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INDIAN SOVEREIGNTY VERSUS OKLAHOMA'S GAMBLING LAWS

I. INTRODUCTION

Bingo is currently one of the most controversial topics in Indian affairs.[1] Approximately sixty tribes throughout the United States conduct bingo games on their property and of those tribes, twenty-four are in Oklahoma.[2] Many of the tribes have contracted with outside firms to construct the halls and manage the games.[3] The firms are given a percentage of the proceeds from the games as compensation for their services.[4] The remaining profits are used to guarantee the economic self-sufficiency of the tribes.[5] Non-Indians, as well as Indians, are allowed to participate in the games.[6]

Indian bingo has been the target of extensive debate in recent years.[7] Not only have community groups and charitable organizations criticized

1. *See, e.g.*, 17 AM. INDIAN L. NEWSLETTER 11, 11 (1984) (Responses to Indian bingo have included: civil and charitable organizations pressuring state legislatures to outlaw the operations; law enforcement officials fearing that organized crime will infiltrate and eventually control Indian bingo; and the United States House pressing to pass H.R. 4566, the Indian Gambling Control Act).

2. Peterson, *Indian Land Bonanza*, Tulsa Tribune, Mar. 30, 1984, at H.1, col. 2.

3. *See, e.g.*, Pratter, *"Bingo" to be Shouted Soon In Creek Nation Hall*, Tulsa World, Oct. 25, 1984, at F.1, col. 2 (Creek Nation in Oklahoma has contracted with Indian Country USA to help finance its bingo hall; Indian Country, in turn, will receive 40% of the profits); Wolfe, *Instant Winner*, Tulsa Tribune, Apr. 9, 1984, at B.1, col. 2 (Otoe-Missouria tribe in Oklahoma has entered into a five-year contract with a group of non-Indian investors comprising a company called North American Indigo, Inc.); Diebolt, *Indians Bingo Again*, Tulsa Tribune, Mar. 19, 1983, at A.2, col. 2. (Quapaws have entered into a five-year contract with Central Plains Management, a firm which will fund the bingo hall and receive 65% of the profits).

4. *See supra* note 3.

5. *See, e.g.*, Pratter, *1,000 Folks Put Their Money on New Creek Bingo Game*, Tulsa World, Nov. 18, 1984, at A.4, col. 2 (profits from the bingo operation will be used for Creek tribal projects such as health care and education); Diebolt, *supra* note 3, at A.2, col. 2 (bingo profits will be used to help pay for health, education and welfare of the Quapaw tribe).

6. *See* Pratter, *supra* note 5, at A.1, col. 3.

7. *See, e.g.*, Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1190 (9th Cir. 1982) (bingo is not contrary to public policy, thus games operated by the Barona Group of the Capitan Grande Band of Mission Indians do not violate the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 (1970)), *cert. denied*, 103 S. Ct. 2091 (1983); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981) (operation of bingo hall on Seminole reservation found to be outside of Florida's jurisdiction), *cert. denied*, 102 S. Ct. 1717 (1982); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981) (Wisconsin's regulation of bingo is a civil regulation and thus cannot be enforced against Oneida Reservation); Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983) (bingo games run by Penobscot Indian Nation found to be a violation of Maine's gambling laws).

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the games,[8] but law enforcement and government officials have become pitted against tribal leaders.[9] To law enforcement officials, bingo is illegal gambling, likely to attract organized crime.[10] To the cities, counties, and states involved, Indian bingo represents the usurpation of their right to govern, thus constituting an intrusion on local control and state plenary power.[11] To the Indians, their advocates, and the federal courts, bingo is a lawful method to raise revenue for faltering tribal economies.[12]

Oklahoma law currently authorizes bingo games conducted by "any organization that is a bona fide religious, charitable, labor, fraternal, educational organization or any branch, lodge, chapter or auxiliary thereof or any veterans' or firemen's organization which operates without profit to its members."[13] There are few distinguishing features between bingo played on tribal lands in Oklahoma and the games played at the American Legion or Catholic churches, except that jackpots of $100,000 are currently found in Indian bingo games[14] and outside firms share in the profits.[15] Oklahoma bingo laws limit jackpots to $200 per game and the aggregate amount of all games in a single bingo session is not to exceed $1,000.[16] The laws prohibit anyone other than a charitable organization from having a financial interest in bingo profits.[17] Oklahoma bingo laws further provide that no part of the bingo profits are to inure to the benefit of any individual member or employee of the charitable organization.[18]

This Comment discusses the concept of tribal sovereignty as it relates to the enforcement of Oklahoma's bingo laws on Indian land. Various approaches used by other states in asserting jurisdiction over Indian land will be explored and addressed in relation to Indian bingo. It is urged that Oklahoma allow Indians to operate bingo halls free from state interference.

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8. *See, e.g.*, Pratter, *Indian Bingo Termed Threat to Veteran and Civic Games*, Tulsa World, Nov. 19, 1984, at A.1, col. 1 (local veterans' groups and civic organizations which have used bingo as a fundraiser claim that their economic base has been threatened by the big jackpots offered at the Creek Indian bingo hall).

9. DeDominicis, *Betting On Indian Rights*, 3 CAL. LAW. 29, 29 (1983).

10. *Id.*

11. *Id.*

12. *Id.*

13. OKLA. STAT. tit. 21, § 995.1 (Supp. 1984).

14. Program for Otoe-Missouria Bingo, Red Rock, Oklahoma (Apr. 7-29, 1984).

15. *See supra* note 3.

16. OKLA. STAT. tit. 21, § 995.10 (Supp. 1984).

17. *Id.* § 995.1.

18. *Id.*

II. THE CONCEPT OF TRIBAL SOVEREIGNTY

A. *The Origins of Tribal Sovereignty*

The aggressive attempts by state governments to extend their laws into Indian territory are of great concern to tribal authorities.[19] Although the Supreme Court has established a shield to protect Indian tribes from state regulatory and administrative intrusions,[20] Indians continue to feel the threat of state encroachment into tribal activities.[21] Tribal sovereignty and state encroachment are at the crux of the Indian bingo controversy. The Indians maintain that due to tribal sovereignty they have a right to conduct bingo operations free from state interference.[22] The states, on the other hand, would like to, at a minimum, regulate the games under the purview of their gambling legislation.[23]

Johnson v. M'Intosh[24] was the Supreme Court's first attempt to define the federal government's relationship to Indian nations. While the

19. *See generally* Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment Into Indian Country*, 8 AM. INDIAN L. REV. 65 (1980) (author explores the role the Supreme Court has played in providing Indian nations with protection against attempted state intrusions into Indian country).

20. *See, e.g.*, Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 165 (1980) (Indian trader statutes and their implementing regulations, as federal law, preempt the imposition of state tax); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148-51 (1980) (state taxation on motor carriers who used Bureau and tribal roads exclusively amounted to double taxation and was, therefore, preempted by the comprehensive federal regulatory scheme); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 690 (1965) (Indians may, in general, run the reservation and its affairs free from state control).

21. *See, e.g.*, Moapa Band of Paiute Indians v. United States Dep't of Interior, 747 F.2d 563 (9th Cir. 1984) (Paiute Indians enjoined from running houses of prostitution on tribal land in Nevada); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982) (California attempted to enjoin the Barona Group of Mission Indians from operating bingo games on the reservation), *cert. denied*, 103 S. Ct. 2091 (1983); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981) (Florida attempted to enjoin Seminole tribe from conducting bingo games on tribal property), *cert. denied*, 102 S. Ct. 1717 (1982); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981) (Wisconsin attempted to enjoin Oneida tribe from conducting bingo games on Indian land).

22. *See, e.g.*, Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 714 (W.D. Wis. 1981) (enforcement of state bingo laws on Indian reservation would infringe on the right of reservation Indians to make their own laws and be ruled by them); Penobscot Nation v. Stilphen, 461 A.2d 478, 482 (Me. 1983) (Penobscot Nation argued that it could run bingo games free from state regulation as it retained all of the inherent powers recognized as an attribute of the tribe's internal sovereignty).

23. *See* Stephenson, *Government to Watch Tulsa Bingo Hall*, Tulsa World, Nov. 1, 1984, at C.8, col. 4 (noting that in 1983, the Justice Department proposed legislation for state regulation of Indian bingo).

24. 21 U.S. (8 Wheat.) 543 (1823). In *Johnson*, the Piankeshan and Illinois tribes conveyed certain parcels of land to private individuals. *Id.* at 550-54. Subsequently, the tribes ceded the same land to the United States by treaty. *Id.* at 555-58. The Court was required to determine the validity of the earlier conveyances from the Indian tribes to individuals. *Id.* at 571-72. The tribes were found to have no independent power to sell and convey their aboriginal homelands without approval from the federal government. *Id.* at 572.

Court maintained the notion of Indian sovereignty, it recognized the colonial concept used by the European nations to partition the New World.[25] Thus, the discovery of Indian lands gave the discovering European nation title to those lands.[26] Title to the lands was subject, however, to the continued right of Indian occupancy and use.[27] As a result, the Indians retained an interest in their lands, but the federal government, taking the place of the first European discoverers, retained ultimate dominion over and ownership of the soil.[28]

The federally owned land theory in *Johnson* formed the basis of the Court's decision in *Cherokee Nation v. Georgia*.[29] In *Cherokee Nation*, Chief Justice Marshall noted that while Indians possessed a right to occupy Indian territory, the federal government had title to the land, independent of the Indians' will.[30] Marshall stated that the Indians' relationship to the United States "resemble[d] that of a ward to his guardian."[31]

Despite the reinforcement of the federally owned land theory in *Cherokee Nation*, the tribal sovereignty concept remained strong in the landmark case of *Worcester v. Georgia*.[32] In *Worcester*, the Court held that the State of Georgia could not enforce its laws on the Cherokee Reservation.[33] The Court stated:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . . The whole intercourse between the

25. *Id.* at 573.
26. *Id.*
27. *Id.* at 574.
28. *Id.*
29. 30 U.S. (5 Pet.) 1 (1831). The tribe sought to enjoin the execution of Georgia laws in Cherokee territory by claiming to be a "foreign state" within the meaning of Article III of the Constitution. *Id.* at 15-16.
30. *Id.* at 17.
31. *Id.* The Court stated:

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

Id. at 17-18.
32. 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, the State of Georgia imprisoned two non-Indians who had lived among the Cherokees with the consent of tribal authorities, but without permission from the state in accordance with Georgia law. *Id.* at 532. The Court held that such imprisonment was in violation of the constitution because the state's action infringed upon the exclusive federal power to regulate intercourse with the Indians. *Id.* at 561. Such authority had been exerted in treaties with the Cherokees and in federal laws regulating Indian affairs. *Id.* at 561-62.
33. *Id.* at 561.

> United States and this nation, is, by our constitution and laws, vested in the government of the United States.[34]

Under the concept of tribal sovereignty, Indian tribes retained internal control over their reservations. This internal control was, however, subject to limitations when the federal government had exercised its constitutional powers concerning the regulation of commerce with the Indian tribes,[35] or its power to make treaties.[36] One commentator analyzed the outcome in *Worcester* and its impact on Indian sovereignty by stating:

> Focusing heavily on the right of Indians to govern themselves *internally* . . . [the Court] created a shield of sovereignty by which to protect Indian tribes from state encroachments. Indian sovereignty then became multifaceted. On one hand, it was a formidable barrier to state encroachment into its affairs; on the other hand, it was a fragile legality capable of extinguishment if and when the federal government felt so inclined.[37]

B. *The Erosion of Tribal Sovereignty*

In matters of internal self-government within tribal territory, tribal powers are exclusive, and state law is generally inapplicable unless such tribal powers have been limited by the incorporation of the tribes under the sovereignty of the United States, or by federal laws and policies.[38] For example, in *Oliphant v. Suquamish Indian Tribe*,[39] the Supreme

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34. *Id.*

35. U.S. CONST. art. I, § 8, cl. 3.

36. *Id.* at art. II, § 2, cl. 2. In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973), the Court stated: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." For a discussion of the source and scope of federal authority in Indian affairs, see generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207-28 (1982).

37. Lytle, *supra* note 19, at 71.

38. *See infra* note 41 and accompanying text.

39. 435 U.S. 191 (1978). In *Oliphant*, a non-Indian was arrested by Suquamish tribal authorities for assaulting a tribal officer and resisting arrest. *Id.* at 194. After arraignment before the tribal court, the accused was released on his own recognizance. *Id.* In holding that the Suquamish had no authority to try or sentence non-Indians, the Court relied on a treaty provision which required the tribe to turn over fugitives to federal authorities. *Id.* at 207-08. The Court stated that the treaty provision, when "[r]ead in conjunction with 18 U.S.C. § 1152, which extends federal enclave law to non-Indian offenses on Indian reservations," implied that the Suquamish had no authority to impose penal sanctions on non-Indians. *Id.* at 208.

But see Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975), wherein the Court sustained the tribal arrest of a non-Indian on a non-treaty reservation for importing marijuana with intent to distribute. *Id.* at 1177. A tribal police officer stopped and searched the defendant's vehicle as it proceeded across the reservation from the direction of the Mexican border. *Id.* at 1178. The Court held that a tribal officer has the authority to investigate within the reservation if he has probable cause to believe state and federal laws are being violated. *Id.* at 1181.

Court held that tribal jurisdiction to try non-Indian criminal defendants who were citizens of the United States was necessarily terminated by the dependent relationship created by the tribe's incorporation into the United States.[40] The Court concluded that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[41]

Although the Supreme Court has long since departed from the exclusive tribal sovereignty concept that the laws of a state have no force within reservation boundaries,[42] it continues to recognize the principle that Indian tribes possess "attributes of sovereignty over both their members and their territory."[43] As a result, there is no rigid rule by which to resolve the question of whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as "an anomalous one and of complex character."[44] Despite their partial assimilation into American governmental structure, the tribes have retained

> a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.[45]

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40. *Oliphant*, 435 U.S. at 210.

41. *Id.* Other powers implicitly lost by the tribes due to their incorporation into the United States include the power to transfer tribal land without federal approval, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); the power to carry on relations with nations other than the United States, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and the power to regulate non-Indians, absent an express congressional delegation, when no tribal interest justifies such regulation, Montana v. United States, 450 U.S. 544 (1981).

42. *Worcester*, 31 U.S. (6 Pet.) at 561.

43. United States v. Mazurie, 419 U.S. 544, 557 (1975) (citing *Worcester*, 31 U.S. (6 Pet.) at 515). In *Mazurie*, non-Indians were convicted of selling liquor in Indian country without the requisite tribal permission. *Id.* at 547-48. The Court's decision to uphold the convictions was based on the interpretation of 28 U.S.C. § 1161, which states that liquor transactions in Indian country are not subject to federal prohibitions "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction." *Id.* at 547 n.4. The tribe in *Mazurie* had adopted an ordinance permitting liquor sales on the reservation only after a retail liquor outlet obtained both a tribal and a state license. *Id.* at 548. Inasmuch as the defendant's retail liquor outlet was within Indian country, he was subject to the authority of the tribe. *Id.* at 558.

44. United States v. Kagama, 118 U.S. 375, 381-82 (1886). In this case two Indians were convicted of murder on an Indian reservation. *Id.* at 375. The offense occurred on a reservation established by California statute and executive order. *Id.* at 381-83. The defendants argued that state jurisdiction was exclusive, but the Court indicated that even in the absence of federal jurisdiction under Acts of Congress, the state courts would lack jurisdiction. *Id.* at 384-85.

45. *Id.* at 381-82.

The Supreme Court, in *White Mountain Apache Tribe v. Bracker*,[46] noted that the "semi-independent position" of Indian tribes gave rise to two independent but related barriers to the assumption of state jurisdiction over tribal matters.[47] First, a state could not act if the field it wished to regulate had been preempted by federal law.[48] Second, a state could not infringe upon the Indians' inherent rights of limited self-government.[49] The two barriers were said to be independent because either barrier standing alone was a sufficient basis for holding state law inapplicable to an activity undertaken on the reservation or by tribal members.[50] Nonetheless, they are related in two important ways. First, "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress."[51] Second, "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' . . . against which vague or ambiguous federal enactments must always be measured."[52]

46. 448 U.S. 136 (1980).

47. *Id.* at 142.

48. *Id.* Federal preemption was at the heart of the Court's decision. Arizona attempted to impose a motor carrier license and a use fuel tax on a non-Indian logging company that had entered into a contract with the Apache tribe to sell, load, and transport logs on the Apache Reservation. *Id.* at 136. The Court held that the taxes were inapplicable to reservation logging operations due to the fact that the federal government, having already undertaken regulation of the harvesting, sale, and management of tribal timber, had preempted the field. *Id.* at 147. Thus, the state was precluded from imposing its taxes on the reservation. *Id.* at 148.

49. *Id.* at 142; *see also* Williams v. Lee, 358 U.S. 217 (1959). In *Williams*, an Arizona court attempted to exercise civil jurisdiction when a non-Indian sought to collect a debt for goods he sold to an Indian couple on a Navajo Reservation. *Id.* at 218. The Court held that since the tribe had its own court system, Arizona could not extend its jurisdiction to the Indian reservation. *Id.* at 222. To do so would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. The Court recognized that a tribe's inherent sovereignty did not render all activities conducted on a reservation immune from state regulation or action. "Essentially, absent governing Acts of Congress, the question has always been whether the state infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220.

50. *White Mountain*, 448 U.S. at 143.

51. *Id.* While tribal sovereign powers may be exercised independently from federal and state governments, they are subject to important limitations. F. COHEN, *supra* note 36, at 241. A tribe's sovereign powers are subject to qualification by treaties and statutes. *Id.* at 241-42. For example, the Treaty with the Navajos, Sept. 9, 1849, art. 9, 9 Stat. 974, 975, subjected the internal affairs of the Navajos to federal control, abandoning the long-established distinction between internal and external tribal matters. *Id.* at 69.

52. *White Mountain*, 448 U.S. at 143 (quoting, in part, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973)). Once powers of tribal self-government have become established, subsequent federal action which might infringe upon Indian self-government is construed narrowly in favor of retaining Indian rights. F. COHEN, *supra* note 36, at 224. In Bryan v. Itasca County, 426 U.S. 373 (1976), the Indians' right to be free of state taxation in Indian country was upheld in spite of the provisions of Public Law 280, which provided for the extension of many state laws into Indian territory. *Id.* at 379. Furthermore, the Indian Civil Rights Act, 25 U.S.C. § 1302, which applied many provisions of the Bill of Rights to tribes in the exercise of self-government was

III. STATE JURISDICTION OVER INDIAN ACTIVITIES ON INDIAN LAND

Several states have attempted to assert jurisdiction over various Indian activities on Indian land. The following is a discussion of the approaches used by those states and an analysis as to whether Oklahoma can rely on one or more of these approaches to assume jurisdiction over Indian bingo.

A. *Public Law 280*

States lack jurisdiction over Indian land until granted that authority by the federal government.[53] "Public Law 280[54] embodies express congressional consent to state assumption of civil and/or criminal jurisdiction over Indians and Indian activities within Indian Country."[55] As originally enacted, Public Law 280 granted states the right to assume criminal and civil jurisdiction if the state amended any barriers in its constitution or statutes which prevented the assumption of jurisdiction and if the state exercised affirmative legislative action.[56] However, title IV of the Civil Rights Act of 1968[57] changed the procedure set forth under Public Law 280 by eliminating the affirmative legislative action mandate and by requiring the consent of the tribe involved before a state was permitted to assume criminal or civil jurisdiction over Indian territory.[58] States with legal impediments to the assumption of jurisdiction

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construed strictly in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), to limit the availability of federal judicial review of tribal action.

53. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973) (citing U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

54. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360 (1982)).

55. Ahboah v. Housing Auth. of Kiowa Tribe, 660 P.2d 625, 630 (Okla. 1983).

56. 67 Stat. 588, 590 (1953), *repealed by* Pub. L. No. 90-284, § 403, 82 Stat. 79 (1968) (codified at 25 U.S.C. §§ 1321-1326 (1982)). The former section provided:

> The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

67 Stat. 588, 590 (1953). This section was directed at all states except Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.* Under Public Law 280 as originally enacted these states were considered "mandatory" states and were *required* to assume civil and criminal jurisdiction over most Indian territory within their boundaries. *Id.* at 588.

57. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 78 (codified at 25 U.S.C. §§ 1321-1326 (1982)).

58. 25 U.S.C. §§ 1323(b), 1326 (1982) (state's criminal and/or civil laws shall be applicable in Indian country "only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote").

under title IV were given permission to amend their constitutions and statutes to remove any such impediments.[59] The assumption of jurisdiction by such a state would not be effective until the required amendments were made and permission was obtained from the affected tribes.[60] Article I of the Oklahoma Constitution may constitute a legal impediment to state jurisdiction over Indian country. It provides:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.[61]

It is difficult to determine whether Oklahoma has assumed jurisdiction over Indian country under Public Law 280 because Oklahoma courts disagree on the scope and effect of the "disclaimer language" in the constitution. In *State v. Littlechief*,[62] the Court of Criminal Appeals of Oklahoma confirmed the trial court's dismissal of an information which charged Littlechief with murder.[63] In its Order Affirming Dismissal, the court found that the State of Oklahoma had no jurisdiction over the crime.[64] The court held that the issue of jurisdiction had already been determined by the United States District Court for the Western District of Oklahoma.[65] The federal district court had noted that under the provisions of Public Law 280 the State of Oklahoma could have unilaterally assumed jurisdiction over any Indian land within its borders at any time between 1953 (when Public Law 280 was first enacted) and 1968 (when Public Law 280 was amended) had the Oklahoma Constitution been amended as required.[66] "After the enactment of Title IV in 1968

59. *Id.* § 1324 (1982) (states have the power "to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction").

60. *See* Ahboah v. Housing Auth. of Kiowa Tribe, 660 P.2d 625, 630 (Okla. 1983); 25 U.S.C. §§ 1324, 1326 (1982).

61. OKLA. CONST. art I, § 3.

62. 573 P.2d 263 (Okla. Crim. App. 1979).

63. *Id.* at 264.

64. *Id.*

65. *Id.* The issue presented to both the Oklahoma Court of Criminal Appeals and the United States district court was whether the crime charged occurred in "Indian country" as defined by statutes of the United States. *Id.* The district court found that since the murder occurred on Indian Trust Land which was part of an original allotment and held in trust for the tribe by the federal government, the federal court, and not the State of Oklahoma, had jurisdiction over the defendant. *Id.* at 264-65.

66. *Id.* at 265.

Oklahoma had to amend its constitution *and* the affected tribes had to consent to the State's assumption of jurisdiction over them before the State could acquire jurisdiction over 'Indian country.' "[67] The State of Oklahoma, however, has never acted pursuant to Public Law 280 or title IV to assume jurisdiction over Indian territories.[68]

The Supreme Court asserts a different view of the constitutional disclaimer. In *Currey v. Corporation Commission*,[69] the court interpreted Oklahoma's disclaimer of right and title to Indian lands as a disclaimer of proprietary rather than governmental interests.[70] The court stated that "[t]he State may well waive its claim to any right or title to [Indian] lands and still have all of its political or police power with respect to the actions of the people on those lands, as long as that does not affect the title to the land."[71]

Not only is there an apparent conflict between the Supreme Court's interpretation of Public Law 280 and Oklahoma's constitutional disclaimer and the Court of Criminal Appeals' interpretation, there appears to be some confusion within the Court of Criminal Appeals itself. Some criminal cases have held that since Oklahoma has not repealed the constitutional disclaimer prohibiting state jurisdiction over Indian country,

67. *Id.*

68. *See, e.g.*, Confederated Bands & Tribes of Yakima Indian Nation v. Washington, 550 F.2d 443, 445 n.3 (9th Cir. 1977) (noting that ten states, including Oklahoma, have not assumed any effective jurisdiction over Indian land under Public Law 280).

69. 617 P.2d 177 (Okla. 1980), *cert. denied*, 452 U.S. 938 (1981). In *Currey*, the court was required to determine whether the Oklahoma Corporation Commission could order the replugging of abandoned wells on Choctaw property. *Id.* at 178. Currey asserted that "because the wells were drilled on restricted Indian lands Oklahoma [was] without jurisdiction." *Id.* at 179. The court noted that section 11 of Public Law 80-336 "withdraws Congress from preemption in the field of oil and gas conservation and thereby enlarged the sovereignty of Oklahoma to that extent." *Id.* at 180. Section 11 reads:

> All restricted lands of the Five Civilized Tribes are hereby made subject to *all* oil and gas conservation laws of Oklahoma: *Provided*, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

Act of Aug. 4, 1947, Pub. L. No. 80-336, ch. 458, 61 Stat. 731, 734. The court concluded that federal jurisdiction over Indian land was not exclusive jurisdiction and that the Corporation Commission had the authority to order Currey to replug the wells. *Currey*, 617 P.2d at 180.

70. *Currey*, 617 P.2d at 180; *see also* Organized Village of Kake v. Egan, 369 U.S. 60, 69-76 (1962) (Alaska disclaimer of all rights and title to Indian land does not authorize Indian communities to use fish traps in Alaskan waters in violation of the Alaska Anti-Fish Trap Conservation Law because such action would violate governmental interests); Ahboah v. Housing Auth. of Kiowa Tribe, 660 P.2d 625, 630-31 (Okla. 1983) ("disclaimer" language in Oklahoma Constitution presents no barrier to adjudication of forcible entry and detainer actions involving Indians and Indian property in and of itself, since such act is governmental and the disclaimer clause is a disclaimer of proprietary rather than governmental interests).

71. *Currey*, 617 P.2d at 180 (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 69 (1962)).

the federal government has exclusive jurisdiction over Indian country located within Oklahoma's boundaries.[72] At least one criminal case, however, has held that even if an offense is committed within Indian country, this does not preclude the State of Oklahoma from applying its laws. In *Goforth v. State*,[73] the Court of Criminal Appeals noted that Oklahoma's constitutional disclaimer was not to be read so restrictively as to deny the state the authority to punish crimes within its borders.[74]

In light of the ambiguities in Oklahoma cases addressing the implications of Public Law 280 and the constitutional disclaimer, it is difficult to determine what position the state could take in enforcing its bingo laws on tribal land under this federal legislation. The section of Public Law 280 which allows states to assert criminal jurisdiction over Indian land provides that the criminal laws of a state shall have the same force and effect within Indian country as they have elsewhere in the state.[75] As for civil jurisdiction, the Law offers little assistance in determining which civil laws may be enforced. Public Law 280 grants the states

> jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .[76]

It has been determined that this section applies to private causes of action, but not to state regulatory and licensing laws. Thus, in *Bryan v. Itasca County*,[77] the Supreme Court interpreted Public Law 280 as granting civil jurisdiction to the states only to the extent necessary to resolve private disputes between Indians and between Indians and private citi-

72. *See* State v. Littlechief, 573 P.2d 263, 265 (Okla. Crim. App. 1978); *accord* State v. Burnett, 671 P.2d 1165, 1167 (Okla. Crim. App. 1983) (noting that according to Washington v. Confederated Bands & Tribes, 439 U.S. 463, 486 (1979) and Kennerly v. District Court, 400 U.S. 423 (1971), a constitutional amendment may not be necessary if the state manifests by political action a willingness and the ability to discharge the new responsibilities); C.M.G. v. State, 594 P.2d 798, 799 (Okla. Crim. App.), *cert. denied*, 444 U.S. 992 (1979).

73. 644 P.2d 114 (Okla. Crim. App. 1982). In *Goforth*, the defendant argued that since he was an Indian and committed a murder within Indian country, the state had no jurisdiction over the matter. *Id.* at 115. The defendant failed, however, to establish his status as an Indian. *Id.* at 116. State jurisdiction was not, therefore, preempted by federal law. *Id.*

74. *Id.* at 117.

75. 18 U.S.C. § 1162(a) (1982); 25 U.S.C. § 1324 (1982).

76. 28 U.S.C. § 1360(a) (1982).

77. 426 U.S. 373 (1976). In *Bryan*, an enrolled Chippewa Indian brought suit in state court seeking a declaratory judgment that the State of Minnesota and County of Itasca lacked the authority to impose a property tax on his mobile home which was located on reservation land. *Id.* at 375.

zens.[78] The Court stated that "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so."[79] Thus, the mandate from the Supreme Court is that states do not have general regulatory power over the Indian tribes.

In the event that the disclaimer language in Oklahoma's Constitution is not deemed an impediment to state jurisdiction over activities within Indian country, it may prove useful to examine how other states have interpreted Public Law 280 and its relationship to the enforcement of state bingo laws on Indian land. In *Seminole Tribe of Florida v. Butterworth*,[80] the Seminole tribe sought to enjoin the Sheriff of Broward County from enforcing Florida's bingo laws on their reservation.[81] The Seminoles contracted with a private limited partnership that agreed to build and operate a bingo hall on Seminole land in exchange for a percentage of the profits as management fees.[82] Florida bingo laws authorized only charitable or non-profit organizations to engage in bingo.[83] Moreover, the state prohibited sponsors from being compensated in any way for operating the games.[84] The court noted that whether the state could assume jurisdiction under Public Law 280 turned on the determination of whether Florida's bingo statutes were "civil/regulatory or criminal/prohibitory in nature."[85] The court held that "under a civil/regulatory versus criminal/prohibitory analysis, we consider the Florida

78. *Id.* at 383-85. The Court stated that Public Law 280 provided for civil jurisdiction as follows: "[S]ubsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes." *Id.* at 383. The Court also noted that:

> A fair reading of [Public Law 280] suggests that Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather that Congress intended 'civil laws' to mean those laws which have to do with private rights and status. Therefore, 'civil laws . . . of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws.

Id. at 384 n.10 (quoting Israel & Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D.L. REV. 267, 296 (1973)).

79. *Id.* at 390.

80. 658 F.2d 310 (5th Cir. 1981).

81. *Id.* at 311.

82. *Id.*

83. FLA. STAT. § 849.093(2) (1985) (permitting "nonprofit or veterans' organizations engaged in charitable, civic, community, benevolent, religious, or scholastic works or other similar endeavors, which organizations have been in existence . . . for a period of 3 years or more" to conduct bingo games).

84. FLA. STAT. § 849.093(7) (1984).

85. *Butterworth*, 658 F.2d at 311.

statute in question to determine whether the operation of bingo games is prohibited as against the public policy of the state or merely regulated by the state."[86] In finding that bingo was not against the public policy of the State of Florida, the court held that the bingo statutes were regulatory and, thus, beyond the reach of state jurisdiction under Public Law 280.[87]

In *Oneida Tribe of Indians v. Wisconsin*,[88] the United States District Court for the Western District of Wisconsin similarly addressed the relationship between Public Law 280 and state bingo laws.[89] The Oneidas operated a bingo hall on tribal property without the assistance of any profit organizations.[90] Proceeds from bingo operations were appropriated solely for the purposes of promoting the health, education, and welfare of the tribe.[91] Wisconsin's Constitution had previously been amended to provide that the legislature could "authorize bingo games licensed by the state, and operated by religious, charitable, service, fraternal or veterans' organizations or those to which contributions are deductible for federal or state income tax purposes."[92] The state argued that the tribe's bingo operations were in violation of state law because Indians were not one of the groups authorized to play bingo under the constitution.[93] The State of Wisconsin was granted full criminal jurisdiction pursuant to Public Law 280 to enforce laws on Indian reservations which prohibit "activities that the state determined are too dangerous, unhealthy, or otherwise detrimental to the well-being of the state's citizens."[94] Nonetheless, the court held that Wisconsin's regulation of bingo was a civil regulation and that under Public Law 280, Wisconsin had no authority to enforce its bingo laws on Oneida property.[95] The court based its decision upon a finding that bingo was not against the public policy of Wisconsin inasmuch as the state's laws were not designed to

86. *Id.* at 313.

87. *Id.* at 314-15. In concluding that bingo was not generally against public policy in Florida, the court examined the gambling regulation scheme in the state. *Id.* at 314. It was noted that Florida does not outlaw bingo, horse racing, dog racing and jai alai outright, but rather excepts them from the state's lottery prohibition and permits them to be regulated by the state. *Id.*

88. 518 F. Supp. 712 (W.D. Wis. 1981).

89. *Id.* at 716-18.

90. *Id.* at 713.

91. *Id.*

92. *Id.* at 717 (citing WIS. CONST. art. IV, § 24(1)). Pursuant to this change in the constitution, Wisconsin enacted legislation governing the operation of bingo games. *Id.* (citing WIS. STAT. §§ 163.03-.74, 945.01-.12 (1974)).

93. *Oneida*, 518 F. Supp. at 717.

94. *Id.* at 720.

95. *Id.* at 719.

prevent the general populace from playing the game.[96]

Most recently, the United States Court of Appeals for the Ninth Circuit, in *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*,[97] addressed the applicability of state bingo laws on Indian land. The Barona Group entered into a management agreement with a corporation to commence bingo operations on the reservation.[98] California laws authorized cities and counties to provide for bingo games, but only for charitable purposes.[99] The Sheriff of San Diego County contended that Public Law 280 gave the state jurisdiction over Indian bingo.[100] The court, however, applied the public policy arguments set forth in *Oneida* and *Butterworth* and held that California bingo laws were regulatory and of a civil nature.[101] Thus, the state could not exercise jurisdiction over the reservation games.[102]

As in *Butterworth*, Oklahoma law also provides that the charitable organization running a bingo game cannot form any agreement or contract concerning the operation of the games with other persons or organizations for which consideration or compensation is provided.[103] Indians throughout Oklahoma have contracted with corporations to help finance their bingo halls.[104] Oklahoma law further stipulates that no licensee may conduct bingo games more than two days per week, that no prize greater than $200 shall be offered or awarded in any single game of bingo, and that the aggregate amount of all prizes offered or awarded in a single session shall not exceed $1,000.[105] The Creek Nation plays bingo

96. *Id.* at 718. "State law governing bingo appears to provide penalties for those who illegally conduct bingo games rather than for those who merely play in such games." *Id.* at 719.

97. *Barona*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 2091 (1983).

98. *Id.* at 1187.

99. *Id.* (citing CAL. PENAL CODE § 326.5 (West Supp. 1982)).

100. *Id.* (citing 28 U.S.C. § 1360 (1976)).

101. *Id.* at 1189. The court first established that there was no general prohibition against playing bingo in California. *Id.* The court then noted that the sheer number of organizations permitted to run bingo games mitigates against the games being considered a violation of public policy. *Id.* Finally, the court relied on several "rules of construction," including the encouragement of tribal self-government and the strong historical precedent disfavoring state jurisdiction over reservations, to find that the bingo laws were not prohibitory. *Id.* at 1190 (citing, respectively, United States v. Wheeler, 435 U.S. 313, 322-26 (1978); Bryan v. Itasca County, 426 U.S. 373, 392 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973)). Thus, the court considered the Indian bingo issue against the "backdrop" of tribal sovereignty.

102. *Barona*, 694 F.2d at 1190.

103. OKLA. STAT. tit. 21, § 995.1 (Supp. 1984). Florida law states that members of the organization conducting bingo games shall not be compensated in any way. FLA. STAT. ANN. § 849.093(7) (West 1984). Nonetheless, this provision was found not to act as a bar to the Seminole Indians operating bingo games under the sponsorship of a limited partnership. *Butterworth*, 658 F.2d at 312.

104. *See supra* note 3.

105. OKLA. STAT. tit. 21, § 995.10 (Supp. 1984). Other jurisdictions which have addressed Indian bingo have had similar statutes regulating the number of sessions and amount of prizes. For

daily, offers prizes as high as $1,000 per game, and awards prizes in an aggregate amount for a single session as high as $12,000.[106] It is evident that Indian bingo is not conducted in compliance with Oklahoma's bingo laws. Nonetheless, pursuant to the test developed for application of Public Law 280, Oklahoma can impose its bingo laws on Indian bingo operations only if the state's bingo laws are classified as criminal or prohibitory.

The state may argue that bingo laws are prohibitory in that the purpose of the bingo licensing law is to prohibit entirely the operation of bingo games except by those organizations issued licenses by the district court clerk.[107] One further argument for bingo laws being classified as prohibitory is that persons who fail to conduct their bingo games in compliance with state bingo laws are subject to penalties.[108] When analyzing these arguments in light of the cases previously discussed and with a view toward Oklahoma's entire gambling regulatory scheme, it appears that the arguments would likely fail.

As in *Butterworth*, *Oneida*, and *Barona*, public policy would play an important role in ascertaining whether Oklahoma's bingo laws are regulatory as opposed to prohibitory. In evaluating Oklahoma's bingo laws, it is apparent that the legislature meant only to regulate bingo, not to prohibit it entirely. The legislature has the inherent power to prohibit or regulate any and all forms of gambling.[109] Although the Oklahoma Leg-

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example, Florida law states that games can be conducted only two days per week and that no more than three jackpots per day are permissible. FLA. STAT. ANN. § 849.093 (West 1984); *see Butterworth*, 658 F.2d at 312. Wisconsin law limits the number of bingo sessions to 54 per year, and no single prize can exceed $250. WIS. STAT. ANN. § 163.51 (West 1984); *see Oneida*, 518 F. Supp. at 713, 720 (Indian bingo permissible despite its noncompliance with Wisconsin law). Furthermore, although Indians operate high-stakes bingo in several other states, this has not been a bar to upholding the legality of Indian bingo games in those states. *See, e.g.*, McGregor, *Indians Hit Jackpot in High-Stakes Bingo Games*, Tulsa World, Oct. 25, 1984, at E.1, col. 2 (in Florida, the Seminoles gross approximately $20 million per year, with annual profits of $3.5 million; in Minnesota, the Sioux raised $3 million in profits after paying out $6 million in prizes during the first year of operation); *Million-Dollar Bingo*, Tulsa Tribune, June 30, 1983, at A.7, col. 1 (North Carolina Cherokees charged players a $500 entry fee for the chance to win $1.05 million in prizes, including a $200 thousand final-game prize).

106. *See* Pratter, *1,000 Folks Put Their Money on New Creek Bingo Game*, Tulsa World, Nov. 18, 1984, at A.1, col. 2.

107. *See* OKLA. STAT. tit. 21, § 995.1 (Supp. 1984).

108. *Id.* § 995.15. Section 995.15 provides that:

> Any violation of . . . this title [Bingo Act] is hereby declared to be a public nuisance. Any person violating the provisions of this act except as otherwise provided in this section shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by confinement in the county jail for a period of time not to exceed thirty (30) days and by a fine of not less than Two Hundred Dollars ($200.00) and not more than Five Hundred Dollars ($500.00), or by both such fine and imprisonment.

109. The Oklahoma Constitution provides that "[t]he authority of the Legislature shall extend to

islature has expressly prohibited some forms of gambling,[110] bingo appears to fall within a category of gambling that Oklahoma has chosen to regulate by imposing certain limitations to avoid abuses.[111] Thus, the statutes regulate bingo as a money-making venture by limiting the number of sessions and the amount of prizes,[112] by requiring that the organization operate without profits to its individual members,[113] and by requiring that the games be operated by volunteers from the authorized organizations.[114] That so many diverse organizations are allowed to conduct bingo operations[115] and that the general populace is permitted to engage in the games which these organizations sponsor, is contrary to a finding that such operations violate Oklahoma's public policy.[116]

Public policy rationales must be further examined in view of the "backdrop" of tribal sovereignty.[117] The federal Indian policy of self-government for Indian tribes works against a finding that Indian bingo is a violation of Oklahoma's public policy.[118] The explicit purpose of Oklahoma Indian bingo operations is to collect money for the support of

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all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subjects whatsoever." OKLA. CONST. art. V, § 36. The legislature is constitutionally vested with the power and authority to pass legislation on any subject not withheld by state or federal constitutions. *See* State *ex rel.* Okla. Tax Comm'n v. Daxon, 607 P.2d 683, 687 (Okla. 1980).

110. *See, e.g.*, OKLA. STAT. tit. 21, § 1052 (1981) (lotteries are unlawful in Oklahoma).

111. Moreover, the state can no longer claim a "general policy" against most types of gambling, since the Oklahoma Legislature has recently provided that counties may hold elections to approve pari-mutuel horse racing. OKLA. STAT. tit. 3A, § 209 (Supp. 1984). Horse racing is regulated by the state and licensees are required to retain 18% of all money wagered, one-third of which is to be remitted to the Oklahoma Tax Commission. *Id.* § 205.6; *see infra* notes 156-92 and accompanying text for analysis of the issue of taxing Indian bingo revenues. An Indian tribe in Oklahoma is currently attempting to locate a parimutuel race track on tribal land in Comanche County without licensing from the Oklahoma Horse Racing Commission. Ervin, *Indian Rights vs. State: Tax Agency on Front Line*, Tulsa World, May 8, 1985, at A.4, col. 6.

112. OKLA. STAT. tit. 21, § 995.10 (Supp. 1984).

113. *Id.* § 995.1.

114. *Id.*

115. *See supra* note 13 and accompanying text.

116. *See, e.g.*, *Barona*, 694 F.2d at 1189 (noting the importance of these two factors in finding that California's public policy is not against bingo); *accord Oneida*, 518 F. Supp. at 719. The same arguments cannot be made with regard to recent attempts by Indians in Oklahoma to place slot machines in Indian Country. *See Indian Lotteries, Slot Machines Ruled Illegal*, Tulsa World, May 1, 1985, at A.1, col. 5. The operation of slot machines is prohibited in Oklahoma. OKLA. STAT. tit. 21, § 970 (1981). A recent opinion of Oklahoma's Assistant Attorney General John Galowitch found that it would be unlawful for a person within Indian Country in Oklahoma to possess a slot machine. *See* 56 OKLA. B.J. 1085 (1985).

117. *See, e.g.*, *Barona*, 694 F.2d at 1189 (discussing the historical precedents of encouraging tribal self-government and non-state interference with Indian tribal affairs).

118. Federal Indian policy has been addressed by other jurisdictions attempting to regulate Indian bingo. *See, e.g.*, *Oneida*, 518 F. Supp. at 720 (Wisconsin's bingo laws could not be enforced on the Oneida Reservation; to hold otherwise would be contrary to present Federal policy encouraging tribal self-government).

programs to promote the health, education, and general welfare of the tribes.[119] High-stakes Indian bingo has meant not only jobs and revenue for the Indians, but also income for nearby hotels, motels, and restaurants.[120] The intent to better the Indian community is as worthy as the other charitable purposes to which bingo proceeds are authorized under Oklahoma bingo statutes.[121] Although Indian bingo operations do not fully comply with the letter of the statutory scheme, they do at least fall within the general tenor of its permissive intent and should not be viewed as against public policy.

Finally, an argument that the bingo law is criminal because it has a penal provision would likely fail. First, such a conclusion would transform numerous purely regulatory statutes into prohibitory ones, thus depriving Indians of a significant degree of control over their sovereign territories.[122] Second, the statute provides a penalty only for those who *illegally* conduct bingo games, rather than for those who merely play the game.[123]

B. *The Assimilative Crimes Act*

The state could attempt to curtail Indian bingo activity through the use of the Assimilative Crimes Act.[124] In *United States v. Marcyes*,[125] the Puyallup Indian tribe sold fireworks to the public at a fireworks stand on tribal land in Washington.[126] The state asserted jurisdiction over the activity through the Assimilative Crimes Act which provides:

> Whoever within or upon any of the places now [under the jurisdiction of the United States], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would

119. *See* Cass, *Bingo! Money From Enterprises Helps Indians Go Forward*, Tulsa World, Jan. 1, 1984, at A.14, col. 4 (bingo proceeds are used "to build and staff health- and day-care centers, to provide college scholarships, to hire lobbyists, to contribute to political campaigns and to make up for the Reagan administration's budget cuts in welfare programs").

120. *See, e.g.*, Neal, *Bingo! Indian Nations Hit the Jackpot*, Tulsa Tribune, Jul. 29, 1984, at B.1, col. 6 ("hotel[s] and motels in the area, hurting for business, are happily awaiting busloads of bingo players").

121. *See, e.g.*, *Barona*, 694 F.2d at 1190 (noting that the betterment of the Indian community is a worthy purpose).

122. *See, e.g.*, *Oneida*, 518 F. Supp. at 720 ("Congress did not intend to allow states to use licensing requirements in an attempt to create jurisdiction to enforce otherwise civil regulations on Indian reservations").

123. *See* OKLA. STAT. tit. 21, § 995.15 (Supp. 1984); *see also Butterworth*, 658 F.2d at 316 ("The courts that have prohibited Indians or non-Indians from gambling on reservations have done so in light of a statute that specifically prohibits the *act of gambling*.") (emphasis added).

124. 18 U.S.C. § 13 (1982).

125. 557 F.2d 1361 (9th Cir. 1977).

126. *Id.* at 1363.

> be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.[127]

The Act essentially transforms the laws of a state into federal law. Thus, when no federal law specifically addresses a particular crime, the state law is applied through the Assimilative Crimes Act to individuals on federal territory within the boundaries of the state. The Assimilative Crimes Act is applied to Indian reservations through the General Crimes Act[128] which provides that the general criminal laws of the United States shall extend to Indian lands.[129]

The Puyallups argued that the Assimilative Crimes Act was inapplicable to their fireworks sales because the Act only incorporates the general criminal code or prohibitory laws of the state and Washington's fireworks laws were merely penal provisions of regulatory laws.[130] Nonetheless, the court found that the fireworks laws were criminal and prohibitory in that their purpose was to "promote the safety and health of all citizens."[131] Similarly, the Ninth Circuit Court of Appeals found that the regulation of prostitution in Nevada was within the purview of the Assimilative Crimes Act and, thus, the Department of the Interior could prohibit Moapa Indians from operating houses of prostitution on the reservation.[132]

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127. 18 U.S.C. § 13 (1982).

128. *Id.* § 1152.

129. The General Crimes Act provides: "[T]he general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country." 18 U.S.C. § 1152 (1982). Since the Assimilative Crimes Act is applicable to Indian reservations only through the General Crimes Act, it is subject to the latter's exceptions. *See* Guzman, *Indian Gambling on Reservations: Organized Crime or Assimilative Crime?*, 24 ARIZ. L. REV. 209, 217 (1982). The General Crimes Act does not extend to: (1) offenses committed by one Indian against the person or property of another Indian; (2) any Indian committing any offense in Indian country who has been punished by tribal law; or (3) "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152 (1982); *see also* Williams v. United States, 327 U.S. 711, 713 (1946) (Court indicated that the Assimilative Crimes Act applies to Indian reservations through the General Crimes Act).

130. *Marcyes*, 557 F.2d at 1364.

131. *Id.*

132. Moapa Band of Paiute Indians v. United States Dep't of Interior, 747 F.2d 563 (9th Cir. 1984). In *Moapa*, the Phoenix Area Director of the Bureau of Indian Affairs rescinded a tribal ordinance permitting the licensing of houses of prostitution on a Paiute reservation. *Id.* at 564. Although Nevada law permits counties having populations of less than 25,000 persons to license the operation of houses of prostitution, the county in which the reservation was located had a population of 250,000, thus brothels were not permitted. *Id.* (citing NEV. REV. STAT. § 244.345(8) (1981)). One of the justifications for rescinding the ordinance which was offered by the Department of Interior was that both Indians and non-Indians would be subject to arrest under the Assimilative Crimes Act, 18 U.S.C. § 13 (1976), which makes punishable as a federal crime any act committed on federal

Oklahoma could argue that the state can prohibit Indian bingo under this Act. Once again, the counterargument is that the penalties for violations of Oklahoma's bingo laws are merely penal provisions of a regulatory law and, as such, the Assimilative Crimes Act is inapplicable. Moreover, the Supreme Court, in *Johnson v. Yellow Cab Transit Co.*,[133] indicated that a strong argument exists that Congress did not intend to include the penal provisions of a state regulatory system within the Assimilative Crimes Act.[134] The rationale for this argument is obvious: "a state could thereby enforce its regulatory system on the federal jurisdiction by making criminal any failure to comply with those regulations."[135] This argument is even stronger with respect to Indian lands because a state could attempt to use the Act to implement all of its regulatory provisions on Indian reservations and thus destroy the concept of tribal sovereignty.[136]

C. *The Organized Crime Control Act*

Finally, Oklahoma could attempt to eliminate Indian bingo through use of the Organized Crime Control Act.[137] In *United States v. Farris*,[138] the Puyallup tribe in Washington operated profitable casinos featuring blackjack, poker and dice on tribal land.[139] The casinos were open to the public and many non-Indians and out-of-staters participated in the games.[140] The United States District Court for the Western District of Washington obtained jurisdiction over these activities through the Organized Crime Control Act, which makes it a federal crime to operate a large scale gambling business in violation of state law.[141]

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land which would be a state crime if committed in the state surrounding the area. *Id.* The Department also noted that although the federal government encourages the economic development of Indian reservations, the revenues generated by prostitution were "not the kind of economic development envisioned by federal policy." *Id.* Furthermore, the "licensing and operation of brothels on the Moapa Reservation would bring about a political reaction adverse to Moapa and other Indian tribes." *Id.*

133. 321 U.S. 383 (1944).

134. *Id.* at 389 n.8.

135. *Marcyes*, 557 F.2d at 1364.

136. *See* Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 715-19 (W.D.Wis. 1981).

137. 18 U.S.C. § 1955 (1982).

138. 624 F.2d 890 (9th Cir.), *cert. denied*, 449 U.S. 1111 (1980).

139. *Id.* at 893.

140. *Id.*

141. *Id.* at 892 (citing 18 U.S.C. § 1955 (1976)). The Organized Crime Control Act was intended to reach the heart of organized crime. *See, e.g.*, Iannelli v. United States, 420 U.S. 770, 786 (1975) (basic purpose of the Organized Crime Control Act was "to seek the eradication of organized crime in the United States"); United States v. Grezo, 566 F.2d 854, 859 (2d Cir. 1977) ("examination of the legislative history of § 1955 indicates . . . that Congress intended to reach all manifestations of large-scale organized crime"); United States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974) (Organ-

The Puyallups argued that the Act did not apply to them and that even if it did, they were not guilty of violating it because their casinos were on Indian land which was outside of the jurisdiction of Washington's gambling laws.[142] The court disagreed and held that the Act was a federal law and that federal laws generally applicable throughout the United States apply with equal force to Indians on Indian land.[143]

The Puyallup's gambling activities are analogous to Indian bingo in Oklahoma. Indian bingo halls are operated on tribal land and are open to the public.[144] Many non-Indians and out-of-staters participate in the high-stakes games.[145] Indian bingo also meets the definition of "illegal gambling" as set forth in the Organized Crime Control Act which defines illegal gambling as gambling which is "a violation of the law of a State . . . [involving] five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business . . . in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."[146] Indian bingo can be said to be a violation of state law because of noncompliance with the licensing requirements or jackpot limitations.[147] Furthermore, Indian bingo halls are generally operated by more than five persons[148] and gross more than $2,000 per day.[149]

While the analysis in *Farris* seems applicable to Indian bingo in Oklahoma, there is an important distinction between the Indian gambling casinos in Washington and the Indian bingo halls in Oklahoma. The particular gambling activities engaged in by the Puyallups were against Washington's public policy.[150] Organized blackjack, poker, and

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ized Crime Control Act "was aimed at curtailing syndicated gambling, the lifeline of organized crime"). At least one commentator has argued that the Act was never intended to apply to gambling on an Indian reservation which was not within the reach of state law. *See* Guzman, *supra* note 129, at 222 (Organized Crime Control Act and Assimilative Crimes Act examined to determine their applicability to the facts in United States v. Farris, 624 F.2d 890 (9th Cir. 1980)).

142. *Farris*, 624 F.2d at 893-94.

143. *Id.* The court found that the Puyallup gambling activities were a violation of Washington's gambling laws for purposes of the Organized Crime Control Act. *Id.* at 895.

144. *See* Pratter, *supra* note 3, at F.1, col. 1.

145. *See, e.g.*, Everly-Douze, *Big Prizes Attracting Crowds to Indian Bingo Hall*, Tulsa World, Nov. 11, 1984, at A.1, col. 1 ("would-be jackpotters endure overnight bus trips from as far away as Chicago and McAllen, Texas, on the Mexican border, to pack the hall" at the Otoe-Missouria Indian Tribe's bingo hall in Red Rock, Oklahoma).

146. 18 U.S.C. § 1955(b) (1982).

147. *See supra* notes 103-06 and accompanying text.

148. *See, e.g.*, Pratter, *supra* note 3, at F.1, col. 2 (Creek bingo hall in Tulsa is operated by members of the tribe and by consultants from Indian Country USA; the hall has provided approximately 125 jobs).

149. *See supra* note 106 and accompanying text.

150. *Farris*, 624 F.2d at 895.

dice which are operated for profit are not freely engaged in by members of the general public in Washington.[151] Bingo, on the other hand, is not against Oklahoma's public policy in that the games are played by members of the general public.[152]

There is also a serious defect in the *Farris* court's reasoning. First, it stated that Washington could not enforce its gambling laws against the Puyallups on Indian land[153] and then it held that the Indian gambling activities were a violation of the law of the state for purposes of the Organized Crime Control Act.[154] This interpretation of the statute is untenable. It exceeds the limits of reasonable statutory construction to hold that conduct which could not be punished under a state law is nonetheless a violation of that same state law. Furthermore, the idea that a person can transgress state law by conduct not punishable under that state law is inconsistent with minimum notions of notice and fairness.[155]

D. *The Cigarette and Liquor Cases and the Issue of Taxation*

The tension between states and tribal governments has become particularly acute in the area of state taxation of reservation activities. In the event Oklahoma attempts to regulate Indian bingo through taxation, a different analysis from that presented in the previous sections may be used to attack the state's alleged right to tax this source of revenue.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[156] the Supreme Court upheld Washington's state sales tax on cigarette sales by Colville Indians to non-Indians and non-member Indians.[157] Prior to this decision, the Colville tribes were able to sell cigarettes at prices much lower than off-reservation shops because no state sales tax was collected.[158] The income earned from reservation smokeshops was exempt from state taxation because the tribes were deemed to have been under federal control and to have occupied federal trust lands.[159] Most of the tribes' cigarette business was generated be-

151. *Id.*; *see* WASH. REV. CODE ANN. §§ 9.46.010, 9.46.220 (1977).
152. *See supra* notes 109-23 and accompanying text.
153. *Farris*, 624 F.2d at 895.
154. *Id.*
155. *See* Guzman, *supra* note 129, at 221 ("Because the Indians were innocent under state law, prosecuting them under the gambling statute was a violation of due process.").
156. 447 U.S. 134 (1980).
157. *Id.* at 161; *see* WASH. REV. CODE ANN. § 82.24.260 (Supp. 1981). The tax immunity is based on membership in a tribal government, not on race. *Colville*, 447 U.S. at 160-61. A nonmember Indian on a reservation does not possess the same immunities afforded a member. *Id.*
158. *Colville*, 447 U.S. at 145.
159. Indians and reservation activities were originally immune from state taxation because the

cause of this exemption; the low prices attracted non-Indian purchasers from surrounding areas.[160] Furthermore, each Colville tribe raised significant revenue for its own use by placing a tax on the sales.[161]

The Court upheld the state cigarette sales tax for two reasons. First, although the Court recognized that the state taxation scheme would deprive the tribes of business and revenue, it refused to find that Washington's action was preempted by federal Indian law.[162] No federal act authorized the tribes to market their tax exemption to non-Indians by enacting tribal taxing ordinances and no federal act hindered the state's ability to collect the sales tax from non-members.[163] Second, the Court applied the infringement test and found that the state's interest in raising revenues outweighed the Indians' right to self-government.[164] The in-

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tribes were considered to be distinct political communities under the exclusive control of Congress. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1886). In *Kansas Indians*, the Court rejected state efforts to impose a land tax on reservation Indians. *Id.* at 757. The federal instrumentality doctrine, which exempts federal lands from state taxation, was also asserted as a basis for tax immunity for reservations. *Id.*; *see also* United States v. Thurston County, 143 F. 287 (8th Cir. 1906), providing that:

> Lands allotted to Indians, inalienable for certain periods of time during which they are held in trust by the United States for the benefit of the allotees and their heirs . . . are exempt from taxation by any state or county during the period of the trust, because they are instrumentalities lawfully employed by the nation in the exercise of its powers of government to protect, support, and instruct the Indians.

Id. at 287. The federal instrumentality doctrine was later rejected in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-51 (1973), where the state was allowed to impose taxes on a ski resort operated by Indians on land leased from the federal government. The Court has returned to tribal sovereignty as the basis for immunity. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply . . . . Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.") (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

160. *Colville*, 447 U.S. at 145. The tribes argued that since they imposed their own tax on cigarette sales, the additional state tax would drive cigarette prices up and the tribes would be placed at a competitive disadvantage as compared to businesses elsewhere. *Id.* at 154.

161. *Id.* at 145. For example, from 1972 through 1976, the Colville tribe raised approximately $266,000 from its cigarette tax; the Lummi tribe realized $54,000; the Makah tribe raised $13,000; and the Yakima tribe realized $278,000. *Id.* at 144-45.

162. *Id.* at 154.

163. *Id.* at 155-56. The tribes asserted the power to create state tax exemptions "by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises." *Id.* at 155. The Court stated that if this assertion were true, "the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas." *Id.* The Court concluded that no principle of federal Indian law authorized tribes to market an exemption from state taxation to customers who would normally do their business elsewhere. *Id.* The Court stated that neither the mere fact of federal approval of the Indian taxing ordinances, nor the fact that tribes exercise congressionally sanctioned powers of self-government preempted state sales tax on cigarettes sold to non-members of the tribe. *Id.*

164. *Id.* at 156. Although the taxes would deprive the tribes of substantial revenues, Washing-

fringement test consists of determining whether state law conflicts with tribal self-government.[165] If there is a conflict, the state intrusion is invalid.[166] A state may only extend its civil laws onto a reservation if there is no conflict.[167]

In accordance with *Colville*, it is clear that a state may tax non-Indians on a reservation, even if the non-Indians are already taxed by the tribe.[168] What is not clear is the proof required to invalidate a state tax because of its infringement on tribal self-government. The standard to which courts will hold the burdened tribe is difficult to ascertain. The Ninth Circuit Court of Appeals did, however, establish a standard in *Crow Tribe of Indians v. Montana*.[169] In invalidating a Montana tax, the court stated that: "[T]he Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable."[170]

If the State of Oklahoma attempts to tax non-Indian bingo players, tribes engaged in bingo operations will likely claim that the state tax is an infringement upon their right to govern themselves. Under the test developed in *Crow*, they will have to show that the tax substantially affects their ability to govern themselves or their ability to regulate the development of tribal resources. If Oklahoma is allowed to tax non-Indian bingo players, the players may journey to off-reservation bingo halls to avoid the tax, resulting in a severe loss of revenue for the tribes.[171] Tribes utilize bingo profits to support their schools, clinics, and recreational facilities.[172] Tribal governments would, however, have to show in detailed figures how severely a state tax will damage their economic standing. Nonetheless, it is likely that the courts would rather see Indians generate

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ton's actions did not infringe upon the right of the reservation Indians to "make their own laws and be ruled by them." *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

165. *See* Lytle, *supra* note 19, at 75.

166. *Id.*

167. *Id.*

168. *Colville*, 447 U.S. at 151.

169. 650 F.2d 1104 (9th Cir. 1981).

170. *Id.* at 1117.

171. Over $1 million was generated through admission fees alone at Creek Nation bingo games in Oklahoma from December, 1984 through February, 1985. Letter from Sherrin Watkins of Muskogee Creek Nation Office of Justice to Stefanie Lorbiecki (March 28, 1985) (discussing Creek Nation bingo operations). On the other hand, it has been estimated that the state is losing about $1.6 million in sales tax annually which could be raised from Indian bingo facilities in Oklahoma. Myers, *House Approves Indian Tribes Bill*, Tulsa World, Mar. 15, 1985, at A.1, col. 5.

172. *See supra* note 119 and accompanying text.

their own income than depend on the federal government for economic assistance.

Since its decision in *Colville*, the Supreme Court has moved even further from the concept of tribal sovereignty. In *Rice v. Rehner*[173] the Court held that existing federal control over liquor regulation did not preempt state licensing of liquor vendors on Indian reservations.[174] The Court abruptly diverged from prior preemption decisions by stating that it need not automatically consider tribal sovereignty as a backdrop against which to examine existing federal regulations in liquor licensing.[175] Instead, the Court held that if the case did not involve "a tradition of sovereignty" or if the state's interests in regulation outweighed those of the tribe and the federal government, use of the "backdrop" analysis would be inappropriate.[176] The Court concluded by noting that "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention."[177]

Rehner leaves unanswered several questions regarding state regulation of Indian activities. First, *Rehner* created an exception to the preemption barrier by holding that the state could regulate an area not under "a tradition of sovereignty" by the tribe,[178] but it did not address the effect of this exception on infringement of tribal sovereignty. Specifically, the Court failed to state whether the infringement test still constitutes an independent barrier to the assumption of state regulatory jurisdiction in Indian country.[179]

Second, the Court in *Rehner* failed to define "a tradition of tribal sovereignty." In finding that no tradition of tribal sovereignty existed in *Rehner*, the Court relied upon the fact that colonists had regulated Indian liquor trading long before any tribal regulatory attempts.[180] This may mean that the Court will refuse to recognize an Indian tradition of sovereignty unless the tribe attempts regulation of a field before any state authority is asserted.[181] Furthermore, even if a tribe asserts regulatory jurisdiction over a field prior to the state, this may not be sufficient to

173. 103 S. Ct. 3291 (1983).
174. *Id.* at 3299.
175. *Id.* at 3295.
176. *Id.* at 3296-98.
177. *Id.* at 3298 (quoting New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2387 (1983)).
178. *Rehner*, 103 S. Ct. at 3298.
179. *See* Ryan, *Confusion in the Land of Indian Sovereignty: The Supreme Court Takes a Detour*, 25 ARIZ. L. REV. 1059, 1067 (1983).
180. *Rehner*, 103 S. Ct. at 3297.
181. *See* Ryan, *supra* note 179, at 1067.

constitute "a tradition of sovereignty."[182]

Third, it is difficult to determine what effect *Rehner* will have on a state's ability to tax the sale of liquor within a reservation. In *Colville*, the Court upheld the imposition of state taxes on cigarette sales made to non-Indians and non-members, but precluded state taxation of cigarette sales to members of the Colville tribe.[183] As one commentator has noted:

> Consistent application of *Colville* would allow state liquor taxation only on sales to non-Indians and non-tribal members. This result, however, would leave the Court in the anomalous position of holding that tribal sovereignty is infringed by state taxation of on-reservation liquor purchases by tribal members, but that it is not infringed by state regulation or potentional preclusion of the sale entirely.[184]

The same conclusion would follow if Oklahoma attempted to tax non-Indians and non-members of the tribe operating a bingo hall. Inasmuch as there is currently no federal regulation over Indian bingo,[185] federal preemption analysis is inapplicable and infringement analysis would have to be applied. Consistent application of *Colville* would leave the Court in the anomalous position of finding that tribal sovereignty is infringed by state taxation of Indians at Indian bingo halls, but that it is not infringed by state taxation or regulation of the games entirely.

It could also be argued that *Rehner's* consideration of the "traditions of sovereignty" is equally applicable to the infringement test. Thus, Indian bingo may have to be examined under this new consideration. It does not seem likely, however, that a state can regulate Indian activities based on tradition analysis alone. The Supreme Court's analysis of cases involving infringements on tribal sovereignty has *never* turned on whether the particular area being regulated is traditionally within the tribe's control. In *Ramah Navajo School Board, Inc. v. Bureau of Revenue*,[186] for example, the Court held that federal regulation of Indian schools precluded the imposition of a state tax on construction of such a school.[187] The Court did not find it relevant that federal policy had not encouraged the development of Indian-controlled institutions until the

182. *Id.*

183. *Colville*, 447 U.S. at 154-60.

184. Ryan, *supra* note 179, at 1067.

185. *See infra* notes 193-207 and accompanying text (discussing proposed Indian Gambling Control Act).

186. 458 U.S. 832 (1982). In *Ramah*, a tribal school board protested the imposition of a New Mexico tax on the gross receipts that a non-Indian construction company received from the school board for the construction of a school for Indian children on the reservation. *Id.* at 834. The Court held that the tax was preempted by the "comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education." *Id.* at 846.

187. *Id.* at 841-45.

early 1970's or that the school in question was "the first independent Indian school in modern times."[188] In *Moe v. Salish & Kootenai Tribes*,[189] the Court held that a state could not require the operator of an on-reservation smokeshop to obtain a state cigarette retailer's license but did not consider whether tribal Indians traditionally had exercised regulatory authority over cigarette sales.[190] Moreover, in *Mescalero Apache Tribe v. Jones*,[191] the Court concluded that a state could not impose a use tax on personalty installed at ski lifts at a tribal resort,[192] yet it could hardly be argued that the construction of ski resorts is a matter with which Indian tribes historically have been concerned. Thus, while the state does traditionally control non-Indian bingo operations, it does not necessarily follow that tradition analysis alone will preclude Indian bingo or allow the state to tax it.

IV. THE INDIAN GAMBLING CONTROL ACT

While Indian bingo does not appear to violate Oklahoma's public policy, concern has arisen regarding the tribes' inability to provide adequate safeguards against criminal activities associated with high-stakes Indian bingo.[193] The explosion of high-stakes Indian bingo operations has state and federal law enforcement officials anxious about being unable to police an industry which they believe is already attracting criminals.[194] The issue of who is to police bingo operations on Indian

188. *Id.* at 834.

189. 425 U.S. 463 (1976). In *Moe*, members of the confederated Salish and Kootenai tribes in Montana brought actions challenging the state's cigarette sales taxes and personal property taxes on motor vehicles as applied to reservation Indians. *Id.* at 465. The tribe also challenged the state's vendor licensing statute as applied to tribal members who sold cigarettes at reservation smokeshops. *Id.* The Court held that Montana was barred from imposing cigarette sales taxes on sales by tribal members to Indians residing on the reservation; from imposing the vendor license fee on tribal members operating smokeshops on the reservation; and from imposing a personal property tax as a condition precedent to registration of a motor vehicle. *Id.* at 480-81. The Court did, however, allow the state to tax cigarette sales to non-Indians. *Id.* at 483.

190. *Id.* at 483.

191. 411 U.S. 145 (1973). The Mescalero Apache Tribe operated a ski resort in New Mexico on land outside the boundaries of the tribe's reservation. *Id.* at 146. The state assessed a $26,086.47 income tax on the gross receipts of the ski resort and a $5,887.19 use tax against the tribe, based on the purchase price of materials used to construct ski lifts at the resort. *Id.* at 146-47. Although the state could tax the gross receipts of the ski resort, it could not impose a use tax on personalty which had been "permanently attached to the realty." *Id.* at 158. Inasmuch as the land in question was not subject to state property taxes, the permanent improvements upon the land were not subject to state taxation. *Id.*

192. *Id.* at 158.

193. *See, e.g.*, Stephenson, *supra* note 23, at C.8, col. 2 ("sudden growth of Indian bingo has generated concern in the law enforcement community" and the basis of that concern is the attraction that lucrative gambling operations have for organized crime).

194. *See* McGregor, *supra* note 105, at E.1, col. 1 ("large amounts of cash act as a magnet and a

land in Oklahoma is also controversial. Unlike some states where Indian land or reservations comprise large tracts, Oklahoma has scores of small plots of Indian allotment land where only federal officials have authority.[195] These plots form a checkerboard pattern of Indian lands throughout Oklahoma and their boundaries are difficult to locate.[196]

The Indian Gambling Control Act[197] has been introduced into Congress in response to the problem of inadequate supervision over Indian gambling activities.[198] The Act recognizes that "tribal operation and licensing of gambling activities is a legitimate means of generating revenues."[199] The principle goal of federal Indian policy of "promot[ing] tribal economic development, tribal self-sufficiency, and strong tribal governments" is also noted in the Act.[200]

While the Indian Gambling Control Act recognizes the benefits of tribal gambling activities, it also attempts to establish federal standards and regulations for the conduct of gambling activities within Indian country.[201] The Act legalizes gambling within Indian country only if it is conducted by tribal ordinance and approved by the Secretary of the Interior.[202] The bill prohibits, however, any type of gambling that is prohib-

source of potential corruption"); Marler, *Congress to Examine Controversial Indian Gambling Bill*, Tulsa World, June 18, 1984, at A.1, col. 1 (allegations of organized crime having infiltrated Indian bingo games).

195. *See Crime Threat Raises Concerns*, Tulsa World, June 20, 1984, at A.14, col. 2.

196. *Id.* at A.14, col. 3.

197. H.R. 4566, 98th Cong., 1st Sess. (1983) (microfiche at Y 1.4/6:98-(NOS.)). The most recent version of this bill is H.R. 1920, 99th Cong., 1st Sess. (1985). H.R. 1920 is virtually the same as its predecessor H.R. 4566. Moreover, an Indian Gaming Control Act was introduced in the Senate on April 4, 1985. S. 902, 99th Cong., 1st Sess. (1985). The primary difference between the House's bill and the Senate's bill is that the Senate's version provides for the establishment of Indian-controlled Gaming Commissions to oversee Indian gambling activities. S. 902, 99th Cong., 1st Sess., § 11 (1985).

198. *See, e.g.*, Marler, *Indian Leaders Not in Favor of Proposed Gaming Law*, Tulsa World, June 20, 1984, at A.14, col. 3 (Indian Gambling Control Act was introduced "under the guise" of protecting tribal games from being infiltrated by organized crime).

199. H.R. 4566, 98th Cong., 1st Sess., § 2 (1983) (microfiche at Y 1.4/6:98-(NOS.)).

200. *Id.*

201. "Gambling" is defined by the Act to mean "deal, operate, carry on, conduct, or maintain for play any banking or percentage game or other game of chance played for money, property, credit, or any representative value." *Id.* § 4. "Gambling" does not include "social games played solely for prizes of minimal value or games played in private homes or residences for prizes of minimal value, or traditional forms of Indian gambling engaged in by individuals as part of or in connection with tribal ceremonies or celebrations." *Id.*

"Indian Country" includes "(a) all lands within the limits of any Indian reservation, and (b) any lands title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." *Id.*

202. *Id.* § 6.

ited by federal or state law, as opposed to merely regulated.[203] For example, Oklahoma Indians would not be allowed to operate lotteries since lotteries are currently prohibited under Oklahoma law.[204] Tribes may still contract with outside firms to operate bingo games, but only if the firms are paid a flat fee instead of a percentage of gross revenue.[205] This will deter management firms from taking more than their fair share of the profits. Also, tribes must provide detailed information on bingo operators to check against felony or gambling convictions, and agree to open all records for the Department of Interior's inspection and audit.[206]

The Indian Gambling Control Act is in accordance with the federal Indian policy that tribes should begin to meet the needs of their constituents, and assume greater responsibility for the cost of running their government.[207] It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of their independent governing costs. Profits from Indian bingo operations may provide the tribes with the opportunity to realize that goal.

V. CONCLUSION

Indians in Oklahoma should be allowed to continue operating bingo halls free from state regulation. It is clear that Oklahoma cannot regulate Indian bingo pursuant to Public Law 280, the Organized Crime Control Act or the Assimilative Crimes Act.[208] Recent developments in state taxation of cigarette and liquor sales on Indian land demonstrate, however, that Indian tribes must prove that state regulation is unreasonable before a tax will be invalidated.[209] The state tax will be deemed unreasonable if the field it seeks to regulate has been preempted by federal law or if the tax infringes upon the Indians' right to self-government.[210]

203. *Id.*; *accord* H.R. 1920, 99th Cong., 1st Sess., § 6 (1985); S. 902, 99th Cong., 1st Sess., § 6 (1985).

204. OKLA. STAT. tit. 21, § 1052 (1981).

205. H.R. 4566, 98th Cong., 1st Sess., § 7 (1983) (microfiche at Y 1.4/6:98-(NOS.)). The new House bill would permit an outside firm to take a percentage of gross or net revenues, providing that the fee does not exceed forty percent of net revenues and "the contractor has made or is committed to make a significant financial contribution to the tribal gaming operation" or the percentage-based fee will only be in effect for the first two years of operation. H.R. 1920, 99th Cong., 1st Sess., § 7(c) (1985). The Senate bill would permit a fee of up to forty-nine percent of net revenues from an operation. S. 902, 99th Cong., 1st Sess., § 7(a) (1985).

206. H.R. 4566, 98th Cong., 1st Sess., §§ 7, 8 (1983); *accord* H.R. 1920, 99th Cong., 1st Sess., §§ 7, 8 (1985); S. 902, 99th Cong., 1st Sess., §§ 7, 8 (1985).

207. *See* Chen, *What About* Colville?, 8 AM. INDIAN L. REV. 161, 169 (1980).

208. *See supra* notes 53-155 and accompanying text.

209. *See supra* notes 156-92 and accompanying text.

210. *Id.*

While the *Rehner* decision redefined basic principles of preemption analysis in Indian law by upholding an unprecedented extension of state regulatory jurisdiction within Indian country, judicial precedent does not adequately support such an extension. As Justice Blackmun warned, this "is activism in which [the] Court should not indulge."[211]

While the State of Oklahoma appears to be precluded from taxing or otherwise regulating Indian bingo, it remains apprehensive regarding the Indians' inability to properly police bingo operations. A federal act would be for the mutual benefit of both the state and the tribes. Like the Indian Gambling Control Act, federal legislation should contain comprehensive regulations to ensure that bingo operations are conducted honestly and efficiently. To benefit the tribes, the legislation should contain regulations which curb the amount of profits outside firms can demand and which provide that all profits will be used to fund tribal governmental operations and programs. None of the Indian bingo profits should inure to the benefit of the federal government. Federal guidelines such as those contained in the Indian Gambling Control Act are preferable to state regulatory attempts because state regulatory attempts would result in state attorneys general and other local public officials attempting to define and interpret the authority of Indian tribes. Both the state and the Indians will be better off with a national framework to protect Indian fundraising activities.

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211. *Rehner*, 103 S. Ct. at 3308 (Blackmun, J., dissenting).

Authors Note: In a recent decision, the Oklahoma Supreme Court reversed the trial court's dismissal for lack of subject matter jurisdiction of actions brought by the State of Oklahoma to enjoin the Seneca-Cayuga and Quapaw Indian Tribes from conducting bingo games. *See State v. Seneca-Cayuga Tribe of Oklahoma*, 56 OKLA. B.J. 1554 (July 2, 1985). The court first found that the games were being conducted in "Indian Country," as defined by 18 U.S.C. § 1151(c). *Id.* at 1556. The court held that when neither federal preemption, nor the infringement of tribal self-government is involved in a state's attempt to regulate activities on Indian land, then the test shifts from one of " 'strict compliance with P.L. 280' to the presence of state residuary powers." *Id.* at 1558. A balancing approach is to be used to resolve competing tribal and state interests. *Id.* The court balanced the state's regulatory interest, the tribe's stake in self-government and the federal policies and concluded that "state residuary jurisdiction" could be exercised "only to the extent that tribal activity in Indian Country takes on a form that necessarily affects non-Indians and Indians who are nonmembers of the self-governing tribal unit." *Id.* The causes were remanded for a determination of the state's residuary jurisdictional powers under the facts presented.