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Native American Gaming: Promises and Prospects

Abstract

The Indian Gaming Regulatory Act of 1988 was intended to provide a statutory basis for the growth of Indian gaming. This article explains that the intentions of the act, when coupled with court decisions and a competitive economic environment, may be the basis for federal intervention in the gaming industry, specifically for Native American gaming. The author reviews the history of programs and promises, the magnitude of the total gaming industry, and the role of Native American gaming.

Keywords

Carl Pfaffenberg, Gaming, Gambling, Casino

Native American gaming: Promises and prospects

by Carl J. Pfaffenberg
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The Indian Gaming Regulatory Act of 1988 was intended to provide a statutory basis for the growth of Indian gaming. This article explains that the intentions of the act, when coupled with court decisions and a competitive economic environment, may be the basis for federal intervention in the gaming industry, specifically for Native American gaming. The author reviews the history of programs and promises, the magnitude of the total gaming industry, and the role of Native American gaming.

For the past six years, gaming, including horse racing, charitable bingo, card rooms, and jai alai, has been the fastest growing business in the United States.¹ Lotteries, casinos, and Native American gaming have been the major segments. Direct government involvement in the gaming business is reflected in the phenomenal growth of state-sponsored lotteries.

Since its reintroduction into the United States in 1964, the state lottery has been the engine that has powered the resurgence of legal gaming.² Lotteries currently are available to 80 percent of the U.S. population. Future growth in this area is highly dependent on aggressive marketing of the games and more product diversification. While many lotteries are maturing with revenues leveling off, the growth of casino gaming has taken over the meteoric gaming growth curve in the form of Native American gaming (NAG).³

Legislation, gaming, taxes all grow

The following events occurred between June 1988 and June 1989, the most influential 365 days ever for gaming legislation:

- Colorado legalized small stakes gaming in several mining towns.
- Neighboring South Dakota followed suit within the city limits of Deadwood.

- Iowa legalized casino style, small stakes, gaming on riverboats.
- The United States Congress passed the Indian Gaming Regulatory Act.

Tax revenues have been substantial where gaming has been legalized and/or where NAG operations have secured operating compacts, as in Michigan and Connecticut. It has been estimated that local and state tax revenues for Nevada and New Jersey are well over \$800 million. In Connecticut, where NAG operations are the only form of gaming, tax revenues for 1995 have been estimated at \$150 million.

Revenues for all gaming enterprises in 1994 exceeded \$40 billion. Total revenues taken in by General Motors, Ford, and Chrysler combined totaled \$34 billion during the same period. Casinos accounted for over \$16 billion, lotteries over \$14 billion, and NAG almost \$4 billion.⁴

Fiscal 1995 brought record revenues to virtually all gaming organizations. The major organizations include Harrah's, 18 properties with \$1.6 billion; Mirage, four properties with \$1.5 billion; Hilton, 10 properties with \$0.941 billion; Circus, 17 properties with \$1.2 billion; ITT, 10 properties with \$1.4 billion; and NAG, 170 properties with \$3.8 billion. Native American gaming properties are receiving about 20 percent of the revenue from all casinos. This makes NAG the largest among some strong and established competitors.⁵

Many states are currently taking a wait and see attitude as it relates to the further legalization of gaming, though, generally speaking, gaming is viewed positively by 60 percent of the U.S. population. An additional 30 percent of the population contends that it is not for them personally, but is acceptable for someone else.

Congress pulls the strings

Before a discussion of the intricacies of NAG can begin, a brief review of Native American history is needed. The United States Congress has complete authority over Indian affairs. It can disband the Indian tribes as it did under the Indian General Allotment Act of 1887 and the termination legislation of the 1950s, or it can permit them to organize as it did under the Indian Reorganization Act of 1934. Congress can overrule court decisions dealing with Indian tribes.⁷

Congress exercises its authority over Indian affairs through the Indian Affairs subcommittees of the Interior and Insular Affairs committees of the Senate and the House of Representatives. Congress also controls Indian affairs through appropriations. Money to support the tribal organizations, pay for social services and education, and provide development capital is appropriated through the House and Senate appropriations subcommittees on Interior and related agencies.

In 1924 all the Native Americans in the United States were made citizens. They now possess the same citizenship rights in the states where they reside as do citizens of those states. However, those Native Americans who are members of federally-recognized tribes or who live on individually-owned restricted or trust land enjoy a special status. Their tribes are political entities which generally are outside the jurisdiction of the individual states in which they are located, and their treaty rights are still valid.⁸

Title to tribal land and to restricted land belonging to individual Native Americans is held in trust for them by the United States government. These trust lands and the proceeds therefrom are tax-exempt. The Secretary of the Interior, the Indian Gaming Regulatory Act (IGRA), and federally-recognized Native American tribes have the potential to expand gaming wherever there are lands held in trust for Indians. Native Americans residing on their tribal reservations or on restricted land are eligible for services from the Bureau of Indian Affairs (BIA) of the Department of the Interior and from the Indian Health Service of the Department of Health, Education, and Welfare. The BIA also serves Indians living in the cities.

Indian Gaming Regulatory Act dates to 1988

In 1988, Congress decided to reach a compromise between the ability of sovereign Indian nations to conduct business and the rights of states to regulate activities that occurred within their borders. A U.S. Supreme Court decision, *Cabazon v California*, created the political situation necessary for Congress to establish the Indian Gaming Regulatory Act of 1988 (IGRA). Essentially, the court stated that an Indian tribe can operate any gaming activity performed in the state in which it resides, even if the state allows it for non-profit agencies as a fundraising activity. The Indian tribe, as a sovereign entity, may determine the type of activity that takes place on its lands. IGRA was a statutory, rapid response to this decision, designed to provide a regulatory framework for NAG operations. In a climate of uncertainty, courts tended to give a wide latitude toward the Indian tribes pursuing gaming compacts (agreements) within the states in which they resided. The court decision, plus the legislation, left the door open for Indian gaming to progress in many states, since only Utah and Hawaii prohibit all forms of gambling.

The primary purpose of IGRA was to provide the statutory basis for Indian gaming, to adequately shield an Indian tribe and players from organized crime and other corrupting influences, and to establish an independent federal regulatory authority (National Indian Gaming Commission) for gaming on Indian land.⁹ The act states that a tribe that wishes to establish any Class III gaming, which includes blackjack, baccarat, slot machines, craps, big six wheel, etc., must negotiate with

the state in which it resides to establish a compact for that operation. To ensure that the state involved would negotiate with the tribe in good faith, a provision was put in that allowed the Indian tribe to sue the state if they believed that the state was negotiating in bad faith.

Not all the negotiating went smoothly. In a U.S. Supreme Court decision in April 1996, *Seminole v Florida*, the Seminole tribe brought suit against the state of Florida because they believed that Florida was negotiating in bad faith. The court decided that the Congress of the United States exceeded its authority when it allowed a sovereign nation to sue a state. The Constitution essentially forbids such an action under both the 10th and 11th amendments. However, the court went on to state that if a tribe is not satisfied with the negotiations with the state in which it resides, it may turn to the Secretary of the Interior for relief. The extent of this relief has not been determined, though speculation on both sides of the issue is very active. The Secretary of the Interior, it would seem, would act in the best interests of the tribes. However, as gaming becomes an increasingly emotional issue, the best interests of the tribes may be subjugated by political reality.

Gaming is the new buffalo

The buffalo is an intensely spiritual symbol that represents the replenishment of the American Indian people.¹⁰ The buffalo provided all the Native Americans needed to sustain the basics of life. The skin provided warmth and protection in the form of clothing and shelter; the meat provided food. As long as the buffalo was plentiful, Indians generally were prosperous. With pioneer expansion westward, slaughter of buffalo became a sporting way of life for the non-Indian settlers. As the herds diminished, the Indians became more desperate, then more aggressive, and, eventually, totally dependent on the settlers.

The renewed potential for economic self sufficiency was reintroduced to tribes through gaming. Gaming has become the new buffalo. As Indian gaming consultant Thorpe-Granowski stated, "Gaming represents regeneration and taking control of our lives." Currently, 170 tribes operate some form of gaming.¹¹

Gaming expands across the country

Once IGRA was law, Native American casino operations began to expand across the United States. A review of Native American Gaming (NAG) cannot start without mention of the success of the Mashantuckett Pequot Tribe of southern Connecticut. The tribal casino, Foxwoods, in Ledyard, Connecticut, consists of over 200,000 square feet of gaming space, with over 4,500 slot machines. Many consider this operation the most successful gaming operation of any sort, and certainly the most successful of those in the NAG sphere. The Pequot compact with the state indicates that the tribe will pay the

state \$100 million per year or 25 percent of the slot machine revenues, whichever is greater. In 1995, the state of Connecticut collected \$140 million as a result of this compact. From the money collected, it would appear that the Pequots took in \$560 million from slots during 1995. In July of 1996, Foxwoods established a national record for slot revenues in one month: \$65 million. Total revenues for the entire casino in 1996 are estimated to be in the area of \$600 to \$800 million.¹²

Michigan has one of the smaller operations in relationship to the number of NAG operations. The state has seven casinos, five located in the Upper Peninsula. The seven casinos participated in a 1994 study which indicated that gaming receipts from the participants combined increased from \$41.8 million in 1991 to over \$214 million in 1993, a 412 percent increase.¹³ Additionally, in 1993 56 percent of all Indian gaming goods and services were purchased in Michigan. When specialized Indian gaming products not currently available in Michigan are omitted from this analysis, the results rose to 86 percent Michigan purchases. In addition, Indian gaming employees earn above average wages for their geographic area.¹⁴

The White Mountain Apache tribe of Arizona opened the Hon Dah casino on December 29, 1994. It has earned a reputation as being the best managed casino in the state. The tribe has found that the benefits of gaming are similar to the Michigan experience: jobs, income, and an increased self-esteem for casino employees, all of which far outweigh the negatives of addiction to gaming and costs associated with increased infrastructure. In a statement to the House Committee on Interior Affairs, Tribal Chairman Ronald Lupe claimed, "Jobs were created where there were no jobs, income generated where there had been no income. I have seen small tribes that had little hope of any kind of self-sustaining existence above the poverty level transformed into communities bustling with economic activity, vitality, pride, and a sense of accomplishment. That opportunity is there for all of US."¹⁵

Association moves into Washington

On September 23, 1996, a 5,500-square-foot office building at 224 Second Street, NW, Washington, D.C., was purchased by the National Indian Gaming Association (NIGA) as a permanent office for association activities. This is the first building on Capitol Hill to be owned by Native American tribes. The non-profit association serves as an informational, educational, analytical, and public policy resource for member tribes, Congress, government agencies, and the public regarding NAG issues.¹⁶

The positive stories of self-improvement and pride of accomplishment through gaming are found abundantly throughout Native American tribes. All 24 states that have NAG have had positive experiences with the tribes. The stories of Foxwoods, Michigan, Arizona,

and NIGA indicate that the tribes have acquired the most precious commodity upon which the political process feeds: money.

Native Americans have influence

Politics has been referred to as the art of compromise: give and take. Twenty-five years ago, Native Americans had to occupy the Bureau of Indian Affairs to be heard.¹⁷ Today, they call their lobbyist, or, more than likely, their congressman, directly. Native Americans, through the revenues derived from gaming, now have the ability to seek counsel and advice in the highest circles of influence. Prior to gaming, these avenues of access generally were not available.

Indian tribes, perhaps more than any other political group in the country, are aware of the uncertainties of Congress. It is axiomatic among Native Americans that "what Congress giveth, Congress can take away," and American Indian history is awash with such political swings.

Native American gaming is a success

The active participants in the gaming equation are almost universally pro-gaming. There is considerable acrimony among supporters, however, about their competition. The Las Vegas Resort Hotel Association and the American Gaming Association were formed shortly after the passage of IGRA. Their espoused goal is the business promotion of their members. Many NAG operations feel this "promotion" is achieved at the expense of Indian gaming via innuendo, lobbying influence, and a general aura of disparaging remarks. Even though some negatives have surfaced, Native Americans and gaming are a success story. Gaming has provided them with the means to extricate themselves from the poverty level; gaming represents the new buffalo. Its success also has brought some detractors; there are some who find gaming an immoral, unproductive, parasitic plague which consumes resources in a far greater proportion than it produces. Politicians, always mindful of the prevailing winds, justify the economic gain of casinos as positive because they will regulate the operation in such a way as to absolutely minimize the potential for harm.

The United States Chamber of Commerce estimates that American business spends 18 percent of its annual expenses on all forms of government regulation. The history of American business has been one of increased regulation, not decreased regulation.¹⁸ The gaming industry is heavily regulated. Will this regulation extend to NAG? Can state, county, or local authorities regulate, control, or influence what takes place on sovereign tribal lands? It has already started.

The New York State Supreme Court on August 13, 1996, decreed Indian tribes must charge, collect, and submit state taxes on gasoline and tobacco products when those sales are made to non-tribal

members.¹⁹ Prior to gaming, this was deemed to be too insignificant. A compact with the state in which the tribe resides is essentially an agreement that the state will let the tribe operate a gaming facility with minimal intrusion from the state, if the tribe agrees to pay the state for the right to do so. The activists in NAG believe that it is nothing more than taxation at best and blackmail at worst. They argue that if a tribe is a sovereign entity it does not have to gain permission to conduct any activity, let alone one which is conducted on its own land.²⁰ The states, for their part, were content to let the federal government deal with these sovereign nations. However, after many of the sovereign nations started grossing millions of dollars from state residents, the states now want to add regulations.

Joint committee will study gaming

In August of 1996, Congress and the President approved the establishment of a joint committee for the study of gaming in the United States. Initially, most gaming interests opposed such a study because they believed that it would be biased against gaming from the outset. Its principal proponent, Representative Frank Wolfe from Virginia, is an avowed gaming opponent.

The findings of this committee will probably not enhance the business or operating opportunities for gaming proponents. Virtually all committees established to study issues recommend that the issue be taxed and regulated, or if it is currently taxed and regulated, that should be increased. Since gaming represents a major growth industry with billions of dollars in revenues, regulation, at the least, means fees for regulators.

NAG operations contend they are the most regulated of any gaming interests. They police themselves, have the National Indian Gaming Commission overseeing them, and have the U.S. Congress regulating their activities. While this is a true statement, it is not accurate. Active oversight and regulation in a NAG operation is relatively insignificant to that of a private commercial facility in Nevada or New Jersey. While the revenues derived from NAG are used to provide for a rising economic tide to benefit all tribe members, the tribal leaders are not totally altruistic. Well-documented stories in California, Michigan, and Minnesota have shown that tribal gaming can influence members to shoot one another, steal, embezzle, and commit fraud, not the image that NIGA would like to portray.

When the evidence is in, the joint commission will have no choice but to increase the regulation of tribal activities for the welfare of those whom the original act was intended to benefit. Private gaming operations may feel that the competitive environment will be benefited. Private operators shouldn't celebrate too long. This initial federal foray into the regulation of gaming operations only can lead to more of the same for all.

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