A History of Indian Gaming in Michigan

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Indian gaming in Michigan traces its roots to the early 1980s when the Keweenaw Bay Tribe began conducting high stakes bingo games in Baraga in the Upper Peninsula. To conduct bingo in Michigan, a group or organization must register and be licensed by the Charitable Gaming Division of the Bureau of State Lottery.[1] The Keweenaw Bay Tribe did not register its bingo operations and suit was brought by the U.S. Attorney's Office to cease operations. The tribe defended its gaming operations in court by asserting its status as a sovereign nation and thereby not subject to State regulation.

The suit remained in court for several years, during which time other recognized tribes within the state began to conduct bingo and card games as well. Similar situations and suits were arising throughout the country, and, at the time, there were no governing statutes to provide a remedy for the suits.

Finally, in 1987, a case reached the U.S. Supreme Court. In *California v.Cabazon Band of Mission Indians*,[2] the Court ruled that the states' interest in regulating these games was outweighed by the tribes' interest in promoting tribal gaming for the economic good of the tribe. Therefore, the states could not enforce any gaming laws or regulations on Indian reservations.

In response to *California v Cabazon*, Congress passed the Indian Gaming Regulatory Act (IGRA)[3] of 1988, which was enacted to give the states a role in the conduct of tribal gaming.

INDIAN GAMING REGULATORY ACT (IGRA) OF 1988

President Ronald Reagan signed the Indian Gaming Regulatory Act into law in October of 1988. IGRA was passed to establish guidelines and provisions under which states could regulate Indian gaming within their borders. The Act established a role for states in governing gaming and defined the classes of games conducted on Indian land.

In its statement of findings, Congress specifies that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." Congress then went on to define, in Section 2703, certain games as Class I, II, or III.

Class I games are defined as 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. These games are regulated solely by the tribes.

Class II games as defined in IGRA consist of bingo played for monetary prizes, including pull-tabs, lotto, and instant bingo. Class II games also include card games that are not

prohibited by the laws of the state and are played at any location in the state. A provision is added that specifically excludes card games such as baccarat and blackjack as Class II types of games. However, Section 2703 (7)(c) includes as Class II games those card games played in the states of Michigan, North and South Dakota, and Washington that were in operation prior to May 1, 1988. Tribes in Michigan were conducting card rooms with blackjack and similar card games prior to that date.

Since Michigan allows card games like blackjack and dice games like craps at charitable "Vegas Nights" types of events through the Charitable Gaming Division of the Bureau of State Lottery, these games met the criteria of not being prohibited by the laws of the State. State regulations for charitable events place limits on bets, payout, and hours of operation. The tribes are not subject to these rules.

Lastly, IGRA defined Class III games as all forms that are not Class I or II. These games would include any electronic games of chance, such as slot machines, video poker and the like. (As will be discussed later, the Blanchard Administration originally refused, as did the Engler Administration, to allow electronic games of chance in the compacts. Both Administrations believed that these games did not meet the test of being authorized by State law.)

By classifying games in this way, Congress attempted to give states a regulatory role in determining the types of games to be operated within its boundaries. Class III games were defined to include all casino style games, notwithstanding Section 2703(7)(c), as mentioned above. To operate Class III games, a tribe must submit a request to a state to enter into negotiations for a Tribal-State compact governing the conduct of gaming activities. Upon receiving a request, a state must negotiate "in good faith" with the tribe to enter into a compact. The seven tribes in Michigan used this clause to sue the State when initial compact negotiations broke down.

Finally, a provision of note in IGRA is section 2710(4), which provides that "nothing in this section shall be interpreted as conferring upon a state or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a Class III activity." In other words, IGRA prohibited a tax on Indian gaming revenues. The only allowance for payment to a state was an amount to defray the costs of regulating gaming activities. It should be noted that a provision does allow for gaming revenues to be used to help fund operations of local governmental agencies.

When President Reagan signed the Indian Gaming Regulatory Act into law, the federal government "dealt its hand" and left it to the states and tribes to play the cards.

NEGOTIATIONS OF TRIBAL-STATE GAMING COMPACTS

With the passage of IGRA, Congress had placed the burden upon the states and tribes to negotiate compacts affecting gaming within the individual states affected. Compact negotiations began in Michigan in 1989. As stated earlier, negotiations broke down with the State over the permission of video games of chance. The tribes sued the State in federal district court. The Blanchard Administration asserted that these types of games were not authorized by State law. The tribes countered with the position that P.A. 328 of 1931[4] permitted the play of video games of chance. This statute is commonly referred to as the "pinball exception."

Public Act 328 states that the prohibition of games involving skill or chance does not apply to "...a mechanical amusement device which may, through the application of an element of skill, reward a player with the right to replay the mechanical amusement device at no additional cost..." if the device does not accumulate more than 15 replays at one time. Also, the device cannot keep a permanent record of the free replays awarded.

The Engler Administration continued the stance the State had taken previously on video games of chance and asserted the Eleventh Amendment sovereign immunity defense against the tribes' lawsuit. This defense is predicated on the fact that governmental entities are given immunity from lawsuit by the Eleventh Amendment of the U.S. Constitution and may only be sued when they allow themselves to be sued. This defense was successful. (The Supreme Court of the United States recently affirmed the Eleventh Amendment immunity defense that the states have employed in lawsuits against tribes in *Seminole Tribe of Florida v. State of Florida)*.[5] The tribes appealed the decision and amended the suit naming Governor Engler as the sole defendant.

While the trial was proceeding, an unrelated case that would have an enormous impact on the compact negotiations and the lawsuit was concluding before the Michigan Court of Appeals. This case is *Primages International of Michigan v. Liquor Control Commission.*[6]

Primages International is a distributor of amusement devices. One service Primages International does provide is the distribution of video games of chance, such as video poker, to bars and restaurants. The Michigan Liquor Control Commission began seizing these types of machines as prohibited gambling devices. Primages International brought suit against the Liquor Control Commission asserting that the "pinball exception" made these games of chance legal. The State asserted that these games were not "mechanical gaming devices" as stated in MCL 750.303(2), but electronic. Also, the State argued that the games were not "amusement devices" and did not involve an element of skill to operate. The case was decided in favor of Primages International in Wayne County Circuit Court. The State appealed and on April 6, 1993, the Michigan Court of Appeals upheld the decision. The verdict again was appealed to the Michigan Supreme Court, which declined to hear the case.

The decision of the Michigan Court of Appeals in *Primages v. Liquor Control Commission* effectively eliminated the State's defense that electronic games of chance were not authorized by State law and therefore could not be operated per the provisions in IGRA. At this time, the State and the tribes resumed negotiations to reach a Class III gaming compact.

On August 20, 1993, Governor Engler signed compacts with the seven federally-recognized tribes in the State to allow them to conduct Class III gaming on Indian lands in compliance with IGRA. At the same time, the State and the seven tribes entered into a consent decree regarding the sharing of revenue with the State and local units of government.

Currently, the seven tribes operate 17 gaming facilities within the State. Map 1 *[included in published document]* on page 6 shows the governing tribe and the location of each gaming facility.

THE COMPACTS AND THE CONSENT DECREE

The provisions contained within the State's compacts with the tribes allowed for the operation of electronic games of chance and also reclassified some games operated as Class II for the State of Michigan in IGRA as Class III games. The compacts also provide that

regulation of Class III gaming is the sole responsibility of the tribe and requires the posting of a sign at each facility stating that fact and that the State of Michigan does not regulate these facilities. The compact gives the State the right to inspect the records maintained in conjunction with, and the facilities upon which, Class III gaming is conducted. A provision is included requiring a tribe to reimburse the State for its actual costs incurred for conducting its oversight responsibilities. Each tribe will submit $25,000 annually toward the reimbursement of these costs. Currently this amounts to $175,000, which is allocated to the Native American Casino Oversight Program in the Office of Racing Commissioner.

As stated earlier, IGRA prohibited the imposition of a tax on Indian gaming revenues in the compacts. In an effort to reach final agreement on a Class III gaming compact, the State and the tribes entered into a consent judgment in U.S. District Court at the same time that the compacts were signed. The State wished to receive some form of revenue from Indian gaming, and the tribes were concerned about completing a compact. Without a Class III compact governing their gaming operations in the state, the tribes were in violation of IGRA and could be forced to cease operations at any time by the U.S. Attorney's Office. The consent decree gave the State and the tribes a vehicle outside the compacts that would allow for the taxation of gaming revenue. The agreement provides that the State shall receive 8% of the "net win" from all Class III electronic games of chance. "Net win" is the amount wagered at each machine minus the payout to the players. As part of this agreement, the tribes were given the exclusive right to operate electronic games of chance in the State of Michigan. At any point in which this right is rescinded, the tribes' obligation to make these payments ceases.

Revenues from the consent decree are deposited into the Strategic Fund. Table 1 *[included in published document]* shows the payments made by the tribes to the State for deposit into the Strategic Fund since the adoption of the compacts.

The consent decree also contains a provision stating that payments equal to 2% of the "net win" on electronic games of chance will be distributed to neighboring local units of government. Under the decree, the tribes determine which local unit or units would receive payments and the amounts thereof, provided that when making these determinations, the tribes compensate local units of government for services provided to the tribes. Each local unit must receive at least an amount equal to the share of ad valorem property taxes that it would receive if that facility were subject to such taxation.

With most of the tribes, a payment is made directly to the neighboring local units of government for use at their discretion. The consent decree provides that local units shall be reimbursed for services provided to the tribe, such as police and fire service protection, along with county road commission services. However, in the case of the Sault Ste. Marie Tribe, the tribal council unilaterally determines where the 2% shall be allocated.

In this case, the Sault Ste. Marie Tribal Council reviews applications from governmental agencies and offices for reimbursements and grants. They also receive applications from schools, nonprofit organizations, and similar groups. The Council then consults with local civic leaders and decides which applicants are to receive an award. As an example, the Sault Ste. Marie Tribe has provided funding to an animal control shelter, to a group for the maintenance of a baseball field, to Mackinaw County's Habitat for Humanity program, and to Lake Superior State University.

In many cases, the tribes have given an aggregate amount above the 2% required in the consent decree. Table 2 *[included in published document]* details the revenue distributed by each tribe to their local units of government and to local groups and agencies.

Since the passage of IGRA and the signing of the compacts, four additional tribes in Michigan have been formally recognized by the federal government. The tribes are the Little Traverse Band in Petoskey, the Little River Band in Manistee, the Pokagon Potawatomi in Dowagiac, and the Huron Potawatomi in Athens. Two tribes, the Little Traverse Band and the Pokagon Potawatomi, attempted to enter into compacts with the State to open casinos in Mackinaw City and New Buffalo, but the compacts were not approved by the Legislature.

BALLOT PROPOSAL

It is noteworthy to reiterate that the consent decree gives the tribes the exclusive right to operate electronic games of chance in Michigan. In November, the voters will decide whether or not to allow private casino gambling in Michigan. Proposal E limits operations to three casinos in a city of certain population and proximity to a jurisdiction that allows private gaming. The City of Detroit is currently the only city in the State to meet these criteria.

Should the ballot proposal pass, the consent decree's exclusivity clause would be voided and the tribes would no longer be required to pay the 8% gaming tax to the state (although local units of government would continue to receive their 2%). As shown in the previous table, this would result in a loss to the Strategic Fund of approximately $25-$30 million dollars annually.

The ballot proposal provides that a tax of 18% will be placed on the gross gaming revenues at the casinos. The language further states that the local unit of government would retain 55% of this amount for crime prevention and economic development, with the State receiving the other 45% to be earmarked for public education.

The amount of revenue that these casinos might produce for the State and the City of Detroit is indeterminable. There are many factors whose impact would be difficult to determine at this time. A comparative analysis of revenues generated at Indian casinos could make an estimate feasible, but tribal revenues are not public information. Also, many intangibles like the size of the casino operation in the City of Detroit and the proximity of the Windsor casino must be factored in as well.

SUMMARY

Indian gaming and gambling in general has proliferated across the state and country over the past two decades. As states search to enhance revenues, more and more have turned to gambling as a source of funds. At the beginning of 1996, 21 states allowed some form of Indian gaming, six states allowed the operation of riverboat casinos, and eight states had casinos or card rooms. Map 2 *[included in published document]* shows where casino-style gaming is currently being operated across the country.

This issue certainly has not concluded itself in Michigan. The voters of the state will wrestle with the issue in November and policy makers will continue to deliberate, and perhaps determine, the degree to which the State is willing to rely on gambling as a source of revenue.

ENDNOTES

1. P.A. 382 of 1972, as amended. Back to text

2. 480 U.S. 202 (1987). Back to text

3. Pub. L. 100-497, Oct. 17, 1988, 102 Stat. 2467. Back to text

4. MCL 750.303.(2). Back to text

5. 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Back to text

6. 199 Mich. App. 252, 501 N.W. 2d April 6, 1993. Back to text