


1-1-2005

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Recommended Citation

Katie Eidson, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319 (2005),
<https://digitalcommons.law.ou.edu/air/vol29/iss2/4>

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WILL STATES CONTINUE TO PROVIDE EXCLUSIVITY IN TRIBAL GAMING COMPACTS OR WILL TRIBES BUST ON THE HAND OF THE STATE IN ORDER TO EXPAND INDIAN GAMING

Katie Eidson*

I. Introduction

The Indian gaming industry has hit the ground running since Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988.¹ Today, tribal gaming operations in Oklahoma have grown to comprise the “largest number of Indian gaming operations in the country.”² For this reason, the National Indian Gaming Commission (NIGC) has centered its “enforcement activity in recent years” in the Heartland.³ The focus of this activity is geared toward “determining what sort of gaming was permissible without tribal-state gaming compacts, and Class III gaming which is only permitted under compacted arrangements.”⁴ To address this issue, the Oklahoma Legislature passed Senate Bill 553, authored by Senator President Pro-Tempore Cal Hobson, titled, the State-Tribal Gaming Act (Act) which Governor Brad Henry signed in March 2004.⁵ The Act received much opposition, and through the impetus of a referendum, combatants rallied for a statewide vote.⁶ The Legislature amended portions of Senate Bill 553 and

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The author would like to dedicate this article to Joy and Wayne Eidson for their unconditional love, guidance, and support, and to her best friend for life, Jay Griffen.

1. 25 U.S.C. §§ 2701-2721 (2000); see *Oversight Hearing on the Indian Regulatory Act Before the Senate Committee on Indian Affairs*, 107th Cong. 64 (2001) [hereinafter *Oversight Hearing*] (statement of Montie R. Deer, Chairman, National Indian Gaming Commission) (footnote omitted).

2. Nat'l Indian Gaming Comm'n, *Chairman Hogan Addresses Oklahoma Legislators*, at <http://www.nigc.gov/nigc/documents/releases/okla-legislators.jsp> (Jan. 29, 2004).

3. *Id.*

4. *Id.*

5. OKLA. HOUSE OF REPRESENTATIVES RESEARCH DIV., *SESSION HIGHLIGHTS 2004*, at 7 (Nancy Marshment ed., 2004), available at <http://www.lsb.state.ok.us/house/2004%20Session%20Highlights.pdf> [hereinafter *SESSION HIGHLIGHTS*] (last visited Oct. 12, 2004).

6. *Id.*

proposed a newly drafted version as Senate Bill 1252.⁷ Senate Bill 1252 was presented to voters on November 2, 2004, as State Question 712.⁸

State Question 712 passed with 59.47% approval.⁹ Many of the “large[r] tribes such as the Chickasaw, Choctaw and Cherokee nations spent” large sums of money in an effort to pass State Question 712.¹⁰ These tribes support the legislation and its potential to “stabilize the state’s growing gaming industry.”¹¹ By passing State Question 712 Oklahoma expects to receive \$71 million for state education. The tribes endure this loss of revenue as an opportunity to provide electronic gaming.¹²

The purpose of the Act is to provide for the cooperative formation of a state compact with federally recognized Indian tribes on tribal lands.¹³ The compact provides that Indian tribes must enter into compacts with the State before receiving the authority to operate Class III gaming on their lands, while simultaneously providing for a means of state regulation.¹⁴ Governor Brad Henry stated that the act “does not expand gaming but allows . . . [Oklahoma] for the first time in history to share in . . . [gaming] revenues.”¹⁵

Profit sharing of tribal gaming takes place through exclusivity provisions that allow the State to reap the benefits of the lucrative gaming industry.¹⁶ The revenue sharing provisions within the Act are not means to “limit the tribe’s right to operate any game that is Class II under IGRA and no Class II game shall be subject to the exclusivity payments set forth . . . [in] this Compact.”¹⁷ In fact, the provisions provide that an Indian tribe “covenants and agrees to pay to the state a fee derived from . . . [Class III gaming]” provided for in the statute.¹⁸ The revenue accrued will benefit the Oklahoma Higher Learning Access Fund and the

7. *Id.*

8. Marie Price, *Groups Stake Out Positions on Issues*, TULSA WORLD, Sept. 26, 2004, at A1.

9. General Election Results (Nov. 2, 2004), at <http://www.state.ok.us/~elections/04gen.html>.

10. *Tribal State Gaming Compact Approved in Oklahoma*, INDIANZ.COM, Nov. 3, 2004, at <http://www.indianz.com/IndianGaming/2004/005143.asp?print=1>.

11. *Id.*

12. *Id.*

13. State-Tribal Gaming Act, 3A OKLA. STAT. ANN. § 281 (West 2005).

14. *Racetrack Gaming Proposition*, SUNDAY OKLAHOMAN, June 13, 2004, at 12A.

15. Rob Martindale, *Governor Stumps for State Questions*, TULSA WORLD, Aug. 18, 2004, at A9.

16. Marie Price, *Tribal Gaming Facing a New Deal*, TULSA WORLD, May 25, 2003, at A1; see State-Tribal Gaming Act, 3A OKLA. STAT., § 281.

17. State-Tribal Gaming Act, 3A OKLA. STAT. § 281.

18. *Id.*

Education Reform Revolving Fund.¹⁹ These provisions are ones of substantial exclusivity.²⁰ In essence, the result of substantial exclusivity provides Indian tribes the substantially exclusive right to operate Class III gaming, provided that they contribute a certain portion of their revenues to the state.²¹

This note analyzes the Oklahoma State-Tribal Gaming Act with the development of other state compacts. Practitioners and those focusing on gaming regulatory measures will gain insight on the future direction of the substantial exclusivity provision and its effect. This note addresses the progression from substantial exclusivity to limited exclusivity provisions in light of the divergence from total exclusivity provisions in state tribal-gaming compacts.

This note will provide a historical analysis into the background of the IGRA. Within the analysis of the IGRA in part II, there will be a discussion of the distinction between the different classes of gaming, focusing on Class III gaming. Part III analyzes the states equivalent of a tax created by way of revenue sharing. This section also addresses the migration toward the provisions of substantial exclusivity as bargaining power in Class III gaming compacts along with concerns raised in regard to these revenue sharing provisions. Part IV discusses the meaning of exclusivity, followed by an examination of states' revenue sharing provisions created within states' tribal gaming compacts. While analyzing a majority of the states' revenue sharing agreements, this note will also incorporate concerns expressed with regard to those particular states. Part V will discuss George Skibine's statements on revenue agreements. This note concludes with a discussion and evaluation of the future of exclusivity provisions within state tribal gaming compacts.

II. Indian Gaming Regulatory Act — IGRA

A. Landmark Decision of *California v. Cabazon Band of Mission Indians*

The Supreme Court of the United States set forth the foundation for the gaming industry in the key decision of *California v. Cabazon Band of Mission Indians*.²² In *Cabazon*, the Court held that Indian tribes have the right to conduct gaming activities on reservation land without regulation by state or local authorities.²³ In *Cabazon*, California sought to disallow certain types of Indian gaming and to place laws on Indian tribes located on the Cabazon Band

19. SESSION HIGHLIGHTS, *supra* note 5.

20. State-Tribal Gaming Act, 3A OKLA. STAT., § 281, (West 2005).

21. *Id.*

22. 480 U.S. 202 (1987).

23. *Id.* at 221-22.

reservation.²⁴ However, California is a Public Law 280 state, which means enforcement of its criminal laws extends to Indians in Indian Country.²⁵ Public Law 280 does not impose the state's regulatory and civil laws upon Indians in Indian Country.²⁶

The overriding factor in *Cabazon* was whether California's law regulated or prohibited certain types of gaming operations in the state.²⁷ The Court reached its decision on the basis that "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery . . . that California regulates rather than prohibits gambling." California's endeavor to regulate gaming on the Cabazon Band reservation was civil/regulatory in nature, and thus not permitted.²⁸

B. Enactment and Purpose

The *Cabazon* decision played a major role in shaping the future of Indian Gaming by finding that states where gaming is not criminally prohibited possess no authority to regulate such gaming.²⁹ Therefore, Congress provided the only means of relief for states in dealing with gaming regulation where it was not criminally prohibited. Due to the influx of state regulation requests to the legislature, Congress enacted the Indian Gaming Regulatory Act of 1988.³⁰ This posed a "legislative limitation to the tribal power recognized in . . . *Cabazon*."³¹

Under IGRA, Congress established the National Indian Gaming Commission.³² The purpose of the Commission is set forth in three primary objectives.³³ It is the Commission's intention to regulate Indian gaming, to guard it against corruption, to ensure that the benefit from Indian gaming focuses first

24. *Id.* at 202.

25. *Id.* at 209; see Pub. L. No. 280, 28 U.S.C. § 1360 (2000).

26. *Cabazon*, 480 U.S. at 209 ("[I]f the state law generally permits conduct at issue, subject to regulation, it must be classified as "civil/regulatory" and Public Law 280 does not authorize its enforcement on an Indian reservation.").

27. *Id.* at 202.

28. *Id.* at 211.

29. Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 428 (2001); see *Cabazon*, 480 U.S. at 202.

30. 25 U.S.C. §§ 2701-2721 (2000).

31. Washburn, *supra* note 29, at 428.

32. 25 U.S.C. § 2704.

33. *Id.* § 2702; Nat'l Indian Gaming Comm'n, Statement of Priorities, at [http://ciir.cs.umass.edu/ua/October2001/regplan/NATIONAL_INDIAN_GAMING_COMMISSION_\(NIGC\).html](http://ciir.cs.umass.edu/ua/October2001/regplan/NATIONAL_INDIAN_GAMING_COMMISSION_(NIGC).html) [hereinafter NIGC Priorities] (last visited Oct. 13, 2004).

and foremost on Indian tribes, and to promote fair play amongst the Indian tribes and their customers.³⁴

In addition, three primary objectives are given by Congress in its enactment of IGRA.³⁵ The first objective is “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.”³⁶ The second objective of the NIGC is “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.”³⁷ The third and final objective of the NIGC is “to declare that the establishment [on Indian lands] of independent Federal regulatory authority for gaming . . . Federal standards for gaming . . . [and] a National Indian Gaming Commission are necessary to meet congressional concerns . . . and to protect such gaming as a means of generating tribal revenue.”³⁸

C. Classification of Gaming Classes

IGRA grants statutory authority for tribes to operate gaming operations not prohibited by federal law and creates three categorical classifications for these gaming activities.³⁹ These three categories are Class I, Class II, and Class III gaming.⁴⁰ Class I gaming includes traditional games associated with tribal rituals conducted for minimal prizes.⁴¹ The authority to regulate Class I gaming rests within the exclusive jurisdiction of the Indian tribes.⁴²

Class II gaming includes games that traditionally include an element of chance.⁴³ These games commonly include bingo and can also include lotto, punch boards, tip jars, and pull tabs because the playing of these games takes place in the same location as bingo.⁴⁴ Class II gaming also includes card games that are “explicitly authorized by the laws of the state” as well as card games the state does not prohibit and that occur in the state.⁴⁵ IGRA expressly excludes

34. NIGC Priorities, *supra* note 33.

35. 25 U.S.C. § 2702.

36. *Id.* § 2702(1).

37. *Id.* § 2702(2).

38. *Id.* § 2702(3).

39. *Id.* §§ 2701(5), 2703.

40. *Id.* § 2703.

41. *Id.* § 2703(6).

42. *Id.* § 2710(a)(1).

43. *Id.* § 2703(7)(A)(i).

44. *Id.* § 2703(7)(A)(i)(III).

45. *Id.* § 2703(7)(A)(ii).

from Class II gaming, banking card games such as blackjack or slot machines of any kind.⁴⁶

Indian tribes retain their autonomy to conduct, license, and regulate Class II gaming on Indian lands provided that the state in which the Indian tribe is located allows such gaming.⁴⁷ In conjunction with the states allowance of gaming, the tribe's governing body must adopt a gaming ordinance approved by the chairman.⁴⁸ In effect, the tribal governments are accountable for regulating Class II gaming with Commission oversight.⁴⁹

The final and broadest category is Class III gaming. Class III gaming includes "all forms of gaming that are not Class I gaming or Class II gaming."⁵⁰ Class III games commonly include games played at casinos, such as craps, poker, blackjack, and roulette. Class III games also include those types that fall under wagering games and electronic facsimiles. Realizing that states face major policy concerns with regard to Class III gaming, Congress created certain criteria for tribes that wish to offer Class III gaming on Indian lands.⁵¹

The first criterion is that the tribes must meet the same requirements set forth under Class II gaming.⁵² Once the tribes meet the Class II requirements, they are allowed to offer Class III gaming only if the state in which the Indian land is located allows Class III gaming to occur.⁵³ The next criterion requires that the tribes must first negotiate a tribal-state compact with the state and then receive approval from the Secretary of the Interior in order to engage in Class III gaming.⁵⁴

Under IGRA, Congress requires states to act in good faith when entering into negotiations with Indian tribes.⁵⁵ If the state fails to abide by these good faith guidelines, Indian tribes can seek relief through the United States federal court system.⁵⁶ This sought to provide the tribes with a great deal of bargaining power when dealing with the states. However, the United States Supreme Court in *Seminole Tribe v. Florida* disregarded the right to bring suit in federal court.⁵⁷

46. *Id.* § 2703(7)(B).

47. *Id.* § 2710(b)(1).

48. *Id.* § 2710(b)(1)(B).

49. *Id.* § 2710(b)(2)(A).

50. *Id.* § 2703(8).

51. *Id.* § 2710(d).

52. *Id.* § 2710(d)(1)(A)(ii).

53. *Id.* § 2710(d)(1)(B).

54. *Id.* § 2710(d)(3)(A).

55. *Id.*

56. *Id.* § 2710(d)(7)(B)(i).

57. 517 U.S. 44 (1996).

In *Seminole*, the Supreme Court ruled that under Eleventh Amendment jurisprudence, the Indian tribes no longer have the right to bring suit against a state in federal court for failure to comply with the good faith negotiation provision set forth by IGRA.⁵⁸ This decision did not change the purpose and extent of IGRA, yet it provided a means of legal escape for states that do not wish to engage in good faith negotiations with the tribes.⁵⁹ The ability of the states to profit through revenue sharing has created a huge incentive for tribes and a leveraging tool for states when entering into state compacts with Indian tribes.

III. States Profit Through Means of Revenue Sharing

A. Revenue Sharing in Light of Seminole Tribe v. Florida

As a result of the Supreme Court's decision in *Seminole*, the notion of whether to permit states to engage in profit sharing through Indian gaming revenues pursuant to the state compacting process, has created concern within the Indian community. Indian tribes now face sharing their gaming profits in order to secure the necessary state compact to engage in Class III gaming on Indian lands.⁶⁰ These revenue sharing "agreements" contain revenue sharing and regulatory fee provisions that are arguably violations of federal law.⁶¹ The revenue sharing provisions are the most controversial part of state tribal-gaming compacts because federal law prohibits a state from taxing a tribal government, and IGRA specifically prohibits a state from taxing or charging a fee to an Indian tribe for engaging in Class III gaming.⁶²

B. What is Required for the Legality of Revenue Sharing Provisions?

State governments have continuously "looked to Indian gaming as a means to address huge budget deficits."⁶³ States that wish to engage in revenue sharing from Indian gaming must formulate their revenue sharing provisions in a manner

58. *Id.* at 72-73.

59. *Id.*; see *United States v. Santa Ynez Band of Chumash Mission Indians*, 33 F. Supp. 2d 862, 866 (C.D. Cal. 1998) (allowing states to forgo negotiations for Class III gaming compacts with Indian tribes).

60. *Seminole Tribe*, 517 U.S. at 76.

61. 25 U.S.C. 2710(d)(4) (2000) (charging fees or assessment upon Indian gaming is prohibited).

62. *Id.*

63. Kelly B. Kramer, *Current Issues in Indian Gaming: Casino Lands and Gaming Compacts*, 7 GAMING L. REV. 329, 333 (2003), (citing Erica Werner, *Deficit-Ridden States Eye Indian Gaming Cash*, ST. PAUL PIONEER PRESS, Apr. 27, 2003, at 20A.).

to bypass the prohibition against tax impositions. The question faced by states is how to secure a legally enforceable revenue sharing agreement between the local government and the Indian tribes.

The IGRA specifies five statutory uses of tribal gaming revenue.⁶⁴ The legislation is embodied in 25 U.S.C. § 2710(b)(2)(B)(i)-(v). The section reads as follows:

Net revenues from any tribal gaming are not to be used for purposes other than[:] (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribes and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund organizations of local government agencies.⁶⁵

The Department of the Interior approves such revenue sharing compacts on the basis that the compacts provide for substantial exclusivity for Indian gaming in the state.⁶⁶ The Department of the Interior's position, stated by Aurene Martin, Acting Assistant Secretary for the Bureau of Indian Affairs, is as follows:

To date, the Department has only approved revenue sharing payments that call for tribal payments when the state has agreed to provide valuable economic benefit of what the Department has termed substantial exclusivity for Indian gaming in exchange for the payment. As a consequence, if the Department affirmatively approves a proposed compact, it has an obligation to ensure that the benefit received by the state under the proposed compact is appropriate in light of benefit conferred on the tribe. Accordingly, if a payment exceeds the benefit received by the tribe, it would violate IGRA because it would amount to an unlawful tax, fee, charge, or assessment. While there has been substantial disagreement over what constitutes a tax, fee, charge or assessment within this context, we believe that if the payments are made in exchange for the grant of a valuable economic benefit that the governor has discretion to provide, these payments do not fall within the category of prohibited taxes, fees, charges, or other assessments.⁶⁷

64. See 25 U.S.C. § 2710(b)(2)(B)(i)-(v) (2000).

65. *Id.*

66. *Senate Committee on Indian Affairs*, 107th Cong. (2001) [hereinafter Martin Statement] (statement of Aurene M. Martin, Acting Assistant Secretary of Indian Affairs).

67. *Id.*

Therefore, revenue sharing provisions that provide for substantial exclusivity are enforceable in state compacts.⁶⁸

C. Concerns Raised Regarding Revenue Sharing Provisions

States in need of extra monies are vigorously attempting to share in the benefits of Indian gaming.⁶⁹ Indian gaming creates a number of employment and “economic activity in 29 [sic] states,” but only a small number of those states have created agreements with tribes to “share casino revenues.”⁷⁰ Some believe that states are taking advantage of gaming tribes’ revenues and ignoring the true impact felt by tribes.⁷¹ Despite the fact that tribes are provided with “substantial exclusivity” over gaming, “Jacob Viarrial, governor of the Pojoaque, told lawmakers” that “revenue sharing has become a smokescreen for extortion.”⁷² Pedro Johnson, the executive director of public affairs for the Mashantucket Pequot, stated that “[s]tates should not balance their budgets on the backs of Indian governments. It’s patently unfair.”⁷³ Some tribes are so adamantly opposed to sharing in revenues and sharing in gaming operations, that there have been reports of tribes paying named leaders to keep state revenue compacts off state ballots.⁷⁴

Though revenue sharing has yet to receive recognition recognized as legal under the IGRA,⁷⁵ tribes agree that they can gain from these agreements formed with their respective states.⁷⁶ However, tribes seem to view this revenue sharing trend with much apprehension.⁷⁷

68. *Id.*

69. Pamela M. Prah, *States Vie for Bigger Payouts from Tribal Casinos*, KANSAS CITY INFOZINE, Dec. 12, 2004, available at <http://www.infozine.com/news/stories/op/storiesView/sid/4767/>

70. *Id.*

71. *It's Always Easier to Spend Someone Else's Money*, ST. PAUL PIONEER PRESS, Sept. 7, 2004, at 10A.

72. *Tribes with Casino Profits Adverse to Aiding Strapped States*, GAMING MAGAZINE, July 10, 2003, available at <http://gamingmagazine.com/managearticle.asp?c=280&a=7900>.

73. *Id.*

74. *Indian Casino Revenue Is Still Off-Limits to State*, CASINO MAGAZINE, Oct. 8, 2004, available at <http://casinomagazine.com/managearticle.asp?c=280&a=12118>.

75. 25 U.S.C. 2710(d)(4) (2000) (charging fees or assessment upon Indian gaming is prohibited).

76. *States Look at Indian Gaming Revenue*, GAMBLING NEWS, Apr. 25, 2003, available at http://www.casinoman.net/Content/casino_gambling_news/article/states_look_at_indian_gambling_revenue.asp.

77. *Id.*

IV. *The Construction of Revenue Sharing States' Exclusivity Provisions in State Tribal Gaming Compact*

A. *Definition of Exclusivity*

The term "substantial exclusivity" provides local tribes with the exclusive authorization to operate Class III gaming within the state's territory.⁷⁸ In essence, tribes receive "substantial exclusivity, by [states] prohibiting non-Indian gaming from competing with Indian gaming or by agreeing to relinquish payments if non-Indian gaming is permitted by the state in the future."⁷⁹ The meaning of exclusive is when:

[T]he Tribes enjoy the exclusive 'right to operate' so long as the Tribes are the only persons or entities who have and can exercise the 'right to operate' electronic games of chance in the State or, in other words, as long as all others are prohibited or shut out from the 'right to operate' such games.⁸⁰

B. *Comparison of States' Revenue Sharing Provisions*

Arizona, California, Colorado, Michigan, New Mexico, New York, Wisconsin,⁸¹ Connecticut,⁸² and now Oklahoma⁸³ have each entered into revenue sharing agreements regarding tribal gaming. This note provides an analysis of a majority of the states' revenue-sharing provisions.

1. *Oklahoma*

On November 2, 2004, Oklahoma created a State-Tribal Gaming Act for purposes of Indian gaming.⁸⁴ The Oklahoma compact provides substantial exclusivity for Indian tribes for electronic games and total exclusivity for card

78. *E.g.*, Press Release, Bruce Babbitt, Secretary of the Interior, Department of the Interior (on file with the Office of Indian Gaming Management, Bureau of the Indian Affairs) [hereinafter Babbitt Press Release], available at <http://www.doi.gov/news/archives/indnmcom.html>. (Aug. 23, 1997).

79. *Id.*

80. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 93 F. Supp. 2d, 850, 852 (W.D. Mich. 2000).

81. *Id.*

82. *Tribal Gaming: Sharing Revenue with States*, National Conference of State Legislatures 2004, at <http://www.ncsl.org/programs/statetribes/trgaming.htm> (last visited Jan. 2, 2005).

83. State-Tribal Gaming Act, 3A OKLA. STAT. ANN. § 281 (Part 11) (West 2005).

84. *Id.* § 261.

games.⁸⁵ However, the compacts require tribes to pay a portion of their revenues to the state in return for this exclusivity.⁸⁶

Oklahoma first requires tribes to pay 4% “of the first ten million dollars . . . of adjusted revenues received by a tribe in a calendar year from the play of . . . games.”⁸⁷ Second, tribes must pay 5% “of the next ten million dollars of adjusted gross revenues received by a tribe in a calendar year from the play of . . . games.”⁸⁸ Third, the tribe must pay 6% to the state of “all subsequent adjusted gross revenues received by a tribe in a calendar year from the play of . . . games.”⁸⁹ Last, the state requires the tribe to pay 10% of its “monthly net win of the common pool(s) or pot(s) from which prizes are paid for nonhouse-banked card games.”⁹⁰ Tribes must pay an annual oversight assessment to assist the state with costs incurred that are related to the state’s oversight of the gaming operations.⁹¹ The tribes must also deposit a one-time start-up fee of \$50,000 to assist the state with administrative duties.⁹²

The state shall distribute the different revenue percentages collected under various statutory provisions by allocating 10% of the revenues to the Oklahoma Tax Commission, by allocating 12% to the Oklahoma Higher Learning Access Trust Fund, and by allocating 88% to the Education Reform Revolving Fund.⁹³ The revenue totals will be distributed annually to the Department of Mental Health and Substance Abuse Services to treat those with compulsive gambling disorders.⁹⁴

2. California

California is one of the highest-grossing states for tribal gaming,⁹⁵ therefore California’s compact program will be discussed in more detail than the other states. California established the right to operate gaming on Indian lands in March of 2000 when voters passed legislation that amended the state’s constitution.⁹⁶ The legislation requires tribes to enter into a compact with the

85. *Id.* § 281 (Part 1).

86. *Id.* at Part 4(A).

87. *Id.* at Part 11 (A)(2)(a).

88. *Id.* at Part 11 (A)(2)(b).

89. *Id.* at Part 11 (A)(2)(c).

90. *Id.* at Part 11 (A)(2)(d).

91. *Id.* at Part 11 (B).

92. *Id.* at Part 11 (C).

93. *Id.* § 263.

94. SESSION HIGHLIGHTS, *supra* note 5.

95. See Prah, *supra* note 69.

96. CAL. CONST. art. IV, § 19.

state in order to operate Class III gaming on Indian lands.⁹⁷ These compacts include revenue sharing provisions that require for annual payments of gaming revenues to the state; however, the state grants the tribes the exclusive right to slot machine gaming.⁹⁸

The revenues received in California from gaming operations flow into the Gaming Revenue Trust Fund.⁹⁹ This fund receives all revenue payments required under the California Constitution.¹⁰⁰ The first payments require Indian tribes to pay 25% “of its net win from all gaming devices operated by it or on its behalf to the Gaming Revenue Trust Fund.”¹⁰¹ The term net win is defined as “the wagering revenue from all gaming devices operated by the Indian tribe or on its behalf retained after prizes or winnings have been paid to players or to pools dedicated to the payment of such prizes and winnings, and prior to the payment of operating or other expenses.”¹⁰²

The second revenue sharing provision, whose funds flow to the Gaming Revenue Trust Fund, applies to owners of official gambling establishments and allowed horse racing tracks.¹⁰³ These provisions require owners of both gambling and horse racing establishments to pay 30% “of the net win from gaming devices operated by them to the Gaming Revenue Trust Fund.”¹⁰⁴ Under this provision, owners of gambling establishments and authorized horse racing tracks must pay for an annual audit to make certain their net wins are “properly reported and . . . properly paid to the Gaming Revenue Trust Fund.”¹⁰⁵ These owners must also pay 2% of their net wins “to the city in which each authorized horse racing track and authorized gambling establishment is located.”¹⁰⁶ If either of the owner’s operations fall outside of city boundaries, the 2% payment “shall be made to the county in which the authorized gambling establishment or authorized horse racing track is located.”¹⁰⁷ On top of this fee, California also requires tribes to

97. *Id.* § 19(f).

98. Eric S. Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 456 (2003) (citing Carol Sowers, *Indian Casino Profits Get States' Attention*, ARIZ. REPUBLIC, Sept. 15, 2000, at A1).

99. CAL. CONST. art. IV, § 19(j)(1).

100. *Id.* § 19(j)(1).

101. *Id.* § 19(h)(1).

102. *Id.* § 19(h)(1).

103. *Id.* § 19(i)(1)(a).

104. *Id.* § 19(i)(1)(a).

105. *Id.* § 19(i)(1)(C).

106. *Id.* § 19(i)(1)(D).

107. *Id.* § 19(i)(1)(D).

pay a fee of 1% of net wins to be paid to the “county in which each authorized gambling establishment and authorized horse racing track is located.”¹⁰⁸

The Gaming Revenue Trust Fund first provides that 1% of the revenues goes to the California Gambling Control Commission for assistance with managerial duties and for “reimbursement of any state department or agency that provides any service pursuant to . . . the Gaming Revenue Act of 2004.”¹⁰⁹ Second, the fund guarantees that non-gaming tribes will receive \$1.2 million annually from the fund.¹¹⁰ “‘Non-gaming tribe’ shall mean a federally recognized Indian tribe which operates fewer than 350 gaming devices.”¹¹¹ Thus, tribes that sign compacts with the Gaming Revenue Trust Fund provision are essentially “licens[ing] other tribe’s rights to operate gaming devices.”¹¹² Third, the fund provides \$3 million annually “to responsible gambling programs.”¹¹³

Fourth, if there are remaining funds after meeting the previously listed three provisions, the distribution of revenues occurs in the following order.¹¹⁴ First, 50% of the remaining revenues goes toward the “county offices of education to provide services for abused and neglected children and children in foster care.”¹¹⁵ The funds are allocated to county offices and used for different purposes.¹¹⁶ Second, 35% of the remaining funds is distributed to “local governments on a per capita basis for additional neighborhood sheriffs and police officers.”¹¹⁷ Last, 15% of the remaining revenues is distributed to “local governments on a per capita basis for additional firefighters.”¹¹⁸

Indian tribes in California seem willing to participate in revenue sharing for purposes of expanding Indian gaming.¹¹⁹ However, Indian tribes in California oppose compacts that would allow “non-Indian” card clubs and racetracks to operate slots thus making the exclusive right to operate slot machines a crucial point for discussion.¹²⁰ In August 2004, California Governor Arnold

108. *Id.* § 19(i)(1)(E).

109. *Id.* § 19(j)(3)(A).

110. *Id.* § 19(j)(3)(B).

111. *Id.* IV § 19(j)(3)(C).

112. *In re Indian Gaming Related Cases*, 147 F. Supp. 2d 1011, 1016 (N.D. Cal. 2001).

113. CAL. CONST. art. IV § 19(j)(3)(C).

114. *Id.* § 19(j)(3)(D).

115. *Id.* § 19(j)(3)(D)(i).

116. *Id.* § 19(j)(3)(D)(i)(I)-(IV).

117. *Id.* § 19(j)(3)(D)(ii).

118. *Id.* § 19(j)(3)(D)(ii).

119. *See, e.g.,* Gregg Jones, *Help from Tribes No Done Deal*, L.A. TIMES, June 15, 2003, at A1.

120. *Exclusivity a Focus in Gaming Compact Negotiations*, INDIANZ.COM, June 7, 2004, available at <http://www.indianz.com/IndianGaming/2004/002793.asp?print=1>.

Schwarzenegger signed new additional compacts pertaining to the state.¹²¹ The state expects these new compacts to produce an additional \$200 million for the state on an annual basis.¹²²

Indian tribes and other supporters of the “multimillion-dollar ballot effort to end Indian tribal monopoly . . . fizzled before California’s voters.”¹²³ In November 2004, Governor Schwarzenegger advised voters to decline the passage of legislation that would expand tribal-gaming along with stating a percentage of gaming profits for the State of California.¹²⁴ His reasoning being that he could “negotiate more lucrative deals for the state” thus tapping into more monies made as a result of tribal gaming.¹²⁵

3. Connecticut

Connecticut was the first state to challenge a tribe’s right to offer Class III gaming operations pursuant to IGRA.¹²⁶ The Pequot Tribe sued Connecticut after the state denied the Tribe the compact needed to open a tribal casino.¹²⁷ The Second Circuit affirmed the lower court’s decision thus supporting the Indians and allowing for Class III gaming.¹²⁸ However, following the *Seminole Tribe* decision, Connecticut became the first state to receive revenues under a revenue sharing agreement.¹²⁹ The compacts required the Indian tribes to pay Connecticut \$100 million or 25% of revenues generated from slot machines.¹³⁰ These revenue sharing compacts in return provided an incentive to the tribe by giving them the exclusive rights to install slot machines.¹³¹

Following this exclusive grant to the Pequot tribe, the Mohegans became Connecticut’s second federally recognized tribe.¹³² The Mohegans also wanted to engage in tribal gaming and entered into an agreement with the Pequot tribe.¹³³

121. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82.

122. *Id.*

123. Rita Beamish, *Supporters of Calif. Casino Measure Back Off*, BOSTON GLOBE, Oct. 10, 2004, at A13.

124. Prah, *supra* note 69.

125. *Id.*

126. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2d. Cir. 1990).

127. *Id.*

128. *Id.*

129. *Id.*

130. *See* Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 511 (1995).

131. *Id.*

132. Hilary Waldman & David Lightman, *Mohegans Get Federal Tribal Status*, HARTFORD COURANT, May 18, 1994, at A1.

133. George Judson, *Weicker Signs Agreement with Two Tribes on Casino Gambling*, N.Y. TIMES, Apr. 26, 1994, at B1.

In this agreement, both tribes promised annually to pay \$80 million to Connecticut.¹³⁴ In return, the tribes received the right of a near monopoly on casino games.¹³⁵ If Connecticut allows the building of casinos to take place by someone other than a member of these two named tribes, the annual payments to Connecticut would stop.¹³⁶

The State of Connecticut ranked as the second highest-grossing state in 2003, reaching the two billion dollar mark.¹³⁷ The two agreements reached with Connecticut's tribes will provide a gain to Connecticut's general fund of "\$405 million in F[iscal]Y[ear] 2004 . . . with local governments receiving \$85 million of the total."¹³⁸ Furthermore, the year 2005 estimates an amount of "\$345 million to state coffers."¹³⁹

4. Wisconsin

Wisconsin began requiring revenue sharing after the Supreme Court handed down its decision in *Seminole Tribe* and after previous tribal state compacts not requiring revenue sharing expired.¹⁴⁰ The compacts required tribes to pay the state 3% of their net gaming revenues.¹⁴¹ An amendment to the compacts provided that 7.6% of net gaming revenues go to the state.¹⁴² Furthermore, in 2003 additional amendments increased the amount of revenue the state would receive.¹⁴³ Wisconsin's compacts state that Indian tribes will invest millions of dollars to the State of Wisconsin while creating 25,000 new jobs in the state.¹⁴⁴

Under Wisconsin law, the governor may enter into gaming compacts with Indian tribes.¹⁴⁵ The majority of Wisconsin's compacts require the Governor to allocate the received revenues to benefit Indian tribes, but the legislature is not

134. *Id.*

135. *Id.*

136. George Judson, *In Gambling Debate, Foes Await Bridgeport Casino Vote*, N.Y. TIMES, Mar. 12, 1995, at 44.

137. Prah, *supra* note 69.

138. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82.

139. Prah, *supra* note 69.

140. See Tom Sheehan, *Multi-Tribe Council Sought in State; The Goal Is to Enhance Communication Between Tribes and State*, WIS. ST. J., Nov. 5, 2001, at B1.

141. Sarah Wyatt, *Spending of Gambling Money Set: Budget Panel Agrees on Two-Year Plan*, WIS. ST. J., May 25, 2001, at B3.

142. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82.

143. *Id.*

144. Press Release, Jim Doyle, Governor of Wisconsin, Statement of Governor Doyle Regarding Indian Gaming Lawsuit (May 13, 2004).

145. WIS. STAT. ANN. § 14.035(1) (West 2003); see generally *Panzer v. Doyle*, 680 N.W. 2d 666 (2004) (allowing Governor to enter into compacts with Indian tribes).

forced to account for these allocations in the budget.¹⁴⁶ Wisconsin did not use the revenues for the sole benefit of the tribes. The state did use the revenues to fund tourism and economic development.¹⁴⁷ The state also uses the funds to help balance the budget.¹⁴⁸ The tribes in Wisconsin are unhappy with the use of the revenues, and to address this problem, the state has asked tribal leaders to submit suggestions for revenue use in the future.¹⁴⁹ Disagreement over the use of revenues have "strained relations between some tribes and the state."¹⁵⁰

The State of Wisconsin ranks third among states that receive gaming revenue, falling far behind the two leading states of California and Connecticut.¹⁵¹ State leaders hope to reach an agreement with Indian tribes that will provide a better benefit to the state.¹⁵² The state hopes to negotiate future contracts to increase Indian revenue payments to the state.¹⁵³ However, unlike Connecticut, the State of Wisconsin cannot offer the same level of exclusivity that surrounding states offer.¹⁵⁴

5. Michigan

On August 20, 1993, an agreement between seven tribes and the state of Michigan designated that 8% of net gaming revenues from Class III gaming would go to the state.¹⁵⁵ This 8% went toward the state's "Strategic Fund."¹⁵⁶ Two percent of net revenues went to local government units.¹⁵⁷ The 8% agreement provided exclusive rights to operate electronic gaming within the State

146. Wyatt, *supra* note 141, at B3.

147. Sheehan, *supra* note 140, at B1.

148. *Id.*

149. Wyatt, *supra* note 141, at B3.

150. Tom Sheehan, *Casinos Eye Long-term Compacts: Higher Payments for Longer Deals a Possibility*, WIS. ST. J., Sept. 24, 2002, at B3.

151. Tom Sheehan, *Republicans Say State Could Get More From Tribes*, WIS. ST. J., May 22, 2004, at B1.

152. *Id.*

153. *Id.*

154. George Lewis, *State Got the Best Deal It Could from Ho-Chunk*, WIS. ST. J., June 27, 2004, at B2.

155. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82; see *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 93 F. Supp. 2d 850, 851 (W.D. Mich. 2000).

156. See JERRY GRIFFIN, REPORT TO THE MICHIGAN HOUSE FISCAL AGENCY, A HISTORY OF INDIAN GAMING IN MICHIGAN, available at <http://www.house.state.mi.us/hfa/gaming96.html> (1996).

157. Michigan Gaming Law Website, *Overview of Gaming in Michigan*, at <http://www.michigangaming.com/Overview.html> (last visited Dec. 20, 2004) [hereinafter *Overview of Gaming in Michigan*]

of Michigan.¹⁵⁸ If the state reneged on its duties under the agreement, the tribes would stop making the 8% payments.¹⁵⁹

Three years following the entry of the exclusivity agreements, Michigan passed a law that allowed for additional tribes to enter into tribal gaming compacts.¹⁶⁰ Based on the agreement providing for exclusive rights to operate electronic games, the initial seven tribes stopped paying revenues to the state.¹⁶¹

The courts upheld the validity of the right to stop payments when the “the right was extended” and thus diminished the tribes exclusive right to operate.¹⁶² Despite the loss of revenue sharing agreements, the State of Michigan still managed to receive gaming revenues by entering into new compacts with other tribes.¹⁶³

Michigan’s new compacts continue to provide revenue to both state and local governments.¹⁶⁴ The monies received by the Michigan Strategic Fund in the fiscal year of 2004 “approach[ed] \$15 million.”¹⁶⁵ Furthermore, the 2% portion of the gaming revenues totaled \$17 million in fiscal year 2004.¹⁶⁶

6. *New Mexico*

Before the Supreme Court’s decision in *Seminole Tribe* in 1995, New Mexico gaming compacts provided for revenue sharing.¹⁶⁷ In 1997, the state renegotiated the previous compacts and endorsed a new revenue sharing program.¹⁶⁸ The compacts required the tribes to pay 16% of net revenues generated from slot machines to the state.¹⁶⁹ Many tribes expressed their displeasure with the state’s payment structure set forth in the 1997 compacts.¹⁷⁰

158. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82; *see Sault Ste. Marie Tribe of Chippewa Indians*, 93 F. Supp. 2d at 851.

159. *Id.*

160. *See Michigan Gaming Control and Revenue Act*, MICH. COMP. LAWS §§ 434.201-26 (2002).

161. *Overview of Gaming in Michigan*, *supra* note 157.

162. *Sault Ste. Marie Tribe of Chippewa Indians*, 93 F. Supp. 2d at 851.

163. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See Clark v. Johnson*, 904 P.2d 11, 15 (N.M. 1995).

168. *Madrid Focuses Gaming Suit on State’s Rights; Tribes Call Compact Illegal Taxation*, ALBUQUERQUE J., Sept. 16, 2000, at E3 (state legislature approved new gaming compacts that included provisions for 16% of revenue sharing).

169. *See Babbitt Press Release*, *supra* note 78.

170. *Madrid Focuses Gaming Suit on State’s Rights; Tribes Call Compact Illegal Taxation*, *supra* note 168.

The main concern with the 1997 compacts was not that the tribes felt that revenue sharing was illegal, but that the tribes “simply [did] not like the state’s bottom line placed on the value of the exclusivity granted to the tribes with respect to gambling.”¹⁷¹ Many tribes eventually agreed to enter into compacts in order to receive the opportunity to participate in Class III gaming.¹⁷² Former Secretary of the Interior Babbitt raised concern with the structure of the compacts because the compacts failed to provide for substantial exclusivity of gaming activities but rather provided for limited exclusivity.¹⁷³ Furthermore, Babbitt stated, “My most serious concern is the state’s insistence that the tribes make large payments to the state.”¹⁷⁴ Babbitt further stated that “[t]o date, the Department has approved...payments to a State...only [when] the State has agreed to provide... substantial ‘exclusivity,’ by prohibiting non-Indian gaming from competing with Indian gaming” or when all payments cease while the State permits competition to take place.¹⁷⁵ Aurene Martin at the Senate Committee on Indian Affairs reiterated this notion in 2001.¹⁷⁶

In 2001, new tribal compacts were approved.¹⁷⁷ The agreements provided that the tribes pay the state 8%, reduced from the previous 16% of slot machine revenues.¹⁷⁸ The new compacts also provide for exclusivity provisions that are very similar to the previous compacts questioned by Secretary Babbitt.¹⁷⁹ The compacts provide the exclusive right for tribes to operate Class III tribal gaming; however, states need not bar racetracks nor “fraternal, veterans or other nonprofit membership organizations” from participating in electronic gaming.¹⁸⁰

Assistant United States Department of Interior Secretary Neal A. McCaleb wrote a letter to Governor Gary Johnson that permitted states to receive a percentage of revenues if the tribes received substantial exclusivity over gaming.¹⁸¹ The McCaleb letter was a compromise on exclusivity in an effort to

171. *Id.*

172. Gatsby Contreras, *Exclusivity Agreements In Tribal-State Compacts: Mutual Benefit Revenue-Sharing Or Illegal State Taxation*, 5 J. GENDER RACE & JUST. 487, 500 (2002).

173. Babbitt Press Release, *supra* note 78.

174. *Id.*

175. *Id.*

176. *Senate Committee on Indian Affairs*, *supra* note 66.

177. S. 804, 45th Legis., 1st Sess. (N.M. 2001); see *Tribal Gaming: Sharing Revenue with States*, *supra* note 82.

178. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82.

179. Babbitt Press Release, *supra* note 78 (gaming compacts failed to include exclusivity for tribal gaming).

180. N.M. STAT. ANN. § 11-13-2 (Michie 1978), amended by 1997 N.M. LAWS 15-(4)(B).

181. Jonathan McDonald, *Fee Fight*, SANTA FE NEW MEXICAN, Nov. 29, 2001, at B1; see Lent, *supra* note 98, at 461.

bring the tribes together by holding geographic exclusivity of tribal gaming equal to that of substantial exclusivity.¹⁸² This compromise, along with Babbitt's informal policy statements regarding substantial exclusivity, does not provide a bright-line test or rule for future tribal-gaming compacts.¹⁸³ Furthermore, we now see the tribes agreeing to participate in revenue sharing for "limited" as opposed to exclusive or substantial gambling competition.¹⁸⁴

The State of New Mexico projects that revenue of \$34.7 million for fiscal year 2004 and an increased \$36.4 million for fiscal year 2005 to its general fund.¹⁸⁵

7. New York

The Governor of the State of New York has the ability to enter into tribal state compacts pursuant to the IGRA.¹⁸⁶ The state uses these revenues to reimburse local governments that provide tribal casinos for job growth and state economic development.¹⁸⁷ A portion of some counties' revenue goes toward the treatment of individuals facing gambling addiction.¹⁸⁸ The remaining revenues "shall be transferred to the general fund for the support of government."¹⁸⁹

The Mohawk Tribe agreed to give the State of New York up to 25% of its gaming revenues; however, this occurred after the Oneida Nation agreed to share revenues in what amounted to virtually nil.¹⁹⁰ Following this agreement, the Seneca Nation expressed its willingness to provide 25% of its gaming revenues.¹⁹¹ The Senecas reached an agreement and signed a compact with the State of New York providing 25% of revenues to the state.¹⁹²

The Seneca agreements provide exclusivity in the form of a gaming monopoly.¹⁹³ Furthermore, the Mohawk Tribe in New York amended its tribal compacts with the state to provide a gradual revenue sharing plan in exchange for exclusivity.¹⁹⁴ The amendment stated that "no other person or entity other than

182. See Lent, *supra* note 98, at 461 n.93.

183. Contreras, *supra* note 172, at 507.

184. See Jeff Jones, *Tribe, AG Cut Slot Deal*, ALBUQUERQUE J., Apr. 21, 2004, at 1.

185. *Tribal Gaming: Sharing Revenue with States*, *supra* note 82.

186. N.Y. EXEC. LAW § 12(a) (McKinney 2002).

187. N.Y. STATE FINANCE LAW § 99-h(3)(a) (McKinney 2002).

188. *Id.* § 99-h(3)(b).

189. *Id.*

190. Jerry Zremski, *Senecas Uncommonly Generous In Giving State A 25% Casino Cut*, BUFFALO NEWS, Aug. 5, 2001, at A1.

191. *Id.*

192. Zremski, *supra* note 190.

193. See *id.*

194. Act of Oct. 19, 2004, ch. 590, S.5670-A, 2004 Sess. N.Y. Laws (amending Mohawk Tribe Compact).

an Indian nation or tribe shall be permitted to . . . or operate, slot machines within the geographic area as defined by the counties . . . ”¹⁹⁵ If New York breaches the promised exclusivity provisions provided for in the tribal compacts, the Mohawk’s payments will cease.¹⁹⁶ Individuals have raised concerns regarding exclusivity provisions that acted as monopolies. The State of New York continues to provide this benefit to tribes in exchange for revenue sharing.¹⁹⁷

V. George Skibine Provides Suggestions in Resolving the Confusion with Exclusivity Provisions in Revenue-Sharing Compacts

George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development in the Office of the Assistant Secretary–Indian Affairs at the Department of the Interior, spoke before the Committee on Indian Affairs on March 24, 2004.¹⁹⁸ Mr. Skibine attended the committee meeting to support the Amendments of 2004 to the Indian Gaming Regulatory Act.¹⁹⁹ One of Mr. Skibine’s priorities was to address “uncertainties created by . . . the *Seminole v. Florida* case and existing revenue-sharing schemes adopted by tribes and states and approved by the Department.”²⁰⁰

Mr. Skibine noted that revenue sharing agreements that provided for substantial exclusivity to operate Class III gaming did receive departmental approval.²⁰¹ Mr. Skibine endorsed the Department’s support for a “statutory basis for revenue sharing provisions in Class III gaming compacts” but felt the “conditions for apportionment should be modified.”²⁰² Mr. Skibine proposed that the amendments to IGRA needed to provide a “clearer definition of the substantial benefits that Congress determines are appropriate in exchange for revenue-sharing.”²⁰³

To date, the Department continues to assert that substantial exclusivity of Class III gaming allows for the revenue sharing among a tribe and its local

195. *Id.* § 1(c).

196. *Id.* § 1(d).

197. Zremski, *supra* note 190.

198. *The Indian Gaming Regulatory Act Amendments of 2003, Before the Senate Committee Hearings on Indian Affairs* (2004) [hereinafter *IGRA Amendments of 2003 Hearings*] (statement of George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development in the Office of the Assistant Secretary).

199. *Id.* at 1.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 2.

state.²⁰⁴ However, Mr. Skibine did indicate that if Congress envisioned further benefits, the Department would ask that more explanation be provided to address these benefits.²⁰⁵ Furthermore, Mr. Skibine expressed the Department's recommendation that Congress consider placing a limit on the amount of revenue shared in compacts.²⁰⁶ The revenue payment should be at most 10% to avoid qualifying as a tax.²⁰⁷ This would be a safeguard to protect tribes from having to pay increased revenue to the state.

The final issue raised by Mr. Skibine concerned compacts that included anticompetitive provisions.²⁰⁸ The compacts' provisions provided tribes with a "protected territory, outside of its reservation, in which they may game."²⁰⁹ This provision guarantees exclusivity, thus creating a barrier to non-compacted tribes who may desire to locate a facility outside of the reservation.²¹⁰ Mr. Skibine stated that "[t]his limitation as applied to other tribes appears to violate the spirit of IGRA, but there is no express prohibition contained in the Act."²¹¹ The Department and Congress face, once again, the problems of exclusivity provisions.

Conclusion

To amend the Indian Gaming Regulatory Act is a major step in restructuring the scope of tribal-state gaming compacts. Though there seems to be much disenchantment with revenue sharing between tribes and states, the driving force behind these agreements is the opportunity for tribes to operate Class III gaming, and for states to take advantage of the gaming success. Furthermore, the classification of exclusivity has not reached consensus among jurisdictions. Will exclusivity eventually fade out of the picture due to states' concerns against monopoly power, or will tribes keep their sovereignty with regard to operating gaming? The next undertaking of the Congress, working with the Department of the Interior, should be to address these fundamental issues.

204. *Id.*

205. *Id.*

206. *Id.*

207. Tom Wanamaker, *Let the Games Begin: A Revenue Sharing Cap of Ten Percent?*, INDIAN COUNTRY TODAY, Apr. 6, 2004 (quoting George Skibine) available at <http://www.indiancountry.com/content.cfm?id=1081281811>.

208. *IGRA Amendments of 2003 Hearings*, *supra* note 198, at 3.

209. *Id.*

210. *Id.*

211. *Id.*

