

Regulating Tribal Gambling

Background

Tribal Sovereignty and Indian Gambling: According to the U.S. Census Bureau, Native Americans have the highest rate of poverty and the second highest rate of unemployment of any ethnic group in the nation, while their average per-capita income and level of academic attainment scores are the second lowest.ⁱ To help improve these statistics, recent administrations in the 1980s and 1990s adopted a policy of encouraging tribal economic self-determination. It was within this context that large-scale Indian gambling emerged.

Native Americans have a unique form of sovereignty, protected by the U.S. Constitution and subsequent laws and treaties. Differing perspectives on the nature and extent of Native American sovereignty, in particular the relationship of Indian tribes to the state governments in which they reside, lie at the heart of nearly all disputes over Indian gambling. What is not disputed is the federal government's responsibility for the welfare of the Indian tribes and their members. Specifically, the federal government is obligated to protect the tribes' status as self-governing entities, including protecting tribes' rights under the Constitution, an arrangement known as a "trust responsibility."

The Growth of Indian Gambling: In order to provide a regulatory framework for Indian gambling, Congress passed the Indian Gaming Regulatory Act of 1988 (IGRA). IGRA gives Native American tribes the privilege of matching any existing form of "Class III" gambling which is the statutory term for games such as craps, blackjack and various types of slot machines on tribal lands by negotiating a compact with the host state.ⁱⁱ Thus, if the state legalizes any game of chance, Indian tribes could petition the state for a compact allowing gambling on their lands.

From 1988 to 2009, tribal gambling revenues grew from \$212 million to \$26.4 billion. At present, 419 tribal casinos are in operation.ⁱⁱⁱ Less than half of all eligible Indian tribes operate gambling facilities on their reservations; of the 561 federally recognized tribes in the United States, approximately 240 had

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Class II or Class III gambling facilities as of March 2011.^{iv} Some tribes have rejected Indian gambling in referenda, while others are in the midst of policy debates on whether to permit gambling on their reservations.

For the majority of tribes with gambling facilities, the revenues have been modest yet nevertheless useful. However, not all gambling tribes benefit equally. In 2009, the 21 largest Indian gambling facilities accounted for 38.7 percent of all revenues, with the next 50 accounting for another 30.8 percent. By comparison, the 139 smallest casinos accounted for less than two percent of all revenues.^v

State Tribe Compacts: According to IGRA, if a state has a public policy of complete prohibition against Class III gambling, then tribes within the borders of the state may not initiate such gambling. However, if the state has no completely prohibitive policy against Class III gambling, then the federal courts have held that the state may not prohibit gambling on reservations. This ruling has been the source of

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considerable dispute. States like Alabama, which already has Class III gambling in the form of pari-mutuel wagering, consider it an infringement on their own sovereignty.

IGRA and Alabama: Controversy over the establishment of tribal gambling in Alabama began in 2004, when a constitutional amendment to legalize bingo in Greene County was ratified and contained the phrase: "...that specific kind of game commonly known as bingo in which prizes are awarded on the basis of designated numbers or symbols on a card or *electronic marking machine*" (emphasis added). Shortly after this legislation was passed, electronic bingo machines began appearing across the state.

Concerned about the increase in electronic bingo machines, Gov. Bob Riley and Attorney General Troy King went to Washington, D.C. in September 2004 to meet with U.S. Attorney General John Ashcroft, the National Indian Gaming Commission (NIGC) and FBI Director Robert Mueller about what actions the state could take to control the spread of the games. A month later, the NIGC notified Attorney General King that some of the machines at the non-tribal venues were actually slot machines and therefore illegal. This information, however, was not shared with the Governor's office.^{vi} Instead, Attorney General King issued his own definition of legal bingo in December 2004, which did not mention the NIGC's findings, but instead declared the electronic bingo games at two non-tribal gambling sites legal.^{vii} Once the Attorney General established his own criteria as to what constituted legal electronic bingo in Alabama, the Poarch Creek Indians, the state's only federally-recognized Indian tribe, began installing the machines at their own gambling halls on the grounds that the state could not prevent the tribe from having them because it had already legalized electronic bingo.

Throughout 2009 and 2010, as gambling supporters tried to pass legislation to bring the legality of electronic bingo machines to a vote of the people, Gov. Riley attempted to roll back the expansion of gambling. First, a task force was created to shut down illegal, non-tribal gambling venues.^{viii} Second, gambling supporters were dealt a serious defeat in late 2009 when the Alabama Supreme Court established a six-point test that clearly defines "legal" bingo. It was hoped that, by eliminating all electronic gambling machines in the state, the Governor could successfully petition the NIGC to force the Poarch Creeks to remove theirs as well.

By early 2011, all of the non-tribal gambling halls with suspected electronic bingo machines had either been raided or had closed their doors to avoid being raided. Yet, when incoming Attorney General Luther Strange petitioned the NIGC in February to have the Poarch Creek Indians remove their machines as well, his request was rejected a month later. According to the NIGC's response, the machines operated by the Poarch Creeks only have to comply with the NIGC's definition of bingo, not the definition established by the state's Supreme Court.^{ix}

Conclusion

At present, the office of the Attorney General is working with the NIGC to determine what influence the state may have to encourage the removal of the electronic bingo machines on tribal lands.^x Until this issue is resolved, the machines will likely remain on tribal lands.

ⁱ U.S. Census Bureau, "2009 American Community Survey" (interactive database). *American Fact Finder*, 2009. Available at <http://tinyurl.com/3nyxkcv>. Access verified May 11, 2011.

ⁱⁱ According to IGRA, Class I gambling includes "social games solely for prizes of minimal value," such as traditional Indian games identified with tribal ceremonies and celebrations. Class II gambling includes bingo and "games similar to bingo." Class III gambling includes "all forms of gaming that are not Class I or Class II gaming," such as blackjack, slot machines, roulette, and other casino-style games. (Source: Earl L. Grinols and David B. Mustard, "Casinos, Crime, and Community Costs." *Review of Economics and Statistics*, vol. 88, 2006, p. 29.

ⁱⁱⁱ National Indian Gaming Commission (NIGC), "NIGC Tribal Gaming Revenues." Last updated May 18, 2010. Available at <http://tinyurl.com/268avtf>. Access verified May 11, 2011.

^{iv} NIGC, "Gaming Tribe Report." March 18, 2011. Available at <http://tinyurl.com/6ch88hm>. Access verified May 11, 2011.

^v NIGC, "NIGC Tribal Gaming Revenues."

^{vi} Mike Perrin, "AG Troy King, Gov. Bob Riley Spar over Bingo Report." *Birmingham News*, 28 June 2009. 18 May 2010. Available at <http://tinyurl.com/l1npza>. Access verified July 27, 2011.

^{vii} State of Alabama, Office of the Attorney General, "A.G. King Announces Findings of His Gambling Review." 1 Dec 2004. 18 May 2010. Available at <http://tinyurl.com/3xqtslt>. Access verified July 27, 2011.

^{viii} Greg Richter, "'Sweet Home Alabama' Bill Dead." *Birmingham News*. 6 May 2009. 19 May 19, 2010. <http://tinyurl.com/39bnh63>.

^{ix} Kim Chandler, "Poarch Creek Bingo is Legal, Federal Agency Tells Alabama." *The Birmingham News*, March 21, 2011 (blog). Available at <http://tinyurl.com/6ec4h6b>. Access verified May 12, 2011.

^x *Ibid.*