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BETTING THE RANCHERIA: ENVIRONMENTAL PROTECTIONS AS BARGAINING CHIPS UNDER THE INDIAN GAMING REGULATORY ACT

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Abstract: In 2005, the State of California and the Big Lagoon Rancheria American Indian Tribe reached an agreement whereby the tribe agreed to forego development plans for a casino on environmentally sensitive lands in exchange for the right to build a casino in Barstow, California. In January 2008, the Department of the Interior denied the Rancheria's land-into-trust application for land in Barstow based on the Department's newly issued "commutable distance" memorandum. This denial represents a missed opportunity to allow California and the tribe to cooperate in fashioning a workable tribal-state compact. The Department should abandon the guidance memorandum and allow tribes to pursue off-reservation gaming in appropriate instances where the proposed development enjoys political support at the local level. In exchange, states should be afforded greater deference under the Indian Gaming Regulatory Act to achieve some level of regulatory control to address the off-reservation impacts of casino development.

Introduction

The Big Lagoon in Northern California—one of the state's few remaining naturally functioning coastal lagoons—borders three state parks and supports diverse populations of animals and plants.[1] The Big Lagoon Rancheria American Indian Tribe occupies lands adjacent to

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[1] Tribal-State Compact between the State of California and the Big Lagoon Rancheria 1 (2005), *available at* http://www.cgcc.ca.gov/Press/Big_Lagoon_Rancheria_Compact.pdf [hereinafter Big Lagoon Compact]; Frank D. Russo, *Agua Caliente Puts Governor and Legislature in Hot Water over Casino Compact While Big Lagoon Tribe Is Left Out in the Cold*, California Progress Report, Aug. 16, 2006, http://www.californiaprogressreport.com/2006/08/agua_caliente_p.html.

this "environmentally sensitive" ecosystem.[2] The state resisted tribal attempts to build a casino on the lagoon, arguing that the proposed casino would have dire consequences on the lagoon ecosystem.[3]

In 2005, the tribe and state reached a compromise where the tribe agreed to waive all gaming rights on its ancestral lands in exchange for the right to construct a casino over 500 miles away in Barstow, California (the "Barstow proposal").[4] The Indian Gaming Regulatory Act (IGRA) generally prohibits off-reservation gaming except in limited circumstances.[5] The tribe applied under IGRA's "two-part determination" exception, which permits gaming on newly acquired lands when the proposed off-reservation gaming establishment would be "in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community."[6]

In January 2008, the Department of the Interior effectively killed the proposal when it denied the tribe's trust application.[7] It based this denial on its own guidance memorandum—released the same day it denied the Barstow proposal—in which the Department intended to clarify when it would apply the two-part determination exception to take off-reservation lands into trust for gaming purposes.[8]

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[2] Joshua L. Sohn, Comment, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 152 (2006) (citing California Coastal Act, CAL. PUB. RES. CODE § 30240(a) (West 1996)).

[3] *Id.*

[4] *Id.*; *see* Jason Smith, *Federal Government Rejects Tribes' Casino Plans*, DESERT DISPATCH (Barstow, CA), Jan. 8, 2008, at A1. Press Release, Office of the Governor for the State of California, Governor Schwarzenegger Announces Indian Gaming Agreements (Sept. 9, 2005), http://gov.ca.gov/index.php?/press-release/1438/ [hereinafter Governor's Press Release].

[5] 25 U.S.C. § 2719(b)(1)(A) (2000).

[6] *Id.*; *see, e.g.*, Erik M. Jensen, *Indian Gaming on Newly Acquired Lands*, 47 WASHBURN L.J. 675, 688–89 (2008). IGRA does not authorize the Secretary to take land into trust; it creates a separate requirement that a tribe must meet in addition to the requirements under the Indian Reorganization Act. *See, e.g.*, Kathryn R.L. Rand, Alan P. Meister & Stephen Andrew Light, *Questionable Federal "Guidance" on Off-Reservation Indian Gaming: Legal and Economic Issues*, 12 GAMING L. REV. & Econ. 194, 195–96 (2008).

[7] *See* Letter from Carl J. Artman, Assistant Sec'y for Indian Affairs, U.S. Dep't of Interior, to the Honorable Virgil Moorehead, Chairman, Big Lagoon Rancheria 4 (Jan. 3, 2008), *available at* http://www.indianz.com/docs/bia/biglagoon010408.pdf [hereinafter Artman Letter].

[8] Memorandum from Carl Artman, Assistant Sec'y of Indian Affairs, U.S. Dep't of the Interior, to Bureau of Indian Affairs Reg'l Dirs. and the Office of Indian Gaming (Jan. 3, 2008), *available at* http://www.indianz.com/docs/bia/artman010308.pdf [hereinafter Guidance Memorandum]; *see* Jenson, *supra* note 6, at 694–95; Rand, Meister & Light, *supra* note 6, at 198.

The rise and fall of the Barstow proposal highlights the complex tension among federal, tribal, state, and local interests brought about by the rise in American Indian casino gambling.[9] Although some states welcome the economic boost that Indian gaming provides, there has also been a considerable backlash to its development.[10] States overwhelmingly attempt to mitigate this backlash by demanding large revenue-sharing agreements in the tribal-state compacting process.[11] The Barstow proposal highlights a move beyond this pecuniary tunnel vision towards a creative compact process that better addresses the myriad concerns often associated with casino projects.[12] This new model of compact negotiations contemplates appropriate off-reservation development in exchange for an increased role for state environmental regulatory control.[13]

This Note proposes that the Barstow proposal should serve as a model for future tribal-state compacts. Part I frames the discussion with a brief history of the Barstow proposal. Part II examines the evolution of Indian gaming. Part III examines environmental regulatory control in the context of Indian lands. Part IV discusses the compacting process. Part V concludes that the Department's guidance memorandum unduly restricts the ability of states and tribes to utilize off-reservation gaming to alleviate economic, environmental, and social concerns. To wit, states should enjoy a broad interpretation of the compacting provisions permitted under IGRA to achieve greater environmental regulatory control. In exchange, tribes should enjoy greater leeway in developing off-reservation gaming operations when the local municipality supports the project and the site offers environmental and social advantages over on-reservation development. This compacting regime represents the best opportunity for states to negotiate with tribes in order to alleviate citizen concerns, mitigate environmental impacts, and respect tribal sovereignty in the casino development process.

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[9] *See, e.g.*, Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971, 982 (2007) (discussing the increasing influence of state legislatures over Indian gaming).

[10] Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 40 (2007); *see* discussion *infra* Part II.E.

[11] *See* Fletcher, *supra* note 10, at 69. Although IGRA prohibits states from taxing Indian casinos, courts and the Secretary of the Interior generally permit revenue-sharing schemes so long as the tribe receives separate consideration—often an exclusive license that prohibits non-Indian gaming competition. Rand, *supra* note 9, at 985–86.

[12] *See* Governor's Press Release, *supra* note 4 ("These agreements are a creative solution for avoiding the construction of a casino on California's coast and alongside a State ecological preserve, while respecting the tribes' federal right to engage in gaming.").

[13] *Id.*

I. The Big Lagoon Rancheria's Barstow Proposal

The California Department of Fish and Game manages an ecological preserve around the Big Lagoon— "an environmentally sensitive habitat area within the meaning of the California Coastal Act."[14] This fragile coastal ecosystem supports three species listed under the Federal Endangered Species Act.[15] Although the California Coastal Commission severely limited development around the lagoon on non-tribal lands, the tribe planned to build a casino on its land.[16] Environmentalists and state officials recognized the environmental concerns associated with the tribe's on-reservation casino development proposal.[17] California, intent on preserving the Big Lagoon ecosystem, objected to any casino that would have violated the California Coastal Commission's land-use restrictions.[18]

The 2005 compromise between the tribe and the state had the potential to resolve the impasse because the tribe agreed to forego development at the lagoon and instead construct a casino in Barstow.[19] Governor Arnold Schwarzenegger lauded the agreement, believing the state had averted an environmental crisis, and had guaranteed much-needed economic stimulus for the tribe and the city.[20] The city of Barstow overwhelmingly supported the proposal.[21] State environmental agencies—happy to avoid threats to water quality, endangered species, and scenery at the Big Lagoon—also joined in sup-

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[14] Big Lagoon Compact, *supra* note 1, at 1; Sohn, *supra* note 2, at 152 n.112.

[15] Big Lagoon Compact, *supra* note 1, at 1.

[16] *See* Sohn, *supra* note 2, at 152 (citing California Coastal Act, Cal. Pub. Res. Code § 30240(a) (West 1996) ("Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.")).

[17] *Id.*; Russo, *supra* note 1 ("[T]he Big Lagoon Rancheria is . . . home to old-growth redwoods, bald eagles, black bears, Roosevelt elk, Coho salmon, peregrine falcons, and other rare plant and animal species.").

[18] Sohn, *supra* note 2, at 152; s*ee* Big Lagoon Compact, *supra* note1, at 1. Activities exclusively within and directly affecting a coastal zone are subject to state review under the Coastal Zone Management Act. *See* Sec'y of the Interior v. California, 464 U.S. 312, 330 (1984).

[19] Sohn, *supra* note 2, at 152; Governor's Press Release, *supra* note 4.

[20] *See* Governor's Press Release, *supra* note 4. The governor hailed the compact as a "creative solution for avoiding the construction of a casino on California's coast and alongside a State ecological preserve, while respecting the tribes' federal right to engage in gaming." *Id.*

[21] *Id.* (noting the "City of Barstow's active efforts to bring to that city the economic activity associated with an Indian gaming facility").

port.[22] Others echoed that the deal represented a "legitimate example of appropriately relocating a casino out of environmentally-sensitive lands and one that uph[eld] the state's responsibility to protect . . . invaluable natural resources."[23] The California Legislature, however, was less receptive to the proposal, and failed to endorse it in 2007.[24] Although lawmakers pointed to the large distance between the reservation and the city of Barstow as the reason for their reluctance, critics of the legislature felt that the political clout of powerful southern California gaming tribes opposed to any incursion into their market fueled legislative antipathy.[25]

On January 4, 2008, the Department of the Interior declined to take the Barstow land into trust based on a new "commutable distance" guidance memorandum issued the same day.[26] In a letter to the tribe, Assistant Secretary for Indian Affairs Carl Artman stated that the distance between the proposed acquisition and the reservation would not allow tribal members to remain on the reservation and enjoy any "meaningful employment benefits" at a facility located 550 miles away from the reservation.[27] Tribal members expressed dismay at this decision, complaining that federal officials believed "tribal members would be better off poor and unemployed and living on the reservation rather than living off the reservation near the casino with [jobs]."[28] Following this denial, the tribe

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[22] John Driscoll, *Feds Kill Barstow Casino Plan; Rancheria Unswayed on Gaming Facility at Big Lagoon*, Times-Standard (Eureka, CA), Jan. 9, 2008, at A1.

[23] Russo, *supra* note 1.

[24] John Myers, *Feds Reject Barstow Casino Plan*, Capital Notes, Jan. 7, 2008, http://blogs.kqed.org/capitalnotes/2008/01/07/feds-reject-barstow-casino-plan/. *See* Jason Smith, *Some Residents Not Surprised By Casino Setback*, Desert Dispatch (Barstow, CA), Jan. 8, 2008, at A1. In California, Indian gaming compacts must be negotiated by the governor and then ratified by the legislature. Cal. Const. art. 4, § 19.

[25] Myers, *supra* note 24. Indeed, even the governor's support for the proposal cooled after the Agua Caliente tribe voiced opposition to the Barstow proposal. Russo, *supra* note 1. The Agua Caliente claimed that the Barstow casino would compete with the their existing casino and embolden union organizers. *Id.* In an effort to keep the compact alive, however, the governor did extend the time by which the compact must take effect in order to give the federal government more time to take the land into trust. Press Release, Office of the Governor for the State of California, Gov. Schwarzenegger Announces Extension for Big Lagoon and Los Coyotes Gaming Compacts (May 31, 2007), http://gov.ca.gov/index.php?/press-release/6514/.

[26] *See* discussion *infra* Part IV.

[27] Artman Letter, *supra* note 7, at 3.

[28] Indianz.com, BIA Starts New Year with Off-Reservation Gaming Policy, http://www.indianz.com/News/2008/006500.asp (last visited Jan. 23, 2009) (quoting Francine Kupsch, Spokesperson for the Los Coyotes Band of Cahuilla and Cupeño Indians in California).

began to resurrect its efforts to construct a casino at Big Lagoon—an idea opposed by environmental groups and the governor.[29]

II. Evolution of the Indian American Gaming Industry

A. *Historical Context: Tribal Sovereign Power and Federal Preemption*

The purpose of Indian reservations is to provide a "homeland for the survival and growth of the Indians and their way of life."[30] Indians on their reservations have the sovereign right "to make their own laws and be ruled by them."[31] This retention of tribal sovereign power constrains the power of the states to interact with Native American tribes.[32] Although the Supreme Court recognizes Indian tribes as sovereign nations, it does not accord the tribes the "full attributes of sovereignty."[33] As the Court in *Washington v. Confederated Tribes of Colville* noted, "[t]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[34] The Constitution vests Congress with plenary power over Indian affairs.[35] Therefore, tribes retain sover-

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[29] Jessie Faulkner, *Big Lagoon Takes Steps to Expand Tribal Lands*, Times-Standard (Eureka, CA), Feb. 5, 2008, at A3, *available at* http://www.times-standard.com/local/ci_8172078. Prior to the Secretary's decision, the Rancheria asked the Bureau of Indian Affairs to take a five-acre parcel into trust near the reservation for housing. *Id.* Fearing casino development on this new trust land, the California Coastal Commission sought development restrictions. *Id.* After the Secretary denied the Barstow Proposal, the Rancheria chairman objected to any land-use restrictions, hinting that the tribe may pursue casino development on the land. *Id.*

[30] Confederated Colville Tribes v. Walton, 647 F.2d 42, 49 (9th Cir. 1981). "[T]he tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978).

[31] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 121 n.5 (2005) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)).

[32] *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987). Congress's plenary power over Indian affairs means "Indian tribes fall under nearly exclusive federal, rather than state, control." American Vantage Co. v. Table Mountain Rancheria, 292 F.3d 1091, 1096 (9th Cir. 2002).

[33] *E.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 169 (1982) (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

[34] 447 U.S. 134, 154 (1980); Stephanie A. Levin, *Betting on the Land: Indian Gambling and Sovereignty*, 8 Stan. L. & Pol'y Rev. 125, 127 (1997).

[35] U.S. Const. art. I, § 8. Because Congress must act in a manner consistent with protecting Indian affairs, the relationship between the federal government and Indian tribes is often characterized as a trust relationship, whereby the United States owes fiduciary duties to Indian tribes. Jason D. Kolkema, Comment, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites*, 73 U. Det. Mercy L. Rev. 361, 366 (1996).

eign power where it has not been: "(1) given up in a treaty; (2) divested by an act of Congress; or (3) divested by implication as a result of their status as, to use the term adopted by the U.S. Supreme Court, 'domestic dependent nations.'"[36]

Although tribal sovereignty "is not subject to diminution by the States,"[37] in 1953, Congress enacted Public Law 280 to give California and a handful of other states "a broad grant of criminal jurisdiction and a limited grant of civil jurisdiction over tribes within their borders."[38] Public Law 280 restricted these grants of jurisdiction to causes of action in which Indians are a party; it did not, however, grant jurisdiction over the tribe itself.[39]

It is worth noting that since 1981 there has been a presumption that tribes cannot exert jurisdiction over non-Indians "beyond what is necessary to protect tribal self-government."[40] In *Montana v. United States*, the Supreme Court carved out two exceptions in which a tribe may exert sovereign control over non-Indians: regulating the activities of non-Indians who enter into consensual relationships with the tribes, and civil authority over conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[41] The consent exception has been construed narrowly, where there must be a "tight nexus between the relationship and the regulation or tax at issue."[42] In *Brendale v. Yakima*, the court construed the health and welfare exception narrowly, holding that the effect must be "demonstrably serious" to endanger the health and welfare of the tribe.[43]

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[36] Joyce L. Kiel, Wisconsin Legislator Briefing Book, at P-6 (2006), *available at* http://www.legis.state.wi.us/lc/publications/briefingbook/state_tribal.pdf; *see* 25 U.S.C. § 1322(a) (2000) (tribal consent); State Farm Mut. Auto. Ins. Co. v. Thunder, 605 N.W.2d 750, 754 (Minn. Ct. App. 2000) (Congressional delegation).

[37] Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 756 (1998).

[38] Rand, *supra* note 9, at 975–76; *see* 28 U.S.C. § 1360 (2000).

[39] 28 U.S.C. § 1360. The purpose of this law was to encourage states to assert limited jurisdiction over Indian lands. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 887 (1986).

[40] Montana v. United States, 450 U.S. 544, 564 (1981); *see* Jacob T. Levy, *Three Perversities of Indian Law*, 12 Tex. Rev. L. & Pol. 329, 348 (2008).

[41] Levy, *supra* note 40, at 349 (citing *Montana*, 450 U.S. at 566).

[42] *Id.* at 355 (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001)).

[43] Brendale v. Yakima, 492 U.S. 408, 431 (1989); Levy, *supra* note 40, at 350.

B. *Origins of American Indian Casino Gaming and* California v. Cabazon Band of Mission Indians

Beginning in the late 1970s, several American Indian tribes opened small casino and bingo halls on reservations in an attempt to stimulate tribal economic development.[44] The tribes reasoned that state criminal laws barring gambling did not apply on Indian land.[45] Several of these bingo halls became highly profitable, so tribes began offering larger cash prizes.[46] As their bingo halls expanded, tribes such as the Cabazon and Morongo Band of Mission Indians in California began to offer high-stakes bingo on their reservations.[47] The state sued to stop the gaming, claiming that the operations violated state regulations limiting jackpot amounts.[48] California asserted that Public Law 280 granted it the power to regulate American Indian bingo halls.[49]

In *California v. Cabazon Band of Mission Indians*, the United States Supreme Court denied California's attempts to regulate Indian casino gambling, holding that "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[50] Underlying the Court's decision was a distinction between "criminal/prohibitory" and "civil/regulatory" laws.[51] The Court applied this shorthand test to determine whether the gaming violated the state's public policy.[52] The Court concluded that California regulated gaming but did not prohibit it.[53] This distinction proved crucial, as the Court ruled that Indian tribes could operate gaming facilities on Indian land without state regulatory in-

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[44] *See, e.g.*, Fletcher, *supra* note 10, at 45; Kathryn L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 Chap. L. Rev. 47, 50–51 (2002).

[45] *See* Fletcher, *supra* note 10, at 45; Rand, *supra* note 44, at 50–51.

[46] Levin, *supra* note 34, at 136; Rand, *supra* note 44, at 51. For its part, the federal government recognized that revenue from bingo enterprises could be used to promote Indian economic independence. Fletcher, *supra* note 10, at 45.

[47] Rand, *supra* note 44, at 51.

[48] *See id.*

[49] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987); *see* Fletcher, *supra* note 10, at 47.

[50] 480 U.S. at 216 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)).

[51] *Id.* at 210; *see* Levin, *supra* note 34, at 127.

[52] Levin, *supra* note 34, at 127; Rand, *supra* note 9, at 976 (quoting *Cabazon*, 480 U.S. at 209).

[53] *Cabazon*, 480 U.S. at 211. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." *Id.*

terference, so long as the state regulated rather than prohibited gaming.[54] *Cabazon* therefore stands for the proposition that a state could prevent tribes from engaging in gambling development only by adopting a complete prohibition on all gambling.[55] The *Cabazon* decision "gave tribes the green light to initiate their own gambling enterprises on their reservations—irrespective of state civil regulatory laws."[56]

C. *Post-*Cabazon *Federal Regulation: IGRA and a Balance of Interests*

Fearing that *Cabazon* meant unchecked and unregulated gambling, states quickly lobbied Congress to enact federal legislation to regulate Indian casino development.[57] Congress faced a balancing act in which states "sought to protect their sovereign interest in safeguarding the public health, safety and welfare" while tribes sought freedom to pursue economic development commensurate with their status as domestic dependent sovereigns.[58] Congress responded by passing IGRA, which increased the states' role in regulating American Indian gaming beyond what the Court contemplated in *Cabazon.*[59] IGRA divides Indian gaming operations into three categories.[60] Class III gaming, which covers non-bingo casino activities, is permitted on Indian lands in states that permit "such gaming for any purpose by any person, organization, or entity . . . ."[61]

In enacting IGRA, Congress sought "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal gov-

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[54] *Id.*, at 210, 211 n.10; Levin, *supra* note 34, at 127; *see* Dewberry v. Kulongoski, 406 F. Supp. 2d 1136, 1140 (D. Or. 2005); Fletcher, *supra* note 10, at 48.

[55] *See* Fletcher, *supra* note 10, at 48; Levin, *supra* note 34, at 127; Amy L. Cox, Note, *The New Buffalo: Tribal Gaming as a Means of Sustenance Under Attack*, 25 B.C. Envtl. Aff. L. Rev. 863, 866 (1998).

[56] *See* Levin, *supra* note 34, at 127.

[57] Fletcher, *supra* note 10, at 50; Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 Va. J. Soc. Pol'y & L. 396, 408 (2006).

[58] Memorandum from Michael Rossetti, Counselor to the Sec'y of Interior, et al., Dep't of Interior 4 (2004) [hereinafter Indian Gaming Paper], *available at* http://www.indianz.com/docs/court/stcroix/paper022004.pdf.

[59] Rand, *supra* note 44, at 52. Congress sought to strike a balance between state and tribal authority, while ensuring that tribes could open and operate casinos "in accord with federal interests in tribal self-sufficiency and economic development." Rand & Light, *supra* note 57, at 408.

[60] 25 U.S.C. § 2703 (2000).

[61] *Id.* § 2710(d)(1)(B).

ernments . . . ."[62] Recognizing these fundamental principles, the Senate Committee Report stated: "Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."[63] To assuage state concerns about lack of input, Congress required that the tribe and the state negotiate and enter into a tribal-state compact for each Class III gaming facility.[64] By delegating this negotiating power to the states, Congress provided the states a mechanism to regulate activities directly associated with gaming.[65] This delegation of authority made the legality of tribal gaming development dependent on state gaming policy and the tribal-state compacting process.[66]

Many tribes viewed IGRA as an incursion into tribal sovereign power.[67] As a concession, Congress provided the tribes an enforcement mechanism by allowing them to sue states in federal court if a state refused to negotiate in "good faith."[68] To determine whether a state has negotiated in good faith, the court may consider the "public interest and public safety, criminality and financial integrity, and adverse economic impacts on existing gambling interests."[69] This good faith duty represented the necessary counterbalance to ensure that states opposed to American Indian casinos would not scuttle the negotiation process.[70]

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[62] *Id.* § 2702(1); *see, e.g.*, Fletcher, *supra* note 10, at 51, Rand, Meister & Light, *supra* note 6, at 204.

[63] S. Rep. No. 100-446, at 5–6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075; Rand, *supra* note 9, at 978.

[64] 25 U.S.C. § 2710(d)(1)(C).

[65] *See, e.g.*, Rand, *supra* note 9, at 977.

[66] *See id.*

[67] Levin, *supra* note 34, at 130.

[68] 25 U.S.C. § 2710(d)(7)(B)(iii); Rand, *supra* note 9, at 977.

[69] Steven Andrew Light, Kathryn R.L. Rand & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. Rev. 657, 664 (2004).

[70] *See* Rand, *supra* note 9, at 979; Chris Rausch, *The Problem with Good Faith: The Indian Gaming Regulatory Act a Decade After* Seminole, 11 Gaming L. Rev. 423, 423–24 (2007). IGRA is seen by some as "an example of 'cooperative federalism' in that it seeks to balance competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002).

D. *Upsetting the Balance of IGRA:* Seminole Tribe of Florida v. Florida *and the Rise of Revenue Sharing*

In 1996, the Supreme Court issued a ruling that destroyed the balance struck by IGRA.[71] In *Seminole Tribe of Florida v. Florida*, the Court held that Congress could not subject the states to suit in federal court for failing the "good faith" duty because the Eleventh Amendment granted the states sovereign immunity protection.[72] This decision came as a shock to the tribes because they lost the enforcement mechanism contemplated by Congress to compel states to negotiate in good faith.[73] Consequently, this "right without a remedy" allowed states to dictate the terms of the compact beyond what Congress intended.[74] As a practical result, state politics now have "greater power" in the compacting process.[75] Some critics of *Seminole* feel that "good faith may equate simply to the state's posture toward Indian gaming: what the governor is willing to negotiate, the state legislature to approve, or the state courts to uphold."[76]

After *Seminole* thwarted tribal bargaining power, some states adopted more aggressive negotiation strategies.[77] For example, states have capitalized on this imbalance by requiring that tribes accept "revenue sharing" as a required compact term.[78] IGRA explicitly prohibits states from demanding taxation provisions in compact negotiations—stating that a demand for a taxation provision is "evidence that the State has not negotiated in good faith."[79] Revenue sharing enables states to siphon off a cut of tribal profits but avoid the prohibition against taxation so long as they offer the tribe separate consideration—often a grant of "substantial exclusivity" granting the tribe a monopoly against non-Indian competition in the local market.[80]

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[71] *See generally* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); *see, e.g.*, Fletcher, *supra* note 10, at 57; Rand, *supra* note 9, at 981.

[72] *Seminole*, 517 U.S. at 72; Rand, *supra* note 9, at 981.

[73] Rand, *supra* note 9, at 981.

[74] Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 441 (2001); *see* Rausch, *supra* note 70, at 426 (discussing Pennsylvania's efforts to include hunting rights and cigarette taxes as IGRA compact terms).

[75] Rand, *supra* note 9, at 981; Rausch, *supra* note 70, at 426 (noting that the "caselaw is rife with examples of conduct deemed to be not in *bad* faith").

[76] *Id.* at 983.

[77] *See* Fletcher, *supra* note 10, at 58–59.

[78] *See, e.g.*, *id.* at 57–59; Rausch, *supra* note 70, at 426–27 (noting that courts have generally allowed revenue sharing compact provisions).

[79] 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (2000).

[80] *See* Rand, *supra* note 9, at 985–86 & n.74; Blake A. Watson, *Indian Gambling in Ohio: What Are the Odds?*, 32 CAP. U. L. REV. 237, 308–09 (2003).

Revenue-sharing plans come in many varieties, such as "percentage payments, fixed compact payments, fees and taxes, contributions to community funds, and redistribution to nongaming tribes."[81]

Critics of the *Seminole* decision complain that revenue sharing contravenes congressional intent that tribes be the "primary beneficiaries" of gaming operations.[82] Some claim revenue-sharing provisions go so far as to amount to extortion on the part of the states.[83] One critic noted, "[t]he validity of [revenue-sharing] agreements is dubious in light of the plain meaning of IGRA, its legislative history, and relevant case law addressing similar issues."[84] Nevertheless, tribes feel compelled to accept revenue sharing, which the courts and the Secretary of the Interior generally approve so long as the revenue shared does not inappropriately exceed the benefit enjoyed by the tribes.[85]

After *Seminole*, the Secretary promulgated rules to create a secretarial procedure similar to IGRA's good faith enforcement mechanism.[86] The Secretary did so in order to restore some semblance of the balance intended by Congress.[87] In *Spokane Tribe of Indians v. Washington*, the State argued that this rule constituted an invalid exercise of agency power because IGRA does not grant the Secretary the authority to sidestep a judicial determination that states have failed to negotiate in good faith.[88] The Secretary responded that the rule restored a crucial part of IGRA and thus fulfilled congressional intent.[89] The Ninth Circuit hinted that, although the rule would have been invalid if adopted before *Seminole*, the rule might represent a valid exercise of secretarial discretion to promote the congressional intent underlying IGRA.[90]

E. *The Current Political and Economic Environment*

States and local communities have the potential to receive "extensive economic and social benefits from tribal gaming operations, ranging from increased tax revenues to decreased public entitlement pay-

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[81] Rausch, *supra* note 70, at 426.

[82] Rand & Light, *supra* note 57, at 463.

[83] Fletcher, *supra* note 10, at 59.

[84] Eric S. Lent, Note, *Are States Beating the House? The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 Geo. L.J. 451, 474 (2003).

[85] *See* Rand, *supra* note 9, at 986 n.74; Rausch, *supra* note 70, at 427.

[86] Fletcher, *supra* note 10, at 65.

[87] *Id.* at 65–66.

[88] *Id.* at 66 (citing Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir. 1994)).

[89] *See id.* at 65–66.

[90] *Id.*

ments to the disadvantaged."[91] Revenue-sharing provisions have become commonplace, amounting to more than $1 billion in direct payments to states in 2005.[92]

Despite these benefits, there is considerable and growing backlash to Indian gaming.[93] Compacting occurs at the tribal-state level, so IGRA does not provide local city and county governments a voice in negotiating compacts.[94] This leaves local officials feeling left out of the loop.[95] Many government officials complain that any benefits are vastly outweighed by the strain on municipal services.[96] Citizens groups are concerned that local authorities have no recourse where Indian casinos threaten to decimate local resources or pollute the environment.[97] There is also widespread sentiment that casinos bring with them a host of social ills, including noise pollution, traffic, gambling addiction, and crime.[98] Municipalities fear sovereignty precludes tax collection, land use management, and regulation of environmentally hazardous activities on tribal land—even when the effects spill outside Indian country.[99]

This apprehension over casino development has been exacerbated by tribal efforts to develop off-reservation casinos in closer proximity to urban areas in order to maximize profits and offset the

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[91] Rand, *supra* note 9, at 973.

[92] *Id.* at 986. For example, in 2003 tribes provided $759 million to state and local governments. Steven Andrew Light & Kathryn R.L. Rand, Indian Gaming & Tribal Sovereignty: The Casino Compromise 87 (2005). Another study found that in the same year, "state and local governments collected approximately $1.5 billion in tax revenue generated by Indian gaming." *Id.*

[93] *E.g.*, Fletcher, *supra* note 10, at 68–69. "The backlash has resulted from the misconceptions that Indian tribes, their 'attack-dog' lobbyists, and their 'shady' gaming management and development companies could impose Vegas-style casino operations in Middle American communities that do not want them." *Id.* at 34–40. (citations omitted).

[94] 25 U.S.C. § 2710(d) (2000); *see* California Performance Review, GG30 Require Native American Tribes under the Tribal-State Compact to Enter into Agreements with Local Governments to Address the Impacts of Tribal Casinos on Local Communities, http://cpr.ca.gov/CPR_Report/Issues_and_Recommendations/Chapter_1_General_Government/Strengthening_Government_Partnerships/GG30.html (last visited Jan. 23, 2009) [hereinafter California Performance Review].

[95] Ellen Perlman, *Tribes and Tribulations*, Governing Mag., Aug. 2007, at 53; California Performance Review, *supra* note 94.

[96] *See* California Performance Review, *supra* note 94.

[97] *See* Donald L. Bartlett & James B. Steele, *Playing the Political Slots*, Time, Dec. 23, 2003, at 52, 58; Perlman, *supra* note 95, at 53.

[98] Edward W. McClenathan, *Land Use Implications of Casinos and Racinos on Local Governments in New York State*, 39 Urb. Law. 111, 112 (2007).

[99] California Performance Review, *supra* note 94; *see* Roger Romulus Martella, Jr., Note, "*Not in My State's Indian Reservation*"*—A Legislative Fix to Close an Environmental Law Loophole*, 47 Vand. L. Rev. 1863, 1872 (1994).

costs of revenue-sharing agreements.[100] Because revenue sharing often occurs at the state level, municipalities can only hope that the state compacts with the tribe to funnel a portion of the revenue sharing to the municipality.[101] As a result of this opposition, off-reservation agreements remain a rarity, as state and local governments have been slow to recognize the benefits of tribal gaming.[102]

The backlash has led to considerable lobbying efforts and litigation to stop off-reservation casino development.[103] It has also resulted in proposed amendments to IGRA that would curtail off-reservation gaming.[104] Some argue for legislative reform to fix the problems in bargaining power created by *Seminole*; others seek to prevent tribes from pursuing off-reservation development.[105] Congress has responded to these suggestions with a spate of proposed amendments to IGRA.[106] For example, the 109th Congress contemplated bills that would: require the Secretary of the Interior to consider the results of an economic impact study; eliminate the two-part secretarial determination to take land into trust; limit tribes to gaming at one parcel state where the tribe has historical ties; eliminate the exceptions to the prohibition on gaming on newly acquired lands; and require that a tribe declare its intent to engage in gaming when it submits its application for trust status.[107] None of these bills became law, demonstrating the intensity of tribal lobbying efforts and congressional unwillingness to significantly amend IGRA.[108]

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[100] *See* Fletcher, *supra* note 10, at 40.

[101] California Performance Review, *supra* note 94. The Secretary consults local officials during the two-part determination to take lands into trust for the benefit of tribes. 25 U.S.C. § 2719(b)(1)(A) (2000).

[102] *See, e.g.*, Matthew D. All, *John McCain and the Indian Gaming "Backlash": The Unfortunate Irony of S. 2078*, 15 Kan. J.L. & Pub. Pol'y 295, 303–04 (2006). State officials have generally resisted off-reservation development projects because they are sometimes "viewed as a loophole in federal law to circumvent state law that says gambling is a crime." Kolkema, *supra* note 35, at 362 (citation omitted).

[103] *See* Fletcher, *supra* note 10, at 67–69.

[104] *See* M. Maureen Murphy, CRS Report for Congress, Indian Gaming Regulatory Act: Gaming on Newly Acquired Lands 5–6 (2006).

[105] *Compare* Fletcher, *supra* note 10, at 71–72 (arguing for legislative reform to restore balance destroyed by *Seminole*), *with* Brian P. McClatchey, Note, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the "Governor's Veto" for Gaming on "After-Acquired Lands"*, 37 U. Mich. J.L. Reform 1227, 1272 (2004) (arguing that "the 'governor's veto' should be abandoned in favor of a framework for off-reservation gaming which is solely addressed by the Tribal-State gaming compact's terms").

[106] *See* Murphy, *supra* note 104, at 5–6.

[107] *Id.*

[108] *See* Fletcher, *supra* note 10, at 70.

III. Environmental and Land-Use Regulation of American Indian Lands

For projects on Indian lands, federal environmental laws are "comprehensive in scope."[109] Within this framework of subordination to Congress's plenary power, "tribes possess the right 'to make their own laws and be ruled by them' without interference from the states."[110] Federal environmental laws require that developers of Indian gaming projects obtain federal licenses and comply with federal procedures.[111] They must also assess environmental impacts of the project and comply with applicable environmental laws.[112] The "EPA retains [environmental] regulatory and enforcement authority to the extent it has not been delegated to states or tribes."[113]

A. *Environmental Protection Under IGRA: The National Indian Gaming Commission*

To oversee the regulation of Indian gambling, IGRA established the National Indian Gaming Commission (NIGC).[114] The National Environmental Policy Act (NEPA) mandates that federal agencies identify and consider environmental impact of any agency action "significantly affecting the quality of human environment."[115] It appears that the NIGC has interpreted NEPA to apply to "major construction of a casino."[116] If the NIGC concludes that a proposed gaming facility will lead to significant environmental impacts, it must either require an Environ-

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[109] Michael P. O'Connell, *Environmental Issues Associated with Indian Gaming*, *in* The Gaming Industry on American Indian Lands at 27, 34 (PLI Corporate Law & Practice, Course Handbook Series No. B4-7077, 1994).

[110] Martella, *supra* note 99, at 1873 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983)).

[111] O'Connell, *supra* note 109, at 34–35; *see* Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 Gaming L. Rev. 333, 343 (2004) (discussing National Environmental Policy Act, Endangered Species Act, and other requirements imposed by federal law).

[112] *See generally* O'Connell, *supra* note 109, at 34–61 (discussing the federal laws that govern casino development).

[113] H. Scott Althouse, *Idaho Nibbles at Montana: Carving Out a Third Exception for Tribal Jurisdiction over Environmental and Natural Resource Management*, 31 Envtl. L. 721, 730 (2001).

[114] 25 U.S.C. § 2702(3) (2000).

[115] Washburn, *supra* note 111, at 343 (citing National Environmental Policy Act, 42 U.S.C. § 4321 (2000)).

[116] *Id.* (noting NIGC's informal interpretation of its responsibilities under NEPA).

mental Impact Statement (EIS) to catalogue those impacts or else advise the requesting parties of the steps necessary to avoid the impacts.[117]

Furthermore, IGRA requires the NIGC to ensure that each tribal gaming compact contains a series of mandatory provisions.[118] Among these is the requirement that all proposed contracts contain a provision ensuring that "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety . . . ."[119] Seeking to balance its reluctance to encroach upon tribal sovereignty with this Congressional mandate,[120] the NIGC established and sought the assistance of a tribal advisory commission.[121] With the help of the advisory committee, the NIGC published a proposed regulation that required tribes proposing a gaming facility to submit an environmental management plan that addressed: "(1) Emergency preparedness; (2) food & water; (3) construction & maintenance; (4) hazardous and other materials; and (5) sanitation."[122] These plans would then form the basis of NIGC oversight of the gaming facility.[123]

Facing strong opposition to the proposed rule,[124] the NIGC opted for a "simpler, less programmatic approach" when it adopted its final rule.[125] Noting that its regulatory oversight burden under IGRA is one of "limited and discrete responsibility,"[126] the NIGC's final rule gave tribes discretion as to how to adequately address environment, public

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[117] *Id.*

[118] 25 U.S.C. § 2710.

[119] *Id.* § 2710(b)(2)(E). Class III gaming facilities meet the requirements of class II gaming facilities. *Id.* § 2710(d)(1)(A)(ii).

[120] *Compare* Environment, Public Health, and Safety, 67 Fed. Reg. 46,109, 46,111 (Jul. 12, 2002) (to be codified at 25 U.S.C. § 580) ("[A]s a fundamental principle of federal law and policy, tribal governments have the right and authority to make their own choices in exercising their governmental powers"), *with* 67 Fed. Reg. at 46,110 ("[I]t is clear that Congress intended the Commission to exercise at least some degree of general oversight authority with respect to whether or not a gaming facility is being operated in compliance with the Congressionally mandated provisions in tribal gaming ordinances.").

[121] 67 Fed. Reg. at 46,110.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 46,110–11. Some critics argued that the regulations placed an undue burden on tribes. *Id.* at 46,110. Other argued that the plan exceeded the authority granted to NIGC by Congress and that other governmental agencies were better equipped to address environmental, public health, and safety concerns. *Id.* Furthermore, states and local governments argued that they should have some role in the development of the gaming facility plans. *Id.*

[125] *Id.* at 46,111.

[126] *Id.*

health, and safety concerns.[127] Under this hands-off approach, tribes may develop oversight and enforcement procedures on their own, or they may contract with state, local, or federal governments and even private entities to provide these services.[128]

Some fear that this philosophy leads to lax enforcement.[129] To be sure, the NIGC's own guidelines state the Commission will "proceed [with] enforcement only where no corrective action has been undertaken within a reasonable time and such inaction results in a condition of imminent jeopardy to the environment, public health and safety."[130] The past practice of NIGC lends credence to this fear: as of 2004, NIGC had yet to deny a "management contract because of significant impacts on the environment" and had "never even determined that a casino construction project caused significant environmental impacts requiring the preparation of an environmental impact statement."[131]

B. *State Attempts at Environmental Enforcement on Indian Reservations*

Although the distinction articulated in *Cabazon* between civil/regulatory and criminal/prohibitory may at times be unclear, environmental regulations are most likely civil/regulatory and thus do not extend onto Indian lands without the consent of the tribe.[132] States often seek to overcome this jurisdictional hurdle to assert some form of regulatory control.[133] In order to do so, a state must either seek tribal consent or else the need for regulation must qualify as an "exceptional cir-

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[127] *See* 67 Fed. Reg. at 46,111–12.

[128] *Id.* The NIGC believes that its "key objective is to confirm that standards and enforcement systems are in place" and places less emphasis on "the particular manner in which compliance with tribal environment, public health, and safety standards is enforced." *Id.*

[129] *See* Washburn, *supra* note 111, at 343–44. There is concern that NIGC feels NEPA compliance places Indian casinos at a comparative disadvantage over non-Indian ones because non-Indian casinos are not subjected to NEPA requirements. *Id.*

[130] Environment, Public Health and Safety, 67 Fed. Reg. at 46,112.

[131] *See* Washburn, *supra* note 111, at 343. Professor Washburn notes that in every instance in which the NEPA applied, the NIGC Chairman has issued a "finding of no significant impact." *Id.* at 344. To be fair, though, these FONSIs have often come after the tribes have taken steps to ameliorate environmental impacts. *Id.* Professor Washburn wisely notes that the tribes may be well served by preparing an EIS "to avoid litigation that will further slow approval." *Id.*

[132] *See, e.g.*, KIEL, *supra* note 36, at P-11.

[133] *See* Justin Neel Baucom, Comment, *Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have We Forgotten the Foundational Principles of Tribal Sovereignty?*, 30 AM. INDIAN L. REV. 423, 424 (2006); *see* Martella, *supra* note 99, at 1885–86 (discussing the jurisdictional hurdles states face in asserting environmental regulatory control on reservations).

cumstance," thereby allowing a state to "assert jurisdiction over the on-reservation activities of tribal members."[134]

Cabazon—illustrating this "exceptional circumstances" test—holds that "[s]tate jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless the state interests at stake are sufficient to justify the assertion of state authority.*"[135] This change in attitude towards tribal sovereignty on tribal land is articulated in *Nevada v. Hicks*, where the Court noted "that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."[136]

Thus, public policy may dictate that state and local laws reach on-reservation activities so long as the law represents a compelling state interest and it does not interfere with reservation self-government or "impair a right granted or reserved by federal law."[137] For example, the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.* placed a limit on tribal sovereignty when it prevented tribes from asserting sovereign rights in order to avoid paying property taxes for recently purchased land parcels.[138] The Court concluded that allowing the tribe to assert sovereignty—and thus removing the lands from municipal tax rolls—would "'seriously burde[n] the administration of state and local governments' and would adversely affect [neighboring] landowners."[139] In a few other cases, states have successfully met the exceptional circumstances test to preserve threatened species and provide injunctive relief to mandate an environmental impact statement.[140]

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[134] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); *see* Fletcher, *supra* note 10, at 48; Martella, *supra* note 99, at 1878–79, 1884 (noting that the exceptional circumstances test is likely insurmountable with respect to environmental regulation).

[135] California v. Cabazon Mission Band of Indians, 480 U.S. 202, 216 (1987) (emphasis added) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 333, 334 (1983)).

[136] 533 U.S. 353, 361 (2001).

[137] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

[138] *See* 544 U.S. 197, 219–20 (2005).

[139] *Id.* at 200 (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994)) (first alteration in original) (citation omitted); *see* McClenathan, *supra* note 98, at 113. *City of Sherrill* may have lasting negative effects on tribal sovereignty and may hinder tribal efforts to repurchase "illegally taken land and assert[] sovereign rights over the newly acquired land parcels." Sohn, *supra* note 2, at 161.

[140] *See, e.g.*, Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 175–76 (1977) (holding that species preservation justified state regulation of steelhead trout as a conservation measure); New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1, 6 (E.D.N.Y. 2003) (holding state and town provided sufficient evidence to grant an injunctive order to stop construction of a large facility on the reservation); Concern, Inc. v. Pataki, 801 N.Y.S.2d 232, 232 (N.Y. App. Div. 2005) (prohibiting further planning and construction of an off-

IV. The Compacting Process

A. *Procedural Ambiguity: IGRA's Silence on State Procedures for Negotiating and Ratifying Compacts*

IGRA created a new relationship between states and tribes, but Congress left several key issues unresolved.[141] For instance, Congress did not articulate the procedural requirements for state governments to enter into compacts.[142] As a result, state courts have developed new bodies of state constitutional law to develop procedures states should follow to enter into compacts.[143] Many states—including California—require that the governor negotiate tribal compacts, which must then be ratified by the legislature.[144] For example, the Florida Supreme Court recently held that "the Governor does not have the constitutional authority to bind the State to a gaming compact that clearly departs from the State's public policy by legalizing types of gaming that are illegal everywhere else in the state."[145] In contrast, the Arizona legislature enacted a statute stating that if a tribe that does not have a compact cannot successfully negotiate a compact with the governor, then the governor *is required to* execute a standard compact with the tribe.[146] In other states, courts have held that the governor retains the right to negotiate and enter into compacts because the governor retains the right to "transact business on behalf of the state."[147] As state constitutional law slowly develops, tribes must wait until the state's procedure for entering into a compact is resolved, risk operating an illegal casino, or forego development.[148]

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reservation casino until the state conducted a draft environmental impact statement as required by the State Environmental Quality Review Act).

[141] *See generally* Kevin K. Washburn, A.B.A. Ctr. for Continuing Legal. Educ., Indian Gaming: A Primer on the Development of Indian Gaming, the NIGC, and Several Important Unresolved Issues 6 (2002) (citing unresolved issues in IGRA).

[142] *See* Kiel, *supra* note 36, at P-13; Washburn, *supra* note 141, at 6 (citing New Mexico *ex rel.* Clark v. Johnson, 904 P.2d 11 (N.M. 1995)).

[143] Washburn, *supra* note 141, at 6 (citing *Clark*, 904 P.2d at 18).

[144] Cal. Const. art. 4, § 19. *See, e.g.*, State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1185 (1992) (holding that the governor had the power to negotiate the terms of a gaming compact, but did not have the "power to bind the State to the terms thereof").

[145] Fla. House of Representatives v. Crist, 990 So.2d 1035, 1038 (Fla. 2008).

[146] Washburn, *supra* note 141, at 6 (citing Salt River Pima-Maricopa Indian Cmty. v. Hull, 945 P.2d 818, 826 (Ariz. 1997)).

[147] *Id.* at 6–7 (citing Willis v. Fordice, 850 F. Supp. 523, 532–33 (S.D. Miss. 1994)).

[148] *Id.* at 7.

B. *Scope of Compact Provisions*

IGRA "forbids the assertion of state civil or criminal jurisdiction over class III gaming except when the tribe and the state have negotiated a compact that permits state intervention."[149] In enacting IGRA, Congress placed a rough boundary over the scope of permissible provisions.[150] IGRA permits gaming compact provisions that directly apply to the regulation of Indian gaming.[151] It does not, however, address regulation of environmental impacts.[152] Of the enumerated list of permitted provisions, the last offers the most leeway to parties to negotiate for environmental regulatory control.[153] These address the "*standards for the operation* of such activity and *maintenance* of the gaming facility" and "*any other subjects that are directly related* to the operation of gaming activities."[154] The issue thus becomes how broadly courts interpret the scope of permitted provisions. For example, IGRA "does not specifically authorize application of state labor laws, building codes, or other general regulations."[155] That said, in *In re Gaming Related Cases*, the Ninth Circuit concluded that labor provisions are "directly related to the operation of gaming activities" as contemplated by the catch-all provision of IGRA section 2710(d)(3)(C)(vii).[156] Following *In re Gaming*, some compacts have utilized this catchall provision to include environmental regulation.[157]

C. *Off-Reservation Land Acquisition: New "Guidance"*

IGRA permits gaming on Indian lands where "the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy,

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[149] Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 690 (1st Cir. 1994) ("[A] state ordinarily may regulate casino gambling on Indian lands only in pursuance of a consensual compact.").

[150] 25 U.S.C. § 2710(d)(3)(C) (2000).

[151] *Id.*

[152] O'Connell, *supra* note 109, at 31; *see* Sohn, *supra* note 2, at 151–52.

[153] 25 U.S.C. § 2710(d)(3)(C)(vii); *see, e.g.*, Sohn, *supra* note 2, at 151–52 (citing *In re Gaming Related Cases*, 331 F.3d 1094, 1115–17 (9th Cir. 2003)).

[154] 25 U.S.C. § 2710(d)(3)(C)(vi)–(vii) (emphasis added).

[155] *See* Sohn, *supra* note 2, at 151.

[156] *In re Gaming Related Cases*, 331 F.3d at 1115–16; *see* Sohn, *supra* note 2, at 151–52.

[157] *See, e.g.*, County of Amador v. City of Plymouth, 57 Cal. Rptr. 3d 704, 713 (Cal. Ct. App. 2007) (subjecting off-reservation impacts to California Environmental Quality Act); Cal. Commerce Casino, Inc. v. Schwarzenegger, 53 Cal. Rptr. 3d 626, 630 (Cal. Ct. App. 2007) ("The compact amendments also provided for enhanced environmental protection and employee rights.").

prohibit such gaming activity."[158] Section 2703 of IGRA defines Indian lands as lands within a reservation or lands held in trust by the federal government for the benefit of Indians "over which an Indian tribe exercises governmental power."[159]

IGRA prohibits gaming on lands acquired in trust after October 17, 1988 unless the tribe can demonstrate an enumerated exception.[160] Tribes often seek to establish gaming on "newly acquired lands" under the "two-part determination" exception.[161] The two-part determination exception was intended to give the Secretary and local communities a voice in whether to allow off-reservation casinos.[162] Under this exception, IGRA directs the Secretary to decide whether to take off-reservation land into federal trust for purposes of casino development.[163] This exception requires the Secretary to consider whether the acquisition: (1) is in the "best interest" of the tribe; and (2) is not detrimental to the surrounding community.[164] To make an informed decision, the Secretary must first consult with "appropriate State and local officials, including officials of other nearby Indian tribes" before seeking the gubernatorial concurrence of the state in which the gaming activity is to be conducted.[165]

There has been considerable controversy over the two-part determination exception.[166] Some argue that gubernatorial concurrence should be abandoned and that off-reservation development should be part of the negotiating process between tribes and states.[167] Removal of

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[158] 25 U.S.C. § 2701(5).

[159] *Id.* § 2703(4)(A)–(B).

[160] *Id.* § 2719(a)–(b).

[161] *Id.* § 2719(b)(1)(A); *see, e.g.*, All, *supra* note 102, at 302–03; Rand, Meister & Light, *supra* note 6, at 195.

[162] Rand, Meister & Light, *supra* note 6, at 195; Indian Gaming Paper, *supra* note 58, at 5.

[163] 25 U.S.C § 2719(b)(1)(A); *see, e.g.*, Rand, Meister & Light, *supra* note 6, at 195–96.

[164] 25 U.S.C § 2719(b)(1)(A); *see, e.g.*, Rand, Meister & Light, *supra* note 6, at 195.

[165] 25 U.S.C § 2719(b)(1)(A); *see, e.g.*, Jensen, *supra* note 6, at 688–89.

[166] *See Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Oversight Hearing Before the H. Comm. on Natural Resources*, 110th Cong. 1 (2008) [hereinafter Washburn testimony] (statement of Kevin K. Washburn, Professor, Harvard Law School). Rand, Meister & Light, *supra* note 6, at 197. Many see gubernatorial concurrence as an "extraordinary grant of power" by Congress that grants governors an absolute power to determine the scope of off-reservation gaming in the state. All, *supra* note 102, at 296. That said, in *Confederated Tribes of Siletz Indians of Oregon v. United States*, the Ninth Circuit held that this requirement of gubernatorial concurrence did not violate the Appointments and Property Clauses of the Constitution. Carter W. Hick, *The Indian Gaming Regulatory Act: Why Tribes Can Build Casinos Off the Reservation*, 10 Gaming L. Rev. 110, 117–18 (2006) (citing 110 F.3d 688, 697–98 (9th Cir. 1997)).

[167] *See, e.g.*, All, *supra* note 102, at 306–08 (discussing a Senate bill that proposed to remove the gubernatorial concurrence requirement).

gubernatorial concurrence lies at the heart of amendments proposed by Senator John McCain aimed at preventing a "backlash against Indian gaming generally."[168] Others argue that the two-part determination is essential because it provides states the ability to walk away from negotiations involving unwanted off-reservation development and "allows states and tribes to think creatively about how to situate off-reservation gaming so that it maximizes its success and minimizes [the negative] impact on the local community."[169] Application of the two-part determination remains a rarity in part because of this contention.[170] As of early 2008, only four times has a tribe successfully acquired land in trust under this exception.[171]

The two-part determination informs agency action for land-into-trust acquisitions for the purpose of off-reservation casino development.[172] It does not, however, grant the Secretary the authority to take land into trust.[173] That power is derived from the Indian Reorganization Act of 1934 (IRA), which vests the Secretary with the discretion and authority to acquire an interest in lands for Indian use.[174] Legislative history suggests that Congress intended the IRA to foster off-reservation land acquisitions to promote economic independence for tribes.[175]

In 1980, the Secretary issued guidelines—codified at 25 C.F.R. Part 151—to direct the process of taking land into trust for the benefit of tribes.[176] Under this rule, as the distance from the reservation increases, the Secretary applies "greater scrutiny" to the purported tribal benefits of the proposed acquisition and gives "greater weight"

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[168] Fletcher, *supra* note 10, at 39 (citing 151 Cong. Rec. S13389–90 (daily ed. Nov. 18, 2005) (statement of Sen. McCain)).

[169] All, *supra* note 102, at 309 (noting that the "best location" for a casino is not necessarily on-reservation).

[170] *See* Washburn testimony, *supra* note 166, at 2 (noting that the high political costs associated with off-reservation casino development may lead the Secretary of the Interior to deny trust applications).

[171] *Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Oversight Hearing Before the H. Comm. on Natural Resources*, 110th Cong. 1 (2008) [hereinafter Artman testimony] (statement of Carl Artman, Assistant Secretary for Indian Affairs, U.S. Department of the Interior).

[172] *See* 25 U.S.C. § 2719(b)(1)(A) (2000); *see, e.g.*, Jensen, *supra* note 6, at 688–89; Rand, Meister & Light, *supra* note 6, at 196.

[173] 25 U.S.C. § 2719(c) ("Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust."); Artman testimony, *supra* note 171, at 1; Indian Gaming Paper, *supra* note 58, at 7.

[174] 25 U.S.C. § 465 (2000); Artman testimony, *supra* note 171, at 1.

[175] *See* Indian Gaming Paper, *supra* note 58, at 8.

[176] Land Acquisitions, 25 C.F.R. § 151 (2007); *see* Artman testimony, *supra* note 171, at 1–2; Indian Gaming Paper, *supra* note 58, at 8–9.

to the concerns of affected state and local governments.[177] The rule does not specify how the Secretary must approach these inquiries.[178]

On January 4, 2008, the Department of the Interior released a memorandum to provide guidance on the application of Part 151.[179] In order to apply "greater scrutiny" to the tribe's justification of the anticipated benefits as the distance increases between the proposed acquisition and the existing reservation, the guidance focuses inquiry on the "commutable distance" between the two.[180] The Secretary reasoned that if the proposed land acquisition is not within a commutable distance to the reservation, then tribal residents on the reservation must either move away from the reservation to take advantage of employment opportunities or forego job opportunities if they decide to remain on the reservation.[181] The Secretary reasoned that either course of action risks negative impacts to reservation life.[182]

In order to apply "greater weight" to the concerns of state and local governments, the memorandum recommends that the Secretary consider state and local concerns of: "1) jurisdictional problems and potential conflicts of land use; and 2) the removal of the land from the tax rolls."[183] The memorandum further recommends that applications under Part 151 should include "intergovernmental agreements" negotiated between the tribe and state and local governments.[184] A lack of agreement should "weigh heavily" against the application.[185] Although reviewers must evaluate the "greater weight" requirement regardless of the distance between the proposed acquisition and the reservation, both of the reasons supplied in the memorandum reference increased distances.[186] First, the Secretary reasons that as the distance between the reservation and the proposed land acquisition increases, there is an increased likelihood that transfer to Indian jurisdiction will disrupt "es-

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[177] 25 C.F.R. § 151.11(b); *see, e.g.*, Hick, *supra* note 166, at 115–16; Jesnsen, *supra* note 6, at 693–94.

[178] Guidance Memorandum, *supra* note 8, at 1.

[179] *Id.* at 2–3.

[180] *Id.* at 3 ("A commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation.").

[181] *Id.* at 4.

[182] *Id.*

[183] *Id.* at 5; *see* Jensen, *supra* note 6, at 690 (noting that the Department now seeks detailed information about the "'detrimental impacts to the surrounding community,' such as environmental damage . . . .").

[184] Guidance Memorandum, *supra* note 8, at 5.

[185] *Id.*

[186] *See id.* at 3, 5.

tablished governmental patterns" of the municipality surrounding the proposed land acquisition.[187] Second, increased distances make it more difficult for tribal governments "to efficiently project and exercise its governmental and regulatory powers."[188]

The guidance memorandum also suggests that the application contain a comprehensive analysis of the effects of the proposed gaming facility on state and local zoning and land use requirements.[189] The study should include whether the proposed gaming facility would cause negative impacts such as traffic, noise, and development issues.[190] The memorandum suggests that gaming adjacent to "National Parks, National Monuments, [or] Federally designated conservation areas" may constitute an "incompatible use."[191]

On February 27, 2008, the House Committee on Natural Resources held a hearing on the new guidance memorandum.[192] At the hearing, Assistant Secretary for Indian Affairs Carl Artman testified that the new guidance is needed because the Bureau of Indian Affairs is "not accustomed to assessing applications for land 100, 200, or 1500 miles away from a tribe's reservation."[193]

Tribes testifying at the hearing objected to the memorandum, claiming it was a paternalistic rule that violated the Administrative Procedures Act and the congressional intent of IGRA.[194] Hazel Hindsley, Chairwoman for the St. Croix Chippewa Indians of Wisconsin, argued that the memorandum signified the Department's aversion to off-reservation applications because it used the broader language in Part

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[187] *Id.* at 5. This concern echoes the Supreme Court's holding in *City of Sherrill v. Oneida Indian Nation of N.Y.*, where the Court found that recent land acquisitions by the Oneida Nation were subject to local taxation because exemption would subject state and local governments to undue burden. 544 U.S. 197, 20 (2005).

[188] Guidance Memorandum, *supra* note 8, at 5.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 5–6.

[192] *See Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Oversight Hearing Before the H. Comm. on Natural Resources*, 110th Cong. 1 (2008) [hereinafter Rahall Statement] (statement of Rep. Nick Rahall, Chairman, H. Comm. on Natural Resources).

[193] Artman testimony, *supra* note 171, at 2. Assistant Secretary Artman testified that the Bureau of Indian Affairs "is used to dealing with requests for land 20, 30, or 50 miles away from a tribe's reservation." *Id.*

[194] *See, e.g., Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Oversight Hearing Before the H. Comm. on Natural Resources*, 110th Cong. (2008) [hereinafter Skibine testimony] (statement of Alex Skibine, Professor, University of Utah College of Law).

151 to deny applications before evaluating the "best interest" of the tribes under the two-part determination.[195]

Preeminent Indian Law scholars have echoed these concerns.[196] For example, Harvard Law School professor Kevin Washburn testified that the memorandum "misunderstands" the benefits of gaming because gaming is about "revenue, not jobs."[197] Professor Washburn further argued that off-reservation gaming may be better than on-reservation gaming—especially when supported by state and local governments—because it places casinos in communities that are willing to "put up with the inevitable negative externalities" of gaming in exchange for economic development.[198] Professor Washburn also argues that noncontroversial off-reservation development should be approved, and that the "Secretary should not become an obstacle to joint efforts at economic development when tribes and states agree on the value of an off-reservation Indian gaming operation."[199]

Similarly, scholars Kathryn Rand, Steven Andrew Light, and Alan Meister have rightly criticized the "memo's procedural genesis and substantive 'guidance.'"[200] Their article persuasively raises several legal questions on whether the memorandum: (1) constitutes an administrative legislative ruling subject to the Administrative Procedure Act; (2) meets the *Chevron*[201] test for judicial deference to agency decisions or is

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[195] *See Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Oversight Hearing Before the H. Comm. on Natural Resources*, 110th Cong. 1 (2008) [hereinafter Hinsdley testimony] (statement of the Honorable Hazel Hindsley, Tribal Chairwoman, St. Croix Chippewa Indians of Wisconsin).

[196] *See, e.g.*, Washburn testimony, *supra* note 166; Jensen, *supra* note 6, at 694–95; Rand, Meister & Light, *supra* note 6, at 198–206.

[197] Washburn testimony, *supra* note 166. Washburn argues that "[r]evenues from off-reservation gaming operations pay for tribal jobs on the reservation in a variety of areas, including healthcare, elderly services, social services, education, [and] law enforcement . . . many of which provide direct services to reservation residents." *Id.*

[198] *Id.*

[199] *Id.* (arguing that "no federal interest justifies the Secretary's refusal to take land into trust when tribes, local communities and the state's governor agree").

[200] Rand, Meister & Light, *supra* note 6, at 194.

[201] Under the *Chevron* test, which courts apply to review final agency decisions:

> The first step is to ask whether Congress has spoken to the precise question at issue; if so, then the agency (and the court) must give effect to the unambiguous intent of Congress. If the statute is silent or ambiguous, then courts must employ Chevron's second step and ask whether the agency's decision on the issue is a reasonable construction of the statute. Agency regulations and actions should be given deference by the courts "*unless they are arbitrary, capricious, or manifestly contrary to" the enabling statute*, and "considerable weight" is given to an agency's reconciliation of conflicting policies or exercise of particular expertise.

instead arbitrary and capricious; and (3) undermines congressional intent.[202]

V. A New Model of Cooperation in the Tribal-State Compacting Process

The Big Lagoon Rancheria's Barstow proposal enjoyed the support of the tribe, the city of Barstow, and the governor's office, yet the proposal failed because of the "commutable distance" guidance memorandum, which was possibly fueled by the Department of the Interior's "negative attitude towards off-reservation casinos."[203] Despite this failure, the proposal encompasses a creative new way to approach the compacting process—one that addresses federal, state, tribal, and local concerns.[204] The Barstow proposal highlights the ability to devise creative compacts to address pressing environmental and social concerns.[205] States should emulate this broad interpretation of the provisions permitted by IGRA and actively seek tribal consent for state environmental regulation over activities that adversely affect the off-reservation environment. In exchange, tribes should be afforded greater deference beyond the "commutable distance" guidance memorandum to include off-reservation casino development that is more in tune with the legislative intent of both IRA and IGRA.[206]

A. *Expand the Scope of Compact Provisions Permitted Under IGRA*

IGRA provides little direct support for the contention that environmental regulatory control is a permitted compact provision.[207] A broad interpretation of section 2710 would mitigate state concerns regarding the loss of environmental regulatory control over casino con-

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Id. at 201 (emphasis added) (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984)).

[202] *Id.* at 200–03. The article also echoes several of the economic concerns raised by Professor Washburn. *Id.* at 203–06.

[203] Artman Letter, *supra* note 7, at 2–3; *see* Hindsley testimony, *supra* note 195 (referencing Secretary Kempthorne's negative attitude toward off-reservation casinos).

[204] *See* Governor's Press Release, *supra* note 4, at 1.

[205] *See* Big Lagoon Compact, *supra* note 1, at 62 (requiring a tribal environmental impact report and intergovernmental agreements between the tribe and the city to address environmental concerns as a precondition to construction).

[206] *See* All, *supra* note 102, at 312 (arguing that governors and tribes should be able to "think creatively about how to shape off-reservation gaming proposals").

[207] *See* Sohn, *supra* note 2, at 151.

struction and operation.[208] Some members of Congress cautioned against a broad interpretation.[209] Nevertheless, states have begun to take advantage of the "unprecedented degree of freedom" to seek such regulations in the compacting process.[210] Recent court decisions reinforce this broad interpretation.[211] The compacts negotiated since *Seminole Tribe of Florida v. Florida* suggest that states enjoy a bargaining power beyond the scope contemplated by Congress in IGRA.[212] Although most states see revenue sharing as a primary goal, a few have begun to adopt a more holistic approach to seek tribal consent for greater state environmental oversight.[213]

The most effective vehicle to achieve this tribal-state cooperation is for the tribe to consent.[214] A tribal-state compact is essentially "a contract, subject to the ordinary rules of contract construction."[215] Framing compacts as a contractual issue, parties should have flexibility beyond the limiting terms of IGRA, provided the tribe voluntarily agrees to waive sovereign power.[216] This waiver must be express and constitute

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[208] *See id.* at 151–52 (citing *In re* Gaming Related Cases, 331 F.3d 1094, 1115–17 (9th Cir. 2003)) (discussing the broad interpretation of IGRA's "catch-all" provision—an interpretation that would deem acceptable a "wide array of state regulatory laws").

[209] *See id.*, at 151 n.109 (citing 134 Cong. Rec. 12,651 (1988) (quoting Senator Inouye, 134 Cong. Rec. S24024–25 (daily ed. Sept. 15, 1988)) ("There is no intent on the part of Congress that the compacting methodology be used in such areas as taxation, water rights, environmental regulation, and land use . . . .")).

[210] *Id.* at 151–52 (citing *Gaming Related Cases*, 331 F.3d at 1115–17); *see* Big Lagoon Compact, *supra* note 1, at 66–67 (requiring intergovernmental agreements between the tribe and the City of Barstow).

[211] *See, e.g.*, County of Amador v. City of Plymouth, 57 Cal. Rptr. 3d 704, 713 (Cal. Ct. App. 2007) (subjecting off-reservation impacts to California Environmental Quality Act); Cal. Commerce Casino, Inc. v. Schwarzenegger, 53 Cal. Rptr. 3d 626, 630 (Cal. Ct. App. 2007) ("The compact amendments also provided for enhanced environmental protection and employee rights.").

[212] Fletcher, *supra* note 10, at 59 (noting that states demanded a "cut of the profits from class III gaming"); *see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) (noting that tribes could no longer sue states for refusing to negotiate in good faith). In short, the compacting process has given states an "unprecedented degree of freedom" to apply civil regulations against tribal casinos. Sohn, *supra* note 2, at 151 (citation omitted).

[213] *See Schwarzenegger*, 53 Cal. Rptr. 3d at 630; *see* Fletcher, *supra* note 10, at 57; Perlman, *supra* note 95, at 53; Sohn, *supra* note 2, at 150–51; Legislative Analyst's Office, California Tribal Casinos: Questions and Answers, http://www.lao.ca.gov/2007/tribal_casinos/tribal_casinos_020207.aspx (Feb. 2007).

[214] *See, e.g.*, Environment, Public Health, and Safety, 67 Fed. Reg. 46,109, 46,111–12 (Jul. 12, 2002) (to be codified at 25 U.S.C. § 580).

[215] *See* Wisconsin v. Ho-Chunk Nation, 478 F. Supp. 2d 1093, 1098 (W.D. Wis. 2007) (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987)).

[216] *See* Ariz. Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1135 (9th Cir. 1995) (discussing unmistakable waivers of sovereign power); All, *supra* note 102, at 312–13.

an "unmistakable waiver."[217] Absent such a waiver, tribes retain civil regulatory authority.[218] To illustrate, in *Allen v. Gold Country Casino*, the Ninth Circuit held that waiver of tribal sovereign immunity may not be implied.[219] Similarly, in *New York v. Oneida Indian Nation of New York*, the court held that a tribal-state compact provision waiving sovereign immunity constituted an express waiver.[220] Indeed, the NIGC's own regulations contemplate that tribes have the option to enter into contracts with state, local, and federal governments as well as private entities for services to meet the NIGC's environment, public health, and safety standards.[221]

Tribes may feel compelled to cooperate, especially when they seek off-reservation gaming opportunities under the two-part determination. Since the decision in *Seminole Tribe of Florida v. Florida*, courts and the Department often acquiesce when states seek goals beyond the scope of IGRA.[222] Furthermore, despite the guidance memorandum's faulty reasoning,[223] Department regulations *do* contemplate that as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater weight to the concerns of state and local governments.[224] Factors for consideration include "the impact of removing the land from state and local tax rolls, any jurisdictional problems, and potential conflicts of land use."[225]

For what it is worth, the guidance memorandum does warn that tribes that are located away from the land acquisition may find it more difficult to "efficiently project and exercise . . . governmental and regulatory powers."[226] Without commenting on the dubious accuracy of this assertion, it is possible that apprehensive municipalities will bring concerns such as this to state governors, who hold veto power to kill politi-

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[217] *See Aspaas*, 77 F.3d at 1135. "Unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities." S. Rep. No. 100-446, at 5–6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075–06.

[218] *See* United States v. Winstar Corp., 518 U.S. 839, 877–78 (1996).

[219] *See* 464 F.3d 1044, 1047–48 (9th Cir. 2006).

[220] 78 F. Supp. 2d 49, 54 (N.D.N.Y. 1999).

[221] Environment, Public Health, and Safety, 67 Fed. Reg. 46,109, 46,111 (Jul. 12, 2002) (to be codified at 25 U.S.C. § 580).

[222] 517 U.S. 44 (1996); *see, e.g.*, Washburn, *supra* note 74, at 441; Rausch, *supra* note 70, at 426; Sohn, *supra* note 2, at 152.

[223] *See* discussion *infra* Part V.B.

[224] Land Acquisitions, 25 C.F.R. § 151.11 (2007).

[225] Rand, Meister & Light, *supra* note 6, at 196.

[226] Guidance Memorandum, *supra* note 8, at 5.

cally unpopular land acquisitions.[227] To illustrate, in 2005 Governor Schwarzenegger issued a proclamation opposing reservation shopping in urban areas and has "made local support . . . an essential requirement" for any gaming projects in the state.[228]

The focus on political support has led to gaming compacts that include provisions that address the environmental affects of gaming development.[229] For example, California has leveraged local support for gaming to successfully negotiate for environmental regulatory oversight.[230] The 1999 California Model Compact includes a section regarding off-reservation environmental impacts.[231] The model included a tribal pledge to "[m]ake good faith efforts to mitigate any and all such significant adverse off-reservation environmental impacts."[232] In 2004, California negotiated amendments to five gaming compacts to require "enhanced environmental protection and employee rights."[233] The 2004 amendment cannot affect the federal NEPA requirement that tribes prepare an Environmental Impact Statement prior to breaking ground,[234] but it goes beyond this requirement by including new language in the compacts to promote discussion with local governments and arbitration clauses to solve impasses.[235] The 2004 compacts require that tribes negotiate with local governments to address environmental, public safety, infrastructure, and other demands related to casinos.[236]

NIGC rules anticipate this cooperation and even contemplate intergovernmental contracts under which the tribes receive regulatory

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[227] 25 U.S.C. § 2719(b)(1)(A) (2000); *see, e.g.*, Jensen, *supra* note 6, at 690.

[228] Heidi McNeil Staudenmaier & Anne Bishop, *Reservation Shopping 101*, 9 Gaming L. Rev. 439, 444 (2005) (citing Governor Arnold Schwarzenegger, Proclamation on Tribal Gaming Policy (May 18, 2005), *available at* http://www.schwarzenegger.com/en/news/uptotheminute/news_upto_Proclamation37.asp? sec=news&subsec=uptotheminute).

[229] *See* California Model Tribal-State Compact § 10.8 (1999), *available at* http://www.sycuancompact.com/downloads/1999_compact.pdf.

[230] Big Lagoon Compact, *supra* note 1, at 66–67 (requiring an enforceable agreement between the tribe and City of Barstow to address impact on the off-reservation environment).

[231] *See id.* Based on the model compact, tribes will: determine any significant adverse impacts on the off-reservation environment; submit environmental impact reports to the state for distribution to the public; discuss environmental mitigation action with city and county officials; and provide an opportunity for public comment. During casino operation, the tribe shall inform the public of the project and make good faith efforts to mitigate any and all such significant adverse off-reservation environmental impacts. *Id.*

[232] *See* California Model Tribal-State Compact § 10.8.2(5)(b)(2).

[233] Cal. Commerce Casino, Inc. v. Schwarzenegger, 53 Cal. Rptr. 3d 626, 630 (Cal. Ct. App. 2007).

[234] *See* 42 U.S.C. § 4332 (2000).

[235] *See, e.g.*, Perlman, *supra* note 95, at 54.

[236] Legislative Analyst's Office, *supra* note 213.

and enforcement services to protect the environment, public health, and safety.[237] NIGC regulations permit that tribes form these intergovernmental contracts with state, local and federal governments, and even private entities.[238] Because NIGC grants tribes such wide latitude to implement standards, tribes have the opportunity to work with local communities to overcome regulatory stumbling blocks in the compacting process. Big Rancheria's willingness to swap development right at its reservation for the opportunity to conduct a casino 500 miles off-reservation demonstrates this willingness.[239] The Rancheria is not alone. For example, Wisconsin's gaming compacts now require that tribal gaming facilities comply with state codes regulating electrical wiring, fire prevention, and sanitation.[240] California's United Auburn Indian Community agreed to "follow all local land use ordinances, create an environmental review document, pay for enhanced law enforcement and fire protection, improve local roads, compensate the county for lost taxes and establish a Tribal-County Advisory Council to resolve local issues."[241] California's Rumsey Band of Wintun Indians agreed to comply with local environmental requirements, pay annual road maintenance fees, and to fund traffic mitigation efforts.[242]

B. *Allow Tribes Greater Deference in Off-Reservation Land Acquisitions Beyond that Demonstrated by the "Guidance Memorandum"*

The commutable distance guidance memorandum misconstrues the legislative intent of the IRA, and in the context of Indian gaming, ignores both the rationale for the two-part determination and previous findings by the Department.[243] Without commenting in detail on the

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[237] Environment, Public Health and Safety, 67 Fed. Reg. 46,109, 46,109 (July 12, 2002) (to be codified at 25 C.F.R. pt. 580).

[238] *Id.*

[239] *See* Governor's Press Release, *supra* note 4.

[240] *See e.g.*, Bad River Band of Lake Superior Chippewa Indians and State of Wisconsin, Gaming Compact of 1991 § XIV(A), http://www.doa.state.wi.us/docs_view2.asp?docid=2127.

[241] California Performance Review, *supra* note 94 (citing Press Release, Placer County, *Supervisors Reluctantly Approve MOU for Casino*, Auburn, California, August 25, 1999).

[242] *Id.* (citing Intergovernmental Agreement Between the County of Yolo and the Rumsey Bank of Wintun Indians Concerning Mitigation for Off-Reservation Impacts Resulting from the Tribe's Casino Expansion and Hotel Project (2002)).

[243] *See* 25 U.S.C. § 2719(b)(1)(A) (2000); 25 C.F.R. § 151.11(2007); Rand, Meister & Light, *supra* note 6, at 198; Washburn testimony, *supra* note 166, at 2–3.

dubious legal basis of the guidance,[244] the rule should be scrapped because its determination as to what constitutes "negative consequences of reservation life" is paternalistic, may violate the Administrative Procedures Act (APA), and unduly minimizes the economic benefits of off-reservation gambling.[245]

1. Misplaced Reliance on Distance from the Reservation

When a tribe proposes an off-reservation casino, the Secretary is usually presented with the decision under IRA to take the land into trust at the same time it makes the two-part determination under IGRA.[246] IGRA clearly bases this determination on whether acquisition of the land "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community . . . ."[247] The Department's "greater scrutiny/greater weight" evaluation criteria effectively provide the Department with more discretion to decline a trust application under its own regulations than Congress intended by IGRA or IRA.[248] The 2004 Indian Gaming Paper—an internal policy paper created within the Department of the Interior—found that in enacting IGRA, Congress did not intend for the distance of a proposed casino from an established reservation to be a limiting factor.[249] The paper concluded that "[n]owhere in the IRA or its legislative history was there ever a discussion of mileage limits to lands that tribes could acquire to engage in economic enterprises."[250] Instead, off-reservation trust acquisitions should be encouraged under the IRA because "most current tribal lands will not readily support economic development" as intended by IRA.[251]

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[244] *See* Rand, Meister & Light, *supra* note 6, at 200–06; Washburn testimony, *supra* note 166, at 6–7. Both Washburn and Rand provide excellent critiques of the dubious legal standing of the guidance memorandum.

[245] *See, e.g.*, Skibine testimony, *supra* note 194 (arguing guidance memorandum is paternalistic); Washburn testimony, *supra* note 166 (violation of APA); Rand, Meister & Light, *supra* note 6, at 200–01 (possible violation of APA); Rand, Meister & Light, *supra* note 6, at 203–04 (minimizing positive economic impacts).

[246] *See, e.g.*, Indian Gaming Paper, *supra* note 58, at 10.

[247] 25 U.S.C. § 2719(b)(1)(A).

[248] 25 C.F.R § 151.11; *see* Rand, Meister & Light, *supra* note 6, at 197–98.

[249] Indian Gaming Paper, *supra* note 58, at 12–13; *see* Jensen, *supra* note 6, at 694; Rand, Meister & Light, *supra* note 6, at 197.

[250] Indian Gaming Paper, *supra* note 58, at 8; *see* Rand, Meister & Light, *supra* note 6, at 197.

[251] *See Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Oversight Hearing Before the H. Comm. on Natural Resources,*

2. "Best Interest" Means More Than Employment

The Department's own "Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 [§ 2719] Determinations" provides an informal and nonexhaustive list of criteria for determining whether a land acquisition is in the best interest of a tribe.[252] Criteria include: "economic benefit to the tribe and its members, including the impact on tribal employment, job training, and career development, as well as benefits related to tourism, increased tribal income, and the relationship between the tribe and the surrounding community."[253] IGRA—designed to promote tribal economic development, self-sufficiency, and strong tribal governments—contemplates that gaming revenues will fund tribal government and the general welfare of the tribe, charitable organizations, and local government agencies.[254] The memorandum misconstrues this holistic inquiry—reducing it to a question of employment—and thereby ignores IGRA's overriding goals.[255]

3. "Greater Weight" Should Include Benefits to the Surrounding Community

The denial of the Barstow proposal discounts the interests of the city of Barstow.[256] The guidance advises that tribes provide evidence of "intergovernmental agreements" negotiated between the tribe and state and local governments.[257] Unfortunately, when the Secretary denied the Barstow proposal, it made no reference to the town's support, thereby ignoring its own guidance to consider the existence of intergovernmental agreements when applying "greater weight" to the concerns raised by state and local governments.[258] This guidance therefore ignores the congressional intent of IGRA to encourage land acquisition, especially where state and local communities support the acquisition.[259] In doing so, the guidance creates an obstacle to joint efforts at economic devel-

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110th Cong. 3 (2008) (statement of Jacqueline Johnson, Executive Director, National Congress of American Indians).

[252] Rand, Meister & Light, *supra* note 6, at 198.

[253] *Id.*

[254] 25 U.S.C. § 2710 (2000); Rand, Meister & Light, *supra* note 6, at 204.

[255] Hindsley testimony, *supra* note 195; Washburn testimony, *supra* note 166.

[256] *Id.; see* Governor's Press Release, *supra* note 4.

[257] *See* Guidance Memorandum, *supra* note 8, at 5 (recommending that "greater weight" be afforded to the interests of local governments).

[258] *See* Artman letter, *supra* note 7.

[259] *Id.*

opment and chills IGRA's goal of cooperative federalism.[260] It also ignores the state's interest in averting the environmental disaster that would come from having a casino at the Big Lagoon.[261] Furthermore, the guidance rebukes the Department's own earlier finding that where the local community supports an off-reservation project, successful two-part determinations are more likely both as a legal and a practical matter.[262]

4. "Commutable Distance" Misconstrues IGRA's Intent

The "commutable distance" guidance creates a de facto mileage cap to deny off-reservation land acquisitions that are more than a "commutable distance" from the tribe's reservation.[263] Department of Interior guidelines reference "greater scrutiny" and "greater weight" as the distance from the reservation increases, neither the guidelines nor the IRA contemplate a mileage requirement.[264] It is clear from its application and from agency comments, however, that mileage informs agency action.[265]

On the same day the Department denied the Rancheria's proposal, it also applied the commutable distance guidance to deny ten trust applications of other tribes.[266] Although the guidance memorandum did not specify a bright-line mileage requirement, the rejected applications ranged from seventy to 550 miles.[267] In denying these pro-

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[260] *Id.* at 4–5; *see* Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002).

[261] Governor's Press Release, *supra* note 4; s*ee* All, *supra* note 102, at 309 (noting that off-reservation development be more appropriate).

[262] *See* Indian Gaming Paper, *supra* note 58, at 12; Rand, Meister & Light, *supra* note 6, at 198.

[263] *See* Washburn testimony, *supra* note 166, at 6 (arguing that the Indian Gaming Paper reached a sensible conclusion in finding that "distance limits should not be grafted onto IGRA").

[264] *See* Hindlsey testimony, *supra* note 195, at 4–5; Indian Gaming Paper, *supra* note 58, at 6, 8.

[265] *See, e.g.*, Artman Letter, *supra* note 7, at 3. Of the eleven proposals denied on January 4, 2008, all were for trust applications for land at least seventy miles from the tribe's reservation and all were denied based on the "commutable distance" guidance. Indianz.com, BIA Starts New Year With Off-Reservation Gaming Policy, http://www.indianz.com/News/2008/006500.asp (last visited Jan. 23, 2009). On February 27, 2008, Assistant Secretary Artman testified that most of the lands taken into trust were less than forty miles from the reservation of the tribe requesting the land. Indianz.com, Artman Suggests Mileage Limit for Off-Reservation Land, http://www.indianz.com/News/2008/007378.asp (last visited Jan. 23, 2009).

[266] Rahall Statement, *supra* note 192, at 29.

[267] Indianz.com, *Artman Suggests Mileage Limit for Off-Reservation Land*, http://www.indianz.com/News/2008/007378.asp (last visited Jan. 23, 2009).

posals, the Secretary focused primarily on the distance between the proposed trust acquisition and the reservation.[268] The Secretary approved the trust application of the Confederated Tribes of Chehalis Reservation for a casino in Thurston County, Washington for a parcel that was located seven miles from that tribe's reservation.[269] In contrast, the St. Croix Chippewa Indians of Wisconsin—who also enjoyed gubernatorial and local support—believe their application for land 330 miles from their reservation would have been denied if not for a pending lawsuit against the Department.[270] Surprisingly, the Department approved the application of the Miami Tribe of Oklahoma, whose reservation was located 609 miles from its proposed acquisition.[271]

This "ill-defined" mileage cap frustrates both IGRA—which is intended to guide Secretary decisions when contemplating off-reservation trust acquisitions for gaming purposes—and the IRA, which grants the Secretary the power to make land trust acquisitions for the benefit of Indians.[272]

C. *Moving Forward: Learning from the Barstow Proposal*

In April 2008, Governor Schwarzenegger announced a deal with North Fork Rancheria of Mono Indians to build a casino near the city of Fresno, forty miles from the tribe's reservation.[273] The tribe's reservation is located south of Yosemite in an area the tribe believes is too remote for a casino.[274] Echoing the Barstow proposal, Tribal Chairwoman Elaine Bethel Fink argued that moving the proposed gaming facility also makes sense because it protects the Yosemite environment.[275]

Heeding the stumbling block cause by the guidance memorandum, the governor indicated that he would not submit the proposal to the legislature until the Secretary of the Interior approves the off-

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[268] Artman Letter, *supra* note 7, at 3 (noting the negative consequences to the tribe presented by the large distance between Big Lagoon and Barstow).

[269] *See Department of the Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Oversight Hearing Before the H. Comm. on Natural Resources*, 110th Cong. 1–2 (2008) (statement of David Burnett, Chairman, Confederated Tribes of Chehalis Reservation). Like the Barstow proposal, the Chehalis proposal enjoyed the support of the governor of the state and local officials. *Id.* at 3.

[270] *See* Hindlsey testimony, *supra* note 195, at 2.

[271] Rand, Meister & Light, *supra* note 6, at 205–06.

[272] *See* Hindlsey testimony, *supra* note 195, at 4–5; Rand, Meister & Light, *supra* note 6, at 205 (calling the commutable distance standard "ill-defined"); Indian Gaming Paper, *supra* note 58, at 13.

[273] Nancy Vogel, *Governor Backs Indian Casino*, L.A. Times, Apr. 29, 2008, at B1.

[274] *Id.*

[275] *Id.*

reservation land acquisition.[276] The governor and other proponents of the develop need to work with the Secretary to ensure that the proposed land acquisition is approved, even if it must do so under the constraints of the faulty guidance memorandum.[277] The close distance between the tribal reservation and the proposed acquisition—a mere forty miles—is well within the distance contemplated by the guidance memorandum.[278] Approval is not a foregone conclusion, though, because the governor must also overcome continued state legislative opposition to off-reservation Indian gaming in close proximity to urban centers.[279]

Conclusion

In negotiating the proposed compact with the Rancheria, California adopted novel and creative environmental provisions in an attempt to save the Big Lagoon ecosystem. The State also took a forward stance in exploring off-reservation options in an attempt to avoid environmental deterioration of a fragile ecosystem. Tribes and states should be allowed to emulate the creativity exhibited between the city of Barstow and the State of California. This freedom to define the terms of tribal-state compacts goes a long way towards improving regulatory accord over environmental protection, identifying and developing sites that minimize adverse environmental impacts, and involving local municipalities as willing partners.

To achieve this new model of compact negotiation, the Secretary should abandon its new guidance memorandum and solicit public comment to develop a new rule that achieves the intent behind the IRA and IGRA. This rule should enable tribes to work with local municipalities to identify appropriate off-reservation sites that serve the goals of tribal economic development. In exchange for this deferential stance on off-reservation development, tribes should be more willing to allow states and local municipalities to seek greater environmental regulatory control to address the off-reservation effects of gaming.

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[276] *Id.*

[277] *See* discussion *infra* Part V.B.

[278] *Id.*

[279] Vogel, *supra* note 272, at B1. In the North Fork deal, the governor himself has apparently reversed his own opposition to negotiating for off-reservation gaming in close proximity to urban centers. *See id.*