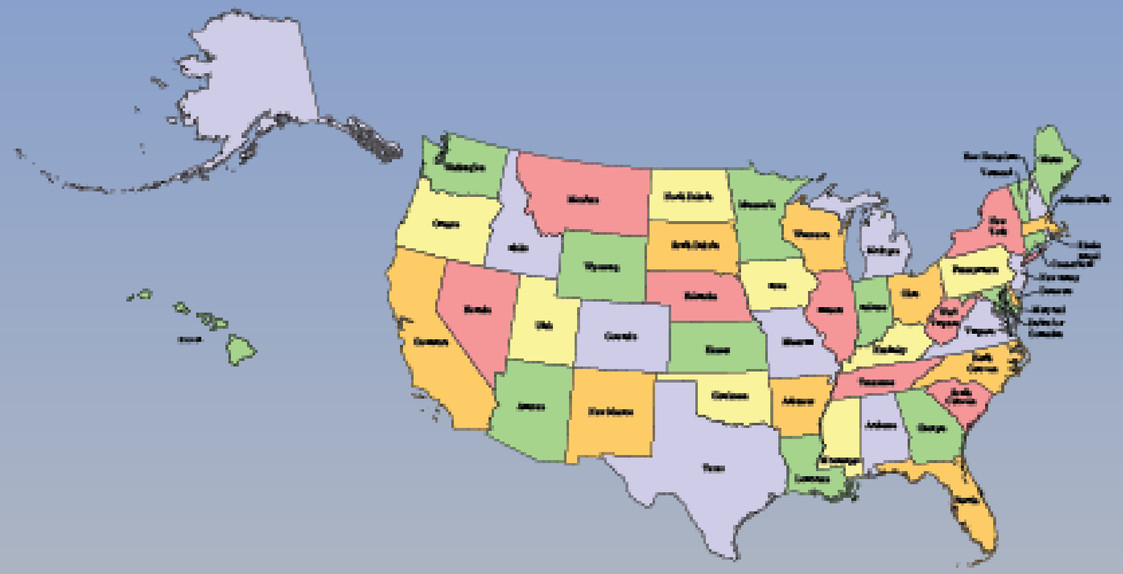
Federal & Indian Gaming Law

Indian Gaming Law Preview

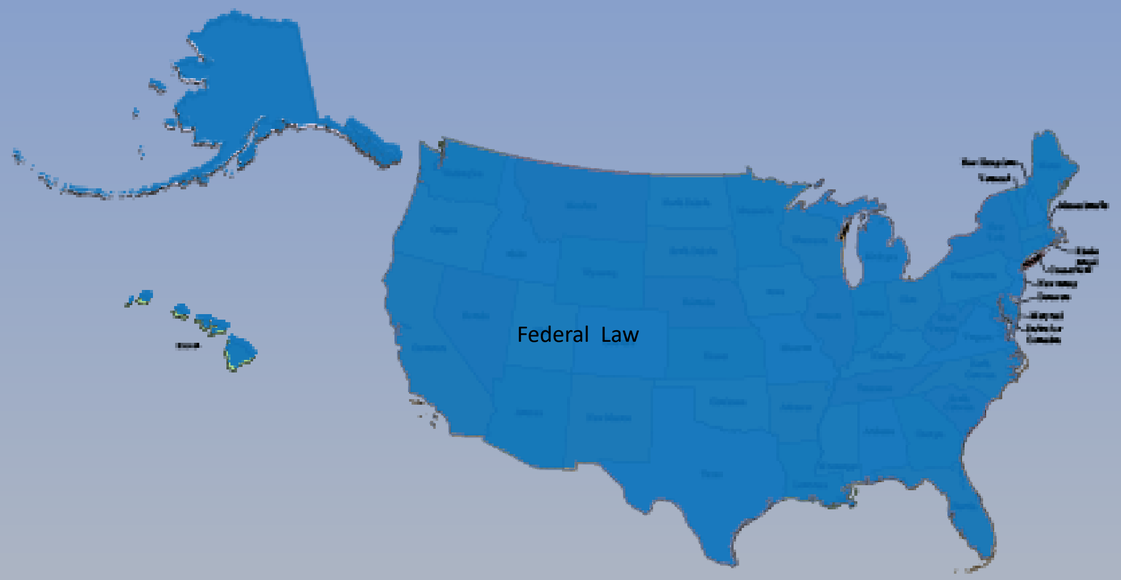
U.S. Gaming Law in General

- In the United States, federal and state laws share concurrent jurisdiction over gaming activities.
- With the exception of sports wagering and certain Indian gaming, federal laws generally assist states in enforcing state gambling prohibitions regarding interstate and foreign gaming that are offered in a state.
- States are usually the primary source of legal authority with regard to most forms of gaming other than sports wagering.

U.S. Gaming Law in General



U.S. Gaming Law in General



Perspective

- Overriding Perspective
  - Looks like commercial gaming, but looks are deceiving
- Nation Building
  - More akin to state lotteries than commercial gaming in that Indian Gaming is a function of the “state/nation” and is used as a tool to fund government and governmental institutions.

Indian Gaming

- History

Indian Gaming

- History
  - 1790 - The Indian Intercourse Act.
    - Established that the federal government was the only body that could authorize the sale of Indian land to other people or states.
    - The federal government had the sole power to manage trade and diplomatic relations with Indians.

Indian Gaming

- History
  - Johnson v. McIntosh 21 U.S. 543 (1823).

Indian Gaming

- History - Johnson v. McIntosh 21 U.S. 543 (1823).
- 1772-1775 Thomas Johnson purchases land in what is now Southern Illinois from various tribes

Indian Gaming

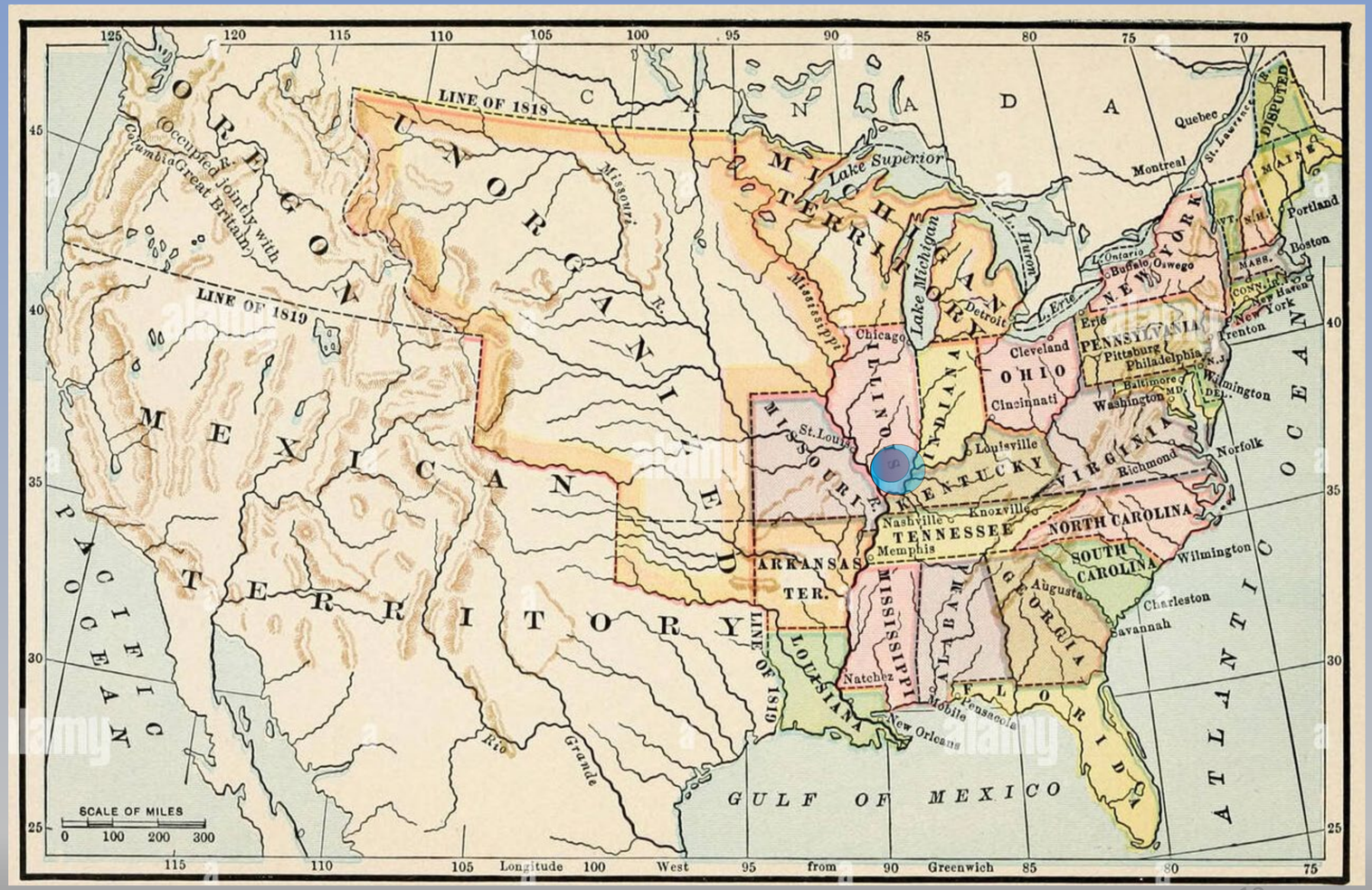
- History - Johnson v. McIntosh 21 U.S. 543 (1823).
- Thomas Johnson dies in 1819 leaving the land to his son Thomas Johnson & grandson Thomas Graham

Indian Gaming

- History - Johnson v. McIntosh 21 U.S. 543 (1823).
- 1818 U.S. sold land encompassing the Johnson land to William McIntosh

Indian Gaming

- History - Johnson v. McIntosh 21 U.S. 543 (1823).
- Johnson seeks an ejectment order against McIntosh in federal court in Illinois (which became a state in 1819)
- McInosh wins Johnson appeals to USSC



Indian Gaming

- History
  - Johnson v. McIntosh 21 U.S. 543 (1823), essentially removed any recognition of Native American property rights based on the proclamation of a “the universal recognition” of two legal principles: (1) that European discovery of lands in America “gave exclusive title to those who made it”; and (2) that such discovery necessarily diminished the power of the Native American nations to “dispose of the soil at their own will, to whomever they pleased.”
  - This ended the first era of Indian relations and relegated Indians to being occupiers of land rather than owners of land.

Indian Gaming

- History
  - The next era was the treaty and war era.
  - The Bureau of Indian Affairs was formed within the War Department in this era in 1894.
  - In a short time, there were over 200 treaties with Indians, most to purchase land.
  - Expansion westward changed relations with Indians and whether treaties would be upheld.

Indian Gaming

- History
  - In 1867 the General Allotment Act was enacted.
    - The General Allotment Act tried to assimilate Indians.
    - It removed tribal governance over Indian lands and put the control into individual land owners.
    - Avowed intent was to make Indians land owners like white Europeans to have them adopt European agricultural practices and to bring Indians into mainstream U.S. society.
    - The implementation was designed to extinguish Indian sovereignty.

Indian Gaming

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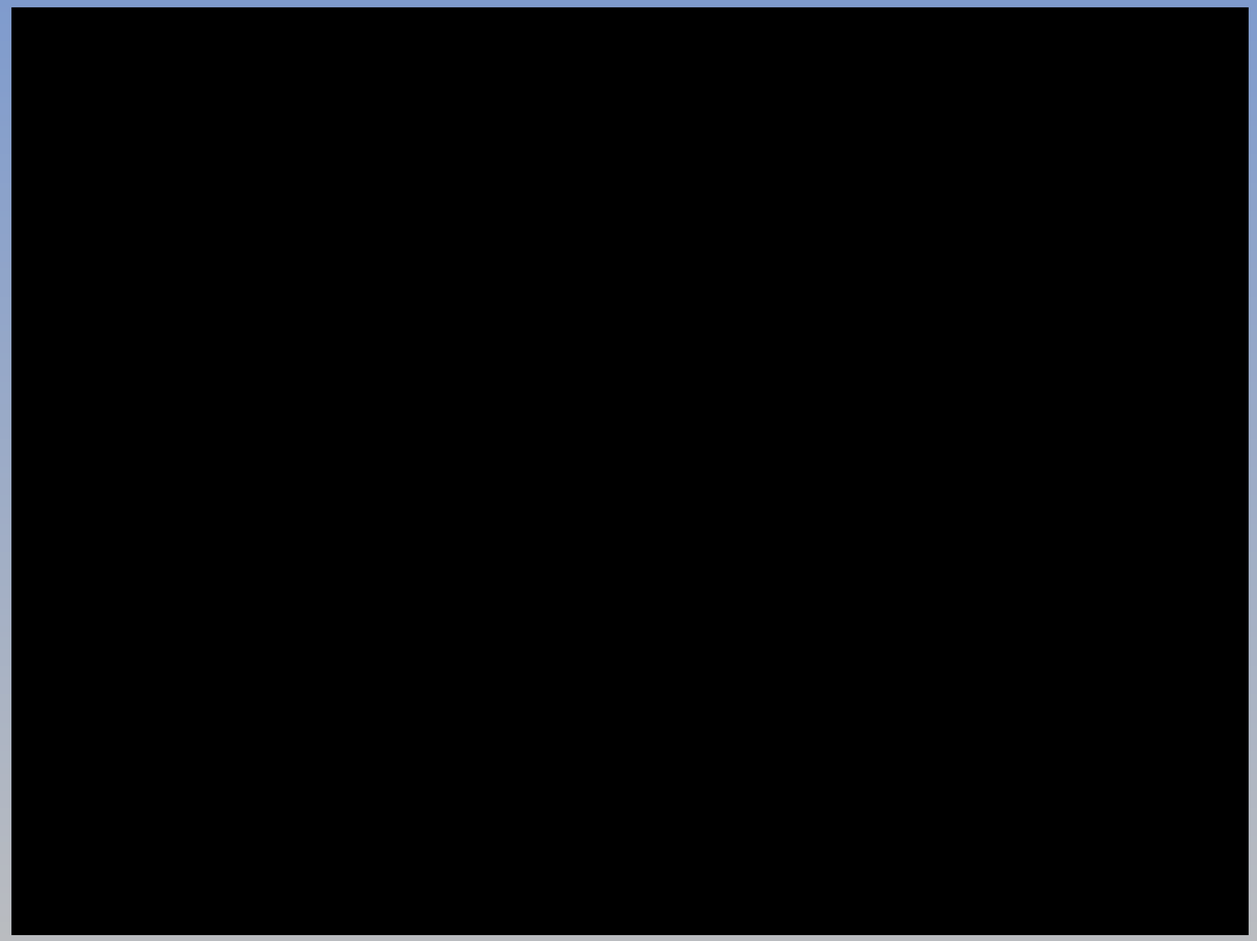
Indian Gaming



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Indian Gaming

- History
  - The Roosevelt administration supported the Indian Reorganization Act of 1934 (the Indian New Deal)
  - Restored Indians to management of their assets (land and mineral rights)
  - Restored recognition of tribal sovereignty to identified tribes
  - Allowed land to be taken into trust to restore tribal land

Indian Gaming

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Indian Gaming

- History
  - During the Truman and Eisenhower years trusteeship of Indian lands was terminated and many Indians were relocated to larger cities.
  - This built on the notion of assimilation as a means to improve the lives of Indians.
  - There was a belief that once Indians left their impoverished reservations, they would have opportunities for education, employment in cities and have a better quality of life.

Indian Gaming

- History
  - During the Eisenhower years, there was concern that the tribes recognized under the FDR administration were ill-equipped to control criminal activity on Indian land

Indian Gaming

- PL280

Indian Gaming

- PL280 - 18 U.S.C.§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country
  - (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

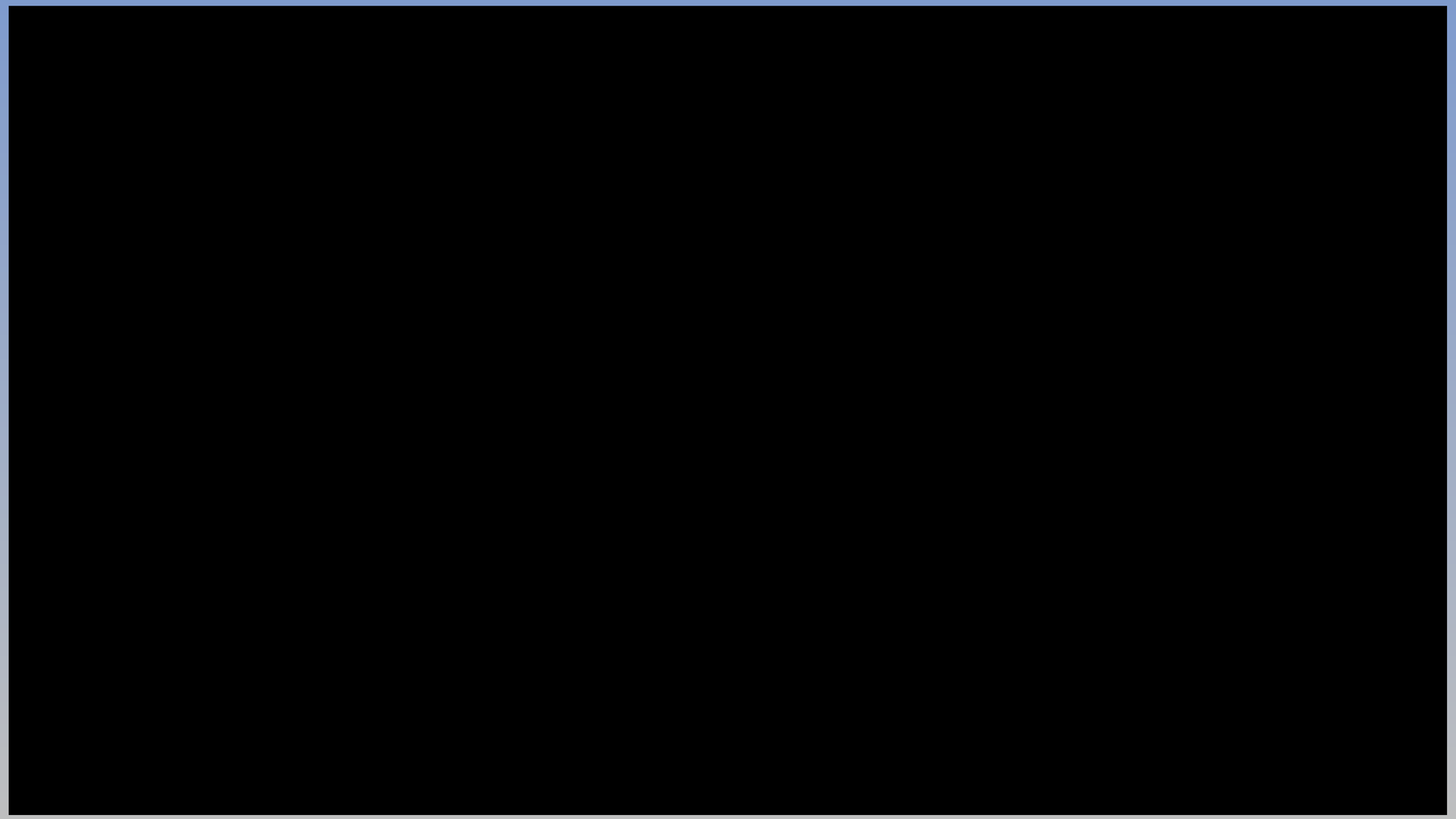
Indian Gaming

- PL280 - 18 U.S.C.§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country
- (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation

Indian Gaming

- History
  - The modern era of “self determination” (with help) was ushered in during the Kennedy years.
  - In the 1960s many statutes were enacted to help Indian tribes and recognize tribes as sovereign nations with the federal system.
  - In the 1970 additional statutes were passed to allow tribes to control federal funds dedicated to education and child welfare.

Indian Gaming



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Indian Gaming

- History
  - In the 1980s, the Reagan administration drastically reduced most federal assistance to tribes (for example economic development funds were cut by 82%). Additionally, bureaucratic structures were reduced and tribes were encouraged to engage in free enterprise.

Indian Gaming

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Pre-IGRA Case Law

- Seminole Tribe v. Butterworth

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Basic Facts

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Basic Facts
    - Florida permits bingo games to be offered by certain qualified organizations
    - The same statute provides civil and criminal penalties for conducting bingo games by others
    - The Seminole Tribe contracted with a private company to build and operate a bingo hall on tribal land (in violation of the Florida statute)
    - The sheriff informed the tribe that he would make arrests for any violation of the statute

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Basic Facts
    - The tribe filed a declaratory relief action against the sheriff.
    - The parties stipulated to the facts and filed cross motions for summary judgment.

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Issue
    - Whether Public Law 280 permits enforcement of Florida's bingo statute on tribal lands.

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Issue
    - Whether Public Law 280 permits enforcement of Florida’s bingo statute on tribal lands.

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Public Law 280
    - Granted certain states the right to exercise criminal jurisdiction and limited civil jurisdiction over the Indian tribes

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Public Law 280
    - Limits to civil disputes
      - PL 280 granted civil jurisdiction to the states only to the extent necessary to resolve private disputes between Indians and Indians and private citizens.
    - Regulatory power over tribes
      - Thus, the mandate from the Supreme Court is that states do not have general regulatory power over the Indian tribes.

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Issue
    - Whether the Florida bingo statute is primarily criminal or regulatory?

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - Discussion
    - Arguments that the Florida bingo statute is a criminal prohibition.
    - Arguments that the Florida bingo statute is a regulatory statute.

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
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    - Arguments that the Florida bingo statute is a regulatory statute.

Pre-IGRA Case Law

- Seminole Tribe v. Butterworth
  - 658 F. 2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982)
- Fifth Circuit held that the Seminole Tribe could conduct gaming free of state interference
- If a state only regulates an activity, rather than prohibits the activity under its criminal code, state regulation is not applicable to operations conducted on the reservation

Pre-IGRA Case Law

- Other court opinions in other circuits reached different results
- Ultimately, there was a split among the circuits on the interpretation of what distinguished criminal and civil acts in relation to PL280

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- Basic Facts

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
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Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- Basic Facts
  - Cabazon Band offers bingo and card rooms
  - The games are open to the public, and are played predominantly by non-Indians coming onto the reservations.
  - The State of California seeks to apply a state statute that prohibits operating bingo games unless they are operated by a recognized charity.
  - Riverside County also sought to apply an ordinance regulating bingo and another ordinance prohibiting card games.

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- Basic Facts
  - The Tribes sued the county in Federal District Court, seeking a declaratory judgment that the county had no authority to apply its ordinances inside the reservations and an injunction against their enforcement. The State intervened, the facts were stipulated, and the District Court granted the Tribes' motion for summary judgment, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations.

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- Issues
  - This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians, since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. Decision in this case turns on whether state authority is preempted by the operation of federal law; and "[s]tate jurisdiction is preempted . . . 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.

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- Issues
  - California does not prohibit all forms of gambling. California itself operates a state lottery, and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Although certain enumerated gambling games are prohibited under Cal.Penal Code Ann. § 330 (West Supp.1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact.

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- Issues
  - The sole interest asserted by the State to justify the imposition of its bingo laws on the Tribes is in preventing the infiltration of the tribal games by organized crime. To the extent that the State seeks to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant, and the state and county laws are preempted…

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- Issues
  - We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club. We therefore affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Pre-IGRA Case Law

- Cabazon Band of Mission Indians v. California
  - 480 U.S. 202 (1987)
- A landmark holding by the United States Supreme Court on tribal sovereignty
- The Court held that, provided the state permits some form of gaming, the state of California could not prohibit gaming on tribal lands
- It affirmed the authority of the tribal government to establish gaming operations on tribal lands

Indian Gaming Regulatory Act of 1988 (“IGRA”)

- In response to Cabazon, Congress passed IGRA to provide a statutory basis to regulate Indian Gaming
- IGRA Overview
  - Established a Federal regulatory body and regime
  - Defined three classes of gaming
  - Defined the State’s role

Classes of Gaming

- IGRA defines three classes of gaming
  - Class I
    - Traditional Indian gaming and social gaming
  - Class II
    - Bingo
    - Card games permitted under state law
    - Expressly does not include banked card cards and slot machines
  - Class III
    - All forms of gaming that is not Class I or II

CLASS I Gaming

- The term “class I gaming” means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

Regulation of Class I Gaming

- Section 2710(a)(1) excludes Class I gaming from IGRA
- Class I gaming remains “within the exclusive jurisdiction of the Indian tribes” provided the gaming occurs on Indian lands

Regulation of Class II Gaming

- An Indian tribe may engage in Class II gaming provided
  - The gaming is located on Indian lands within the tribe's jurisdiction
  - The State permits gaming for any purpose
  - The tribe's governing body has adopted an ordinance permitting Class II gaming

Class II Gaming

- (A) The term “class II gaming” means—
- (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
- (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
- (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
- (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,
- including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

Class II Gaming

- ii) card games that—
- (I) are explicitly authorized by the laws of the State, or
- (II) are not explicitly prohibited by the laws of the State and are played at any location in the State,
- but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.
- (B) The term “class II gaming” does not include—
- (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
- (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

Class II Gaming

- (C) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.
- (D) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710 (d)(3) of this title.
- (E) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710 (d)(3) of this title.

Regulation of Class II Gaming

- The tribe's ordinance must provide that
  - Tribe has total control and interest over the gaming operation
    - Existing third party operations 'grandfathered' in
  - Net revenues only used for
    - Tribal government operations or programs
    - General welfare of tribe and its members
    - Economic development
    - Donate to charitable organizations
    - Fund local government agencies

Regulation of Class II Gaming

- The tribe’s ordinance must provide
  - Annual external audits provided to the NIGC
  - Contracts >$25,000 relating to gaming subject to such independent audits
  - Facilities constructed and maintained to protect environment and public health
  - System for background checks, licensing of managers, standards for licensing and notification to the NIGC

Regulation of Class II Gaming

- Oversight of Gaming Licenses
  - NIGC may consult with law enforcement regarding the issuance of gaming licenses
  - NIGC can object within 30 days to the issuance of a license
  - If the NIGC receives reliable information that a person does not meet the standards established, the tribe shall suspend such license and, after notice and hearing, may revoke the license

Class III Gaming

- The term “class III gaming” means all forms of gaming that are not class I gaming or class II gaming.

Regulation of Class III Gaming

- Class III gaming can only be conducted on Indian lands if
  - Authorized by ordinance or resolution
    - Adopted by the tribe’s governing body
    - Approved by the NIGC Chairman
  - Located in a state that permits gaming for any purpose
  - Conduct gaming in accordance with the Tribal-State compact

Regulation of Class III Gaming

- Tribal ordinance or resolution
  - Must detail the same elements as a Class II ordinance
  - Approved by the NIGC Chairman unless
    - Chair determines that it was not properly adopted by the tribe's governing body
    - Governing body was "significantly and unduly influenced" by unsuitable people

Regulation of Class III Gaming

- State permits gaming in some form
  - One finding of IGRA states tribal gaming can occur “within a State which does not, as a matter of criminal law and public policy, prohibit gaming activity.”
- How broad is gaming activity
- Cabazon: if the state permits some form of gaming (e.g., horse racing), the tribe can conduct full gaming.
- Lac Du Flambeau v. Wisconsin: Games consisting of the common elements of consideration, chance and prize are sufficient.

Regulation of Class III Gaming

- Tribal-State Compacting Process
  - Tribe requests the State to enter into negotiations
  - State must negotiate in “good faith”* (Seminole v. Florida)
  - The Compact shall provide for
    - Application of state or tribal criminal and civil laws
    - Allocation of criminal and civil jurisdiction between the state and the tribe
    - State assessment to costs incurred
    - Taxation by the tribe at a rate comparable to the state’s tax rate
    - Remedies for breach
    - Standards of operations, licensing and maintenance
    - Any other subject “directly related” to the gaming operations
  - Compact approved by the Secretary of Interior unless violated IGRA or other federal law

Regulation of Class III Gaming

- Taxation
  - The state or any political subdivision may not tax, charge or assess a tribe for Class III gaming
- Exclusivity Payments
  - Tribe agrees to pay a percentage of gaming revenue in return for state not permitting any non-Indian Gaming with a proscribed area
    - Lytton Rancheria of California agreed to pay the State 25% of net revenue to have a 35 mile zone of exclusivity

Regulation of Class III Gaming

- Tribal regulation of Class III gaming
  - IGRA does not impair the right of the tribe to regulate gaming concurrently with the state
  - Has to be to at least the standards detailed in the Compact
  - Tribal gaming commission
  - Tribal gaming regulations
  - Licensing of management and employees
  - Auditing of casino operations
  - Law enforcement efforts

Regulation of Class III Gaming

- State fails to negotiate in good faith or enter a compact
  - (Seminole v. Florida)
    - U.S. District Court has jurisdiction
    - Tribe may commence an action 180 days after the tribe requested negotiations
    - The burden is on the state to prove it is acting in good faith
    - Court examines the State’s conduct and demands

Regulation of Class III Gaming

- 25 CFR 293.1 et. seq.
  - Regulatory work around for Class III Gaming when a State asserts sovereign immunity.

Regulation of Class III Gaming

- 25 CFR 293.3 WHEN MAY AN INDIAN TRIBE ASK THE SECRETARY TO ISSUE CLASS III GAMING PROCEDURES?
- An Indian tribe may ask the Secretary to issue Class III gaming procedures when the following steps have taken place:
  - (a) The Indian tribe submitted a written request to the State to enter into negotiations to establish a Tribal-State compact governing the conduct of Class III gaming activities;
  - (b) The State and the Indian tribe failed to negotiate a compact 180 days after the State received the Indian tribe's request;
  - (c) The Indian tribe initiated a cause of action in Federal district court against the State alleging that the State did not respond, or did not respond in good faith, to the request of the Indian tribe to negotiate such a compact;
  - (d) The State raised an Eleventh Amendment defense to the tribal action; and
  - (e) The Federal district court dismissed the action due to the State's sovereign immunity

Class II vs. Class III Devices

- Why important?
  - Class II gaming is permitted if
    - Tribe adopts ordinance
    - State permits some form of gaming
  - No state compact is necessary
- Class II is defined as bingo or lotto games

Class II vs. Class III Devices

- Class II or Class III Device?
- Class II allows for “electronic, computer or other technologic a
- And this is a Class II device that plays a bingo game

Class II vs. Class III Devices

- DESCRIPTION OF QUICK SHOT BINGO
- Quick Shot Bingo is played as follows:
- Once a week, a person at Gold Eagle Hall draws five "B" numbers, five "I" numbers, five "N" numbers, five "G" numbers, and five "0" numbers from a bingo blower. The
- numbers are then posted on bingo number boards located at several individually owned facilities located on the reservation. To play the game, a customer purchases a Quick Shot
- Bingo card for $.50 each. The customer compares the numbers on the card to the numbers that have been drawn, covering those numbers on the card that correspond to the
- posted numbers. If the covered numbers form a previously designated arrangement of numbers, the customer receives a predetermined monetary prize.

Class II vs. Class III Devices

- QUICK SHOT BINGO
-
- CLASS II or CLASS III?
- http://www.nigc.gov/images/uploads/game-opinions/quickshotbingo.pdf

Class II vs. Class III Devices

- QUICK SHOT BINGO
-
- As described, the Quick Shot Bingo game does not meet the regulatory definition of bingo for several reasons. First, the players do not cover the numbers when objects similarly numbered are drawn. Instead, all the winning numbers are drawn and posted on the boards before the players buy their cards. The players then compare and cover the numbers on their cards with the posted numbers to see if they won. Also, as it is being played in some instances, the game is not won by the first person to cover a previously desipated arrangement. Rather the game may be played for a set period of time, such as a week. The possible impact of such variations is that in the first instance, no one would win the game, and in the later instance, people could continue to play after someone else had already won the larger prize. Therefore, Quick Shot bingo is not bingo under
- 25 C.F.R. 502.3.

Class II vs. Class III Devices

- 25 CFR § 502.3 Class II gaming.
- *Class II gaming* means:
- **(a)** Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
- **(1)** Play for prizes with cards bearing numbers or other designations;
- **(2)** Cover numbers or designations when object, similarly numbered or designated, are drawn or electronically determined; and
- **(3)** Win the game by being the first person to cover a designated pattern on such cards;
- **(b)** If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo;

NIGC Classification Opinions

- http://www.nigc.gov/general-counsel/game-classification-opinions

Gaming on Indian Lands

- IGRA permits gaming on “Indian lands”
- Distinction pre- and post-IGRA
- IGRA defines Indian lands as
  - All lands within the limits of the Indian reservation
  - Any lands held in trust by the US Government for the benefit of the tribe and over which the tribe exercises governmental authority

Gaming on Indian Lands

- Lands acquired post-IGRA
  - General prohibition against allowing IGRA-gaming on lands acquired in trust for the benefit of the tribe after October 17, 1988 (date of IGRA)
  - Exceptions
  - Such land is within or contiguous to the boundaries of the reservation (as of October 17, 1998)
  - Tribe had no reservations as of the date of IGRA and the land is located within last recognized reservation within the state the tribe is currently located in (Oklahoma)

Gaming on Indian Lands

- Lands acquired post-IGRA
  - Exceptions (con't)
  - Secretary determines gaming on newly acquired land would benefit tribe and not be detrimental to the community and the **state's Governor concurs (no good faith required)**
  - Lands taken into trust in settlement of a land claim
  - Lands taken into trust for a initial reservation of the tribe acknowledged by the Secretary
  - Lands taken into trust as restoration of lands for a tribe that has been restored to federal recognition

Gaming on Indian Lands

- The Menominee Tribe with investors seeks to open a casino in Kenosha, Wisconsin.
- Kenosha is about 50 miles from Chicago which has about 9.5 million people in the metropolitan area.
- Kenosha is about 45 miles from Milwaukee which has about 1.7 million people in the metropolitan area.

Gaming on Indian Lands

- The proposed casino will be located at an unprofitable but currently operating greyhound race track
- The closest current Menominee tribal lands are reportedly more than 170 miles from the greyhound track.

Gaming on Indian Lands

Gaming on Indian Lands

- Sec. 2719. Gaming on lands acquired after October 17, 1988
  - (a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless—
  - …
- (b) Exceptions.
  - (1) Subsection (a) will not apply when—
  - (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, **but only if the Governor of the State in which the gaming activity is to be conducted concurs** in the Secretary's determination; or

Gaming on Indian Lands

- What happened….

Gaming on Indian Lands

- Lands acquired post-IGRA
  - Exceptions (con't)
  - Secretary determines gaming on newly acquired land would benefit tribe and not be detrimental to the community and the **state's Governor concurs (no good faith required)**
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Management Contracts

- Management Contracts
  - IGRA requires NIGC approval before a tribe can enter into a management contract for the operation and management of Class II or III gaming activities
  - Contract must provide
  - Accounting procedures and financial reports for the tribe
  - Tribal access to daily operations
  - Minimum guaranteed payments to the tribe before reimbursement of development costs
  - Ceiling on development and construction costs
  - Term not to exceed 5 (or 7) years

Management Contracts

- Management Contracts
  - Management fees generally cannot exceed 30% of net gaming revenues
  - NIGC Chair has 180 days (with 1-90 day extension) to approve the contract
  - Such contract is disapproved if, among others
  - Felony or gaming offense
  - Make false statements to the NIGC or tribe
  - Prior activities, criminal record or associations pose a threat to the public interest

Consulting Agreement

- Consulting Agreement
  - No NIGC approval require
  - No IGRA mandated elements

Management vs. Consulting Contracts

- NIGC issued bulletins to address consulting agreements that were truly management agreements
  - Consulting agreements should
  - Finite task/assignment
  - Dates for completion
  - Compensation on a hourly, daily or fixed rate
- NIGC provides an ‘advance determination’ process to assist in determining whether the proposed agreement is a management or consulting contract

Scope of a Tribal-State Compact

- The tribal-state compact is a contract between the tribe and the state regarding the conduct of Class III gaming
- As such it is the result of a negotiating process
- Scope of compacts can vary but there are now general areas that compacts will address
- All compacts when approved by the Secretary of the Interior are published in the Federal Register

Scope of a Tribal-State Compact

- Authorize gaming
- Identify the tribal lands and casino locations
- Construction requirements
- Inspection rights by the state
- Information exchanges
- Workplace health and safety
- Taxation/costs
- Insurance
- Employment law protections

Licensing suitability standards and principles

Licensing of management, employees and vendors

Regulations of casino operations and management

Interplay with state gaming regulations

Patron disputes

Gaming device testing and inspection

Current State of Native American Gaming

GGR Trending

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*2020 revenue is not available as of 2/3/2021

Significant Issues

- Eligible Tribes - Carrier v. Salazar 555 U.S. 397 (2009)
  - Only tribes recognized under the Indian Reorganization Act of 1934
- Compelling States to negotiate in good faith
  - States as sovereigns cannot be compelled to negotiate in good faith - Seminole v. Butterworth - 517 US 44 (1996)
- State taxation
  - States cannot disguise taxation as exclusivity revenue sharing when revenue ends up in the state's general fund. Rincon v. Schwarzenegger 602 F.3d 1019 (9th Cir. 2010)

Current State of Native American Gaming

- Top Issues
  - What Tribes can engage in gaming
    - Carcieri
  - Online Gaming
    - Where does tribal sovereignty end?
    - Does IGRA protect off-Indian Lands gaming?
  - Reinvestment and Diversification
  - Sports Wagering
  - Competition
  - Federal Representation
    - Debra Haaland (Laguna Pueblo) – Nominee for Secretary of the Interior

Questions