting tribes); Connie K. Haslam, Note, *Indian Sovereignty: Confusion Prevails—California v. Cabazon Band of Mission Indians*, 63 WASH. L. REV. 169 (1988) (analyzing *Cabazon's* effect on tribal sovereignty).

23. *California v. Cabazon*, 480 U.S. 202, 204-05 (1987) (outlining background to *Cabazon*).

24. *Id.* at 205-07 (describing tribe's claim).

25. *Id.* at 207 (explaining sovereignty of Indian tribes remains subordinate only to federal law, not state law).

26. *Id.* (declining to find jurisdiction by California over tribal gaming operations). California argued that an express grant of authority to regulate Indian gaming exists in 18 U.S.C. § 1162 and 28 U.S.C. § 1360, which both grant certain criminal and civil authority over tribes to states, and 28 U.S.C. § 1955, known as the Organized Crime Control Act (OCCA). *Id.* In 18 U.S.C. § 1162 and 28 U.S.C. § 1360, Congress expressly granted several states, including California, broad jurisdiction over criminal offenses committed by or against Indians on Indian lands within the state, but only granted states limited civil authority. *See* 18 U.S.C. § 1162(a) (2000); 28 U.S.C. § 1360(a) (2000). The *Cabazon* Court followed *Bryan v. Itasca County*, 426 U.S. 373 (1976), in holding that this civil jurisdiction applied only to private litigation involving tribal members, not to regulatory authority over all civil matters. *Cabazon*, 480 U.S. at 208 (reasoning grant of civil regulatory authority would erode tribal institutions, values, and sovereignty). Although California categorized its gaming statutes as criminal in nature, the Court held that the statutes really constituted civil regulations because California did not prohibit all forms of gambling. *Id.* at 209-11 (characterizing distinction between criminal/prohibitory laws and civil/regulatory laws as whether conduct violates public policy). Because much gambling already existed in California at the time, including state-run lotteries, this conduct could not be viewed as a violation of public policy. *Id.* at 210-11. Similarly, 18 U.S.C. § 1955 sought to control organized crime by criminalizing state gambling violations under federal law. 18 U.S.C. § 1955(a)-(b)(1)(i) (2000). The Court viewed this statute as expanding federal, not state, authority, and thus concluded that it was not a grant of power to California over Indian gaming activities. *Cabazon*, 480 U.S. at 213-14.

27. *Cabazon*, 480 U.S. at 220-21 (explaining state's purpose behind limiting reservation gaming previously eroded by state's off-reservation gaming allowance). The Court similarly rejected California's argument that gaming tribes were simply marketing an exception to state law. *Cabazon*, 480 U.S. at 219 (explaining facility construction and offering of resort experience gave tribes significant interests in operations). The Court noted that the federal government already supports Indian gaming operations through programs such as the Indian Financing Act of 1974, 25 U.S.C. § 1451, and the guarantee of loans and other financial assistance to finance tribal bingo operations. *Id.* at 217-18 (citing S. REP. NO. 99-493, at 5 (1986)). Thus, the Court viewed gaming activities as distinguishable from previous business operations that *did* constitute the mere marketing of an exception to state law, such as pure reselling of goods to avoid state taxes.

overruled California's attempts to assert authority over non-tribal member activities conducted on reservation land, despite its limited authority to do so.²⁸ *Cabazon* not only ushered in a new era of judicially approved Indian gaming, but sparked previously unseen economic development on tribal lands.²⁹

2. Indian Gaming Regulatory Act of 1988

a. Regulation of Gaming by Class

In response to *Cabazon*, Congress passed the Indian Gaming Regulatory Act of 1988 ("IGRA" or "the Act").³⁰ The Act divides gaming operations into three categories, while simultaneously establishing rules to govern the regulation of each gaming category on Indian lands.³¹ Class I gaming consists of social

Id. The debate over whether tribal business activities constitute the marketing of an exception to state law has surfaced again recently in Rhode Island, where the state's ability to force tribes to collect state taxes when selling tobacco products to nonmembers has been challenged. Katie Mulvaney, *Court Weighs Land Appeals by Narragansetts*, PROVIDENCE J., Sept. 18, 2004, at A3. The legacy of *Cabazon* is the Court's positive endorsement of tribal gaming as a legitimate business supported by the fact that "the Cabazon and Morongo Bands are generating value on their reservations through activities in which they have a substantial interest." *Cabazon*, 480 U.S. at 220.

28. See *California v. Cabazon*, 480 U.S. 202, 215-16 (1987) (addressing states' limited authority to impose laws on non-members).

29. Nat'l Indian Gaming Comm'n, *Growth in Indian Gaming*, at http://www.nigc.gov/nigc/documents/releases/pr_revenue_2003.jsp (illustrating tribal gaming revenue increases from \$5 billion in 1995 to \$16 billion in 2003) (last visited Aug. 2, 2005).

30. 25 U.S.C. § 2701 (2000). The stated purpose of the Act was:

1. to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
2. to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
3. to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702 (2000).

Congress passed the Act pursuant to the Indian Commerce Clause of the United States Constitution. U.S. CONST., art. I, § 8, cl. 3; *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (noting source of congressional authority behind IGRA). This Note explores the methods by which land has been and can be used as a tool to further these policies in greater detail below. See *infra* Part III (analyzing the intersection of land and Indian gaming).

31. 25 U.S.C. § 2703(6)-(8) (2000). "Indian lands" are defined as:

- A. all lands within the limits of any Indian reservation; and
- B. any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

games and those conducted in connection with tribal ceremonies or celebrations.³² Class II gaming includes both paper and electronic bingo and card games, either explicitly authorized or not explicitly prohibited by state law, excluding baccarat, *chemin de fer*, blackjack, and slot machines.³³ Class III gaming incorporates all other forms of gaming not classified as Class I or Class II.³⁴ Class III gaming includes most of the games commonly found in modern casinos, including a perennial favorite, the slot machine.³⁵

IGRA also created the National Indian Gaming Commission (NIGC) in the Department of the Interior.³⁶ This three-member panel consists of at least two tribal members; IGRA charged it with developing further regulations for Class II and Class III gaming.³⁷ Class III gaming is of particular importance because major Indian gaming tribes, like Connecticut's Mashantucket Pequot, owners of Foxwoods Resort Casino, rely for their enormous economic success on their ability to conduct Class III operations.³⁸

b. Class III Gaming: The Wonder of It All

Although Class III gaming has historically produced the largest revenues for Indian tribes, it has also been the most heavily regulated.³⁹ IGRA requires that a tribe seeking to operate Class III operations, in addition to adhering to the plethora of Class II regulations, negotiate a "tribal-state compact" with the state where the facility is located.⁴⁰ These compacts may include provisions regarding the application of civil and criminal laws to gaming operations and assessment of state taxes and other revenue-sharing agreements with state

25 U.S.C. § 2703(4) (2000).

32. 25 U.S.C. § 2703(6) (2000) (defining Class I games). These games are subject to the least regulation. See Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 211-15 (1997) (discussing Class I games and subjection of some traditional Indian games to state law).

33. 25 U.S.C. § 2703(7) (2000) (detailing games included in Class II category). This section also requires tribes to follow any state laws regarding hours of operation and/or limitations on wagers and winnings. *Id.* Class II gaming has recently received renewed attention. See generally Heidi McNeil Staudenmaier & Andrew D. Lynch, *The Class II Gaming Debate: The Johnson Act vs. the Indian Gaming Regulatory Act*, 8 GAMING L. REV. 227 (2004) (analyzing importance of, incentives for, and future of Class II gaming).

34. 25 U.S.C. § 2703(8) (2000).

35. See *id.*; Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217, 219-21 (2004) (noting growth of slot machine revenue and its significance to bottom line of modern casinos).

36. 25 U.S.C. §§ 2705-2706, 2710 (2000) (defining powers of NIGC and its chairman).

37. 25 U.S.C. § 2706(b)(10) (2000) (granting regulatory power to Commission).

38. Mezey, *supra* note 9, at 725 (describing Foxwoods' profits and resulting economic benefit to tribal members).

39. See *infra* notes 40-44 and accompanying text (describing Class III regulations including tribal-state compacts).

40. 25 U.S.C. § 2710(d)(1)(C) (2000) (detailing tribal-state compact requirement for Class III gaming operations).

governments.⁴¹ IGRA imposed a good-faith bargaining requirement on tribes and states seeking to reach these agreements, and gave federal courts jurisdiction over the failure of states to negotiate with tribes.⁴² In the mid-1990s, the State of Florida tested the validity of this good-faith bargaining requirement in litigation that altered the balance of power between tribes and states in compact negotiations, ultimately to the detriment of tribes.⁴³ Nevertheless, by 2002, over two hundred tribes in twenty-four states had compacts in place allowing them to conduct Class III gaming.⁴⁴

c. Regulations Explicitly Linked to Land

i. The General Rule

IGRA prohibits gaming on lands acquired by tribes after October 17, 1988, the date of the Act's passage, subject to several exceptions.⁴⁵ For many tribes, successfully arguing to fall under one of the post-1988 exceptions has meant casino or bust.⁴⁶ Not surprisingly, these exceptions have come under intense

41. *Id.* at § 2710(d)(3)(C).

42. *Id.* at § 2710(d)(7).

43. *See infra* Part II.A.3 (discussing *Seminole Tribe* and its effects on Indian gaming regulatory power).

44. Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487, 487-88 (2002).

45. 25 U.S.C. § 2719 (2000). The exceptions include lands located within or contiguous to a then-existing reservation, and certain lands in Oklahoma, Wisconsin, and Florida. *Id.* In addition, and most crucially, the prohibition does not apply when:

- A. 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, but only if the Governor of the state in which the gaming activity is to be conducted concurs in the Secretary's determination; or
- B. lands are taken into trust as part of –
 - i. a settlement of a land claim,
 - ii. the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
 - iii. the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719(b)(1) (2000).

Indian tribes can acquire land either directly or as beneficiaries of land trusts, with the federal government acting as trustee. 25 C.F.R. § 151.3(a)(3) (2004); *see also* Kramer, *supra* note 5, at 330 (describing various ways tribes acquire land in context of method's significance to tribal gaming). *See generally* Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421 (2003) (discussing importance and complexity of tribal land acquisition). Since the passage of IGRA and the Court's decision in *Seminole Tribe*, how and when tribes acquire the lands on which they wish to operate gaming operations is critical to analyzing whether or not they have a right to do so. Kramer, *supra* note 5, at 330-31; *see infra* notes 52-70 and accompanying text (discussing Mechoopda tribal land acquisition and subsequent land determination permitting gaming on these restored lands).

46. *See infra* note 51 and accompanying text (detailing NIGC land determinations).

scrutiny, with critics in states opposed to gaming viewing them as loopholes that allow for the creation of tribes and the acquisition of lands solely for the purpose of gaming.⁴⁷ For tribes located in states amenable to Indian gaming operations, other options exist.⁴⁸

ii. The Exceptions and Other Options

IGRA permits gaming on lands acquired after October 1, 1988, if a tribe obtained the lands through a land settlement claim, if the lands were initial lands of a newly recognized tribe, or where the lands constituted previously depleted lands that have since been restored.⁴⁹ This allowed recognition for new tribes and their lands and restoration of depleted tribal lands, all with the full spectrum of rights available to tribes recognized prior to, and whose lands had already been restored as of, October 17, 1988.⁵⁰ Disputes over how, when, and where a tribe acquired its lands have resulted in significant litigation, particularly at the NIGC administrative level.⁵¹

47. *Supra* note 11 and accompanying text (noting negative public sentiment toward “Casino Indians”).

48. See 25 U.S.C. § 2719(b)(1)(A) (2000) (outlining exception to prohibition on tribal gaming in limited circumstances with state and local approval).

49. 25 U.S.C. § 2719(b)(1)(B) (2000).

50. *Id.* Allowing exceptions mirrors congressional recognition of the potential benefits of Class III gaming in particular, as discussed in a 1988 Senate report:

[B]oth State and tribal governments have significant governmental interests in the conduct of class III gaming. . . . A tribe’s governmental interests include raising revenues . . . to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State’s governmental interests . . . include the interplay of such gaming with the State’s public policy, safety, law, and other interests, as well as impacts on the State’s regulatory system, including its economic interest in raising revenue for its citizens.

S. REP. NO. 100-446, at 13 (1988).

51. See Memorandum from the NIGC Acting General Counsel to the NIGC Chairman (Mar. 14, 2003) [hereinafter NIGC Memorandum] (opining Mechoopda Indian tribal land acquisition would constitute “restored lands” under 25 U.S.C. § 2719), available at <http://www.nigc.gov/nigc/documents/land/mechoopdamemo.jsp>; Memorandum from the NIGC Acting General Counsel to the NIGC Chairman Deer (Aug. 5, 2002) (advising lands acquired by Bear River Band Indians qualify as “Indian lands”), available at <http://www.nigc.gov/nigc/documents/land/memodeer.jsp>; Memorandum from NIGC Deputy General Counsel to Chief, Regions V (July 30, 2001) (discussing why Delaware Tribe of Western Oklahoma lands did not constitute “Indian lands”), available at <http://www.nigc.gov/nigc/documents/land/delawaretribe.jsp>; Memorandum from Acting Associate Solicitor, Division of Indian Affairs to Regional Director, Midwest Regional Office, Bureau of Indian Affairs (Dec. 13, 2000) (opining lands acquired by Nottawaseppi Huron Potawatomi Band would constitute tribe’s initial reservation), available at <http://www.nigc.gov/nigc/documents/land/potawatomi.jsp>; Memorandum from Derril B. Jordan, Associate Solicitor, Indian Affairs to Deputy Commissioner, Indian Affairs (Apr. 18, 2000) (elucidating lands acquired for Paskenta Band of Nomlaki Indians constitute “restored lands” under IGRA), available at <http://www.nigc.gov/nigc/documents/land/jordanmemo.jsp>; Memorandum from Derril B. Jordan, Associate Solicitor, Indian Affairs to George Skibine, Director, Indian Gaming Management Staff (Jan. 18, 2000) (deciding lands acquired by United Auburn Indian Community meet definition of “restored” under IGRA),

In a 2003 land determination, the NIGC considered a 645-acre parcel acquired by California's Mechoopda Indian Tribe of the Chico Rancheria in 2001.⁵² The tribe proposed to conduct gaming on this acquired land.⁵³ To determine whether to permit gaming on the parcel, the NIGC considered whether the land would fall under the "restored lands" exception to IGRA.⁵⁴

Because the proposed lands were off-reservation, the NIGC had to determine first whether the proposed lands were "Indian lands."⁵⁵ To answer this question, the NIGC consulted 25 U.S.C. § 2703(4).⁵⁶ This section of IGRA deems any lands over which the tribe "had jurisdiction" and "exercised governmental power" to be "Indian lands."⁵⁷ Recent case law has concluded that tribes have jurisdiction over all lands located within "Indian country."⁵⁸ Courts have defined "Indian country" to include any lands taken into trust by the government for the benefit of a tribe.⁵⁹ Because the tribe was simultaneously seeking to have the lands it acquired transferred to trust, the NIGC assumed that the proposed gaming site was located in "Indian country."⁶⁰ The tribe submitted proof of its intention to exercise governmental authority by pointing to various proposed law enforcement and other ordinances.⁶¹

The NIGC next considered whether the tribe had been properly restored so as to qualify for relief under 25 U.S.C. § 2719(b)(1)(B)(iii).⁶² Consistent with recent case law, the NIGC applied an ordinary meaning to the word "restored."⁶³ It then examined the Mechoopda's tribal history dating back to the mid-nineteenth century.⁶⁴ The NIGC ultimately found that, although an Act of Congress terminated the tribe in 1958, the Assistant Secretary of Indian Affairs reinstated its status in 1992 in response to the tribe's lawsuit.⁶⁵ Thus, the NIGC concluded that the tribe was properly restored under section 2719(b)(1)(B)(iii).⁶⁶

available at <http://www.nigc.gov/nigc/documents/land/skibine.jsp>.

52. See generally NIGC Memorandum, *supra* note 51.

53. NIGC Memorandum, *supra* note 51, at *1.

54. NIGC Memorandum, *supra* note 51, at *1; see 25 U.S.C. § 2719(b)(1)(B)(iii) (2000).

55. NIGC Memorandum, *supra* note 51, at *1-2.

56. NIGC Memorandum, *supra* note 51, at *2.

57. NIGC Memorandum, *supra* note 51, at *2 (quoting IGRA).

58. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (discussing how tribes retain jurisdiction over land in "Indian country"); see also 18 U.S.C. § 1151 (2000) (defining Indian country).

59. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1998) (holding lands held in trust "Indian country" because set apart for use of Indians).

60. NIGC Memorandum, *supra* note 51, at *3-4.

61. NIGC Memorandum, *supra* note 51, at *4.

62. NIGC Memorandum, *supra* note 51, at *4.

63. *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 689, 700 (W.D. Mich. 1999) (holding word "restore" has no special meaning).

64. NIGC Memorandum, *supra* note 51, at *5.

65. NIGC Memorandum, *supra* note 51, at *5.

66. NIGC Memorandum, *supra* note 51, at *5.

Finally, the NIGC considered whether the particular lands at issue constituted “restored lands” under section 2719(b)(1)(B)(iii).⁶⁷ Mindful that not all lands a tribe once conceivably occupied would necessarily be “restored lands,” the NIGC, relying on the tribe’s ethnographer, concluded that the tribe had a historical and cultural connection to the land and that the tribe had acquired it close enough in time to the restoration of the tribe to consider the lands to be “restored lands.”⁶⁸ Accordingly, the NIGC held that the Mechoopda tribe could lawfully conduct gaming on these lands.⁶⁹ Although the Mechoopda tribe has not initiated gaming operations to date, its battle to gain gaming rights on its lands illustrates the complexity and significance of IGRA land exceptions to tribes seeking to conduct gaming.⁷⁰

Another option, off-reservation gaming, offers tribes the best opportunity to build casinos near target markets, unrestricted by the geographic location of their own lands.⁷¹ Tribes can operate gaming operations on off-reservation lands, under an alternate IGRA exception, if the Secretary of the Interior determines that it would be in the best interest of the tribe, would not be detrimental to surrounding communities, and that state and local officials agree.⁷² Such agreements have been few and far between, with state and local governments slow to recognize the benefits of tribal gaming.⁷³ As with tribal-state compacts, the requirement that states approve off-reservation gaming gives states added leverage when negotiating the terms of revenue-sharing and other agreements beneficial to states.⁷⁴

67. NIGC Memorandum, *supra* note 51, at *5-9.

68. NIGC Memorandum, *supra* note 51, at *5-9.

69. NIGC Memorandum, *supra* note 51, at *9.

70. See *supra* notes 52-69 and accompanying text (exemplifying detailed land determination process).

71. See Brian P. McClatchey, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the “Governor’s Veto” for Gaming on “After-Acquired Lands,”* 37 U. MICH. J.L. REFORM 1227, 1272-73 (2004) (arguing for discussions of controversial off-reservation gaming through vehicle of tribal compact negotiations).

72. 25 U.S.C. § 2719(b)(1)(A) (2000); see also Leah L. Lorber, Note, *State Rights, Tribal Sovereignty, and the “White Man’s Firewater”: State Prohibition of Gambling on New Indian Lands*, 69 IND. L.J. 255, 273-74 (1993) (concluding states should not have veto power over gaming on new Indian lands under 25 U.S.C. § 2719(b)); Heidi McNeil Staudenmaier, *Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles*, 4 NEV. L. J. 301, 303-07 (2004) (detailing complexities of acquiring land for purpose of conducting off-reservation gaming). Compare *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, 660-62 (7th Cir. 2004) (upholding constitutionality of 25 U.S.C. § 2719(b)(1)(A) requirement of state governor agreement to Indian gaming on after-acquired lands), with *City of Roseville v. Norton*, 348 F.3d 1020, 1032-33 (D.C. Cir. 2003) (holding Secretary of Interior need not make impact finding where lands “restored” under IGRA).

73. See Staudenmaier, *supra* note 72, at 311-12 (detailing instances where tribes have successfully reached agreements with state and local officials). These agreements took place in Wisconsin, Washington, and Michigan. *Id.*; see also *infra* note 75 and accompanying text (discussing Maine’s proposed tribal casino battle).

74. See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 296-99 (2004) (detailing the rise of state power in Indian gaming); Jason D. Kolkema, Comment, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial*

Off-reservation gaming was the subject of a heated ballot question in Maine in 2003.⁷⁵ The Penobscots, a tribe whose reservation lands are located in northern Maine, far from the lucrative markets of Boston and New York, sought to build a casino in Southern Maine near the New Hampshire border.⁷⁶ Ironically, the Penobscots voluntarily agreed to seek state approval for such projects in a 1980 settlement of land claims with the state, long before “Indian gaming” entered the vernacular.⁷⁷ Voters ultimately rejected the building of the casino by a nearly two-to-one margin, largely because of the perceived impact the facility would have on surrounding communities and the potentially negative effects on the state’s wholesome New England image.⁷⁸

3. *Seminole Tribe v. Florida*

By the early 1990s, *Cabazon* and IGRA had entrusted to tribes and the federal government substantial control over where Indian gaming could be conducted, often at the expense of state authority.⁷⁹ The Seminole Tribe of Florida (Seminole) tested this balance of power in 1991 in *Seminole Tribe v. Florida*.⁸⁰ Seminole alleged that Florida and its governor prevented Seminole from conducting Class III gaming operations on its lands by refusing to enter into negotiations with Seminole for a tribal-state compact.⁸¹ Seminole claimed

Authority over the Federal Approval of Gaming on Off-Reservation Sites, 73 U. DET. MERCY L. REV. 361, 373-81 (1996) (examining appropriate level of state authority in approving off-reservation gaming); Lent, *supra* note 5, at 452 (discussing revenue sharing agreements).

75. Editorial, *Maine’s Indians Look Beyond Casino’s Defeat*, PORTLAND PRESS HERALD, Dec. 28, 2003, at C4 [hereinafter *Maine’s Indians Look Beyond Casino’s Defeat*] (discussing tribal leaders’ reactions to voters’ decision and economic impact on tribe). The Penobscots sought state permission to operate their casino in York county, an area of Southern Maine readily accessible to the populations of southern New Hampshire, Massachusetts and Boston, specifically. *Id.*; Jim Adams, *Maine Kills Casino in Anti-Sovereignty Hangover*, INDIAN COUNTRY TODAY, Nov. 7, 2003 (reporting Maine vote anti-Indian not anti-gaming because citizens approved slot machines at race tracks), available at <http://www.indiancountry.com>; see also Sharon Wheeler, *Is the Die Cast? Indian Casino Gambling in Maine*, 50 ME. L. REV. 143, 165-70 (1998) (reviewing history and future of Indian gaming in Maine); Casino Gambling, Maine State Law and Legislative Reference Library (listing myriad of resources on Maine gaming proposal), at <http://www.state.me.us/legis/lawlib/casino.htm> (last visited Aug. 2, 2005); *infra* note 98 and accompanying text (noting link between success of existing tribal gaming operations and their location).

76. Adams, *supra* note 75 (outlining geographic issues involved in Maine Indian casino debate).

77. Adams, *supra* note 75 (setting forth Maine Indian land settlement chronology).

78. See *Maine’s Indians Look Beyond Casino’s Defeat*, *supra* note 75 (explaining outcome of Maine vote).

79. 25 U.S.C. § 2710(d)(7)(A)-(B) (2000) (imposing good faith bargaining requirement on states in negotiations with tribes over Class III gaming operations); *California v. Cabazon*, 480 U.S. 202, 221-22 (1987) (striking down California’s attempts to prohibit gaming on tribal land); see also *supra* Parts II(A)(1)-(2) (detailing impact of *Cabazon* and IGRA on Indian gaming).

80. 517 U.S. 44, 51-52 (1996).

81. *Id.* (describing Seminole’s allegations against Florida). Florida allegedly violated 25 U.S.C. § 2710(d)(3), the portion of IGRA that requires states to negotiate in good faith with tribes over tribal-state compacts when seeking to regulate Class III gaming activities. *Id.* Seminole sought jurisdiction in federal court via 25 U.S.C. § 2710(d)(7)(A), the section that the Court ultimately struck down as a violation of states’

a cause of action pursuant to 25 U.S.C. § 2710(d)(7)(A), the section of IGRA permitting tribes to sue states in federal court for refusing to enter into good faith negotiations over tribal-state compacts for Class III gaming operations.⁸² Florida argued that 25 U.S.C. § 2710(d)(7)(A) violated its sovereign immunity.⁸³ Holding the sovereign immunity of states supreme, the Supreme Court ordered that tribes could not seek enforcement in federal court of states' duties to negotiate in good faith for the purpose of entering into such compacts.⁸⁴

Seminole Tribe empowered states in their negotiations with tribes seeking to open Class III gaming operations by limiting tribes' ability to force states to accept gaming within their borders.⁸⁵ States have utilized this new advantage to negotiate highly lucrative tribal-state revenue-sharing agreements, reaping millions annually in revenues from Indian gaming facilities.⁸⁶ Connecticut and New York, for example, both take in roughly 20% of Indian gaming revenues generated within their states.⁸⁷ Foxwoods slot machine revenue alone

sovereign immunity. *Id.* at 47, 51-52.

82. *Id.* at 52 (describing *Seminole*'s cause of action).

83. *Id.* (outlining Florida's motion to dismiss for violation of sovereign immunity).

84. *Seminole Tribe*, 517 U.S. at 53 (immunizing states from tribal suits under Eleventh Amendment and declining jurisdiction under *Ex parte Young* doctrine). The Court analyzed whether the Eleventh Amendment permitted tribes to sue states using a two-prong test. *Id.* at 55. The Court held that, while Congress had "unequivocally express[ed] its intent to abrogate the immunity" of states with the language in 25 U.S.C. § 2710(d)(7), this section did not result from a valid exercise of congressional power. *Id.* at 55-73 (quoting *Green v. Mansour*, 474 U.S. 64 (1985) (internal quotations omitted)). The Court also declined to exercise jurisdiction pursuant to *Ex parte Young*, 209 U.S. 123 (1908), contrasting the need to remedy the continuing violations of federal law found in *Young* with the detailed remedial scheme already available to tribes under IGRA in the absence of judicial intervention. *Id.* at 73-74. Under IGRA, if a state and tribe fail to enter a compact within 60 days of a court order, each side submits its latest proposed compact to a mediator, who selects the proposed compact that best adheres to federal law. 25 U.S.C. § 2710(d)(7)(B)(iv) (2000). The Secretary, with or without state consent, then has authority to prescribe regulations consistent with the mediator-selected compact and allow the tribe to begin conducting Class III gaming operations. 25 U.S.C. § 2710(d)(7)(B)(vii)(I)-(II) (2000). Numerous writers have reviewed the constitutional issues raised in *Seminole Tribe*. See generally Nancy J. Bride, *Seminole Tribe v. Florida: The Supreme Court's Botched Surgery of the Indian Gaming Regulatory Act*, 24 J. LEGIS. 149 (1998) (arguing *Seminole Tribe* inconsistent with history of IGRA and tribal sovereignty, and overemphasizes states' rights); Dan J. Schulman, *Seminole Tribe: Federalism, State Sovereign Immunity, and Limits on Federal Court Jurisdiction*, 5 J. BANKR. L. & PRAC. 521 (1996) (noting broader effects of state sovereign immunity illuminated in *Seminole Tribe* on bankruptcy practice); Allison Fabyanske Eklund, Casenote & Comment, *When Losing is Winning: American Indian Tribal Sovereignty Versus State Sovereignty After Seminole Tribe v. Florida*, 20 HAMLINE L. REV. 125 (1996) (analyzing consequences of *Seminole Tribe* on state and tribal sovereignty).

85. See Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487, 510-11 (2002) (exploring whether exclusivity agreements common to tribal-state compacts constitute illegal taxation).

86. See, e.g., Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263, 272 (1999) (analyzing states' exploitation of Indian gaming as "cash cow"); Alan Meister, *Tribal-State Gaming Compacts and Revenue Sharing: A California Case Study*, 7 GAMING L. REV. 347, 348-50 (2003) (exploring revenue-sharing in California and its role in tribal-state relations and state politics). See generally Lent, *supra* note 5 (discussing legality of tribal-state revenue-sharing compacts).

87. Meister, *supra* note 86, at 350 (depicting projected annual California compact revenues as similar to those in Connecticut and New York).

generates approximately \$200 million annually for Connecticut.⁸⁸

The issue of tribal-state compacts has collided with the question of Indian lands again in recent actions.⁸⁹ In *Artichoke Joe's California Grand Casino v. Norton*,⁹⁰ non-Indian gaming operators unsuccessfully challenged tribal-state compacts that granted tribes the exclusive right to conduct Class III gaming on their lands.⁹¹ In *Match-E-Be-Nash-She-Wish v. Engler*,⁹² the Sixth Circuit denied tribes without lands the right to negotiate tribal-state compacts.⁹³ The holdings of these cases reflect how deeply Indian lands have been integrated into the legal discourse surrounding tribal gaming.⁹⁴ Despite the crucial role land plays in tribal gaming's legal arena, however, its impact on Indian gaming would not be called "key" but for the impact of geography on casino success.⁹⁵

B. Land's Role in the Success of Indian Gaming

1. Geography as a Savior: Economic Success

Indian tribes have long recognized the importance of location to the success of gaming operations.⁹⁶ There are few differences between the types of games offered by each casino; thus, geographic convenience motivates gaming consumption.⁹⁷ As a result, the most successful Indian casinos are consistently located near major metropolitan areas.⁹⁸

88. State of Connecticut, Division of Special Revenue, Foxwoods Casino, Schedule of Selected Video Facsimile/Slot Machine Data for the Period January 1, 1993 through February 28, 2005, at <http://www.ct.gov/Dsf2202/lib/dosr/Fostweb.pdf>.

89. *Infra* notes 90-93 and accompanying text (describing two such actions).

90. 353 F.3d 712 (9th Cir. 2003).

91. *Id.* at 714 (denying challenge to California tribal-state compact). Although the compact permitted Class III gaming operations only on tribal lands, the court allowed it to stand because it complied with IGRA and did not violate equal protection of non-tribal card clubs and charities. *Id.* at 742.

92. 304 F.3d 616 (6th Cir. 2002).

93. *Id.* at 618 (holding states not obligated to negotiate with tribes under IGRA until tribe acquires "Indian lands").

94. *See supra* notes 91-93 and accompanying text (describing cases turning on question of Indian lands).

95. *See infra* Part II.B (detailing geography's key positive and negative role in success of Indian gaming).

96. Rand, *supra* note 6, at 62-67 (noting commercial success of Foxwoods not by accident but by exploitation of tribe's location).

97. *See* JOSEPH P. KALT, ET AL., PUBLIC POLICY ANALYSIS OF INDIAN GAMING IN MASSACHUSETTS: A REPORT TO THE GOVERNMENT OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT 4 (May 13, 2002) (noting gaming product relatively constant so geography key to consumer affinity for particular casino), available at [http://ksgnotes1.harvard.edu/research/wpaper.nsf/rwp/RWP02-019/\\$File/rwp02_019_kalt.pdf#search=visitors%20indian%20gaming%20geography](http://ksgnotes1.harvard.edu/research/wpaper.nsf/rwp/RWP02-019/$File/rwp02_019_kalt.pdf#search=visitors%20indian%20gaming%20geography).

98. *See* David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 187 (2004) (linking tribal gaming success to geographic location); Rand, *supra* note 6, at 49-50 (noting minority of casinos account for majority of economic success, trend tied closely to location); *see also infra* note 112 (noting importance of geography not only to casino success but also to impact on local region).

Over the years, two models of Indian gaming and its successes have emerged, and both models are inextricably linked to geography.⁹⁹ The Pequots, owners of Connecticut's Foxwoods Resort Casino, have been among the most successful gaming operators.¹⁰⁰ Their success can be traced to the proximity of the tribe's lands to New York, New Jersey, Massachusetts, and the rest of New England.¹⁰¹ Foxwoods' location has allowed it to capitalize on these lucrative Northeast markets.¹⁰² The Plains tribes, located in central and western states, often far from major metropolitan areas, are more characteristic of the majority of Indian gaming operators, experiencing only moderate success.¹⁰³

Despite the varied experiences of the Pequots and Plains tribes as a result of their land locations, tribes with and without land continue to seek the ability to engage in gaming.¹⁰⁴ This trend follows studies that point to an overall increase in the standard of living on reservations as a result of gaming.¹⁰⁵ Northeast Indian gaming tribes have even announced nationwide expansion plans.¹⁰⁶ These expansion efforts by the Connecticut's Pequots and Mohegans foreshadow a nationwide presence for these important gaming tribes.¹⁰⁷

2. *Geography as a Curse: State and Local Objections to Indian Gaming and the Indian Identity Crisis*

Geography plays a central role in state and community opinions about tribal gaming.¹⁰⁸ By far, location, either because a facility is proposed within a

99. Rand, *supra* note 6, at 50 (outlining Plains model versus Pequot model of Indian gaming).

100. Rand, *supra* note 6, at 62-67 (discussing success of gaming at Foxwoods).

101. Rand, *supra* note 6, at 62-68 (describing successes of Foxwoods casino and views of its critics).

102. Rand, *supra* note 6, at 63 (noting location of Foxwoods and relation of location to number of visitors).

103. Rand, *supra* note 6, at 68-80 (describing successes and failures of Plains model). Rand concludes that an oversimplification of tribal gaming by the media and policymakers eroded efforts to understand and promote tribal development. Rand, *supra* note 6, at 82-85 (recommending policymakers consider full spectrum of tribal experiences).

104. See *supra* note 51 and accompanying text (detailing attempts by tribes to exempt their lands from gaming restrictions imposed by IGRA).

105. See generally JONATHAN B. TAYLOR & JOSEPH P. KALT, AMERICAN INDIANS ON RESERVATIONS: A DATABOOK OF SOCIOECONOMIC CHANGE BETWEEN THE 1990 AND 2000 CENSUSES, THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT (2005) (extensively reviewing statistical successes of Indian gaming for tribes), available at <http://www.ksg.harvard.edu/hpaied/pubs/documents/AmericanIndiansonReservationsADatabookofSocioeconomicChange.pdf>. The study found per capita income for tribal members rose by approximately 30% during the 1990s, compared to only an 11% rise in the total U.S. per capita income. *Id.* at i. Moreover, family poverty rates in gaming areas dropped by about 10% in the 1990s compared with 7% in non-gaming areas and 0.8% in the overall U.S. population. *Id.* The unemployment rate also fell by 5% in gaming areas in the 1990s, compared with only 2.5% in non-gaming areas and 0.5% in the overall U.S. population. *Id.*

106. Jim Adams, *Casino Leapfrog Heats Up for Pequots*, INDIAN COUNTRY TODAY (Jan. 12, 2005) (noting diversification underway by several major gaming tribes), available at <http://www.indiancountry.com>.

107. *Id.*

108. See Harold Monteau, *Tribes Can Improve Image by Investing in Indian Country*, Indian Country Today (Jan. 14, 2005) (noting media's anti-tribal sentiment) available at <http://www.indiancountry.com>.

particular state or in a particular region of that state, underlies most local concern about Indian gaming.¹⁰⁹ As a result, some gaming states have mounted strenuous resistance to Indian gaming within their borders.¹¹⁰ States often fear Indian casinos' competition with their own lotteries and existing private gaming operations.¹¹¹ Despite an intensification of the uproar over potential lost revenues for states, this uproar has not settled the debate over Indian gaming in many states.¹¹² In Massachusetts, for example, a report commissioned by the legislature found that a proposed Indian gaming facility would recapture approximately \$750 million in out-of-state spending by Massachusetts residents, attract spending from residents of northern New England states, and increase economic development in depressed regions of the state.¹¹³ Despite this study, however, Indian gaming remains undeveloped in Massachusetts.¹¹⁴

Land has symbolized tribal identity since the first European contacts with Indians.¹¹⁵ More recently, land has become a double-edged sword for tribes, mirroring both the promise of sovereignty and the scourge of isolation and poverty.¹¹⁶ Opinions about the meaning of land vary greatly among tribes, as some consider relocating burial sites to construct casinos while others oppose almost any development.¹¹⁷ Resulting from these forces for and against Indian gaming is something of an identity crisis for Native Americans, whether or not

Compare Light & Rand, *supra* note 10, at 262-63 (noting decline in public perception of Indian tribes since inception of Indian gaming), with John J. Miller, *Buffaloed: Fighting the Truth About American Indians*, NAT'L REV., Oct. 9, 2000, at 28-29 (arguing public perception of Indians as victims garnered them special rights, including gaming abilities).

109. *Supra* notes 75-78 (detailing heated debate in Maine over location of proposed Indian casino); *infra* notes 112-114 (describing concerns over Indian gaming facility location in Massachusetts, despite Connecticut Indian casinos' proximity).

110. See KALT, ET AL., *supra* note 97, at 1-3 (noting prior resistance to Indian gaming in Massachusetts where state's citizens spend millions on out of state gaming).

111. KALT, ET AL., *supra* note 97, at 8 (describing anticipated impact on Massachusetts lottery of tribal casino).

112. See generally KALT, ET AL., *supra* note 97 (discussing impact of proposed Indian gaming facility in Southeastern Massachusetts).

113. KALT, ET AL., *supra* note 97, at 2-3.

114. See KALT, ET AL., *supra* note 97, at 2-3; Nat'l Indian Gaming Comm'n, Gaming Tribes (noting Massachusetts not among those states with gaming tribes), at http://www.nigc.gov/nigc/nigcControl?option=GAMING_TRIBES®IONID=0&SORT=1 (last visited Aug. 2, 2005).

115. Bedortha, *supra* note 6, at 264-66 (expounding on role of geography and land in social, political, and economic interactions between Indians and Westerners).

116. Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 112 (2003) (noting sovereignty as economic development catalyst while Indians suffer impoverished conditions, unemployment, and substandard housing); Rand, *supra* note 6, at 53-55 (detailing often deplorable conditions characteristic of reservation life).

117. See Russel L. Barsh, *Grounded Visions: Native American Conceptions of Landscapes and Ceremony*, 13 ST. THOMAS L. REV. 127, 145-46 (2000) (discussing disagreement between Oklahoma and Kansas tribes over relocating burial grounds to construct casino facilities).

they personally engage or seek to engage in gaming.¹¹⁸

With more and more tribes seeking the legal right to operate gaming on their lands, experts in the fields of history, genealogy, sociology and anthropology are commonly employed to research tribal ancestry and land possession.¹¹⁹ A cottage industry has sprung up to serve a market of consumers eager to discover and document their tribal lineage and land ownership.¹²⁰ While some see this industry as helping tribes explore their roots, the trend further contributes to an identity crisis for many tribes because the public views these efforts as purely pecuniary, with the ultimate goal of developing gaming enterprises by would-be “Casino Indians.”¹²¹

3. *Indian Gaming has Brought New Visitors to Indian Lands*

Gaming on tribal lands has fueled opposition to tribes, altered public perception of what it means to be “Indian,” and created an identity crisis for many tribes.¹²² Along with these changes, however, Indian gaming has also marked a new era of markedly increased non-member visitation to Indian lands, resulting in interesting legal consequences.¹²³ In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*,¹²⁴ for example, the Supreme Court prevented a creditor from collecting on a promissory note issued by the tribe on the basis of the tribe’s sovereign immunity.¹²⁵ Similarly, courts have restricted personal injury claims against tribes, with judges unwilling to find jurisdiction over tribal gaming facilities.¹²⁶ Increased visitation to Indian lands has created new reasons for lawyers and business people to study Indian law.¹²⁷ The

118. See *supra* note 108 and accompanying text (comparing effects of public perception on Native Americans).

119. Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. TIMES, Mar. 29, 2004, at A1 (commenting on breadth of experts involved in tribal recognition for tribes seeking to conduct gaming).

120. See *id.* (noting financial backing of tribes by investors paying for experts to research lineage).

121. See *supra* note 51 (noting various NIGC land determinations); *infra* note 128 (describing environmental impact study for proposed Indian gaming facility in California); Peterson, *supra* note 119 (noting most groups seeking tribal recognition emerged after development of Indian gaming).

122. *Supra* Part II.B.2 (postulating identity crisis resulting from shifting public sentiment toward tribal economic conditions and development).

123. See *infra* notes 124-127 (describing several ways tribal gaming has altered legal landscape).

124. 523 U.S. 751 (1998).

125. *Id.* at 753, 760 (applying doctrine of sovereign immunity to protect tribe from suit on promissory note).

126. See, e.g., *Kizis v. Morse Diesel Int’l*, 794 A.2d 498, 505-06 (Conn. 2002) (holding Mohegan Gaming Disputes Court proper forum for relief because state court lacked subject matter jurisdiction); *Diepenbrock v. Merkel*, 97 P.3d 1063, 1068 (Kan Ct. App. 2004) (finding tribal sovereignty protects it from wrongful death action stemming from negligent emergency treatment); *Bonnette v. Tunica-Biloxi Indians*, 873 So.2d 1, 6 (La. Ct. App. 2003) (holding sovereign immunity protects tribe from personal injury suit); see also Larry Betz & Donna Budnick, *Labor and Employment Law and American Indian Tribes*, 83-JUL MICH. B.J. 15, 15-18 (Jul. 2004) (summarizing how tribal casino development impacted employment law).

127. See Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 155-61 (2004) (explaining possible remedies against tribes in light of jurisdictional issues); June D. Bell, *Betting on the Tribe*:

environmental impact of casino development on Indian lands, which is beyond the scope of this Note, presents further complex factors that tribes and governments must consider when evaluating the costs and benefits of Indian gaming.¹²⁸

4. *Geography Defines Indian Gaming's Role in the Gaming Industry*

The rise of Indian gaming as a competitive force in the gaming marketplace has driven gaming-dependent areas, such as Las Vegas, to redefine themselves as more than gaming destinations.¹²⁹ Indian gaming has found a viable economic niche in the gaming market, serving both local and regional customers who play on a regular basis.¹³⁰ It has not, however, eclipsed destinations such as Las Vegas or Lake Tahoe, which continue to offer a variety of gaming and entertainment venues unmatched even at the most lavish and expansive Indian gaming facilities.¹³¹

As Indian Gaming Explodes, Law Firms Get in on the Action, NAT'L L.J., Sept. 27, 2004, at 1 (discussing the growth of Indian gaming law). Indian gaming has also spawned new educational opportunities for those interested in pursuing a career in gaming. See Michael Gormley, *More Colleges Bet on Success of Gambling Courses—Industry's Growth Spurs Trend, But Not Without Opposition*, MEMPHIS COMMERCIAL APPEAL, Sept. 4, 2004, at 7 (noting rise in gaming offerings for students, including studies of gaming law and Indian land).

128. See Graton Rancheria Casino and Hotel Project—Environmental Impact Statement Scoping Report (Aug. 2004) (analyzing alternatives for resort casino located in Sonoma County, California, and environmental impact), at http://www.nigc.gov/nigc/documents/nepa/graton_rancheria/eis.jsp. A wide variety of agencies were consulted for the report, including NIGC, Environmental Protection Agency, Bureau of Indian Affairs, California Department of Transportation, Fish and Wildlife Service, Department of Fish and Game, and the Army Corps of Engineers. *Id.* at 1-3.

129. See Rod Smith, *California Deal with Tribes Unlikely to Hurt Las Vegas*, LAS VEGAS REV.-J., Jun. 22, 2004, at D1 (explaining Indian casinos providing limited gaming experience no threat to wide array of entertainment). The Bellagio Hotel, Las Vegas's most profitable hotel-casino, is an example of a resort no longer solely dependent on gaming for the majority of its revenue. See *Bellagio Opens Doors to New \$375 Million, 33-Story Spa Tower*, RENO GAZETTE-J., Dec. 24, 2004, at D1 (outlining casino's investment in non-gaming offerings). Roller coasters, theme parks, celebrity restaurants, shopping arcades, and lavish shows have redefined Las Vegas as an entertainment capital, not just a gaming destination. See Suzette Parmley, *Las Vegas, Wish We Were You. It's Not Just About Gambling Anymore. So Atlantic City is Following the Leader in Offering a Total Experience.*, PHILADELPHIA INQUIRER, Jan. 30, 2005, at E1. By contrast, bankruptcy has become more commonplace at those destinations, such as Atlantic City, that rely more heavily on pure gaming dollars, as exemplified by the 2003 bankruptcy filing by Donald Trump for his Taj Mahal and other Atlantic City properties. *Judge OKs Loan for Trump Casinos*, N.J. REC., Feb. 4, 2005, at A3. Gaming, as a nationwide industry, has grown enormously over the last two decades. See George G. Fenich & Kathryn Hashimoto, *Perceptions of Canibalization: What Is the Real Effect of Casinos on Restaurants?*, 8 GAMING L. REV. 247, 247 (2004) (noting revenues of \$68.7 billion for commercial gaming in 2002, up over five percent from 2001 and seven times the amount spent on movie tickets); John K. Maloney, *Global Gaming Compliance*, 8 GAMING L. REV. 119, 120 (2004) (explaining growth of gaming industry outpaced regulations).

130. See Tu-Uyen Tran, *Grand Forks Casino Campaign Tribe to Talk Proposed Casino with Officials, Residents in Next Three Months*, GRAND FORKS HERALD, Nov. 9, 2004, at A1 (noting lack of strong regional market potential impediment to casino development for North Dakota tribe).

131. See Rod Smith, *Unperturbed Gaming Executives Say Industry Going Strong*, LAS VEGAS REV.-J., Oct. 7, 2004, at D1 (explaining Indian gaming has sent consumers to Las Vegas in search of gaming "nirvana").

III. ANALYSIS

*A. Land Establishes a Tribe's Legal Right to Conduct Gaming**1. Cabazon Interprets Gaming as Extension of Tribes' Sovereignty over Their Lands*

Cabazon ushered in the modern Indian gaming era and cemented land as the cornerstone of tribal gaming rights.¹³² The *Cabazon* Court viewed tribal land ownership as the fundamental basis for tribal sovereignty.¹³³ This connection is logical and rooted in history.¹³⁴ Out of tribal sovereignty, the Court fashioned tribes' right to conduct gaming.¹³⁵ Thus, Indian gaming represented a property right that extended naturally from tribes' sovereignty on their lands.¹³⁶

In concluding that tribal casinos could draw patrons from the surrounding non-Indian communities, the Court elected to focus on where gaming was taking place rather than on who was gaming.¹³⁷ This extended tribal property rights at the expense of state power to regulate the activities of state citizens.¹³⁸ Although the Court declined to hold that tribes were merely marketing an exception to state law, the creation of tribal gaming islands in states where gaming was highly regulated or nonexistent initiated the link between geography and Indian gaming success.¹³⁹ The Court's ultimate endorsement of gaming as a legitimate business tied gaming to tribal lands by directing its decision, and thus national Indian policy, toward the economic development of tribes "on the[ir] reservations."¹⁴⁰

132. See *infra* notes 135-140 and accompanying text (describing how Court developed gaming rights around tribal land possession).

133. *California v. Cabazon*, 480 U.S. 202, 207 (1987) (noting Indian tribes have sovereignty over their territory).

134. Light & Rand, *supra* note 10, at 268-69 (discussing Indian sovereignty's historical basis in land); Bedortha, *supra* note 6, at 263-65 (highlighting role of land in development of relationship between Indians and westerners).

135. *Cabazon*, 480 U.S. at 207 (permitting gaming on tribal lands because tribal sovereignty subordinate only to federal government).

136. *Id.* (holding state power on tribal lands limited to instances of express congressional intent); Braveman, *supra* note 116, at 112 (noting sovereignty serves as catalyst for tribal economic development); Light & Rand, *supra* note 10, at 268-70 (reviewing importance of tribal sovereignty to Indian gaming).

137. *Cabazon*, 480 U.S. 202, 217-22 (1987) (limiting California's ability to restrict non-tribal members' gaming on reservation land).

138. *Id.* (finding California's interest in curbing organized crime less persuasive than federal policy promoting tribal economic development). The Court noted that few opportunities, aside from gaming, presented the same promise for economic growth. *Id.* at 218-19. *Cabazon* and Morongo land contained no exploitable natural resources. *Id.* at 218.

139. See *supra* note 27 (analyzing Court's holding Indian gaming more than mere marketing of exception to state law). Tribes, however, have lost this debate in connection with other economic enterprises, such as the marketing of tax-free tobacco products. See Mulvaney, *supra* note 27 (reporting battle over tax-free tobacco sales by Rhode Island tribes on reservation land).

140. *California v. Cabazon*, 480 U.S. 202, 220 (1987).

2. IGRA Uses Land to Regulate Indian Gaming

a. Casino Regulations Determined by Combination of Gaming Class and Geography of Proposed Facility

If *Cabazon* introduced land as the legal basis for Indian gaming, IGRA solidified land's key role by codifying it.¹⁴¹ The Act charged the NIGC with the "establishment of independent Federal regulatory authority for gaming on Indian lands."¹⁴² IGRA regulated gaming geographically when it required tribes to follow state laws regarding various aspects of gaming operations.¹⁴³ Class II and higher gaming operations, for example, had to adhere to any state laws limiting hours of operation and wager amounts.¹⁴⁴ The Act further imposed geographic restrictions on Class III gaming by requiring potential Class III gaming tribes to negotiate tribal-state compacts.¹⁴⁵

Due to IGRA's focus on geography, state laws and political climates restricted or totally barred the exercise of *Cabazon* gaming rights.¹⁴⁶ The increased state and federal regulation to which tribes must adhere in order to conduct gaming has diminished tribal sovereignty.¹⁴⁷ For some tribes, the financial freedom associated with gaming's economic success may outweigh any of its members' lost political freedoms.¹⁴⁸ Unfortunately, this has not held true for all gaming tribes.¹⁴⁹ Although allowing some local input into the operation of gaming facilities is sensible, IGRA's geographic regulations place too much power in the hands of states.¹⁵⁰ The Act thereby fails to protect tribes in the exercise of their *Cabazon* rights.¹⁵¹

141. See *supra* notes 31-42 and accompanying text (setting out terms of IGRA and describing land's central role).

142. 25 U.S.C. § 2702 (2000) (emphasis added); see also *supra* note 30 (quoting from IGRA's purpose).

143. See 25 U.S.C. §§ 2703(7), 2710(d), 2719 (2000) (incorporating state law into federal gaming legislation).

144. 25 U.S.C. § 2703(7) (2000).

145. 25 U.S.C. § 2710(d) (2000); see also *supra* notes 40-42 and accompanying text (discussing stringent regulations governing Class III gaming and tribal-state compact requirement).

146. See 25 U.S.C. §§ 2703, 2710(d) (2000); see also *supra* notes 40-42 and accompanying text (discussing Class III gaming and tribal-state compact requirement).

147. Levin, *supra* note 6, at 130 (highlighting intrusive effect of IGRA on tribal right of self-government).

148. Rand, *supra* note 6, at 62-64 (describing economic prosperity realized by Connecticut's Foxwoods casino).

149. Rand, *supra* note 6, at 64-67 (casting negative light on economic growth produced by Foxwoods).

150. See 25 U.S.C. §§ 2703, 2710(d) (2000); see also *supra* notes 40-42 and accompanying text (detailing state regulation over Class III gaming).

151. See *supra* Parts II.A.2-3 (describing post-*Cabazon* legislative and common law erosion of gaming rights).

b. Land Is Key to Tribes' Right to Initiate Gaming Under IGRA's General Rule and Exceptions

To prevent tribes from acquiring land solely for gaming development, IGRA incorporated the October 17, 1988 cut-off date for tribal land acquisition intended for gaming, subject to few exceptions.¹⁵² This made land possession and acquisition critical to tribes seeking to conduct gaming.¹⁵³ The exceptions or "loopholes" prior to that date thus became fertile ground for litigation between tribes and the NIGC, further illustrating how critical a role land plays in the tribal gaming regulatory scheme.¹⁵⁴

Critics argue that allowing tribes to acquire land through land settlement claims, designate lands as the initial lands of a newly recognized tribe, or recover lands previously depleted represents the "creation" of tribes solely for gaming.¹⁵⁵ An emerging industry designed to serve the business development needs of potential tribes who seek authority to game fuels this criticism.¹⁵⁶ The risk certainly exists for these exceptions to swallow the intent of the original rule.¹⁵⁷ Notwithstanding these negative perceptions, the NIGC extensively analyzes a tribe's claim, as illustrated by the case of the Mechoopdas, which reveals how difficult it is in practice to obtain the land determination necessary to conduct gaming.¹⁵⁸ Ironically, despite the extensive state regulation of Indian gaming, states play no role in the land determination process.¹⁵⁹ Rather than state interference with the rights of established tribes on their lands, limited geographic regulation of Indian gaming and the increased state oversight that necessarily results might be better suited to the land determination stage.¹⁶⁰

152. 25 U.S.C. § 2719(a) (2000); *see also* Staudenmaier, *supra* note 72, at 303 (noting checklist limits land acquisition for gaming in response to acquisition aimed at gaming).

153. *See supra* note 51 and accompanying text (exemplifying extent to which tribes will seek NIGC review of potential gaming lands).

154. *Supra* note 45 (detailing exceptions to gaming prohibition on lands acquired after October 17, 1988); *see also supra* note 51 (acknowledging multiple land decisions by NIGC).

155. *See* 25 U.S.C. § 2719(b)(i)(B)(i)-(iii) (2000); Light & Rand, *supra* note 10, at 277 (detailing negative public sentiment over creation of tribes solely for gaming purposes).

156. *See supra* notes 119-121 (describing industry's response to need for tribal gaming development resources).

157. *Compare supra* note 50 and accompanying text (detailing purpose behind exceptions and relation of exceptions to congressional intent), *with supra* note 11 and accompanying text (detailing criticism of exceptions as exemplified in phrase "Casino Indian").

158. *See supra* notes 52-70 and accompanying text (noting NIGC considered request by Mechoopdas to conduct gaming on after-acquired lands); *see also* Staudenmaier, *supra* note 72, at 319 (noting slow expansion of gaming on after-acquired lands); Staudenmaier, *supra* note 73 and accompanying text (noting three such successful instances).

159. *Supra* notes 141-149 and accompanying text (criticizing geographically-based IGRA regulations placing too much power in states' hands).

160. *See supra* notes 51-70 and accompanying text (detailing complexities of Indian land determination process); *supra* notes 141-149 and accompanying text (noting problems inherent in IGRA-created state power of Indian gaming).

Perhaps the best option for states and tribes is off-reservation gaming, which is available with state and Department of the Interior approval.¹⁶¹ This form of gaming is permitted where the Secretary of the Interior determines that it is in the best interest of a tribe, that it would not be detrimental to the surrounding communities, and that state and local officials agree.¹⁶² This geographic model of gaming has several advantages.¹⁶³ Off-reservation gaming allows states maximum control over where casinos are located, irrespective of a tribe's lands.¹⁶⁴ It permits tribes to transfer their gaming rights to lands nearest target markets, a critical factor to Indian gaming success.¹⁶⁵ Although off-reservation gaming by the Penobscots met opposition in Maine, tribes and states should explore its potential for success and the NIGC should encourage it as a way to better balance tribal and states interests.¹⁶⁶

3. Seminole Tribe Reinforced Geography's Key Role in Indian Gaming

Seminole Tribe marked a step backward for tribes seeking to force states to accept Indian gaming, ratcheting up the significance of geography to gaming tribes.¹⁶⁷ If a tribe was located in a state that permitted Indian gaming, it was allowed.¹⁶⁸ If not, *Seminole Tribe* effectively ended tribes' ability to enforce IGRA against states, and refocused the Indian gaming debate on the state rather than federal level.¹⁶⁹ As a result of this new state power over Indian gaming, geography, more than anything else, now determines how much revenue Indian gaming operations take in and how much they pay to states in revenue-sharing agreements.¹⁷⁰

Seminole Tribe has spawned a whole new series of lawsuits rooted in land, including equal protection challenges by non-Indian gaming operators and tribes seeking to negotiate tribal-state compacts without land.¹⁷¹ *Match-E-Be-Nash-She-Wish v. Engler* held that no obligation existed under IGRA for a state

161. 25 U.S.C. § 2719(b)(1)(A) (2000).

162. *Id.*

163. See *infra* notes 164-165 and accompanying text (detailing positive aspects of off-reservation gaming).

164. 25 U.S.C. § 2719(b)(1)(A) (2000) (requiring local governmental permission to conduct off-reservation gaming).

165. See *supra* Part II.B.1 (describing role of geography in Indian gaming success).

166. See *supra* notes 75-78 and accompanying text (describing off-reservation Indian gaming battle in Southern Maine).

167. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *supra* notes 81-93 and accompanying text (analyzing how *Seminole Tribe* shifted balance of power to states in negotiations over Class III operations).

168. See *supra* note 84 (listing commentators reviewing practical effect of *Seminole Tribe*).

169. See *Seminole Tribe*, 517 U.S. at 53 (denying tribes right to sue states in federal court in order to enforce IGRA provisions); Washburn, *supra* note 74, at 296-99 (noting rise of state power in Indian gaming regulation).

170. See *supra* note 86 (providing examples of how state power impacts economic picture of tribal casinos).

171. See *supra* note 93 and accompanying text (citing example of cause of action created from interaction between land and holding in *Seminole Tribe*).

to negotiate with a landless tribe.¹⁷² Thus, recent case law has read *Seminole Tribe* together with IGRA to make land an absolute prerequisite to protection and redress under the Act in connection with lucrative Class III gaming.¹⁷³

B. Land Determines the Economic Success of a Tribal Gaming Facility

1. Economic Success

Geography is critical to the economic success of Indian gaming.¹⁷⁴ From a tribe's perspective, state prohibition or restriction on gaming creates the market, forming legal and geographic islands of gaming in otherwise gaming-free areas.¹⁷⁵ Because gaming is so prevalent in America, location drives consumption, with the most economically successful casinos traditionally located near major metropolitan areas.¹⁷⁶ The success of the East Coast or Pequot casinos overshadows the truth that many midwestern and western casinos, the Plains casinos, have failed to see the same explosive economic development.¹⁷⁷ Still, evidence of an overall increase in the standard of living of tribes on reservations since the advent of gaming cannot be discounted.¹⁷⁸ Tribes, states, and the federal government should jointly implement policies that consciously take into account the individual, geographically-influenced challenges facing gaming tribes.¹⁷⁹

2. Land Predicts Community Opposition to a Tribal Gaming Facility and Has Fed Tribal Identity Crisis

The same geography that leads to Indian gaming success also breeds contempt among residents opposed to tribal gaming in their states and communities.¹⁸⁰ States, themselves, walk an extremely precarious line as to gaming.¹⁸¹ Many prohibit or highly regulate many forms of gaming, particularly casino gaming.¹⁸² On the other hand, they often run their own

172. 304 F.3d 616, 618 (6th Cir. 2002).

173. *See id.*

174. *See supra* Part II.B.1 (reviewing geography's role in Indian gaming success); Haddock & Miller, *supra* note 98, at 187 (exploring link between geography and casino success).

175. *See* KALT, ET AL., *supra* note 97, at 2-3 (noting proposed revues for Massachusetts casino in light of prohibition of casino gaming in state).

176. *See* KALT, ET AL., *supra* note 97, at 4 (noting geographically-driven consumption pattern).

177. *See supra* notes 99-103 and accompanying text (analyzing "Pequot" versus "Plains" model).

178. *See supra* note 105 and accompanying text (comparing rise in tribal standard of living with overall change in standard of living in United States).

179. *See* Rand, *supra* note 6, at 82-85 (noting oversimplification of Indian gaming by media).

180. *See supra* notes 75-78 (describing concerns in Maine); *supra* notes 112 (describing concerns in Massachusetts).

181. *See* S. REP. NO. 100-446, at 36 (1988) (noting states allowing most gaming often most opposed to tribal gaming development).

182. *Id.* (explaining gaming not a moral issue because states, charities and even churches engage in it); *see*

large-scale gaming operations in the form of state-run lotteries.¹⁸³ States then criticize Indian gaming for not adhering to the restrictions on gaming that they themselves do not follow while simultaneously bemoaning the exporting of casino dollars to other states, where tribes operate casinos and reap the benefits of lucrative revenue-sharing agreements.¹⁸⁴ States also take exception to Indian casinos' competition with their lotteries.¹⁸⁵ If states improved their understanding of where and how Indian gaming can complement their economies, and more thoughtfully regulated their participation, both states and tribes could exploit these geographic ironies to their mutual economic benefit.¹⁸⁶

Whether Indian gaming is a successful economic and social policy remains an elusive and complex issue.¹⁸⁷ As discussed above, the economic success of Indian gaming varies greatly between tribes depending on their geography.¹⁸⁸ In some respects, tribes have suffered an identity crisis as a result of Indian gaming.¹⁸⁹ Media attention on Indian gaming has often portrayed tribes in a negative light, claiming they are driven only by pecuniary motives.¹⁹⁰ Indian gaming has spawned an industry that assists those seeking tribal recognition and the ability to game on specific lands, further diluting the meaning of being "Indian."¹⁹¹ Indian gaming supporters counter that recent history has tarnished the image of Indian lands as stricken with poverty, unemployment, alcoholism, and economic despair.¹⁹² Gaming has also brought increased attention to tribes and their histories, the best example being the National Indian Museum, the funding of which is defrayed by Indian gaming dollars.¹⁹³ The significance of land to modern tribes represents a synergy of these various sociological and economic factors, and tribes hold various opinions about the use of their

also Rick Alm, *Gambling Takes a Hit in This Week's Voting in Several States*, KANSAS CITY STAR, Nov. 4, 2004 (noting residents' concerns about gaming prompted rejection of gaming initiatives in states such as Florida, Michigan, California and Oklahoma).

183. KALT, ET AL., *supra* note 97, at 8-9 (discussing effect of proposed Indian casino of Massachusetts lottery).

184. KALT, ET AL., *supra* note 97, at 9 (noting net increase in total gaming revenue in states where casinos introduced); *id.* at 11-12 (noting potential in Massachusetts for recovery of additional infrastructure costs though reimbursement by gaming tribes).

185. KALT, ET AL., *supra* note 97, at 8-9 (discussing impact of Indian casinos on state lotteries); *see also supra* notes 111-112 and accompanying text (describing states' fear of competition).

186. KALT, ET AL., *supra* note 97, at 9 (noting total gaming revenues increase in states where casinos introduced).

187. *See supra* note 6 and accompanying text (referencing debate over Indian gaming as sound Indian policy).

188. *Supra* Part II.B.1 (noting varying economic success between Pequot and Plains tribes).

189. *See supra* Part II.B.2 (discussing Indian gaming challenges to tribal identity on several fronts).

190. *Supra* note 11 and accompanying text (detailing image of "Casino Indians").

191. *Supra* notes 119-121 (describing rise in use of experts to research tribal ancestry and land possession).

192. *Supra* note 116 (detailing often terrible conditions found on modern Indian reservation).

193. James Dao, *Drums and Bells Open Indian Museum*, N.Y. TIMES, Sep. 22, 2004, at A14 (noting disagreement among tribes over using Indian gaming revenue to help fund museum).

lands.¹⁹⁴ At its best, gaming can reestablish the image of tribes and their lands as both successful and sacred places if citizens and governments can make sense of these complex issues.¹⁹⁵

3. *Indian Gaming Has Brought New Visitors to Indian Lands, Resulting in Legal Consequences*

As Indian casinos bring huge numbers of non-tribal consumers onto tribal lands, a whole new area of law has emerged.¹⁹⁶ These new visitors are subject to a variety of unique phenomena, particularly in the areas of contract and tort.¹⁹⁷ Tribal land therefore touches on the interactions between members and other Americans, and legal fairness in these dealings will guarantee the future success or failure of Indian gaming.¹⁹⁸

4. *Land Defines Indian Gaming's Role in Gaming Industry*

Land has also played a central role in how Indian gaming fits into in the gaming industry.¹⁹⁹ Indian gaming's service of local and regional consumers has shifted gaming destinations, such as Las Vegas, from pure gaming towns to broader entertainment destinations.²⁰⁰ The servicing of target markets according to their geography will continue to drive gaming industry leaders and ultimately impact both consumers' gaming experiences and the industry's success.²⁰¹

IV. CONCLUSION

Indian gaming is a complex phenomenon that impacts tribes, states and the federal government. Land permeates the legal, economic and social issues created by Indian gaming and plays a key role in its existence, regulation, success, and controversy. Land is at the center of the legal discourse on Indian gaming.

Beginning in *Cabazon*, the Supreme Court recognized the sovereignty of a tribe on its lands as a fundamental right. That right is the legal basis for

194. *Id.* (explaining some tribes oppose gaming on Indian lands); *supra* note 117 and accompanying text (noting differences of opinion between tribes over use of Indian lands).

195. *See supra* note 105 and accompanying text (detailing economic data showing improved socio-economic conditions for tribes engaged in gaming).

196. *Supra* note 127 (highlighting development of Indian law as field of study).

197. *Supra* notes 124-127 and accompanying text (discussing legal impact of increased interaction between tribal members and non-members resulting from gaming).

198. *See supra* notes 124-127 and accompanying text (noting legal phenomena resulting from Indian gaming).

199. *Supra* notes 129-131 and accompanying text (discussing Indian gaming's role in gaming industry).

200. *See supra* note 129 (discussing broadening on gaming experience resulting from increased regional competition).

201. *See supra* note 131 (noting Indian gaming has not eclipsed but has impacted other gaming areas).

permitting Indian gaming on tribal lands. IGRA codified the use of land as a tool to regulate Indian gaming. For all classes of gaming, IGRA requires a tribe to look to the state in which the tribe's lands are located for many critical regulations. For tribes seeking to operate Class III gaming, IGRA further requires the negotiation of tribal-state compacts with home states. For tribes without gaming operations, analysis of their lands or potential land acquisitions against IGRA's rules and exceptions is crucial to predicting whether gaming may occur. A whole industry has sprung up to assist tribes in navigating IGRA's land requirements.

Seminole Tribe tested the balance of power between states and tribes located within their borders. The Court's holding that tribes could not sue states over tribal-state compacts in federal court solidified geography as the central practical concern for potential gaming tribes. Recent legal challenges to Indian gaming are tied frequently to land as a result of *Seminole Tribe*.

As fundamental as land is to the legal analysis of gaming, it also plays a significant role in the success or failure of a gaming facility. Geographic location of a tribe's lands is the primary predictor of tribal gaming success. The prevailing models of Indian gaming clearly separate the highly successful and moderately successful operations along geographic lines.

Ironically, the same reason why geography can make a gaming facility successful can also make it controversial. The location of a gaming facility determines its impact on cities and towns. A tribe often competes with a state's own gaming enterprises, like state-run lotteries, thus creating resentment against tribes that are seen as reducing state revenues. This resentment is shared by members of state business communities who depend on gaming dollars for their livelihood. The fact that a tribe's lands are located within the borders of a state that opposes or restricts gaming also allows a tribe to successfully create an island of gaming in an otherwise gaming-free zone, highlighting the paradox of Indian gaming success and controversy. Thus, Indian gaming success and controversy can be viewed as two sides of the same coin. Land has historically been very significant to the identities of tribes, and gaming represents a new attempt by tribes to change the image of reservation lands from poverty to plenty.

Tribal gaming on lands from coast to coast has also increased non-tribal member visits to tribal lands. This introduces a whole new dimension to Americans' impression of Native Americans, who are defined in the modern world by their casinos. This increased visitation has also raised questions about non-tribal members' rights in tort and contract when injured, either physically or economically, on tribal lands. These phenomena, along with an increased need for legal professionals to help tribes navigate the maze of complex regulations in order to start gaming operations, has resulted in the spread of gaming law specialists. The location of tribal casinos throughout the United States, serving regional customers eager to consume casinos' offerings, has

forced other segments of the gaming industry to redefine the gaming experiences they offer.

Land plays a key role in the legal, social and economic issues surrounding Indian gaming. Policy makers should carefully consider the variety of ways that land impacts Indian gaming and use this enhanced understanding to develop improved Indian gaming policy.

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