

Indian Casinos: Another Tragedy of the Commons?*

by

Ronald N. Johnson**

October, 2004

Abstract

With passage of the Indian Gaming Regulatory Act of 1988 reservation landscapes have changed, and some now look more like Las Vegas than buffalo country. The rapid growth of Indian casinos has surprised many and the revenues generated, \$16.7 billion in 2003, are staggering. But, property rights have not been clearly delineated. The Indian Gaming Regulatory Act requires states to negotiate in “good faith” with tribes seeking to develop Las Vegas-style casinos. As argued in this chapter, the result has been the socially costly pursuit of wealth transfers as state and local governments have come to realize the enormity of the funds generated by Indian casinos. Among other consequences, in hopes of influencing the rules of the game and the negotiation process, tribes have now become major contributors to political campaigns. Nevertheless, gaming tribes appear to be well positioned to defend their new-found source of wealth.

*This paper is a draft of a chapter to appear in Terry L. Anderson, Bruce Benson, and Tom Flanagan, eds., *Self-Determination: The Other Path for Native Americans*. The author wishes to thank Bruce Benson, D. Bruce Johnson, and participants at the 2003 Southern Economic Association meetings for helpful comments.

**2206 River Run Dr. #38, San Diego, CA 92108. Email: ronnilsjohnson@aol.com.

“I think it is fair to say, that 15 years ago nobody could have seen that by 2002 Indian gaming revenues would grow to be \$14.5 billion.” Senator Ben Nighthorse Campbell.¹

I. Introduction.

American Indian reservations often conjure an image of extreme poverty, with economies based largely on transfer payments and governmental services. Casino gaming, however, has brought a new source of wealth to a number of formerly impoverished Indian tribes. A key factor contributing to the success of Indian gaming is the sovereign status enjoyed by Indian tribes.

Although Indian tribes do not have the sovereign status of a foreign nation, they are recognized as having retained vestiges of aboriginal sovereignty. The sovereign status of Indian tribes and the special nature of their relationship to both federal and state governments was recognized in the well known cases of *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). In the *Cherokee* case, the Court recognized the sovereign status of Indians, albeit they were domestic nations dependent on the federal government. The *Worcester* case established that, within the boundary of an Indian reservation, Congress was recognized to have plenary authority and state law did not apply. The history of Indian tribal relations with the federal government, however, hardly resembles that of two sovereigns on equal footing.² United States Indian policy since the 1830s has shifted from

¹ United States Senator from the State of Colorado, Chairman, Senate Committee on Indian Affairs, Oversight Hearings on the Indian Gaming Regulatory Act of 1988. Washington, DC, July 9, 2003.

² See Anderson (1995, pp. 166-76) on the ambiguity inherent in the notion of tribal sovereignty and the tensions that policy has created.

removal and subjugation, to allotments and assimilation, to reorganization, and to tribal termination in the 1950s. In the early 1970s, Indian policy shifted again when the federal government began to support tribal self-determination and self governance.

Concomitant with this shift in federal Indian policy has been the growth of legalized gambling in the United States. Backed initially by a series of court decisions, Indian tribes have leveraged their sovereign status to participate in this growth industry. But, many states opposed Indian gaming and the battle shifted to Congress. The result was passage of the Indian Gaming Regulatory Act of 1988 (IGRA).³ While the Act allows tribes to engage in certain gaming operations, such as bingo halls, independent of state oversight or regulation, a tribe wanting to engage in the potentially more lucrative operation of Las Vegas-style casinos, with slots and house-banked table games, must negotiate a compact agreement with the state where the casino is to be located. In essence, regulatory jurisdiction over Indian-operated, Las Vegas-style casinos would involve three sovereigns: the federal government, the state in which a tribe has land, and the tribe itself.

From a property rights perspective, the Act allows for too many claimants, a situation that encourages the socially costly pursuit of gaming profits, a type of activity often referred to as “rent seeking” (Tullock, 1967 and Tollison, 1997). Moreover, with excessive rent seeking development of a potentially valuable resource can be severely retarded. In contrast to the more traditional case where there is overusage of a common or open-access resource, the absence of the right to exclude can also result in underusage. Buchanan and Yoon (2000) have referred to this problem as the tragedy of the anticommons. At the heart of the problem of both the

³ P.L. 100-497, codified at 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.

commons and anticommons is the absence of clearly defined property rights.

Reducing the number of sovereigns to one would reduce the potential for conflict over resource development and rent seeking. But, whether Indians are entitled, on moral, legal or efficiency grounds, to a greater or lesser degree of sovereignty is not the subject of this paper. Instead, the focus is on whether Indian tribes are likely to sustain and continue to develop profitable gaming operations. That is, can gaming tribes withstand the onslaught from both external and internal forces that can be predicted to challenge their success? The recent and largely unanticipated success of Indian gaming has prompted state politicians to seek revenue sharing and other concessions from gaming tribes. In response, gaming tribes have become major contributors to political campaigns. But, there are also internal governance problems that challenge the success of Indian gaming. Rather than a strong sovereign state that protects individual property rights, Indian tribes are more like a commons, subject to internal forces that can lead to dissension and challenge the accumulation and productive use of wealth. The analysis commences with a description of the events leading up to and following passage of the IGRA.

II. The Rise of Indian Gaming.

In the mid 1970s, casinos and off-track betting were illegal everywhere except in Nevada (Eadington, 1999). While bingo was typically permitted by churches or fraternal organizations, only New Hampshire had a state lottery. The legal climate for gambling, however, was about to change. In 1976, New Jersey voters authorized casino gaming in Atlantic City, and by 2004, non-Indian, Las Vegas-style casino gaming was permitted in eleven states, and seven states

allowed racetrack casinos.⁴ Although some may be tempted to associate this dramatic increase in legalized gaming with a decline in social mores, Raymond Sauer (2001) points out that gambling regulation over the past 400 years has been episodic in character. The original colonies, and later many states, used lotteries to raise revenues, but were later challenged by anti-lottery groups. Gambling establishments thrived on the frontier, but were later subject to substantial restrictions. Even Nevada banned gambling in 1909, repealing the ban in 1931. Between 1890 and 1910, horse racing was challenged in most major racing states. According to Sauer, this episodic nature of gaming regulation reflects a change in the willingness of voters to accept gaming as a source of government revenues.⁵ Since the 1970s, there has been a steady progression of states instituting lotteries and by 2001, 40 states had legal lotteries. Importantly, the states' growing interest in using legalized gambling to raise revenues sets the stage for the rise of Indian gaming.

Starting in the 1970s, Indians were granted a greater role in managing their own affairs. The Indian Self-Determination and Education Act of 1975 (88 Stat. 2203) codified procedures allowing tribes to engage in contracting for various services free of local Bureau of Indian Affairs (BIA) control, and provided greater tribal control over educational programs. During the 1980s, both the Reagan and Bush administrations reaffirmed the policy of self-determination, even if it included gaming operations (Mason, 2000, p 58). The idea was to encourage tribes to

⁴ The American Gaming Fact Sheet (<http://www.americangaming.org>). Parimutuel wagering is also allowed in 43 states.

⁵ Direct revenues to states from gambling, including lotteries, was around \$27 billion in 2001. Recent state budget deficits have caused states to seek even more funding from gaming operations, both Indian and non-Indian (Binkley, Hilsenrath and Forelle, 2003).

develop their own enterprises, while also lowering federal expenditures on Indian programs. Gaming, if properly regulated, offered an opportunity to accomplish both those objectives.

In 1979, the Seminole Indians of Florida opened a relatively high stakes bingo operation that became an instant success (Cordeiro, 1989). But, the stakes offered exceeded state limits on bingo, and shortly after the tribe opened its bingo operation the Broward County sheriff threatened arrests on the Seminole reservation. The Seminole tribe sued the county, seeking a declaratory judgment and injunctive relief.⁶ Although the Seminoles claimed tribal sovereignty, the state of Florida and Broward County argued that Congress had granted the State jurisdiction in this matter. During the tribal termination era of 1950s, Congress enacted Public Law 280 (67 Stat. 588-90) which granted certain states, including Florida, criminal jurisdiction over a limited category of activities occurring on reservations. Although Florida had a statute regulating bingo, the State needed to show that bingo was prohibited through criminal sanctions. Because the Florida statute allowed regulated bingo games, the federal circuit court concluded that Florida's approach to bingo was civil-regulatory in nature rather than criminal-prohibitory. Therefore, the state could not assert its jurisdiction over the Seminoles' bingo operations. In essence, the court reinforced a "regulatory" versus a "prohibitory" distinction that became critical in a series of later cases.

After *Seminole*, tribes across the U.S. seized the opportunity to get into high-stakes bingo gaming in states where bingo was not expressly prohibited by law. By 1987, over 100 tribal bingo facilities, grossing close to \$200 million, were in operation (Cordeiro, 1989, p.1). Moreover, by the mid-1980s tribes were seeking to expand their gaming activities to include

⁶ *Seminole Tribe v. Butterworth*, 658 F. 2d 310 (1981).

card games. This expansion produced another state challenge to tribal gaming.

The Cabazon Band of Mission Indians was operating a bingo and draw-poker parlor on its reservation when the state of California and the county of Riverside attempted to apply state and local statutes governing bingo, poker, and other card games. The Cabazon tribe sought declaratory relief, and the federal district court granted summary judgment against the State.⁷ The case was appealed to the U.S. Supreme Court. Using the civil-regulatory, criminal-prohibitory test relied on in *Seminole*, the Court affirmed the district court's decision. Because California operated or allowed a state lottery, parimutuel horse-race betting, bingo, and did not expressly prohibit poker-type card games, the Court reasoned that such games were presumably not contrary to the State's public policy. The *Cabazon* case came to represent the idea that if a state allowed some types of gaming activities, a state's policy on gaming in general would be interpreted as civil-regulatory, with tribal gaming therefore beyond state enforcement.

Federal court rulings, starting with the *Seminole* case, were generally favorable to Indian gaming. But states had an alternate venue to proclaim their concerns about the harmful effects of Indian gaming: the U. S. Congress.⁸ In November of 1983, Rep. Morris Udall of Arizona proposed a bill (H.R. 4566) to regulate Indian gaming. The bill expressed concern that Indian gaming would attract organized crime and other undesirable elements. Although the bill did not make it to the floor, the efforts on behalf of this bill and the efforts that followed it revealed mounting opposition from the states, many of which regarded Indian gaming as a threat to their

⁷ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁸ See Mason (2000, pp. 53-69) for a more detailed description of the events leading up to passage of the IGRA.

own tax revenues from commercial gaming operations and state-run lotteries. This was clearly a justifiable concern, as a state may not impose a tax on tribal property or activities on Indian lands, nor are most tribal enterprises subject to federal taxes (U.S. General Accounting Office (GAO), 1997). Naturally, the states were joined in their opposition to Indian gaming by casino operators in Las Vegas and New Jersey. With the ongoing *Cabazon* case as a backdrop, Congress debated the merits of regulating Indian gaming. Shortly after the decision in the *Cabazon* case was handed down, Congress enacted the IGRA. It was clearly a compromise, but one that gave the states more influence over Indian gaming than the courts had given them.

The IGRA divided gaming into three classes, each class subject to differing degrees of tribal, state, and federal jurisdiction and regulation. Class I gaming is defined to include social and traditional Indian games played for minimal prizes by individuals at tribal ceremonies and gatherings. Class I games are under the exclusive jurisdiction of the tribes. Class II gaming includes bingo (whether or not electronic, computer, or other technological aids are used) and if played in the same location as bingo, pull tabs, punch board, tip jars, instant bingo, and other games similar to bingo. Class II gaming also includes non-banked card games, that is, games that are played exclusively against other players rather than against the house or a player acting as a bank. The Act specifically excludes slot machines or electronic facsimiles from the definition of class II games. Tribes have the authority to conduct, license, and regulate class II gaming so long as the state in which the tribe is located permits such gaming for any purpose and the tribal government adopts a gaming ordinance subject to oversight by the National Indian Gaming Commission (NIGC), a federal agency created by the IGRA.

The definition of class III gaming is broad. It includes all forms of gaming that are

neither Class I nor II. Games commonly played at Las Vegas-style casinos, such as slot machines, black jack, craps, and roulette, would clearly fall in the Class III category. Before a tribe may lawfully conduct Class III gaming, the following conditions must be met: (1) The particular form of Class III gaming that the tribe wants to conduct must be permitted in the state in which the tribe is located; and (2) The tribe and the state must have negotiated a compact that has been approved by the Secretary of the Interior. The state, upon receiving such a request, is required under the IGRA to negotiate in “good faith.” The terms of the compacts may specify, among other things, the types of gaming devices allowed, hours of operation, and local impact mitigation.

In the event that the state fails to negotiate a compact in good faith, the IGRA originally allowed tribes to sue the state in federal court. However, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) the Supreme Court ruled that the IGRA’s judicially-forced negotiation scheme violated the Eleventh Amendment’s guarantee of state sovereign immunity. This decision, which covers a plethora of legal issues, has been widely interpreted. It did not, however, declare invalid nor set aside any part of the Act, nor did it set aside any Class III gaming pacts already negotiated.⁹ States and tribes may continue to enter voluntarily into new compacts. In some states, such as California, tribes opened Class III casinos without a compact. State governments are not empowered to act against Indian tribes if the tribes are operating Class

⁹ Following the 1996 *Seminole* decision, the Department of the Interior published a rule on April 12, 1999, at CFR Part 291, authorizing the Secretary to intervene in situations where a tribe and a state cannot reach agreement. This rule has been used only sparingly and is the subject of current litigation. See Statement of M. Sharon Blackwell, Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, Department of the Interior, Before the Senate Committee On Indian Affairs, July 25, 2001.

III gaming establishments without a compact, as enforcement is a federal responsibility, and states have complained that the federal government refuses to act aggressively in these matters. It is not surprising that the IGRA's requirement that the two parties negotiate compacts for Class III gaming has been a source of continuing controversy. On the one hand, federal courts have ruled that Indian tribes have a right to establish gaming facilities on their reservations; on the other hand, IGRA requires that compacts be negotiated between the tribes and the states, obviously requiring the state's consent for Class III gaming. Accordingly, the IGRA created a situation wherein property rights are ill defined.

The theory of property rights addresses both individual behavior and the organizational forms individuals use to capture and exploit assets.¹⁰ Since property rights are always in danger of appropriation, collective action may be necessary for their protection. Indeed, the origin of the state and the evolution of property rights can be attributed to the need to protect property against outside threats and enhance the prospect for wealth accumulation. A sovereign with the ability to protect the property of the citizens from outside forces while itself refraining from excessive confiscation would encourage the expansion of aggregate wealth. But, modern governments, especially democratic ones, do not have clearly defined residual claimants, a situation that can lead to excessive demands by the competing parties and a failure to develop the resource: a tragedy of the anticommons. Despite the potential for conflict inherent in the IGRA, however, Indian gaming has been a growth industry.

¹⁰ In its most complete form, a property right implies the ability of the owner to derive value from the asset, exclude others from using it, and transfer ownership. See Barzel (1997) for the distinction between economic and legal rights. North (1990) discusses the importance of institutions (property rights) for promoting the accumulation of aggregate wealth.

III. The Revenues at Stake.

Data on Indian gaming net revenues, sometimes referred to as net win (dollars wagered minus payouts), shown in Table 1 indicates a very rapid rise in revenues, especially in the years immediately following passage of the IGRA. The data are from the NIGC and are for both Class II and Class III operations.¹¹ Although bingo operations remain a significant contributor to Indian gaming revenues, Class II operations account for only about 12 percent of total Indian gaming revenues (GAO,1997, p. 9). The distinction between Class II and Class III operations, however, can be murky. Tribes operating without a Class III compact have attempted to use gaming devices that function like video slot machines.¹² The tribes involved argue that these machines are a facsimile of pull-tabs or instant bingo that are permissible under Class II. In most cases, the rulings have gone against the tribes.¹³ Nevertheless, some tribes continue to use gaming devices that violate classification opinions, and others are constantly in search of new gaming devices that would fall within the permissible Class II category. Thus, the distinction between Class II and III operations is murky and constitutes another venue where both tribes and states expend resources defending their positions.

¹¹ While the NIGC collects data on the various tribes' gaming operations, these detailed reports are protected from release under the Freedom of Information Act. However, the GAO (1997 and 2001) was allowed access to the tribes' financial reports. In addition, industry reporting groups such as Christian Capital Advisors LLC (<http://www.cca-i.com>) keep track of the gaming industry, and there are numerous newspaper accounts of tribes' gaming successes and failures. Together, these sources allow for the construction of an overview of the industry.

¹² For example, the Seminole Tribe of Florida has two hotel and casino facilities, operated in conjunction with Hard Rock Cafes, that have the appearance of Las Vegas-style casinos. Most, but not all, of the gaming devices they have utilized are considered to be Class II devices (Testerman, 2004).

¹³ See NIGC, Classification Opinions (<http://www.nigc.gov>).

The rapid, but diminishing annual rate of growth in Indian gaming revenues shown in Table 1 reflects, in part, the fact that Indian gaming has been capturing an ever larger share of total gaming industry revenues. The growth of Indian gaming has been so expansive that their revenues are now approximately equal to the gross gaming revenues from slot machines and table games in Nevada and New Jersey casinos combined. The \$16.7 billion garnered by gaming tribes in 2003 accounts for about 23 percent of total legal gaming revenues in the U.S.¹⁴ Between 1982 and 1997, revenues from all forms of legalized gaming grew at an average annual rate of 7.45 percent (Eadington, 1999, p. 174). But, the rate of growth has diminished in recent years. As a consequence, the future rate of growth of Indian gaming will be more constrained by the overall rate of growth in the demand for gaming than it has been in the past.

Although Indian gaming revenues are impressive, amounting to about \$8,500 per enrolled tribal member in 2002, revenues are concentrated.¹⁵ Of the 562 federally-recognized Indian tribes in 2002, only 224 were engaged in gaming.¹⁶ However, 226 tribes are located in Alaska, where only two tribes are engaged in gaming and, according to the National Indian Gaming Commission, 64 percent of gaming revenues were earned by 13 percent of the 330 Indian gaming establishments in 2003. Indeed, slot revenues from Foxwoods Casino together

¹⁴ Gross industry revenues were \$72.8 billion in 2003. The figure includes parimutuel wagering (on horses, greyhounds, and jai alai), lotteries, casinos, legal bookmaking, charitable games, and Internet gambling. Source, Christian Capital Advisors LLC (<http://www.cca-i.com>).

¹⁵ Enrolled tribal members is a better measure of the affected group than U.S. Census counts. Among American Indians, enrolled members are the group most likely to benefit directly from gaming revenues. The figure in the text was computed using enrollment data from U.S. Department of Interior (1999) and the NIGC's (<http://www.nigc.gov>) list of gaming tribes.

¹⁶ See Indian Gaming Facts, National Indian Gaming Association. (<http://www.indiangaming.org>).

with its Connecticut neighbor, Mohegan Sun Casino, account for about \$1.6 billion or over 9 percent of total Indian gaming revenues.¹⁷

Nevertheless, despite the fact that some large tribes, like the Navajo, do not yet participate in gaming, the tribes in the lower forty-eight states that are engaged in gaming represent approximately 70 percent of enrolled tribal members. Today, Indian gaming can be found in 28 states, and 25 states have signed compact agreements. Only Hawaii and Utah appear to prohibit gambling to the extent that even Class II operations would likely be in violation of the IGRA. Many of the tribes that have chosen not to participate are located in remote sections of the country, distant from major population centers. Of course, Las Vegas wasn't considered to be in close proximity to anything when it first opened casinos. Today, it is considered a destination resort. That concept, although on smaller scale, is increasingly utilized in Indian country. Thus, the potential to get into gaming is present for most tribes in the lower forty-eight states.

Besides the obvious distributional issues, the \$16.7 billion shown in Table 1 for 2003 is a gross measure from which ordinary operating expenses should be deducted. Estimates of tribal gaming costs and expenses were made by the GAO (1997) based on financial statements tribes submitted to the NIGC for 1995. According to the GAO, net income was approximately 38 percent of gaming revenues. This figure compared very favorably with their analysis of non-Indian casinos in Atlantic City and Nevada, but the GAO noted that the tribal advantage

¹⁷ State of Connecticut, Department of Special Revenue (<http://www.dosr.state.ct.us>).

appeared to be largely due to state gaming taxes as well as property taxes and other fees paid by non-Indian casinos. Thus, net returns to Indian casinos appear to be large and growing. While the problem of the anticommons appears to have been avoided, casino revenues have numerous claimants.

IV. Carving up the Pie: The External Threats.

As states began to realize the potential for added revenues, politicians were also beginning to see another potential, the willingness of gaming tribes to make large campaign contributes to establish and maintain Class III gaming operations. The traditional concept of rent seeking (Tollison, 1997) stresses the costs, such as lobbying and litigation expenditures, associated with the use of the political arena by firms and individuals to obtain monopolies or favorable regulations that can generate monopoly-type rents. Firms would be willing to expend up to their expected gain in profits derivable from the monopoly in order to secure such an advantage. Conceivably, lobbying and litigation expenditures could equal potential profits, resulting in the complete dissipation of rents. In contrast, a powerful sovereign could auction off the rights to the monopoly. If competition for the monopoly is sufficiently intense, the sovereign could capture the potential rents, avoiding their dissipation. Likewise, it is possible that a sovereign could tax away the potential profits. Since tax revenues are conventionally treated as a transfer, to the sovereign in this case, dissipation would again be avoided.

The conditions, however, under which complete dissipation or the complete capture of rents can occur are very demanding. For example, competition for the monopoly position is essential for both full capture or complete dissipation. But more to the point, full capture of the rents implies the existence of a well-defined transferable right to the monopoly. As the

discussion in the preceding sections indicates, there are three sovereigns with potential claims to Indian gaming revenues. Consequently, the sovereignty Indian tribes possess is dependent on political ambitions and court decisions. The various claimants can be expected to expend costly resources either protecting or attempting to confiscate gaming rents.

The margins for dissipation are many, but in addition to the traditional forms of rent seeking, politicians can also induce exchanges by threatening to write laws or undertake actions that could disadvantage certain individuals or firms (McChesney, 1987). Whether the initial sponsors of the IGRA were so motivated is beyond the scope of this paper. But, as the examples offered in this section indicate, state politicians have used a variety of threats, including the threat of expanding gaming to non-Indians in order to obtain concessions from gaming tribes.

By granting the states a degree of veto power over Class III operations, the IGRA essentially gave the states and/or their politicians the right to claim part of the residual. But, the states do not have absolute veto power. For one thing, compacts must be approved by the Secretary of the Interior, and the department has made clear that attempts to extract excessive amounts from the tribes would be met with a denial of the compact. The IGRA allows states to assess tribes for the cost of regulating and monitoring Class III operations, but the Act (25 U.S.C. Sec. 2710 (d) (4)) is explicit in denying a state or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment on an Indian tribe's gaming operations. Without obtaining a share of gaming revenues, however, a number of states balked at signing compacts, a stance that was later reenforced by the 1996 *Seminole* decision. Moreover, in 1988 most states prohibited casino-style gambling. If casino gaming were to be allowed, these laws would have to be modified or repealed. But if repealed, that could open the

door to non-Indian gaming operations, and the proliferation of casinos would offend voters who were opposed to gambling.

Accordingly, politicians will seldom act as a perfect broker for any single interest group (Peltzman, 1976, p. 211). Indeed, as Bruce Yandle (1983) has pointed out, regulation often involves a coalition of strange bedfellows, such as bootleggers and Baptists. Hence, a political trade-off, one that allowed a limited amount of gaming, carried on by Indians who were often viewed as having been victimized by federal and state policy, was the more palatable outcome for politicians in a number of key states. Importantly, restricting the number of gaming establishments and devices was also essential if tribes were to become major contributors to political candidates and campaigns. Too much competition would drive net returns to zero and reduce the willingness of gaming tribes to contribute. Although they are unlikely to agree on the same number of devices, both politicians and gaming tribes have an incentive to restrict entry.

The key to achieving a compact agreement in a number of important cases has been a tribe's willingness to share gaming revenues with the state. In exchange, and to obtain the blessings of the Department of the Interior, gaming tribes have been granted "substantial exclusivity" for Class III type gaming in the state or localities within the state.¹⁸ To date, the Secretary of the Interior has approved compacts with revenue-sharing provisions in six states. In approximate chronological order of their approval, the states are Connecticut, Wisconsin, New Mexico, California, New York and Arizona (see Table 2). All compacts with revenue-sharing components involve the granting of exclusivity by the state. Importantly, should the state renege

¹⁸ Statement of Aurene M. Martin, Acting Assistant Secretary-Indian Affairs, Department of the Interior, Before the Committee on Indian Affairs United States Senate, On the Indian Gaming Regulatory Act, Washington, DC, July 9, 2003.

on the exclusivity agreement, revenue-sharing payments from tribes cease. Indeed, Michigan tribes were at one time making revenue-sharing payments to the state under a court-approved consent decree, but these tribes stopped making payments when the voters in Michigan authorized three non-Indian casinos in Detroit. The experiences of the six revenue-sharing states illustrate the trade-offs imposed by the IGRA on gaming tribes and state politicians.

The precedent for states to obtain a share of Indian gaming revenues was established early by the Mashantucket Pequot tribe of Connecticut.¹⁹ Shortly after obtaining tribal recognition, the Pequots opened a bingo hall with seating for 5,000 near the town of Ledyard, about 120 miles from New York City. The bingo hall was an immediate success and, following passage of the IGRA, the tribe sought to expand beyond bingo. At the time, the state of Connecticut allowed charity gaming under the rubric of “Las Vegas Nights.” The games allowed included blackjack and roulette, but not slots. The Pequots argued that since the state allowed Class III gaming it was compelled to negotiate a compact agreement. The state of Connecticut resisted, but a series of court decisions and support from the Department of the Interior and a court-appointed mediator eventually led to a compact agreement and the opening of a casino that offered a variety of games, including poker and parimutuel horse-race wagering, which was banned in Atlantic City, but not slots.

Foxwoods Casino opened in February 1992, and its success and the fact that no taxes were paid to the state stimulated efforts to capture some of the new-found wealth. Shortly after Foxwoods opened, a Las Vegas casino operator initiated a campaign to open a non-Indian casino

¹⁹ The Pequots were thought by some to have been an extinct tribe, but in 1983 remaining members managed to obtain federal recognition. The Pequot’s rise to prominence is described in Benedict (2000) and Eisler (2001).

in Bridgeport, Connecticut, a severely depressed community at the time. The area was promised jobs and the state substantial tax revenues. The Pequots recognized the threat and the opportunity to expand into slots. They commenced their own lobbying effort, outspending their competition. In the process, they revealed the extent to which gaming tribes were capable of becoming major sources of campaign funding. The Las Vegas interests spent \$357 thousand in 1992. The Pequots' lobbying expenses were \$363 thousand (Eisler, 2000, p. 178). The Pequots' campaign paid off. Although the Governor of Connecticut, Lowell Weicker, had declared he was adamantly against allowing slots, the campaign revealed public support for Indian gaming. Importantly, the Pequots offered the state one hundred million dollars a year or 25 percent of the winnings, whichever was greater, if the tribe were granted the exclusive rights to operate slot machines in the state. It was an offer that was difficult to refuse, especially since the state was running a large deficit at the time and there was public support for Indian gaming. Following the introduction of slots in January of 1993, revenues poured into Foxwoods and state coffers. However, arguments were continually raised that a non-Indian casino in Bridgeport, located closer to New York City, could yield even more revenues for the state even though the Pequots would no longer have to contribute 25 percent of their revenues. Again, the Pequots commenced a lobbying campaign, one that cost the tribe over \$2 million (Eisler, 2000, p.225). Their objective was to open a casino in Bridgeport, but that effort failed. Moreover, the only other federally recognized tribe in Connecticut, the Mohegans, were also attempting to open their own casino. While the Pequots did not welcome the competition from the Mohegans, the threat of a non-Indian casino in Bridgeport was real, and the Pequots agreed to maintain the compact if the Mohegans were also required to pay 25 percent of their net revenues to the state. The efforts by

state politicians to establish a non-Indian casino in Bridgeport subsided with the opening of the Mohegan Sun Casino in 1996. Today, the Pequots operate one of the world's largest casino, and Foxwoods' revenue-sharing contribution to the state of Connecticut in fiscal 2004 was \$197 million. The Mohegan Tribe, which operates the Mohegan Sun Casino, paid \$206 million to the state over the same period. The total of \$403 million far exceeds Indian revenue sharing in any of the other states.

In 1991, the Governor of Wisconsin signed the first compact agreements allowing Class III gaming in the state. The compacts called for revenue sharing and were to be renegotiated every five years. Until recently, however, the tribes paid very little to the state. The 11 tribes, operating 24 casinos, paid about \$24 million to the state in FY 2001-2002, an amount that represents only 2.2% of net revenues (Thompson and Schmidt, 2002). Recent shortfalls in the state's budget spurred Governor Doyle to go after additional revenues from the gaming tribes. Of the 11 tribes, 8 have so far agreed to new compacts. During the negotiations, there were threats to amend or repeal state law that prohibits casino gaming other than by compacted tribes. Although the tribes agreed to increases in revenue sharing (see Table 2), the newly negotiated compacts also give the tribes expanded hours and games and have no expiration date.

There were protracted and bitter conflicts over Indian gaming in New Mexico. The State repeatedly refused to negotiate a compact. As had occurred in Connecticut, the tribes took their case to the public, whose response to polls showed they strongly favored legislation allowing Indian gaming (Mason, 2000, p. 161). In 1997 the state finally agreed to a compact that would grant a degree of exclusivity to the tribes in exchange for the state receiving a 16 percent share of net revenues. In commenting on New Mexico's 1997 gaming compacts, Secretary of the Interior

Bruce Babbitt stated, “My most serious concern is the state’s insistence that the tribes make large payments to the state.”²⁰ While Secretary Babbitt allowed the 45-day statutory deadline for disapproval of the compact to expire, essentially allowing it to go into effect, he made his disapproval clear. A number of the tribes also felt that the revenue-sharing agreement was excessive in light of the presence of other gaming establishments in the state and refused to make timely payments. The issue again returned to the courts and the state legislature. The terms of the compact were renegotiated, and in 2001 ten New Mexico tribes agreed to new terms offering the state up to 8 percent of net gaming revenues (see Table 2). However, these compacts are constantly under threat of pending legislation that would expand slot numbers and hours at non-Indian casinos located at New Mexico race tracks. Once again, the state and tribes are faced with the trade-offs that exclusivity and revenue sharing impose.

Similar confrontations occurred in California. When the IGRA passed in 1988, California had a state lottery and allowed wagering on horse races, bingo for charitable purposes, and non-banked card games. However, California’s state constitution essentially prohibited slot machines and house-banked card games. Accordingly, tribes were essentially free to establish Class II gaming operations, but would have to induce the state to sign compact agreements and, eventually, amend the state constitution before they could legally engage in Las Vegas-style gaming operations. A stalemate ensued for almost ten years. Finally, in March of 1998, Governor Wilson signed a compact agreement with the Pala Band of Mission Indians, and later with a few other tribes. But, these compacts did not allow slots and greatly restricted the number of video lottery devices that were considered legal by the state. Most of the larger and

²⁰ U.S. Department of the Interior (<http://www.doi.gov/news/archives/indnmcom.html>).

established gaming tribes objected to the Pala Band compacts. Their recourse was to take the issue to the voting public via a pro-gaming ballot initiative.

If passed, Proposition 5 would permit tribes to offer certain electronic gambling devices.²¹ Importantly, this type of gaming could only occur on Indian lands, essentially granting gaming tribes exclusive rights to slot machines in California. Proposition 5 was opposed by a variety of interest groups, including church groups and Nevada gaming interests. The major coalition organized against Proposition 5 managed to raise over \$26 million for its defeat (Mason, 2000, p. 252). But, the tribes were even more resourceful. Their coalition raised over \$59 million. Moreover, the voters had a clear sense that reparation was in order, and that this was a way to accomplish it. In November of 1998 voters overwhelmingly approved Proposition 5, with 62.4 percent of the vote. In August 1999, however, the Act was ruled unconstitutional by the California State Supreme Court.²²

The State Supreme Court ruling did not come as a surprise, and efforts were immediately undertaken to place another initiative before the voters to amend the state constitution. In the meantime, Governor Gray Davis quickly signed compact agreements with 57 tribes. On March 7, 2000, the voters of California approved proposition 1A by a margin of 64 percent. The state constitution was amended to allow slot machines on federally recognized tribal lands (Article IV, Sec. 19(f)). The amendment essentially granted tribes exclusive rights to operate slot machines in the state. The compact agreements state, “In consideration for the exclusive rights enjoyed by

²¹ CA Secretary of State-Vote 98-Analysis of Proposition 5 (<http://vote98.ss.ca.gov/VoterGuide/Propositions/5.htm>).

²² *Hotel Employees & Restaurant Employees Internat. Union v. Davis*, 21 Cal 4th 585 (Aug. 1999).

the tribes, and in further consideration for the State's willingness to enter into this Compact, the tribes have agreed to provide the state, on a sovereign-to-sovereign basis, a portion of its revenue from Gaming Devices."²³ California's compact agreements call for gaming tribes to contribute a percentage of their net win, depending upon the number of gaming devices the tribe operated on September 1, 1999. There were a total of 19,005 gaming devices statewide at that time.²⁴ Each tribe's contribution was based on scale that was highly progressive (see Table 2). First payments into the fund were due September 30, 2002. Revenues to the fund were initially expected to exceed \$100 million annually and be used mainly for programs to address problem gambling, state cover gambling regulatory costs, and help local governments deal with impacts from the casinos, such as roads.

Indian gaming revenues in California were approximately \$4.7 billion in FY 2003 and are growing rapidly.²⁵ This new-found wealth, coupled with a large state budget deficit, prompted newly elected Governor Arnold Schwarzenegger to seek additional revenues from the tribes. In July of 2004, the State of California ratified new compact agreements with five tribes. If eventually approved by the Department of the Interior, the new compacts would provide an additional \$100 million annually to finance a \$1 billion bond for the state and could generate up

²³ California Gambling Control Commission, *Model Tribal-State Compact*, Preamble E. (<http://www.cgcc.ca.gov>).

²⁴ California Gambling Control Commission, Bulletin, Vol. 1 No. 2 (February 2003) (<http://www.cgcc.ca.gov>).

²⁵ The NIGC does not provide revenue data on a state-by-state basis. However, they do report gaming revenues for six regions. Region II is composed of California and Northern Nevada. Since the Indian gaming establishments in Nevada numbered only two in 2003 and are relatively small, the regional gaming revenues of \$4.7 billion can be attributed largely to California.

to \$200 million a year in recurring revenue from additional slots permitted under the new compacts. Governor Schwarzenegger's ability to extort additional funds was aided by the presence of two gaming initiatives currently on the November 2004 ballot that would expand casino gaming to non-Indians. Since signing the new compacts the Governor has expressed his opposition to those initiatives. The expansion of Indian gaming in California, however, is a concern for the tribes currently engaged in gaming, and some are opposed to the new compacts (Barfield, 2004). Indeed, attempts to control the expansion of Indian casinos in California and preserve potential rents has been an underlying force in the development of the current rules.

As of July, 2003, 61 of the 107 federally recognized tribes in California had entered into compacts with the state, and 53 tribes had gaming operations in place. While some tribes are located in very rural locations and are unlikely to engage in gaming, there is considerable room for expansion by tribes not currently in the game. This potential competition was clearly seen by the major gaming tribes, and the compact agreements establish a benefit scheme for non-compacted tribes. The Revenue Sharing Trust Fund provides up to \$1.1 million annually to tribes that operate less than 350 gaming devices. Payments into the fund are in addition to the revenue sharing contributions to the state, and tribes are required to contribute based on the number of gaming devices operated. While the fund is proclaimed as evidence of California's gaming tribes' willingness to share their wealth with other Indians, equal payment is provided to each of the non-gaming tribes, independent of tribal population. Moreover, the established gaming tribes have challenged the efforts of other tribes to open casinos in their vicinity. The gaming tribes have complained about the negative environmental and local impacts of new casinos, the very same complaints issued against the established casinos (e.g. Barfield 2003c).

But, some of their most adamant opposition is left for tribes attempting to establish casinos off their existing reservations, particularly in urban downtown areas or on major interstate highways where they could compete with other gaming tribes (e.g. Barfield, 2003b).

There is, of course, a clear incentive for each individual gaming tribe to want a casino closer to their patrons. Tribes may purchase land and add it to their reservation base. But, if left unchecked, this could create a rush by tribes to expand into urban areas, resulting in a chase for the same patrons and the dissipation of rents. Section 20 of the IGRA, however, prohibits tribes from conducting Class II or Class III gaming activities on lands acquired in trust after October 17, 1988, unless one of several exceptions applies. Importantly, the governor of the state in which the gaming activities are to take place has veto power. Between 1988 and July 2003, only three applications have been approved.²⁶ There are, however, a number of applications pending, and newly recognized tribes and those who claim their ancestral homes were illegally confiscated may eventually succeed in locating a casino in a major urban area.²⁷ But, they will likely have to overcome the veto power of state governors and that could be very expensive.

In New York, only one tribe, the Seneca, currently has a revenue sharing compact. In exchange for sharing up to 25 percent of the revenue with the State, the compact grants the tribe exclusive rights to open three casinos in western New York (see Table 2). The tribe has one off-reservation casino in Niagara Falls and plans another off-reservation casino in suburban Buffalo.

²⁶ Statement of Aurene M. Martin, Acting Assistant Secretary-Indian Affairs, Department of the Interior, Before the Committee on Indian Affairs United State Senate, On the Indian Gaming Regulatory Act, Washington, DC, July 9, 2003.

²⁷ Not unexpectedly, following passage of the IGRA there was an increase in the number of applications for federal tribal recognition (GAO, 2001).

The off-reservation site in Niagara Falls was provided by the State of New York to the Seneca tribe. Apparently, both the tribe and the State recognize the potential for substantial revenues from a downtown location. Two other major gaming tribes in New York, the Oneida Nation and the St. Regis Mohawks, with gaming compacts since 1993, are not required to make revenue-sharing payments to the state. Any new ventures, however, such as those planned for the Catskill region of southern New York, would be subject to revenue sharing.

Gaming compacts were first negotiated with Arizona tribes in 1992. Under these compacts, limited gaming was permitted, but there was no revenue-sharing component. As elsewhere, the issue was placed before the voters of Arizona, who recently expressed their willingness to grant gaming tribes exclusivity in exchange for a share of the revenue. The new compacts (see Table 2), approved by the Department of Interior in July of 2003, are exemplary. They provide exclusivity and limit the number of gaming devices tribes may operate, but make those rights transferable. Should Arizona state law be modified to allow non-Indian casinos, tribal contributions to the State would immediately be reduced to .75 percent of gaming revenues.

Elsewhere, the recent boom in Indian gaming revenues has caused states to renegotiate their compacts when they expire or reopen negotiations by threatening tribes with competition from non-Indian casinos and racinos (race tracks that offer video lottery terminals or actual slot machines). In the state of Minnesota all casinos are operated by Indian tribes, but there is no explicit revenue sharing agreement. It is likely that this is a temporary situation, as efforts are underway to capture part of the rents by allowing non-Indian casinos whose revenues can be more readily taxed or entering into a revenue sharing agreement with the tribes.

The tribes, however, are not defenseless. But, competing head to head with non-Indian gaming establishments in some states, e.g., Nevada and Montana, does not appear to have been a particularly fruitful endeavor.²⁸ On the other hand, gaming tribes have more than held their own in states like Michigan and Mississippi that allow Las Vegas-style non-Indian casinos but restrict their locations. A key factor contributing to the survival of gaming tribes in states where they compete with non-Indian casinos is that the tribes do not pay taxes on gaming revenues nor do they pay corporate or property taxes. This group, which represents about 40 percent of Indian gaming revenues, pays regulatory fees that are relatively small and may also pay local impact charges.²⁹ Thus, tribes negotiating the amount of revenue sharing and the degree of exclusivity have a fallback position that limits the amount states can extract. Accordingly, the percent of revenues tribes share with the states should be relatively small compared to the revenues extracted from non-Indian casinos.

Table 3 reveals considerable variation in gaming revenue tax rates imposed on non-Indian land and riverboat casinos in the eleven states that allow Las Vegas-style casinos. Tax rates for the casino industry in 2003, applied as a percent of gaming revenues, ranged from 6.75 percent in Nevada to a high of 70 percent in Illinois.³⁰ The average tax rate across the eleven

²⁸ See Zoellner (2003). Of the 13 tribes in Nevada, only 2 tribes are currently engaged in casino gaming; they have relatively small operations.

²⁹ The 40 percent figure was derived by using regional data from the NIGC, state revenue data (see sources in Table 2) and various reports. In 2001 tribal governments claimed they spent over \$163 million enforcing regulations. Tribes also reimbursed states \$40 million for regulatory costs and contributed \$8 million via fee assessments to fund the NIGC. Source NIGA, Department of Research, Washington DC.

³⁰ Illinois raised their maximum tax rate to 70 percent in July of 2003. There are, of course, limits as to how high a rate a state can set before actually losing revenues, and Illinois

states with major casino operations is 16 percent, a figure that is high compared to most of the rates shown in Table 2. Thus, the evidence suggests that even though gaming tribes with revenue sharing compacts have been targeted by states as a revenue source, most have managed to avoid the higher rates paid by many non-Indian casino operators. Moreover, those tribes have obtained a degree of exclusivity in exchange for their payments to the states.

While the initial prices in terms of revenue sharing appears to be relatively low, there are other costs to dealing in the political marketplace. Obtaining a share of Indian gaming revenues can enhance a politician's reelection chances among voters who oppose gaming or those who think it a preferable source of state revenue. But, making demands of gaming tribes can also generate campaign contributions, which aid reelection efforts. The casino industry has long been a major contributor to political campaigns. During the 2002 election cycle, the casino industry contributed over \$14 million to federal office seekers, ranking 27th among all industry groups, up from 75th in the 1990 election cycle.³¹ As the Pequot tribe demonstrated early on, gaming tribes have access to sufficient funds to make them a potent interest group. During the 1990 election cycle, gaming tribes contributed only \$1,750, but in the 2002 election cycle they contributed over \$6.6 million, or 47 percent of the industry total. The terms of the IGRA, however, make clear that most of the obstacles to Indian gaming are at the state level. Hence, one should expect campaign contributions at the state level to be even higher than they are at the federal level. Indeed, since 1998, tribes in California alone have contributed well over \$100

may have reached that limit. Revenues were reported down in late 2003, and patrons are reportedly heading out of state to gamble (Gruszecki, 2003).

³¹ The Center for Responsive Politics (<http://opensecrets.org>).

million to candidates and initiative campaigns, making them one of the largest contributors in the state.³² Total contributions, however, pale in comparison to the net returns to tribal governments. As mentioned previously, the GAO (1997) estimated that net returns, gaming revenues minus operating expenses, were around 38 percent of gaming revenues. Recent testimony by the Chairman of the National Indian Gaming Association suggests net returns in the range of 25 to 35 percent.³³ Applying the 25 percent figure to the \$14.7 billion in Indian gaming revenues earned in FY 2002 yields a net return of \$3.7 billion. According to the Institute on Money in State Politics, total tribal government contributions to candidates and state ballot initiatives in the 2002 election cycle was \$41.5 million.³⁴ Although in some states individual tribes may rank in the top 20 of all campaign contributors, total rents are clearly not being completely dissipated via campaign contributions.

In general, gaming tribes have been successful in warding off efforts by the states to extract payments, either in the form of revenue sharing or campaign contributions, sufficiently high that net returns to the tribes would be reduced to zero. Moreover, economic impact studies indicate that Indian gaming has reduced unemployment in counties where an Indian casino opens

³² California Common Cause (<http://commoncause.org>). The actual contributions may be understated. For example, the Agua Caliente tribe has challenged a California Fair Political Practices Commission ruling that the tribe had failed to report millions of dollars in contributions, arguing that its sovereign status exempts it from FPPC rules (see, *FPPC v. Agua Caliente Band of Cahuilla Indians* (<http://www.fppc.ca.gov/index.html?id=385>)). This case is on appeal, but it is noteworthy that foreign nations are generally prohibited from making campaign contributions.

³³ Statement of Ernest L. Stevens, U.S. Senate, Committee on Indian Affairs, Indian Gaming Oversight Hearings, Washington, DC, May 14, 2003.

³⁴ See Follow the Money (<http://www.followthemoney.org>).

and has increased per capita incomes on reservations with gaming.³⁵ Both the high returns from gaming and the related employment opportunities continue to stimulate tribes to get into gaming, a market signal that the residual rents are positive. But, this success raises another question: What is this money used for?

V. Indian Tribes as a Commons: The Internal Obstacles.

There has been confusion over the usage of the term “commons.” It has, at times, been used to denote a condition whereby no one has the ability or right (which amounts to the same thing) to exclude anyone from use of a resource (e.g., Hardin, 1968). Today, the convention is to denote the latter condition as an open-access regime (Ostrom, 2000, and Eggertsson 2003). In contrast, a common property regime is a societal arrangement whereby members of a clearly demarcated group have the ability to exclude nonmembers from using a particular asset. The commons can have legal standing, recognition by a higher authority, that facilitates the exclusion of nonmembers. Members of a common property regime typically manage the asset in a collective manner, and individual rights are usually stunted. Common property regimes seldom give members full rights of alienation or transferable titles to shares of the assets, making them a very different organizational form than that of a corporation. Because individual property rights within the organization are not well specified, these regimes often confront high internal governance costs.

Indian tribes operate much like a common property regime. In particular, the tribe, and only the tribe, may determine who is a member, and who may directly benefit from gaming

³⁵ See, for example, Evans and Topoleski (2002) and the studies referenced therein.

revenues. The ability to exclude has taken on new importance as gaming profits have soared, and there are numerous accounts of individuals seeking tribal recognition only to be rejected (e.g., Barlett and Steele, 2002). The most frequently used system for determining membership requires applicants to prove blood ties, but the standards vary across tribes. There is also variation in how tribes are governed (Cornell and Kalt, 2000). Although all tribes elect their leaders, some tribal leaders operate with few checks or balances. While tribes have the right to control their own membership numbers, how gains are distributed remains a vexing problem.

Under IGRA, the Secretary of Interior is charged with the review and approval of tribal revenue allocation plans relating to the distribution of net gaming revenues. Net gaming revenues may be distributed in the form of per capita payments to members of an Indian tribe provided the Indian tribe has prepared a Tribal Revenue Allocation Plan which is approved by the Secretary (25 U.S.C. § 2710 (b) (3)). Absent an approved Plan, the IGRA constrains the use of net revenues to funding of tribal government operations and programs and providing for the general welfare of the tribe and its members. But, these programs have all too often been tainted by allegations of extravagant spending, if not outright corruption (e.g. Testerman, 2004; and Barlett, Steele, 2002). It is worth stressing, however, that gaming tribes have also used their funds to build schools and provide housing for their members.

Much of the media attention, however, has focused on the enormity of some tribes' per capita payments. Although these payments are considered confidential, a number of tribes and individuals have released information on payments, and they reveal a general pattern. At the top of the list are the Shakopee Mdewakanton Sioux in Minnesota, who operate the very successful Mystic Lake Casino. In 2002, each of the 170 adult tribal members received over \$1 million

dollars.³⁶ More moderate are the per capita payments distributed by the Viejas tribe, who operate a very a successful casino and adjacent shopping mall about half an hour east of San Diego. The tribe, with about 280 members, makes per capita payments of around \$10,000 per month, plus most members work for the casino (Barfield, 2003a). Other tribes have distributed much smaller payments. Indeed, as of December, 2001 only about one third of gaming tribes were making per capita payments.³⁷ There are a number of factors that likely contribute to that outcome. Unlike tribal revenues, per capita payments are subject to federal individual income tax. Thus, if the tribal government is capable of providing the services enrolled tribal members want, even if they valued them at somewhat less than their cost, there would be little pressure to provide per capita payments. But, for the highly successful gaming tribes, there are limits to what tribal governments can provide in the way of worthwhile services, and relinquishing direct control may be the politically prudent thing for tribal leaders to do. Although the data are limited, it appears that it is the relatively smaller tribes with highly successful casinos who tend to distribute per capita payments to their members.

The fact that few tribes are making per capita payments suggests, as many tribes have claimed, that the real tax rate on Indian gaming revenues is 100 percent, with the taxing authority being the tribal governments. For those who believe that individual sovereignty, in contrast to tribal sovereignty, is the route to real prosperity, the success of Indian gaming is unlikely to contribute to the former status, at least not directly. Indirectly, gaming has provided jobs and

³⁶ “I-team Investigates Federal Subsidies for Local Tribe.” February 12, 2003. (http://wcco.com/iteam/local_story_043282036.html).

³⁷ National Indian Gaming Commission, Frequently Asked Questions (<http://www.nigc.gov>).

work experience, and the more successful tribes have typically set up educational funds for their members. Both employment and education contribute to human capital, which belongs to the individual and increases mobility.

Gaming has also allowed tribes and their members to gain business experience. This learning experience has led some tribes to moderate their claims of tribal sovereignty. While at first tribes objected to gaming regulation by states or outside entities, and many still consider it an affront to their sovereignty (Soto, 2003), a number of tribes have come to recognize that regulation is an integral part of the gaming business. The gaming public wants to know that the game is legitimate and what the chances of winning are. For example, casino patrons will often research guides to learn the average payback percentage of slot machines at various casinos (e.g., Bourie, 2003). But, providing reliable information on slot machines will generally require audits from a state gaming agency or some reputable independent auditor. The top Indian casinos like Foxwoods and Mohegan Sun have followed the lead of Las Vegas and make public their average payback percentages on slots that are based on data audited by the state. Compared to Las Vegas strip casinos, the average payback percentages at these two Connecticut casinos tend to be somewhat lower, approximately 91.8 percent compared to 93.8 percent. But, that is substantially better than the payback percentage of 80 percent or less rumored to hold at smaller Indian casinos.

Relinquishing a degree of sovereignty has also been essential to financing the construction of casinos. As David Haddock (1994, p. 140) explains, “...economically small and immature sovereignties comprise unpromising environments for long-term, immobile private investment.” Sovereign political entities may renege on agreements with private parties, leaving

them very limited abilities to appeal. The U.S. Supreme Court has repeatedly held that Indian tribes are immune from suit in state or federal court on contracts performed on or off the reservation.³⁸ When attempting to construct the Foxwoods Casino, the Pequots were confronted with the reluctance of U.S. banks and financial houses to make loans to Indian tribes (Eisler, 2001, pp 149-156, and Benedict, 2000, pp 216-17). The Pequots turned to a Malaysian group experienced in the operation of casinos. The terms involved gave the Malaysian group the ability to construct a hotel on private land adjacent to the proposed casino, and the right to take over and manage the casino should the Pequots default on the loan. The latter required the approval of the BIA, but the agency ultimately agreed. The key to overcoming the potential for confiscation by the sovereign was the willingness of the Pequots to explicitly grant an exemption to its claims of sovereignty. Following that lead, U.S. banks and financial institutions are today actively engaged in making loans for Indian casinos provided they include exemption clauses in the contract.

Common property regimes can certainly present problems in allocating wealth and are another venue for rent seeking, but they are not inherently inefficient (Eggertsson, 2003). Any conclusion as to efficiency or inefficiency of these entities depends on the real world alternatives. Although it will take time to see how well tribal members take advantage of these new opportunities, the success of gaming enterprises holds out the promise that tribes may eventually break decades of institutional dependence upon federal programs and bureaucracies. The budget for the BIA, however, continues to increase, suggesting that one of the goals of the

³⁸ Most recently in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

IGRA, self-sufficiency, has yet to be achieved.

IV. Conclusions.

The rise of legalized gambling over the past thirty years in the United States reflects, in large part, the willingness of the voters to accept limited gaming in exchange for state revenues. At first, Indian gaming was viewed much like charitable gambling. But, the success of Indian gaming operations appears to have gone well beyond what most state and federal politicians anticipated. Now that it has been demonstrated how successful Indian gaming operations can be, there is no reason to suspect that gaming tribes will be spared the political pressures that beset the commercial gaming industry or any other successful industry dependent on governmental support or acquiescence. Under the IGRA, gaming tribes are not the only residual claimants of Class III gaming revenues. The Act paved the way for rent seeking by both state and federal politicians as the states seek additional gaming revenues. Indian tribes, however, have sovereign status and are largely tax exempt. In contrast, non-Indian gaming operations are heavily taxed. While that provides an umbrella for Indian casinos, sovereignty does not provide exclusivity or preferred locations. To gain these advantages, tribes have signed compact agreements with revenue-sharing components, agreements that have generally paid off for the tribes.

The tribes appear to understand well the rules of the game. While they proclaim their sovereign status, tribes have shown a willingness to pay for exclusivity and other activities that benefit their gaming operations. Given the voting public's conditional acceptance of gaming, however, the tribes will likely have to contribute more in terms of revenue sharing with the states and payments for local impacts. But, there is no reason to believe that the states or the federal

government will be able to capture the entire residual or that competition for it would result in its full dissipation. The IGRA granted tribes attenuated rights to gaming, and the tribes have used those rights to develop highly profitable operations. Unlike so many other attempts at Indian enterprise development, gaming is likely to remain profitable. How well gaming tribes utilize these proceeds to advance the welfare of their individual members and Americans Indians in general is ultimately a more important question, but that question may take the passing of a generation to answer.

References

- Anderson, Terry L. 1995. Sovereign Nations or Reservations? An Economic History of American Indians. San Francisco: Pacific Research Institute for Public Policy.
- Barzel, Yoram. 1997. Economic Analysis of Property Rights, 2nd Edition. Cambridge: Cambridge University Press.
- _____. 2000. "Property Rights and the Evolution of the State." *Economics of Governance*, 1:25-51.
- Barfield, Chet. 2003a. "The Money Tree." *The San Diego Union-Tribune*, May 4, 2003.
- _____. 2003b. "Odds Slim Casinos off Reservation will be Built: Legal Experts Say Governor, other Tribes will Block Them." *The San Diego Union-Tribune*, June 8, 2003.
- _____. 2003c. "Tribe to Pursue Tougher Environmental Review." *The San Diego Union-Tribune*, July 24, 2003.
- _____. 2004. "Rincon Beset by Suits, Infighting." *The San Diego Union-Tribune*, July 8, 2004.
- Barlett, Donald L., and James B. Steele. 2002. "Look Who's Cashing in at Indian Casinos." *Time*, December 16, 2002.
- Benedict, Jeff. 2000. Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino. New York: Harper Collins.
- Binkley, Christina, Jon E. Hisenrath and Charles Forelle. 2003. "States Confronting Budget Deficits Make Long-shot Bets on Gambling." *Wall Street Journal*, March 14, 2003.
- Bourie, Steve. 2003. American Casino Guide--2003 Edition. Dania, Florida: Casino Vacations.
- Buchanan, James M., and Yong J. Yoon. 2000. "Symmetric Tragedies: Commons and Anticommons." *Journal of Law & Economics*. 43: 1-13.

- Cordeiro, Eduardo E. 1989. "The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations." Harvard Project on American Indian Economic Development, PRS89-11.
- Cornell, Stephen, and Joseph P. Kalt. 2000. "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development." *Journal of Socio-Economics*, 29: 443-470.
- Eadington, William R.. 1999. "The Economics of Casino Gambling." *Journal of Economic Perspectives*, 13 (3): 173-192.
- Eggertsson Thráinn. 2003. "Open Access versus Common Property." In. Property Rights: Cooperation, Conflict, and Law, ed. Terry L. Anderson and Fred S. McChesney, Princeton, NJ: Princeton University Press, 73-89.
- Eisler, Kim Isaac. 2001. Revenge of the Pequots. New York: Simon and Schuster, Inc.
- Evans, William N. and Julie H. Topoleski. 2002. "The Social and Economic Impact of Native American Casinos." National Bureau of Economic Research, Working paper 9198.
- Gruszecki, Debra. 2003. "Casinos Tell Lawmakers of Tax Impact." *The Times*, September 3, 2003 (<http://www.nwitimes.com>).
- Haddock, David D. 1994. "Foreseeing Confiscation by the Sovereign: Lessons from the American West." In. The Political Economy of the American West. eds. Terry L. Anderson and Peter J. Hill. Lanham, Maryland: Rowan & Littlefield Publishers, Inc.
- Hardin, Garrett. 1968. "The Tragedy of the Commons." *Science* 162 (December): 1243-48.
- Mason, Dale W. 2000. Indian Gaming: Tribal Sovereignty and American Politics. Norman: University of Oklahoma Press.
- McChesney, Fred S. 1987. "Rent Extraction and Rent Creation in the Economic Theory of Regulation." *Journal of Legal Studies*, 16 (January): 101-18.
- North, Douglas C. 1990. Institutions, Institutional Change, and Economic Performance. New

York: Cambridge University Press.

National Gambling Impact Study Commission. 1999. National Gambling Impact Study Commission Final Report. Washington, DC: GPO.

Ostrom, Elinor. 2000. "Private and Common Property Rights." In Encyclopedia of Law and Economics, Vol. II, ed. Boudewijn Bouckaret and Gerrit De Geest. Cheltenham: Edward Elgar.

Peltzman, Sam. 1976. "Toward a More General Theory of Regulation." *Journal of Law and Economics*, 19(2): 211-240.

Sauer, Raymond D. 2001. "The Political Economy of Gambling Regulation." *Managerial and Decision Economics*, 22: 5-15.

Soto, Onell R. 2003. "Agents Say Indian Casinos Probes Stymied." *The San Diego Union-Tribune*, September 26, 2003.

Testerman, Jeff. 2004. "Government Tells Tribe to Toe the Line on Casinos." *St. Petersburg Times*, February 25, 2004.

Thompson, William N. and Robert Schmidt. 2002. "Not Exactly 'A Fair Share:' Revenue Sharing and Native American Casinos in Wisconsin." *Wisconsin Policy Research Institute Report*, 15(1).

Tollison, Robert D. 1997. "Rent Seeking." In Perspectives on Public Choice: A Handbook. ed. Dennis C. Mueller. Cambridge: Cambridge University Press.

Tullock, Gordon. 1967. "The Welfare Costs of Tariffs, Monopolies, and Theft." *Western Economic Journal* 5: 224-32.

U. S. General Accounting Office. 1997. "Tax Policy: A Profile of the Indian Gaming Industry." GAO/GGD-97-91. Washington, D.C.

_____. 2001. "Indian Issues: Improvements Needed in Tribal Recognition Process." GAO-02-49. Washington, D.C.

U. S. Department of Interior, Bureau of Indian Affairs. 1999. "Indian Labor Force Report," Washington, D.C.

Yandle, Bruce. 1983. "Bootleggers and Baptists: The Education of a Regulatory Economists." *Regulation* 7: 12.

Zoellner, Tom. 2003. "Montana: The Last, Worst Place for Indian Gaming." *Indian Country Today*. August 11, 2003. (<http://www.indiancountry.com/?1060605635>).

Table 1. Indian Gaming Revenues, FYs 1988-2003.

Fiscal Year	Revenues in Constant 2003 Dollars (dollars in millions)	Annual Percent Change
1988	\$188	---
1989	445	135 %
1990	688	55
1991	973	41
1992	1,966	102
1993	3,431	75
1994	4,242	24
1995	6,586	55
1996	7,387	12
1997	8,542	16
1998	9,589	12
1999	10,820	13
2000	11,689	8
2001	13,226	13
2002	15,055	14
2003	16,730	11

Note: The Consumer Price Index was used to convert to constant 2003 dollars.

Sources: For the years 1988 to 1995, United States General Accounting Office (1997). For 1996 to 2003, National Indian Gaming Commission (<http://www.nigc.gov>).

Table 2. States with Approved Revenue Sharing Compacts.

State	Net Revenue Sharing Rates	Approximate State Revenues/Remarks
Arizona ^a	From 1 to 8%. The 8% rate applies to a tribe's net revenues in excess of \$100 million.	Compacts approved January 24, 2003. Estimated state revenues, \$102 million per year.
California ^b	Based on the number of devices operated by the tribe on September 1, 1999. From 1 to 200 gaming devices 0 %. From 201 to 500 devices, 7 % on the excess over 200 devices. The top bracket is 13 percent on the excess over a 1000 devices.	First payments were due September 30, 2002. Revenues are expected to exceed \$100 million annually.
Connecticut ^c	25 % of net revenues	\$ 403 million in FY 2004.
New Mexico ^d	3 to 8 %. The 8% rate applies to revenues in excess of \$4 million.	\$ 35 million in 2003.
New York ^e (Seneca Nation Compact)	18 % in first four years of operation; years 5-7, 22 %; and years 8-14, 25%.	Compact approved October, 25, 2002. Estimated state revenues of \$50 million per year per new casino.
Wisconsin ^f	Varies across tribes. In general, graduated rates rising to 5 %. The top rate is 8 % in later years.	Newly negotiated compacts are expect to generate \$118 million in fiscal year 2003-2004.

Notes:

^aArizona Tribal-State Gaming Compacts (<http://www.gm.state.az.us/compact.final.pdf>).

^bCalifornia Gambling Control Commission, *Model Tribal-State Compact* (<http://www.cgcc.ca.gov>).

^cState of Connecticut, Department of Special Revenue (<http://www.dosr.state.ct.us>).

^dNew Mexico Gaming Control Board (<http://www.nmgcb.org>).

^eNation-State Gaming Compact Between the Seneca Nation of Indians and the State of New York, Approved by the Secretary of the Interior on October 25, 2002.

^f State of Wisconsin Gaming Compacts, 2003 Amendments (<http://www.doa.state.wi.us>).

Table 3. Non-Indian Casino Tax Revenues, 2003.

State	Gaming Tax Rates on Net Revenues	Casino Net Revenues	Gaming Tax Revenue
Colorado	Graduated tax rate. Maximum of 20%	\$698 million	\$95.6 million
Illinois	Graduate tax rate from 15% to a maximum of 70%, plus \$3-5 patron fee	\$1.71 billion	\$719.9 million
Indiana	Graduated tax rate. Maximum of 35%, plus \$3 per patron admission tax	\$2.23 billion	\$702.7 million
Iowa	River boats, maximum of 20%.	\$1.02 billion	\$209.7 million
Louisiana	Maximum of 21.5%.	\$2.02 billion	\$448.9 million
Michigan	Effective tax rate 22 %	\$1.13 billion	\$250.2 million
Mississippi	Maximum state tax of 8%. Local governments can impose additional 4%	\$2.7 billion	\$325.0 million
Missouri	20% tax rate, plus \$2 per patron charge	\$1.3 billion	\$369.0 million
Nevada	Tax rate of 6.75%, plus annual fees on gaming devices	\$9.6 billion	\$776.5 million
New Jersey	8 % plus investment contribution of 1.25%	\$ 4.5 billion	\$414.5 million
South Dakota	8% plus \$2,000 per gaming device tax.	\$70.4 million	\$5.4 million
TOTAL		\$27 billion	\$4.32 billion

Source: American Gaming Association (<http://www.americangaming.org>). Tax revenue data are from state gaming regulatory agencies, as are some of the casino revenue figures. For those states that do not report industry gaming revenues, the revenue figures were estimated by the American Gaming Association.