

## Indian Gaming on Newly Acquired Lands

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In 1988, Congress enacted the Indian Gaming Regulatory Act, commonly known as “IGRA,”<sup>1</sup> to provide a framework within which gambling on the lands of the American Indian nations can take place. The policies behind IGRA were several. Most important, Congress intended to improve the economic conditions, and thereby the political strength, of American Indian tribes and their members—“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.”<sup>2</sup>

To further economic development, Congress wanted Indian gaming to be protected, to some extent at least, by the federal government.<sup>3</sup> For one thing, it was thought necessary “to shield [Indian gaming] from organized crime and other corrupting influences,”<sup>4</sup> especially given the cash-intensive nature of gambling,<sup>5</sup> and the federal government has special responsibilities in that regard.<sup>6</sup> More generally, Congress concluded, “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 [were] necessary to meet congressional concerns regarding gaming.”<sup>7</sup>

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1. Pub. L. No. 100-497, 102 Stat. 467 (codified at 25 U.S.C. §§ 2701-21 (2006)).

2. 25 U.S.C. § 2702(1).

3. *See id.* § 2702(2).

4. *Id.*

5. *See Testimony on Regulation of Indian Gaming, Oversight Hearing on [NIGC] Minimum Control Standards: Hearing Before H. Comm. on Resources*, 109th Cong. 1 (2006) (testimony of Kevin K. Washburn, Associate Professor, University of Minnesota Law School), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1030926](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030926).

6. In 2003, the Federal Bureau of Investigation established the Indian Gaming Working Group, with representatives from seven other federal agencies. Federal Bureau of Investigation, Indian Country Crimes, <http://www.fbi.gov/aboutus/transformation/indian.htm> (last visited Apr. 6, 2008). Over sixty investigations have been initiated, focusing on “public corruption, money laundering, and Asian organized criminal activity.” *Id.*

7. 25 U.S.C. § 2702(3). The National Indian Gaming Commission has links to the Department of the Interior, and relies on Interior for support, but it is an independent regulatory commission. *See id.* §§ 2704-08; National Indian Gaming Commission, Frequently Asked Questions, <http://www.nigc.gov/AboutUs/FrequentlyAskedQuestions/tabid/57/Default.aspx> (last visited Apr. 6,

The gaming furthered is only that operated by “Indian tribes” on “Indian lands”; the meaning of those terms is critical in understanding IGRA. As we shall see, “Indian tribes” has a meaning that is as clear as one can hope for in a statute, and, in many cases, the meaning of “Indian lands” is similarly unambiguous. At its core, “Indian lands” includes reservations and other lands that, at the time of IGRA’s enactment in 1988, were held in trust by the United States for the benefit of American Indian nations.<sup>8</sup>

“Indian lands” includes much more than land that fit the definition in 1988, however, and that is the point of this essay. In particular, this essay addresses the extent to which lands that were not historically Indian lands might become sites for Indian gaming today. This issue has potentially far-reaching economic consequences—for tribes, of course, but for non-Indian populations, too, which can share in the benefits of tribal economic development. And the expansion of Indian gaming beyond the boundaries of Indian country can affect the way we think about American Indian nations: is Indian gaming on newly acquired lands really attributable to tribal sovereignty or is it just an old-fashioned business proposition?

Congress was not totally oblivious to the technical questions when IGRA was enacted. Congress intended that the concept of “Indian lands” not be time-bound—that newly acquired lands might be used for Indian gaming—and it so provided in IGRA. Indeed, it is possible for real estate having only the most tenuous historical connections with a tribe—perhaps having no connections at all—to become “Indian lands.” What, a skeptic might ask, does building a casino far from a tribe’s reservation have to do with “promoting . . . strong tribal governments?”<sup>9</sup>

To be sure, this is not to say that all land in the United States is, as a practical matter, potentially “Indian lands.” IGRA requires state cooperation in furthering Indian gaming, and, in those states unfriendly to gaming or unfriendly to Indian tribes, political considerations may prevent the theoretically possible from becoming the actual. But as traditional distaste for gaming lessens, as states’ need for revenue increases, and as Indian tribes become increasingly expert in working state political corridors, what is politically possible changes as well.

Part I of this essay discusses some of the background of Indian gaming, including IGRA’s history, purposes, and conceptual problems. Part II introduces some basic definitional issues, “Indian tribes” and “Indian lands,” and outlines the statutory classification of different types of gaming in IGRA. With that foundation, Part III focuses on the

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2008).

8. See 25 U.S.C. §§ 2703(4), 2719(a).

9. *Id.* § 2702(2).

real subject of this essay, the extent to which newly acquired lands can qualify as “Indian lands.”

### I. IGRA: THE BACKGROUND

To the casual observer, IGRA might seem like an anomaly. Why, of all imaginable forms of economic development, would Congress have picked gaming for special emphasis?<sup>10</sup> Casino gambling has nothing particularly Native American about it.<sup>11</sup> There is potential for criminal activity—as Congress recognized. And, if one of the goals underlying American Indian law and policy is to preserve distinctive cultures, it is beyond me—a more than casual observer—why Congress would take steps that might convert Indian tribes into nations of blackjack dealers.<sup>12</sup>

What I think does not matter very much, however, and federal support for Indian gaming came anyway. The most important reason supporting enactment of IGRA was that quite a few tribes were already engaged in gaming activity, and there had been unsettling litigation about the extent to which non-tribal governments, particularly states, could regulate gaming within reservation boundaries.<sup>13</sup> Regulatory predictability was needed, and that could come only through federal involvement.

Especially important to the timing of IGRA was *California v. Cabazon Band of Mission Indians*,<sup>14</sup> decided in 1987, in which the United States Supreme Court concluded that the state of California was pre-

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10. For that matter, why would Congress think it desirable to pick only one form of economic development, rather than to provide a smorgasbord of possibilities from which tribes could choose? Congressmen might question this point, I suppose, in that Congress has enacted many general statutes directed at economic development, and some that are aimed at particular forms, like mineral leasing. But gaming has an exalted status after the Indian Gaming Regulatory Act (IGRA).

11. *But see* Wendell George, *Observations from Tribal Leaders*, in INDIAN GAMING AND THE LAW 105, 108 (William R. Eadington ed., 1990) (“Within the Indian culture and the Indian community, gambling is more than a privilege. It is our culture, and it is our tradition. It is inherent in everything we do.”). George, chairman of the planning committee of the Colville Confederated Tribes, was waxing hyperbolic in linking casino gambling to traditional tribal cultures.

12. I understand that for most tribes the goal is something else: to generate income that will make it possible to preserve traditional ways. *See* KATHRYN R. L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 3 (2006) (quoting Oneida Indian Nation representative: “The casino is not a statement of who we are, but only a means to get us to where we want to be. We had tried poverty for 200 years, so we decided to try something else.”). But, whatever the goals of tribal fathers, it is hard to imagine that economic development generally, and this form of economic development in particular, will not affect traditional tribal life.

13. *See* 25 U.S.C. § 2701 (noting congressional findings that “numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue” and “existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands”); CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 423 n.44 (Clay Smith ed., 3d ed., 2004) (noting that a 1986 survey showed 108 gambling facilities on Indian lands). High-stakes Indian gaming can be traced to the 1960s and early 1970s. *See* Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. LEGIS. 39, 45 (2007); *see also* I. Nelson Rose, *The Indian Gaming Act and the Political Process*, in INDIAN GAMING AND THE LAW 3, 3 (William R. Eadington ed., 1990) (noting that in 1979 the Seminole Tribe won the right to run high-stakes bingo games without outside governmental regulation).

14. 480 U.S. 202 (1987).

empted from regulating gaming conducted by several bands of American Indians within the boundaries of their reservations.<sup>15</sup> Because it was a major tribal victory, *Cabazon Band* might have seemed to lessen the need for congressional intervention: if the Court says a state cannot regulate Indian gaming, what uncertainty is left?<sup>16</sup> Preemption analysis in American Indian law is particularistic in nature, however—balancing state interests against federal and tribal ones. Other states might have been able to demonstrate stronger interests than California did, or other tribes might not have been able to demonstrate interests as strong as the Cabazon Band's. A conclusion about gaming on Cabazon Band land thus did not necessarily say anything definitive about the regulatory power of other states, and uniformity in the way Indian gaming was handled was needed across the country, including California.

Because of the increased federal role resulting from IGRA, some tribal spokesmen criticized IGRA as an incursion on tribal prerogatives,<sup>17</sup> and academic commentators have agreed that, in important respects, IGRA compromises tribal sovereignty. For example, the new edition of *Cohen's Handbook of Federal Indian Law* states unequivocally that "IGRA constitutes a substantial infringement of the sovereign rights of tribes to be the exclusive regulators of gaming within the reservations."<sup>18</sup> If nothing else, IGRA has led many to assume that tribal power to operate gaming establishments derives from the federal government, rather than from inherent tribal sovereignty—a decided negative from a tribal standpoint.<sup>19</sup> Furthermore, the fact that "IGRA carved out a significant role for states,"<sup>20</sup> as the *Cohen Handbook* stresses—a marked change from the result in *Cabazon Band*—does not

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15. *Id.* at 214-22. The Court rejected another justification for state regulation as well. California is a "Public Law 280 state"—referring to a statute, enacted during an era when assimilation was the goal of federal Indian policy, that permits some states to exert criminal jurisdiction, and jurisdiction over civil causes of action, in Indian country. Act of Aug. 15, 1953, Pub. L. No. 83-280, 1953 U.S.C.A.N. (67 Stat.) 2409 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360). In *Bryan v. Itasca County*, 426 U.S. 373, 383-84 (1976), the Court had concluded that Congress had not authorized Public Law 280 states to exercise civil *regulatory* jurisdiction within Indian country. In *Cabazon Band*, the Court held that because California's gambling laws were regulatory rather than criminal in nature—California did not intend to *prohibit* gambling—Public Law 280 did not give California authority over Indian gaming. *Cabazon Band*, 480 U.S. at 210-14.

16. Under the federal plenary power doctrine, Congress presumably could have changed the preemption dynamic by specifically authorizing state regulation, but Congress had not done that. See Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 16-21 (2008) (discussing plenary power doctrine).

17. See, e.g., Eddie Tullis, *Observations from Tribal Leaders*, in INDIAN GAMING AND THE LAW 99, 99-100 (William R. Eadington ed., 1990) ("Some . . . see [IGRA as the] slicing away . . . of tribal sovereignty.")

18. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 864 (2005) (footnote omitted).

19. See STEVEN ANDREW LIGHT & KATHRYN R. L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 6-7 (2005) [hereinafter THE CASINO COMPROMISE] ("IGRA, frequently and wrongly identified as the source of tribes' right to open casinos, actually creates a set of limitations on tribal authority, compromising inherent tribal sovereignty.") (footnote omitted).

20. COHEN'S HANDBOOK, *supra* note 18, at 865.

make tribal proponents happy either.

IGRA was not intended to be anti-tribal, however, nor was it intended to be an act of federal aggrandizement. By clarifying the role to be played by various governments in Indian gaming, Congress hoped that, for the benefit of the tribes and their members, IGRA would put to rest disputes about who had what regulatory power.<sup>21</sup> The goal, obviously not fully realized, has been described as “encourag[ing] intersovereign cooperation.”<sup>22</sup> IGRA legitimized enterprises that might otherwise have been under a legal cloud: if you want people to come to Indian country to gamble, it is better to be able to advertise that everything is on the up-and-up.

All of this worked, at least from a financial standpoint.<sup>23</sup> Even when gaming has been successful, concerns remain, of course—the fragility of the economic benefits,<sup>24</sup> the less-than-full success in securing uniformity in regulation,<sup>25</sup> and the social effects of gaming on both Indian and non-Indian populations. But the tradeoff for a technical restriction on tribal power was a dramatic improvement in the prospects for Indian gaming. In 2005, more than 200 tribes were operating more than 350 gaming establishments in about thirty states,<sup>26</sup> and, in 2004, the Indian gaming industry nationwide was estimated to have had \$18.5 billion in gross revenue.<sup>27</sup> All of those numbers have presumably increased

21. Professor Rose has argued that the real concern motivating congressional action “was not that it was Indian gambling, but that it was gambling, period.” Rose, *supra* note 13, at 5.

22. AMERICAN INDIAN LAW DESKBOOK, *supra* note 13, at 416.

23. Sioux Harvey, *Winning the Sovereignty Jackpot: Indian Gaming Regulatory Act and the Struggle for Sovereignty*, in INDIAN GAMING: WHO WINS? 14, 15 (Angela Mullis & David Kamper eds., 2000) (“The passage of IGRA helped bring about an explosion in Indian-run casinos.”) Harvey argues that IGRA *furthered* tribal sovereignty, or at least tribal power, if only because of the economic benefits to tribes. *Id.* But see David Kamper, *Introduction: The Mimicry of Indian Gaming*, in INDIAN GAMING: WHO WINS? vii, vii (Angela Mullis & David Kamper eds., 2000) (“The restriction of Indian gaming hinders tribal economies.”).

24. For example, a state wishing to undercut Indian gaming could eliminate restrictions on gaming generally and thus undercut Indian gaming’s competitive advantages. See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 286 (2004) (“Indian gaming is profitable only because states have created and preserved state legal regimes that maintain the Indian tribes’ monopolistic power in the gaming market place.”). Professor Washburn discusses how many tribes have developed expertise in state politics. *Id.*

25. Professor Washburn notes that the level of state participation in regulation has varied dramatically across the nation; some states have been heavily involved while others have been no-shows. *Testimony*, *supra* note 5, at 1-2. Washburn also interestingly argues for a larger *federal* presence in securing *tribal* regulatory uniformity. For example, Washburn writes,

Each tribal regulator has a responsibility to his own tribe that makes him myopic as to the national interest of all Indian tribes. Federal regulators, on the other hand, can protect the integrity of the entire industry.

. . . .  
[A tribal regulator may lack the will to enforce the rules on his own tribe’s profitable casino, and he is] also more likely to succumb to “regulatory capture.”

*Id.* at 3-4.

26. THE CASINO COMPROMISE, *supra* note 19, at 8. All of these figures should be considered approximations. The National Indian Gaming Commission reports in 2008 that Indian gaming takes place in *twenty-eight* states. See Frequently Asked Questions, *supra* note 7.

27. See RAND & LIGHT, *supra* note 12, at 140 (citing National Indian Gaming Association data).

in the meantime.

By making IGRA potentially applicable to newly acquired lands, as discussed in Part III, the statute also expanded the universe of land over which a tribe might exert control, even if that control is not exclusive. In that respect as well, one might reasonably see IGRA as expanding, not contracting, tribal power. Indeed, non-Indian critics have complained about just that result: "I don't think Congress had any idea what it was doing. People were thinking in terms of on-reservation or near-reservation activity. I don't think people ever thought tribes would be using these legal technicalities to produce gambling operations hundreds of miles away."<sup>28</sup>

It is nevertheless true that the benefits of IGRA have not been spread evenly across Indian country. Some tribal gaming establishments have been enormously successful, most notably the Foxwoods Casino in Ledyard, Connecticut, established by the Mashantucket Pequots.<sup>29</sup> For tribes isolated from population centers and in difficult climates, however, IGRA has been of relatively little help. One of the assumptions behind IGRA was that non-Indian gamblers would come to Indian country to spend money, so that benefits to tribes would come not only from gaming revenue but also from expenditures for food, drink, and lodging.<sup>30</sup> But not many big-city, rich folks are voluntarily going to the Dakotas (or even Topeka, Kansas<sup>31</sup>) in February, especially if gaming alternatives are available closer. It is not that IGRA harms relatively isolated tribes—the Dakota tribes have profited from gaming<sup>32</sup>—and some economic improvement is better than none. The point, however, is that IGRA can have only limited effects in attracting gamblers to many parts of the country.<sup>33</sup>

A major change in recent years is the extent to which some state governments have become friendly to the idea of Indian gaming. Most states were initially hostile, at least insofar as it was assumed that Indian gaming would be exempt from state regulation,<sup>34</sup> and many remain so.

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28. Steven A. Light & Kathryn R. L. Rand, *Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin*, 5 GAMING L. REV. 351, 361 n.109 (2001) [hereinafter *Are All Bets Off?*] (quoting Pat Doyle, *Wisconsin Is Facing New Gambling Frontier*, MINNEAPOLIS STAR TRIB., Aug. 27, 2000).

29. See Andy Newman, *Raising the Ante*, N.Y. TIMES, Apr. 18, 2008, at F-1 (describing the grandiose MGM Grand at Foxwoods and similarly lavish construction occurring at the nearby Mohegan Sun complex). See generally KIM ISAAC EISLER, REVENGE OF THE PEQUOTS: HOW A SMALL NATIVE AMERICAN TRIBE CREATED THE WORLD'S MOST PROFITABLE CASINO (2001).

30. See *Are All Bets Off?*, *supra* note 28, at 352 ("As multifaceted tourist destinations, tribal casinos are magnets for diverse forms of economic development.")

31. I have been to Topeka in February, and it is a nice place. But I will do my gambling somewhere closer (or warmer) at that time of year, thank you very much.

32. At a minimum, a tribe can still draw gamblers from surrounding areas. See THE CASINO COMPROMISE, *supra* note 19, at 115-18.

33. See Washburn, *supra* note 24, at 293 ("Only a handful of tribes possess advantageous business locations."). But see *supra* note 26 and accompanying text (noting that an isolated tribe has opportunity to acquire land in more gambling-friendly environments).

34. See Kamper, *Introduction*, *supra* note 23, at viii ("The adverse responses to Indian gaming

But state governments are increasingly showing support for Indian gaming. California Governor Arnold Schwarzenegger, for a very important example, is “actively encouraging tribes to pursue the acquisition of trust land on which to open casinos.”<sup>35</sup> He is arguing, that is, not only for an expansion of gambling on already existing Indian lands, but also for the acquisition of *new* lands on which Indian gaming can occur.

The reason for the shift in policy is clear: money. Indian gaming can attract dollars, some of which might otherwise be spent elsewhere.<sup>36</sup> The revenues can be dramatic, and Indian gaming can benefit the non-Indian population as well as the Indians themselves. To begin with, the construction of gaming facilities is likely to help local vendors, contractors, and workmen.<sup>37</sup> Rand and Light have concluded that the economic benefits to non-Indian populations continue once things get going: “Tax revenue from non-tribal gambling and revenue sharing with tribes from Indian gaming now make up roughly one-tenth of the overall revenue collected in ten states.”<sup>38</sup> Tourism dollars are obviously important as well—attracting non-tribal members who spend on food, drink, and other amenities. And tribal gaming enterprises, and the businesses that feed on those enterprises, are large employers of non-members of the host tribes: “[N]ationwide 75 percent of the jobs created by Indian gaming are held by non-Indians.”<sup>39</sup> With numbers like that, and with the risks associated with gaming often ignored, furthering Indian gaming is increasingly seen as a win-win situation for states.

## II. INDIAN TRIBES, INDIAN LANDS, AND CLASSES OF GAMING: DEFINITIONAL ISSUES

To continue building the foundation for Part III’s discussion of the extent to which newly acquired lands can serve as sites for Indian gaming, this part of the article introduces some key terms in IGRA: Indian tribes, Indian lands, and the various classes of gaming.

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can be best understood by the menace that Indian high-stakes gaming poses to state governments.”).

35. RAND & LIGHT, *supra* note 12, at 164.

36. As Governor Schwarzenegger undoubtedly knows—indeed, this might be what he has in mind—gambling in Reno, Nevada, has declined substantially, presumably in part because of the pervasiveness of Indian gaming in California.

37. See *Are All Bets Off?*, *supra* note 28, at 354 (noting that, for a gaming site near Kenosha, “[t]he Menominee pledge to obtain most materials and labor from southern Wisconsin vendors and contractors”).

38. RAND & LIGHT, *supra* note 12, at 164. A state would not be able to impose an income tax either on a tribe or on tribal members who work in the casinos. See Jensen, *supra* note 16, at 64-68. But state taxes on the income of non-tribal employees and on those who succeed in gambling are permissible, as are state sales taxes on purchases by nonmembers of the tribe. For some tax implications of IGRA, see Scott A. Taylor, *Federal and State Income Taxation of Indian Gaming Revenues*, 5 GAMING L. REV. 383 (2001).

39. RAND & LIGHT, *supra* note 12, at 164.

### A. Indian Tribes

IGRA applies only to “Indian tribes,” which generally means federally “recognized” tribes. The term includes “any Indian tribe, band, nation, or other organized group” of Indians that is recognized by the Secretary of the Interior “as eligible . . . for the special programs and services provided by the United States to Indians because of their status as Indians,” and that is recognized as having powers of self-government.<sup>40</sup> Determining who should be recognized might not be easy, but the roster of recognized tribes is not subject to doubt. A list is maintained by the Bureau of Indian Affairs and periodically published in the *Federal Register*.<sup>41</sup> As Casey Stengel often said, “You can look it up.”<sup>42</sup>

This is not to say that the federal recognition process is admired. The process is complex and cumbersome, and it is often criticized for that reason: some legitimate tribes have not been recognized, it is argued, solely because of the difficulty—indeed sometimes the impossibility—of meeting regulatory requirements.<sup>43</sup> Whether the process is fair or not,<sup>44</sup> we know what tribes are included for IGRA purposes.

### B. Indian Lands

For an Indian tribe, so defined, the gaming governed by IGRA must take place on “Indian lands.”<sup>45</sup> The meaning of that term, discussed in more detail in Part III, is the heart of this essay, but in most cases the meaning, like that of “Indian tribes,” is not subject to significant doubt. The term “Indian lands” unquestionably includes land that, as of the date of IGRA’s enactment, was held in trust by the United States for the benefit of federally recognized tribes—specifically “all lands within the limits of any Indian reservation,” and “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

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40. 25 U.S.C. § 2703(5) (2006).

41. See, e.g., Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648-52 (Mar. 22, 2007).

42. PAUL DICKSON, *BASEBALL’S GREATEST QUOTATIONS* 427 (1992).

43. At the other extreme, some groups like the Mashantucket Pequot, whose legitimacy as “Indian tribes” might otherwise have been subject to doubt, have been able to avoid the regulatory recognition process by having Congress intervene. See *supra* note 29 and accompanying text.

44. The process is difficult in part because of legitimate concerns about fraud. If not for the recognition process, my family might declare itself a tribe and try to establish a casino in Shaker Heights, Ohio. Cf. Ivor Peterson, *Would-Be Tribes Entice Investors*, N.Y. TIMES, Mar. 29, 2004, at A1 (“It has become a ritual . . . : a group of people of American Indian heritage, eyeing potential gambling profits, band together and seek federal recognition as a tribe.”).

45. When IGRA was enacted, Internet gambling was not even a glint in a regulator’s eye. Would a server located within Indian country be on “Indian lands” for purposes of the statute?

an Indian tribe exercises governmental power.”<sup>46</sup>

To be sure, those concepts, like all legal concepts, are not free of ambiguity. For example, there might be questions about the boundaries of a particular reservation, and that uncertainty could be critical if an Indian tribe were seeking to establish gaming on land the status of which was questionable.<sup>47</sup>

Probably more important, questions can arise about whether a tribe “exercises governmental power” over particular land.<sup>48</sup> A tribe must be able to show not only that its governmental power exists in theory; it must also be able to demonstrate “concrete manifestations of that authority”<sup>49</sup>—that the tribe has really exercised its governmental power. For lands having a historical connection with a tribe, this requirement is unlikely to present serious problems. It is a peculiar standard to apply to newly acquired land, however, particularly if the land is separate from a tribe’s traditional territory—land that was not “Indian land” in 1988 and over which the tribe could not possibly have exercised governmental power in the past. In such a case, any exercise of tribal governmental power obviously can be prospective only. I shall return to that question in the discussion of newly acquired lands in Part III.

### *C. Classes of Gaming*

For enterprises conducted by “Indian tribes” on “Indian lands,” IGRA divides the universe of gaming into three classes, ranging from penny ante social games to the amusements for high rollers. It is the Class III category, the high stakes games, that the public thinks of when it thinks at all about Indian gaming. A brief description of the classification structure, as well as the particular requirements for Class III gaming, is in order.

Class I is the nickel-and-dime stuff—“social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or cele-

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46. 25 U.S.C. § 2703(4) (2006). “Restricted land” is “land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary [of the Interior] because of limitations contained in the conveyance instrument pursuant to Federal law.” 25 C.F.R. § 151.2 (2007).

47. *Cf.* *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358 (1998) (holding that Congress had intended to diminish a reservation and that, as a result, state approval was necessary to establish a landfill on the land at issue). And courts have occasionally had to determine whether a reservation that once existed has been terminated. *See, e.g., DeCouteau v. District County Court*, 420 U.S. 425, 427-28 (1975) (holding that Lake Traverse Reservation had been terminated by the Act of Mar. 3, 1891).

48. 25 U.S.C. § 2703(4). One might also question what the clause “and over which an Indian tribe exercises governmental power” was supposed to modify in 25 U.S.C. § 2703(4). I assume that it was intended to apply both to trust land and to restricted land although, if the incentives were right, I would be willing to argue to the contrary.

49. *Rhode Island v. Narragansett Tribe*, 19 F.3d 685, 702-03 (1st Cir. 2004); *see also Kansas v. United States*, 249 F.3d 1213, 1220 (10th Cir. 2001).

brations.”<sup>50</sup> Tribes have complete power to regulate Class I gaming on Indian lands<sup>51</sup> because—let us be blunt—no one else really cares.

Class II is a step up, or, depending on one’s views about these things, a step down, in the hierarchy. It generally includes bingo and certain non-banking card games. Under IGRA, Class II gaming is ordinarily within tribal control, but it is subject to some particular requirements inapplicable to Class I<sup>52</sup>—for example, that “Indian gaming [be] located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law).”<sup>53</sup> In addition, IGRA requires that net revenues from Class II gaming be used for appropriate tribal, charitable, or other governmental purposes.<sup>54</sup>

Class III gaming—the category that everyone cares about—encompasses all forms of gaming that do not fall within Classes I and II.<sup>55</sup> Most important for present purposes, that means high-stakes gambling. IGRA’s requirements for Class III gaming are much more stringent than those for the other two classes, although there is some overlap with Class II. These requirements include that the activity be authorized by a tribal ordinance that contains, among other things, the protections required for Class II gaming, such as restrictions on use of proceeds;<sup>56</sup> be “located in a [s]tate that permits such gaming for any purpose by any person, organization, or entity”;<sup>57</sup> and be “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State”<sup>58</sup>—a compact to be approved by the Secretary of the Interior and published in the *Federal Register*.<sup>59</sup>

The requirement that the state permit “such gaming for any purposes by any person, organization, or entity” in order for Class III gaming to occur on Indian lands might seem like a difficult hurdle in a state unfriendly to gaming, but it has generally turned out to be not much of a limitation.<sup>60</sup> One interpretive issue is what the term “such gaming”

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50. 25 U.S.C. § 2703(6).

51. *Id.* § 2710(a)(1).

52. *Id.* § 2710(a)(2).

53. *Id.* § 2710(b)(1); see *infra* notes 61-63 and accompanying text (discussing meaning of “such gaming”).

54. *Id.* § 2710(b)(2)(B). This means “(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.” *Id.*

55. *Id.* § 2703(8).

56. *Id.* § 2710(d)(1)(A). The gaming must be “authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (ii) meets the requirements [for ordinances governing Class II gaming], and (iii) [be] approved by the Chairman [of the Tribe].” *Id.*

57. *Id.* § 2710(d)(1)(B).

58. *Id.* § 2710(d)(1)(C).

59. *Id.* § 2710(d)(3)(B).

60. *Id.* § 2710(d)(1)(B).

means for these purposes. Suppose a state altogether prohibits a particular form of gaming—slot machines, for example—but it permits other forms of Class III gaming. Does the state permit “such gaming” or not? The general understanding among commentators—not always accepted by the courts—is that only if a state forbids all forms of Class III gaming would Class III Indian gaming automatically be forbidden as well.<sup>61</sup> If a state does forbid Class III gaming, it would have no obligation even to negotiate with a tribe on compact issues.<sup>62</sup>

Few states, however, are so restrictive. If churches, for example, are permitted to have gambling nights for fund-raising purposes, with roulette wheels spinning throughout the evening, that is almost certainly enough to indicate that the state permits “such gaming.” And if a state operates a lottery, which can involve very high stakes indeed, it is difficult for officials to argue with a straight face that gambling is contrary to that state’s public policy.<sup>63</sup>

The compact requirement is more likely to be a sticking point in creating a gaming enterprise. The tribe must request that the State enter into negotiations, and IGRA provides that the State is obligated to “negotiate with the Indian tribe in good faith to enter into such a compact.”<sup>64</sup> If a state really wants to resist Indian gaming, however, it is likely to throw roadblocks in the way: What, after all, does negotiating “in good faith” mean? You might be able to force someone to go through the motions of negotiating in good faith,<sup>65</sup> but how in the world can you force someone to “agree” to something?<sup>66</sup>

Nevertheless, there are clearly incentives to come to an agreement if a state is on board with the idea of Indian gaming, or if state officials simply view Indian gaming as inevitable. The subjects of the typical compact are things that, as a matter of routine, ought to be decided in

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61. See *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 275 (8th Cir. 1993); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1253-54 (9th Cir. 1994), *amended by* 99 F.3d 321 (1996). Indian law guru Judge William Canby, a commentator as well as jurist, dissented from a denial of rehearing en banc in *Rumsey*. See *Rumsey*, 64 F.3d at 1252-53 (emphasizing that the issue is not whether a state that permits some forms of Class III gaming must agree to any form of gaming proposed by a tribe, but whether the state has a duty to *negotiate*). The boundaries of permissible Class III gaming would be hammered out in the negotiation process. *Id.*

62. Even if state officials resist negotiating about Class III gaming issues, the recalcitrant officials may be repudiated by the state’s citizens, something that happened in California. See DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 735-36 (5th ed., 2005) (discussing California proposition that amended state constitution and effectively repudiated result in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 112 F. Supp. 2d 1185, 1185 (E.D. Cal. 2000)).

63. For example, the Ohio Constitution specifically permits state lotteries so long as the proceeds are used to support education. OHIO CONST. art. XV, § 6.

64. 25 U.S.C. § 2710(d)(3)(A).

65. Or you might not. Constitutional questions have arisen about what recourse a tribe has if state officials arguably have not negotiated in good faith. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacked power to abrogate state sovereign immunity, and the state was therefore immune from suit by tribe absent waiver of immunity).

66. If agreement cannot be reached, the burden will in theory be on the state to demonstrate that it negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). *But see Seminole Tribe of Florida*, 517 U.S. at 47. For a detailed criticism of the compact process, see Fletcher, *supra* note 13, at 45.

advance to minimize subsequent disputes such as criminal jurisdiction—how is peace going to be preserved on Indian lands?—revenue sharing between the state and the tribe—including respective state and tribal taxing powers associated with the gaming—and much more having to do with the respective roles of tribe and state.<sup>67</sup> If Indian gaming works from an economic standpoint, and everyone involved can benefit—or at least he, she, or it thinks that is the case—the incentives point toward agreeing on a compact.

### III. NEWLY ACQUIRED LANDS

Let us now (finally!) move to the real point of this essay.<sup>68</sup> We all understand, more or less, how these rules are supposed to operate to govern gaming on tribal lands of long standing—the reservations and other traditional trust lands. What scope does IGRA provide for Indian gaming on lands that are not associated with traditional tribal activity?

Many states, like my home state of Ohio, have no federally recognized tribes within their borders, but there are recognized tribes with historical connections to Ohio. Could any one of those tribes—the Wyandotte Tribe of Oklahoma, for example—acquire (or reacquire) land in Ohio, have the land placed in trust, negotiate a compact with the state, and take the other necessary steps to create a gaming enterprise? For that matter, is it possible that a tribe having no historical connection to a state might be able to establish a gaming enterprise within that state's boundaries? The answer to both questions is, as a technical legal matter (putting political considerations to the side for the moment): Yes.

When IGRA was enacted, the focus was on attracting investors and gamblers to existing Indian country, not on tribes possibly acquiring new land or reacquiring old land to facilitate the creation of gaming enterprises.<sup>69</sup> Indeed, as Rand and Light rightly note, “IGRA generally prohibits Class II and Class III gaming on Indian lands placed in trust after

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67. 25 U.S.C. § 2710(d)(3)(c). IGRA provides that a compact “may” govern, among other things,

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- ... [and]
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing.

*Id.*

68. I have tried, however, to sprinkle a few other “real” points throughout these pages.

69. *See supra* note 28 and accompanying text.

October 17, 1988 . . . .”<sup>70</sup>

IGRA is not silent on the later-acquired-lands issue, however; the “general” prohibition is not an absolute one. The statute provides for the possibility of Class III gaming on several categories of lands acquired, and placed in trust, after October 17, 1988<sup>71</sup>—lands I will refer to as “newly acquired lands.”<sup>72</sup>

#### A. *The Relatively Obvious Types of Newly Acquired Lands*

Some of the categories of eligible, newly acquired lands are so obvious that they might be seen as merely technical corrections to the general definition of “Indian lands.” Land newly placed in trust within the boundaries of, or contiguous to, an existing reservation qualifies,<sup>73</sup> as do lands newly acquired by a tribe that had no reservation on October 17, 1988, if the lands “are within the Indian tribe’s last recognized reservation within the State or States within which such Indian tribe is presently located.”<sup>74</sup> When such historically-connected property is placed in trust by the federal government, it will become “Indian land” for all practical purposes, and hardly anyone, other than those unwilling to accept IGRA to begin with, would question the propriety of such a designation as a conceptual matter.<sup>75</sup>

Some other categories of newly acquired lands are also relatively noncontroversial from a conceptual standpoint because they too have history behind them—land newly acquired that is placed in trust as a settlement of a land claim,<sup>76</sup> land that constitutes the initial reservation of a newly recognized tribe,<sup>77</sup> or land that is restored to a once termi-

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70. See RAND & LIGHT, *supra* note 12, at 39; 25 U.S.C. § 2719(a).

71. See 25 U.S.C. §§ 2719(a)-(b). IGRA provides for Class II gaming as well on newly acquired lands, but I will focus on Class III, the subject of greater popular interest. *Id.*

72. The term is used in 25 U.S.C. § 2719(b)(1)(A). See also M. MAUREEN MURPHY, CRS REPORT FOR CONGRESS, INDIAN GAMING REGULATORY ACT: GAMING ON NEWLY ACQUIRED LANDS (2007), available at <http://www.citizensalliance.org/Major%20Issues/Land%20Into%20Trust/IGRA-NewlyAcquired-Lands-RS21499.pdf>.

73. 25 U.S.C. § 2719(a)(1); see *Keweenaw Bay Indian Community v. United States*, 940 F. Supp. 1139, 1145 (W.D. Mich. 1996). The term “Indian lands” includes lands within reservation boundaries anyway. See 25 U.S.C. § 2703(5). But gaming may occur only if the land is placed in trust by the federal government. *Id.* § 2719(a).

74. 25 U.S.C. § 2719(a)(2)(B). For an Oklahoma tribe without a reservation as of that date, land may qualify if it is either “within the boundaries of the Indian tribe’s former reservation, as defined by the Secretary,” or is “contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma.” *Id.* § 2719(a)(2)(A).

75. In fact, under the statutory structure, neither of these possibilities is even described as an “exception” to the general rule that land not held in trust on October 17, 1988, is ineligible for Indian gaming. See *id.* § 2719(a). The “exceptions” are included in § 2719(b). Of course, to say that a designation makes sense conceptually will not prevent complaints about particular proposed gaming facilities.

76. *Id.* § 2719(b)(1)(B)(i); see *Gaming on Trust Lands Acquired After October 17, 1988*, 71 Fed. Reg. 58,769, 58,773 (Oct. 5, 2006) (to be codified at 25 C.F.R. pt. 292.5) (delineating how the Department of the Interior will interpret the “settlement of a land claim” exception, generally requiring that Congress must enact settlement into law before land can qualify).

77. 25 U.S.C. § 2719(b)(1)(B)(ii). In proposed regulations, the Department of the Interior has indicated that the “initial reservation” exception is satisfied only if, among other things, the tribe has

nated tribe whose federal recognition has been restored.<sup>78</sup>

The Department of the Interior's understanding of these various exceptions, as set out in proposed regulations issued in 2006, are set out in footnotes to this article. Suffice it to say for present purposes—for footnote-phobic readers—that all require, at least indirectly, demonstrating a strong link between the tribe and the land at issue, looking to factors like the current locations of a tribe's members and governmental headquarters and the extent of "historical and cultural connections" between the tribe and the land at issue.<sup>79</sup> With such factors likely to have controlling effect, who can object to the qualification of these lands as potential sites for Indian gaming? And because these provisions deal with circumstances that are exceptional, they are less likely to be of general public interest, no matter how important they can be for the particular tribes affected and for the communities near those tribes.<sup>80</sup>

### B. *The "Best-Interest" Exception: The Gorilla in the Closet*

We now move from the generally accepted to the controversial. The category of newly acquired lands most likely to have broad application—and most likely therefore to generate public discussion and, for some, dismay—comes into play if the Secretary of the Interior determines that a gaming establishment would be "in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community."<sup>81</sup> If the Secretary makes that so-called "two-part" or "Secretarial" determination,<sup>82</sup> and assuming the governor of the state in which the gaming would occur concurs with the Secretary's

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been recognized through the appropriate administrative process; a "majority of the tribe's members reside within 50 miles of the location of the land or the tribe's government headquarters are located within 25 miles of the location of the land"; and "[t]he land is located within an area where the tribe has significant historical and cultural connections." Gaming on Trust Lands, *supra* note 76 (to be codified at 25 C.F.R. pt. 292.6).

78. 25 U.S.C. § 2719(b)(1)(B)(iii); *see, e.g.*, *City of Roseville v. Norton*, 348 F. 3d 1020, 1032 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 974 (2004). Proposed regulations generally provide that if legislation restores a tribe, land will be treated as "restored lands" if the legislation requires or authorizes the Secretary to take land within a "specific geographic area" into trust. Gaming on Trust Lands, *supra* note 76 (to be codified at 25 C.F.R. pt. 292.11(a)). However, if no legislation establishes a particular geographic area for a reservation, for land to be "restored land," the restored tribe must have "a modern connection to the land and a significant historical connection to the land . . ." *Id.* (to be codified at 25 C.F.R. pt. 292.11(b)). To establish a sufficient connection to the land, a tribe must satisfy several criteria, including that "a majority of the tribe's members reside within 50 miles of the land or . . . the tribe's government headquarters are located within 25 miles of the land," and either "[t]he land is located within the boundaries of the tribe's last reservation reserved to the tribe by a ratified or unratified treaty; or . . . [t]he land is located in an area to which the tribe has significant documented historical connections." *Id.* (to be codified at 25 C.F.R. pt. 292.12).

79. *See supra* notes 76-78.

80. For the sake of completeness, I should note that IGRA also provides for special treatment of the land for the St. Croix Chippewa Indians of Wisconsin and the Miccosukee Tribe of Indians of Florida. 25 U.S.C. § 2719(b)(2).

81. *Id.* § 2719(b)(1)(A). *See generally* Heidi McNeil Staudenmaier, *Off-Reservation Native-American Gaming: An Examination of the Legal and Political Hurdles*, 4 NEV. L.J. 301 (2004).

82. *See* Gaming on Trust Lands, *supra* note 76 (to be codified at 25 C.F.R. pt. 292.2).

determination—the governor’s concurrence is an independent requirement for the exception to apply<sup>83</sup>—the newly acquired land can be eligible for Indian gaming.<sup>84</sup>

I will come back to this point after a discussion of the mechanics of the best-interest exception, but note that nothing in the exception requires any connection between the gaming site and the traditional lands of a tribe, or that the tribe and any gaming facility be in the same state. That is one of the reasons this exception is so potentially powerful, and so potentially controversial.

### 1. The Mechanics and the Considerations

The qualification process begins with a written request from a tribe.<sup>85</sup> Although the Secretary is supposed to do more than rubber stamp an application, much of the real grunt work must be done by the tribe in putting the application together. A carefully constructed application lays a foundation so that the later consultation conducted by the Regional Director of the Bureau of Indian Affairs<sup>86</sup>—acting on behalf of the Secretary—should uncover no surprises.<sup>87</sup> The information to be provided in the application is partly easy stuff—boilerplate items such as names, addresses, telephone numbers—and some relatively easy substantive information, like “[p]roof of identity of present ownership and title status of the land” and the “[d]istance of the land from the tribe’s reservation or trust lands, if any, and tribal government headquarters.”<sup>88</sup>

Most important, the application must include information that will make it possible to consider whether the “best interest of the tribe” test has been satisfied and whether there would be any serious “detrimental [impacts] to the surrounding community” if the project goes forward.<sup>89</sup> The application needs to outline the benefits, economic and otherwise, expected for the tribe and its members, and discuss such matters as the prospects for tribal employment and tourism benefits, the intended uses of projected income, the expected effects of the gaming on the relationship between the tribe and surrounding non-Indian communities, the

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83. 25 U.S.C. § 2719(b)(1)(A).

84. Assuming, that is, that all other statutory requirements have been satisfied as well, like having a state-tribal compact in place for Class III gaming, *see infra* notes 101-109 and accompanying text, and having the land placed into trust, *see infra* notes 103-110 and accompanying text.

85. Gaming on Trust Lands, *supra* note 76 (to be codified at 25 C.F.R. pt. 292.13) (setting out requirement that request be in writing); *id.* (to be codified at 25 C.F.R. pt. 292.14) (setting out that application must be filed with “Regional Director of the BIA Regional Office having responsibility over the land where the gaming establishment is to be located”).

86. *See id.* (to be codified at 25 C.F.R. pt. 292.14). The Regional Director will use “a Checklist for Gaming Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act,” most recently revised on March 7, 2005. *See id.* (Background section).

87. The application may be filed even if the land is not yet held in trust, as long as the tribe simultaneously applies to have the land placed in trust. *Id.* (to be codified at 25 C.F.R. pt. 292.15).

88. *Id.* (to be codified at 25 C.F.R. pt. 292.16).

89. *Id.*

anticipated management and financial arrangements to run the gaming enterprise, and the status of any tribal-state-compact negotiations.<sup>90</sup> Similarly detailed information must be provided about potential “detrimental impacts to the surrounding community,” such as environmental damage and effects on social structure and infrastructure—including problems from compulsive gambling. The application must also include “[a]ny other information that may provide a basis for a Secretarial [d]etermination that the gaming would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.”<sup>91</sup>

The tribal application is thus supposed to provide a substantial amount of information, but obviously an application cannot be conclusive. IGRA requires that the Secretary make the two-part determination only after consulting with the tribe and relevant state and local officials. The consultation, to be conducted by the Regional Director of the Bureau of Indian Affairs, is not a boots-on-the-pavement investigation, however; no one will be studying clues with magnifying glasses. The process is largely a matter of soliciting comments, via letter, from officials of the relevant state, localities, and Indian tribes in the “surrounding community”<sup>92</sup>—that is, local governments and the governments of any other Indian tribes located within a 25-mile radius of the proposed gaming establishment.<sup>93</sup> Twenty-five miles is not a particularly long distance, but for a metropolitan area consisting of many incorporated communities, the number of “local governments” could be substantial.

Although, as a formal matter, “local communities are statutorily powerless” in this procedure<sup>94</sup>—their role is only reactive, responding to the consultation inquiry—their input really is supposed to be taken into account, and a tribe whose application does not reflect steps already taken to do that is asking for trouble.<sup>95</sup> As the director of the Office of Indian Gaming Management in the Department of the Interior put it, “[T]he tribes that have done their homework show they’ve gained community support.”<sup>96</sup>

The Secretary’s favorable determination must be completed before the state’s governor is asked to weigh in definitively—although the gov-

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90. *Id.* (to be codified at 25 C.F.R. pt. 292.17).

91. *See id.* (to be codified at 25 C.F.R. pt. 292.18).

92. *See id.* (to be codified at 25 C.F.R. pts. 292.19-20) (describing how a consultation letter sent to appropriate officials must describe location, scope of gaming, and other relevant information, and must ask the respondents to comment on environmental, social, and economic impacts, and anything else that might be relevant).

93. *Id.* (to be codified at 25 C.F.R. pt. 292.2) (providing generally that a “nearby Indian tribe” is one that has “Indian lands” “within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe is landless, within a 25-mile radius of its government headquarters”).

94. Staudenmaier, *supra* note 81, at 310.

95. *See supra* note 91 and accompanying text.

96. Staudenmaier, *supra* note 81, at 310.

ernor, as a “state official,” should have been consulted along the way already. If the Secretary decides favorably, the Secretary will send the application request and associated materials to the governor.<sup>97</sup> At that point, the governor’s say is final.<sup>98</sup> If the governor declines the request, that is the end of it; the land may not be used for Indian gaming.<sup>99</sup> Legally the governor need provide no reasons to justify the decision, although political pressures might require doing so. Or if the governor does not respond at all within the prescribed period, the effect is that of a pocket veto: the land may not be used for Indian gaming.<sup>100</sup>

Those are the technical requirements for the best-interest exception itself, but one cannot forget the other IGRA requirements that also need to be satisfied.<sup>101</sup> For one thing, the lands must still constitute “Indian lands” in order for Class III gaming to be permissible, and, for that to be the case, the affected tribe must exercise governmental power over the land. As noted earlier, that is a somewhat anomalous requirement for land that is newly acquired—and newly acquired for business purposes at that<sup>102</sup>—but the requirement remains.

In addition, for the land to become “Indian lands,” it will have to be “placed in trust” by the federal government, itself a complex process, albeit one that can take place simultaneously with the two-part determination.<sup>103</sup> Although IGRA does not by itself provide any authority to take land into trust, the two-part determination and the trust process generally dovetail, with the Secretary of the Interior having to rule on both.<sup>104</sup> As set out in regulations,<sup>105</sup> augmented by an Office of Indian Gaming Management checklist specially prepared to deal with land-into-trust applications for gaming purposes,<sup>106</sup> and further complicated by an Interior Department “Guidance Memorandum” on off-reservation land issued in January 2008, to be discussed below,<sup>107</sup> the

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97. See Gaming on Trust Lands, *supra* note 76 (to be codified at 25 C.F.R. pt. 292.22).

98. See *id.* (to be codified at 25 C.F.R. pt. 292.22(b)).

99. *Id.* (to be codified at 25 C.F.R. pt. 292.22(b)(1)). However, if the land is already trust land or will become trust land, it may be used for other tribal purposes. *Id.* (to be codified at 25 C.F.R. pt. 292.22(b)(2)).

100. *Id.* (to be codified at 25 C.F.R. pt. 292.22(d)).

101. The exceptions I am discussing in this part of the article are to the general rule that lands that would otherwise constitute “Indian lands” cannot be sites for Indian gaming if they were acquired after October 17, 1988.

102. See *supra* notes 48–49 and accompanying text.

103. See *supra* notes 86–87 and accompanying text.

104. See Memorandum from Michael Rossetti et al., Indian Gaming Paper, 1, 7, 10–12 (Feb. 20, 2004), available at <http://www.indianz.com/docs/court/stcroix/paper022004.pdf> (internal Interior Department memorandum prepared to advise Secretary Norton about her authority to approve gaming on “far-flung lands”).

105. See, e.g., 25 C.F.R. § 151.11 (2007) (dealing with off-reservation acquisitions).

106. See Staudenmaier, *supra* note 81, at 303. For an example of an application to put land into trust for gaming purposes, filed with the Office of Indian Gaming Management, see COWLITZ INDIAN TRIBE, AMENDED FEE-TO-TRUST APPLICATION FOR 151.87-ACRE PARCEL IN CLARK COUNTY (2006), available at <http://www.doi.gov/bia/Cowlitz%20Indian%20Tribe%202006/Cowlitz%20Indian%20Tribe%202006.pdf>.

107. See Memorandum from Assistant Secretary Carl Artman to Regional Directors (Guidance

process is not supposed to be easy. A lot remains at stake.<sup>108</sup> From the standpoint of non-tribal governments, for example, having land put into trust can result in loss of taxing and zoning powers.

Finally, do not forget that, for Class III gaming to occur, a compact will have to be agreed upon by the tribe and the host state, just as would be necessary for gaming to occur on more traditional tribal lands.<sup>109</sup> One might expect the details of a compact to have been worked out before the application for the two-part determination is filed or, at a minimum, that the negotiation process be fairly far along.<sup>110</sup> In any event, the compact will have to be completed and approved by the Secretary of the Interior before Class III gaming can commence.<sup>111</sup>

## 2. Newly Acquired Land and Traditional Tribal Activities

Under the best-interest exception, there is no legal requirement that a historical connection exist between the proposed gaming site and tribal lands. Political considerations might point in that direction in many cases, but the law does not require it.<sup>112</sup>

IGRA does not hint at any such requirement, nor do proposed regulations issued in late 2006. Indeed, the contrast between the regulatory language governing the best-interest exception and the language applicable to the other types of newly acquired lands is stark. For restored lands, for example, the proposals specifically require such a connection. Indeed, the idea might be considered to be inherent in the concept of “restored lands.” Essentially, the proposed regulations require, in the absence of restoration legislation, that the tribe have modern connections to the land and historical connections to the area where the land is located.<sup>113</sup> Similarly, the “initial reservation” exception requires that “the land [be] located within an area where the tribe has significant historical and cultural connections,” and that a “majority of the tribe’s members reside within 50 miles of the location of the land or the tribe’s government headquarters are located within 25 miles of the location of

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Memorandum), Bureau of Indian Affairs & George Skibine, Office of Indian Gaming (Jan. 3, 2008).

108. See Staudenmaier, *supra* note 81, at 301-02. Where off-reservation land is proposed to be placed in trust, and where the land “is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.” 25 C.F.R. § 151.11(d).

109. See *supra* notes 64-67 and accompanying text. It is not supposed to be possible to circumvent these requirements by simply extending an already existing compact to newly acquired lands. See COHEN’S HANDBOOK, *supra* note 18, at 871. The newly acquired lands will have to be the subject of a new compact. See *id.*

110. See *supra* note 90 and accompanying text.

111. Gaming on Trust Lands, *supra* note 76 (to be codified 25 C.F.R. pt. 292.13).

112. The National Indian Gaming Commission specifically states on its website that “IGRA does not require that a tribe operate a casino within the borders of the state in which the tribe is based.” Frequently Asked Questions, *supra* note 7.

113. See *supra* notes 76-78.

the land.”<sup>114</sup>

For the best-interest exception, the proposed regulations do require that a tribe’s application provide information about the “[d]istance of the land from the location where the tribe maintains core governmental functions” and “[e]vidence of historical connections, if any, to the land.”<sup>115</sup> Those factors thus may be taken into account—the closer the connection, the stronger the case for tribal interests, one assumes—but they are not determinative. Indeed, the phrase “if any” in the quoted language makes my point: no such relationship need exist. In theory at least, land hundreds, possibly thousands, of miles away from traditional tribal lands can be a site for a tribe’s gaming facility.

Of course, general theory will often give way to practical, political considerations. For example, one would think that, all other things being equal, a state governor, who must concur in the process, will be more sympathetic to a tribe with historical connections to a state than to other tribes. And a state’s willingness to negotiate a tribal-state compact might be strengthened by historical connections as well.

Furthermore, the federal government plays a role in the process, in making the two-part determination, in approving any tribal-state compact, and in taking the land into trust. The Secretary of the Interior might be expected to have her own views on gaming establishments far from a tribe’s home base. For example, the first Secretary in the second Bush administration, Gale Norton, expressed concern that “tribes are increasingly seeking to develop gaming facilities in areas far from their reservations.”<sup>116</sup> Such a concern can obviously affect the Interior Department’s level of enthusiasm about a particular proposal involving newly acquired lands.

The rules dealing with taking land into trust become especially relevant for this purpose;<sup>117</sup> indeed, the land-into-trust criteria have become the new battleground for fights about off-reservation gaming. Among other things, the relevant regulations require that the Secretary consider “[t]he location of the land relative to state boundaries, and its distance from the boundaries of the tribe’s reservation” in the following way: “[A]s the distance between the tribe’s reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition.”<sup>118</sup> And

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114. Gaming on Trust Lands, *supra* note 76 (to be codified at 25 C.F.R. pt. 292.6); *see supra* notes 76-77.

115. *See* Gaming on Trust Lands, *supra* note 76 (to be codified at 25 C.F.R. pt. 292.17).

116. Staudenmaier, *supra* note 81, at 311. The memorandum authored by Michael Rossetti and others, *see supra* note 104, was prepared for Secretary Norton to provide guidance about the limits of her discretion in dealing with “far-flung lands,” both with respect to the two-part determinations and the trust process.

117. Staudenmaier describes the checklist used by the Office of Indian Gaming Management for these purposes. *See* Staudenmaier, *supra* note 81, at 303-04.

118. 25 C.F.R. § 151.11(b); *see* COHEN’S HANDBOOK, *supra* note 18, at 1011-12.

the greater the distance from traditional tribal lands, the greater the weight the Secretary is to give to concerns raised by affected state and local governments.<sup>119</sup>

Until recently, however, and despite the regulatory language, distance did not seem to be a significant concern for the Department of the Interior. In 2004, in the so-called Indian Gaming Paper, an internal Interior memorandum, advisors to the Secretary saw few reasons to evaluate off-reservation trust applications with any heightened skepticism. Noting that the legislative history about gaming on lands far from traditional Indian lands was “scant,”<sup>120</sup> the advisors emphasized that “it is certain that if Congress had intended to limit Indian gaming on lands within established reservation boundaries or even within a specified distance from a reservation, it would have done so expressly within IGRA. It clearly did not.”<sup>121</sup> The bottom line in 2004 was that “[n]either IGRA nor the [Indian Reorganization Act of 1934] evince Congressional intent to prohibit off-reservation gaming or to limit it to close proximity to existing reservation lands,”<sup>122</sup> that “nowhere in the law does Congress purport to limit the exercise of that authority to lands within a fixed distance from an existing reservation,”<sup>123</sup> and that the Secretary should exercise her discretion accordingly.

The apparently friendly regulatory environment spawned a number of land-into-trust applications, numbering thirty by early 2008.<sup>124</sup> To this point, only three tribes have successfully taken advantage of the best-interest exception,<sup>125</sup> but more applications are in the pipeline.<sup>126</sup> Interior’s friendliness has recently turned into skepticism, if not hostility, however. In a January 2008 memorandum (often called the Guidance Memorandum) intended to guide the approval process, Assistant Secretary of the Interior Carl Artman decreed that applications to take land into trust should be reviewed using a “commutable distance” standard.<sup>127</sup> If the gaming facility is more than a commutable distance from a reservation, the less likely it is that “job training and employment of tribal members” will be available, and the more likely it is that those tribal members who are able to work at the facility will have to “leave

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119. 25 C.F.R. § 151.11(b).

120. Memorandum from Michael Rossetti et al., *supra* note 104, at 3.

121. *Id.* at 6; *see id.* at 13 (“[A] plain reading of IGRA and its very purpose support[] the conclusion that off-reservation gaming is clearly contemplated by the law.”).

122. *Id.* at 13.

123. *Id.* at 8.

124. *See* Memorandum from Assistant Secretary Carl Artman, *supra* note 107, at 1.

125. *See* RAND & LIGHT, *supra* note 12, at 39 n.19. The three are the Keweenaw Bay Indian Community of the Lake Superior Band of Chippewa Indians, which has a casino outside Marquette, Michigan; the Forest County Potawatomi, who have a casino in Milwaukee, Wisconsin; and the Kalispell Tribe, with a casino in Airway Heights, Washington. *Id.*

126. *See id.*

127. *See* Memorandum from Assistant Secretary Carl Artman, *supra* note 107, at 3.

the reservation for an extended period,”<sup>128</sup> with negative effects on the tribe. Therefore, “as a general principle, the farther the economic enterprise . . . is from the reservation, the greater the potential for significant negative consequences on reservation life.”<sup>129</sup> Assistant Secretary Artman was later quoted as indicating that most off-reservation land now being taken into trust, applying the “commutable distance” standard, is within forty miles of the relevant reservation.<sup>130</sup>

The Guidance Memorandum has been soundly criticized by tribes and commentators as inconsistent with IGRA and with good sense,<sup>131</sup> but it is clearly having enormous impact in the short run.<sup>132</sup> This may be a blip on the historical time-line, however; in fact, I would expect that to be the case. Given the potential economic benefits of Indian gaming, to non-Indian populations as well as to affected tribes, it is not at all inconceivable that the best-interest standard, and the associated land-into-trust requirements, could be met often in the future.

If a tribe, any tribe, is willing to participate in a proposal for economic development, it will be hard for officials in economically depressed areas to resist. If concerns about crime and the social effects of gambling can be dealt with, who really cares who is responsible for the creation and operation of a casino? For the person standing at the slot machine, the ownership of the establishment may well be a mystery—and a matter of indifference.

Political roadblocks to Indian gaming have certainly been overcome in the past. In a fascinating case study, Professors Light and Rand describe the complex interplay of political and legal forces—with strong local, non-Indian support because of potential economic benefits—in a project of the Menominee Indian Tribe of Wisconsin to create a gaming facility on an abandoned greyhound race track site in Kenosha, Wisconsin, off Interstate 94 between Milwaukee and Chicago.<sup>133</sup> The facility is not yet completed, but it is apparently still moving along.<sup>134</sup>

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128. *Id.* at 4.

129. *Id.* at 3.

130. See Altman Suggests Mileage Limit for Off-Reservation Land, Indianz.com, <http://www.indianz.com/News/2008/007378.asp> (last visited April 6, 2008).

131. See, e.g., Jerry Reynolds, *Interior Guidance on Land into Trust Meets with Derision*, INDIAN COUNTRY TODAY, Mar. 7, 2008, <http://www.indiancountry.com/content.cfm?id=1096416765&print=yes>. For a comprehensive criticism of the Guidance Memorandum, see generally *Testimony on the Department of the Interior's New Policy on Off-Reservation Acquisitions of Land in Trust for Indian Gaming, before the United States House of Representatives Natural Resources Committee*, 110th Cong. (2008) (testimony of Kevin K. Washburn, Professor, University of Minnesota Law School), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1097393](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097393).

132. See, e.g., John Jordan, *St. Regis Mohawks Complain to Congress*, GLOBEST.COM, Mar. 3, 2008, [http://www.globest.com/news/1105\\_1105/westchester/168711-1.html?type=pf](http://www.globest.com/news/1105_1105/westchester/168711-1.html?type=pf) (noting rejection of trust application the day after the Guidance Memorandum was issued).

133. *Are All Bets Off?*, *supra* note 28, at 353-54.

134. See Press Release, Menominee Indian Tribe of Wisconsin, Menominee Tribe to BIA: We're Moving Forward in Kenosha (Mar. 12, 2007), available at <http://www.menominee-nsn.gov/kenosha/pdf/casonResponse-031207.pdf>.

And more, I suspect, are yet to come.

#### IV. CONCLUSION

Whether one approves of IGRA or not, one can understand what the core of the Act was supposed to be about. How the best-interest exception fits into a reasonable conception of tribal sovereignty is not at all clear, however. The discussions in the literature about IGRA's effects on sovereignty, which were quite common in IGRA's early years, had little or nothing to do with this particular type of newly acquired lands.<sup>135</sup>

On the one hand, the economic benefits of Indian gaming should strengthen tribal governments, and a strong government is good for sovereignty. To be sovereign is not to be all-powerful, of course, but it is hard to divorce the concept of sovereignty from power. On the other hand, the "Indian lands" involved with the best-interest exception might have no relationship to a tribe's historical lands, and land that has been acquired primarily for Indian gaming is unlikely to have anything distinctively Native American about it.

Yes, the tribe will be obligated to exercise "governmental power" if the land is to be "Indian land," but let us be realistic. The gaming establishment is likely to be "Indian" more in name than in reality. The creation of a tribal casino far from tribal lands is more in the nature of a business deal—with distinctive aspects to be sure—than it is a sovereign act, and the benefits and detriments are likely to accrue to surrounding communities as much as to the "host" tribe. It is a way for gaming to be used as a means of economic development, with the federal government's imprimatur, for localities that might otherwise have no American Indian presence at all.

On the other, other hand—a lot of hands are necessary here—separating the gaming establishment from traditional tribal lands might have a salutary long-term effect on a participating tribe. For those concerned about how gaming can erode traditional tribal values—I count myself in that number—this separation has a lot to be said for it.<sup>136</sup> Indeed, Professor Washburn has persuasively argued that those in the Department of the Interior who claim to be worried about negative effects on tribes of off-reservation gaming, where relatively few tribal members are likely to be employed, have gotten the analysis backwards. The tribal interest in gaming is bringing revenue to tribal lands, not in gaming per se—and certainly not in corrupting tribal culture with a gaming presence: "[T]o Indian communities, the most positive aspect of casinos

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135. See *supra* notes 17-22 and accompanying text.

136. But—I need more hands!—that point illustrates the tenuous connection that gaming of this sort has with anything distinctively Native American.

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is the revenues that they provide. . . . [I]n some ways, the ideal Indian gaming operation is one that is outside the reservation. Off-reservation casinos can provide all the revenue benefits of Indian gaming without the corresponding interference with tribal life.”<sup>137</sup>

The lack of any direct connection between the newly acquired lands and the rest of tribal lands also provides the possibility for relatively isolated tribes, which cannot expect to attract many gamblers to their traditional lands,<sup>138</sup> to participate more fully in Indian gaming—assuming they can exercise “governmental power” in some meaningful sense over newly acquired lands far away—and thus to get a bigger share of the gambling pie. That too is a potentially major benefit to American Indian nations from the best-interest exception.

Perhaps it is too much to expect conceptual clarity here. Indian gaming on newly acquired lands has both pluses and minuses, and trying to understand those pluses and minuses is the most a humble<sup>139</sup> law professor can hope for. This article is in a law journal, but whether Indian gaming will proceed under the best-interest exception is not only, and maybe not even primarily, a matter of legal doctrine. The gaming will happen if the parties affected want it to happen.

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137. *Testimony on Department of the Interior's New Policy*, *supra* note 131, at 4.

138. *See supra* notes 26-33 and accompanying text; *see also* Memorandum from Michael Rossetti et al., *supra* note 104, at 13 (“[I]f IGRA was intended to spur on-reservation economic development only—or lands that are so close that for all intents and purposes they are on-reservation—the purpose of the law would fail because existing isolated reservation lands would not provide the potential of the law.”).

139. And sometimes not so humble.