

ABSTRACT

Tribal-State Gaming Compacts and Revenue Sharing Provisions: Are the States Upping the Ante?

By: Richard L. Skeen

In the ten years following, the Supreme Court's ruling in the Seminole Tribe v. Florida, Indian Gaming has grown to over a \$19 billion a year industry, in 26 States, involving over 241 Approved Class III Tribal Gaming Ordinances. States have been eager to get a piece of this ever-increasing pie. Some commentators have predicted that States will be reluctant to enter into new compacts or renew existing compacts, however, other's have indicated that States will continue to demand a percentages of Gaming revenues.

This comment addresses the central issue of whether the Tribal-State compacts entered into subsequent to the Seminole Tribe decision are valid reimbursements for fees expended in the regulation of Indian Gaming and bargained for exclusivity or whether the States are imposing an illegal tax on tribal enterprises engaged upon tribal lands. The development of Indian Gaming in the United States, sovereignty issues and the extent of the a state's authority to tax Indian Tribes set the stage for laying the analytical framework for determining whether assessments contained in the Tribal-State compacts are a fee or a tax. Recent developments in the law set the stage for a review of various Tribal-State compacts and an analysis of the legality of their revenue sharing provisions. The comment details tribal plans for sustaining future independence in light of the current trend of States to demand increasing proportions of Tribal Gaming revenue. In summary, the comment addresses the status and direction of tribal-state revenue sharing provisions.

Tribal-State Gaming Compacts and Revenue Sharing Provisions:

Are the States Upping the Ante?

Richard L. Skeen[†]

I. Introduction

The Indian Gaming industry developed in the wake of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians* and the subsequent enactment of the Indian Gaming Regulation Act, which together established Tribal governmental authority to operate a gaming industry without state regulation; provided that, the state in which the Tribal gaming takes place also authorizes some form of gaming.¹ The Indian Gaming and Regulatory Act of 1988 (IGRA), requires states to enter into negotiations with Indian Tribes for compacts authorizing the operation of Class III gaming.² However, the various tribes' bargaining chips under the Act have been diminished, in part, by the Supreme Court's decision in *Seminole Tribe v. Florida* which held that states are immune from suit (under the 11th amendment doctrine of sovereign immunity) by Indian tribes for the state's failure to negotiate in good faith as required under the IGRA.³

[†] The author is, currently employed at the law firm of Korn and Zehmer PA. in Ponte Vedra Florida; licensed in Ohio and admission is pending in Florida; he received his B.S.B.A. from The Ohio State University, J.D. from the University of Tulsa, where he was a managing editor and articles editor for the *Tulsa Journal of Comparative and International Law*, and received his LL.M in Taxation from the University of Florida, where he was a graduate assistant.

¹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) [hereinafter *Cabazon*].

² 25 U.S.C.A. § § 2701 – 2721 (2006).

³ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996) [hereinafter *Seminole Tribe*].

In the ten years following the Supreme Court's ruling in the Seminole Tribe v. Florida, Indian gaming has grown to over a \$19 billion a year industry,⁴ in 26 states,⁵ involving over 241 Approved Class III Tribal Gaming Ordinances.⁶ States have been eager to get a piece of this ever-increasing pie, however, some commentators have predicted that following the Seminole Tribe case, states will be reluctant to enter into new compacts or renew existing compacts.⁷ Other's postulate that states will continue to demand increasing percentages of gaming revenues in the renewed Tribal-State compacts, resulting in spiraling costs borne by Tribes, way out of proportion to the regulatory fee collectable provided for in the IGRA.

This comment addresses the central issue of whether the Tribal-State compacts entered into subsequent to the Seminole Tribe decision are valid reimbursements for fees expended in the regulation of Indian gaming and bargained for exclusivity or whether the states are imposing an illegal tax on tribal enterprises engaged upon tribal lands. Part II discusses the historical progression of the legalization and development of Indian gaming in the United States. Part III discusses sovereignty issues related to Indian tribes and the extent of a state's authority to impose taxes on such tribes. Additionally Part III will discuss the analytical framework for approaching the determination of whether an assessment is a fee or a tax. Part IV discusses recent developments in the law. Part V undertakes an analytical review of several types of Tribal-State compacts. In Part VI the author comments on one tribe's plan to sustain future independence and in summary postulates on the status and direction of tribal-state revenue sharing provisions. The vast array of Tribal-State compacts, which differ in style and substance,

⁴ NATIONAL INDIAN GAMING COMMISSION, TRIBAL GAMING REVENUES, *available at*: <http://www.nigc.gov/TribalData/GamingRevenues20042000/tabid/549/Default.aspx> [hereinafter NIGC] (last viewed 5-16-06).

⁵ NIGC, GAMING TRIBE REPORT, *available at*: <http://www.nigc.gov>. (last viewed 5-16-06).

⁶ 67 Fed Reg. 54823 (August 26, 2002).

make an overall assessment difficult, but the current trend of states to exact an increasing amount of revenue from tribal gaming operations appears to be approach the end of the continuum in which revenue sharing can be considered proportional to the benefits received by the tribes.

II. Historical Perspective

A. California v. Cabazon

The Supreme Court granted certiorari to hear the Case of *California v. Cabazon Band of Mission Indians* in 1986.⁸ The case involved California's attempt to apply provisions of its penal code limiting gaming to the conduct of draw poker and bingo by the Cabazon Tribe on tribal lands.⁹ The court held that the state's civil jurisdiction over Indian activities was limited, but the state's criminal jurisdiction in relation to Indian lands was far-reaching, pursuant to Public Law 280.¹⁰ The court developed a test to determine whether a law was regulatory vs. criminal by looking to see if, in this instance, the gaming at issue is against the state's policy and therefore criminal.¹¹ The court-analyzed California's gaming laws and noted that California permitted gambling operations by other entities, such as charities, and in fact even promoted gambling thorough the California State Lottery.¹² Thus, the court determined that the gaming law was regulatory rather than criminal because gaming was not against the policy of the state to prohibit all gaming.¹³

In 1988 Congress enacted the Indian Gaming Regulatory Act (IGRA) which, in effect statutorily ratified the *Cabazon* decision by limiting State regulation of gaming on Indian lands

⁷ Eric S. Lent, *Are States Beating The House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act.*, 91 GEO. L. J. 451, 452 (2003).

⁸ See generally *Cabazon*, 480 U.S. 202.

⁹ *Id.*

¹⁰ *Cabazon*, 480 U.S. at 209. (In Public Law 280 Congress expressly granted criminal jurisdiction to six states including California over crimes committed by or to Indians in Indian country within the state's borders).

¹¹ *Id.*

¹² *Id.* at 211.

¹³ *Id.*

to instances where the activity is deemed criminal.¹⁴ Similar to *Cabazon* decision, under the IGRA, Tribes may engage in and self regulate certain gaming activities as long as the state in which the active is conducted has authorized the gaming activities for any other purpose, such as for charitable or fraternal organizations; and thus the states policy is regulatory.¹⁵

B. IGRA

The IGRA's purpose and policy according to 25 U.S.C. §§ 2701-2702 is to establish clear standards and regulations for gaming conducted on tribal lands, in order to foster economic development and fortify tribal governments, where gaming is not specifically prohibited by state or federal law.¹⁶ The underlying policy of the IGRA is to establish a federal regulatory authority, standards, and to create the National Indian Gaming Commission (NIGC).¹⁷ Thus, congress enacted the IGRA to display its intent to federally occupy the area of law consisting of the regulation Indian gaming pursuant to its Commerce Clause powers.¹⁸

Section 2703 of the IGRA defines the types of gaming which are subject to state and/or federal regulation. Class I gaming includes social or historical forms of tribal gaming with minimal value prizes.¹⁹ Class II gaming includes bingo and related card games explicitly authorized by state statute and played in accordance with state regulations.²⁰ Class II type games (which can be electronic slot machine style) consists of persons playing against others playing the same games or slot machines, which are connected electronically to one another. The persons are not playing against the house odds in Class II gaming. Class III gaming includes all

¹⁴IOWA GENERAL ASSEMBLY, LEGISLATIVE GUIDE TO THE INDIAN GAMING REGULATORY ACT, *available at*: <http://www.legis.state.ia.us/Central/LSB/Guides/indgam.htm#pt1> (last viewed 5-16-06); 25 U.S.C.A. § 2701(5), 2710(b)(1)(A), (d)(1)(B); *See also* U.S. v. Sisseton-Wahponton Sioux Tribe, 897 F.2d 358, 366 (8th Cir. 1990).

¹⁵ *see infra* Part III.B; *see also* 25 U.S.C.A. § 2710 (a)-(d); *see also* *Cabazon*, 480 U.S. at 209-210.

¹⁶ 25 U.S.C.A. § 2701(5), 2702.

¹⁷ 25 U.S.C.A. § 2702.

¹⁸ *See* U.S. CONST. ART. 1 § 8 CL. 3.

¹⁹ 25 U.S.C.A. § 2703 (6)

²⁰ 25 U.S.C.A. § 2703 (7).

other forms of gambling (such as independent slot machines, poker, blackjack, craps, roulette, etc.) not described in Classes I or II.²¹

Class I gaming is in the sole jurisdiction of the tribe and not subject to regulation under the IGRA.²² Class II gaming is subject to exclusive tribal jurisdiction provided it is conducted on Indian lands, within a state permitting such gaming for the purposes of any entity or person and the tribe adopts an ordinance or resolution concerning the conduct of such Class II gaming.²³ Under the IGRA so long as a tribe passes regulatory ordinances, which are approved by the BIA, it may regulate the time place and manner of Class II gaming which is otherwise authorized in the state in which it is conducted. However, Class III gaming is allowed on Indian lands only if it is authorized by tribal ordinance, located in a state permitting such gaming for any persons, and is conducted pursuant to a Tribal-State Compact approved by the Chairman of the Bureau of Indian Affairs (BIA).²⁴

The subject matter of the Tribal-State compact may include application of criminal and civil regulations of the tribe and state related to such Class III gaming activities and allocation of jurisdiction of the forgoing between the tribe and state.²⁵ The compact may also include assessment by the state of such activities in an amount *necessary to defray regulatory costs*, provisions governing taxation of such activities by the Indian tribe in amount comparable to that assessed by the state on similar activities, remedies for breach, standards of operation and other subjects directly related to gaming activities:

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

²¹ 25 U.S.C.A. § 2703(8).

²² 25 U.S.C.A. § 2710(a)(1).

²³ 25 U.S.C.A. § 2710(b).

²⁴ 25 U.S.C.A. § 2710(d).

²⁵ 25 U.S.C.A. § 2710(d)(3)(C).

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies for breach of contract;
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
- (vii) any other subjects that are directly related to the operation of gaming activities.²⁶

The IGRA also requires states to enter into good faith negotiations with tribes.²⁷ The statute provides for a variety of enforcement remedies when a tribe and state fail to agree on the subject matter of a Tribal-State Compact.²⁸ Under the IGRA tribes could sue a state in federal court for refusing to enter into negotiations or for failing to negotiate in good faith, however, tribal remedies to sue states under the IGRA were largely eviscerated by the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*.

In approving Tribal-State compacts, the Department of the Interior generally requires that states must provide “substantial economic benefit” to tribes by offering “more favorable terms” for the right to engage in Class III gaming activities.²⁹ Revenue sharing provisions without a corresponding “substantial economic benefit” have been construed as merely a tax prohibited by the IGRA § 2710 (d)(4).³⁰ “Substantial exclusivity” is the “substantial economic benefit” most widely used by states to justify the revenue sharing provisions because the tribes are considered

²⁶ 25 U.S.C.A. § 2710(d)(3)(C).

²⁷ 25 U.S.C.A. § 2710(d)(3)(A),(7)(A).

²⁸ 25 U.S.C.A. § 2710(d) (7)-(9).

²⁹ See Kevin Grover, *Revenue Sharing*, part III (Unpublished Paper Presented at the 30th annual Federal Bar Association Indian Law Conference), (April 14-15, 2005).

³⁰ Id at Part III.A.1; See also DEPARTMENT OF THE INTERIOR, DISAPPROVAL LETTER FOR ST. REGIS MOHAWK TRIBE AND THE STATE OF NEW YORK, July 26, 2000 p.1.

to have purchased a “valuable right from the state” in the form of a monopoly on gaming.³¹ This seems to hold true given the Federal district court decision invalidating revenue sharing provisions of seven Tribal-State compacts in Michigan after voters authorized Casino Gaming in Detroit by non-Indians and the state entered into more compacts with other Indian tribes.³² Thus most Tribal-State Compacts must contain provisions invalidating revenue sharing in the event the state decides to authorize non-Indian Class III gaming to gain approval.³³

The substantial exclusivity requirement is only the first hurdle for gaining Department of the Interior (DOI) approval of Tribal-State Compacts. The DOI also evaluates amount of revenue demanded by the states and other entities dealing with the tribes.³⁴ In the past, the DOI has required a demonstration of the relationship between the percent of revenue demanded and its relation ship to services provided by local governments,³⁵ however, the DOI has recently back down from that requirement.³⁶

C. Seminole Tribe Decision

In 1991 the Seminole Tribe of Florida filed suit against the state of Florida and the Governor to compel negotiations for Class III gaming under the IGRA in the District Court for the Southern District of Florida.³⁷ The District Court denied the State’s motion to dismiss and Florida appealed the ruling to the 11th Circuit Court of Appeals, which reversed the District

³¹ See Grover, *supra* note 29, at part III.A.2

³² Sault Ste. Marie Tribe of Chippewa Indians, 93 F. Sup. 2d, 850, 851 (2000); See also Lent, *supra* note 7, at 459.

³³ Grover, *supra* note 29, at part III.A.3.

³⁴ See generally, 25 U.S.C.A. §2711 (c), (2006).

³⁵ See Grover, *supra* note 29, at part III.C.4; See also DEPARTMENT OF THE INTERIOR, LETTER TO CHITIMACHA TRIBE OF LOUISIANA, August 24, 2000.

³⁶ Grover, *supra* note 29, at part III.C.4; See also DEPARTMENT OF THE INTERIOR, LETTER TO HONORABLE MURPHY J. FOSTER, March 30, 2001.

³⁷ See Seminole Tribe of Florida v. Florida, 801 F.Supp. 655 (S.D. Fla. 1992).

Court's decision and held the 11th amendment bared suit against the state in federal court.³⁸ Subsequently certiorari was granted by the U.S. Supreme Court on the issue.³⁹ In *Seminole Tribe of Florida v. Florida*, the Supreme Court held that a State's immunity to suit under the 11th Amendment could not be abrogated by Congress by the enactment of the IGRA under the authority of Indian Commerce Clause.⁴⁰ The court noted that a state's sovereign immunity previously could only be abrogated under the Fourteenth Amendment⁴¹ and the Interstate Commerce Clause, which is distinguishable from the Indian Commerce Clause.⁴² Recent constitutional jurisprudence has indicated that Congress's commerce clause powers are rather broad and State's 10th amendment rights will rarely be sufficient grounds for invoking sovereignty from federal interference when Congress has explicitly manifested intent to occupy and area of law. However, in *Seminole Tribe*, the Court expressly overruled the *Union Gas* decision (which previously upheld congressional broad authority under the Commerce Clause) noting that such abrogation of a state's 11th Amendment sovereign immunity under the Commerce Clause was greatly divergent from the precedent of constitutional jurisprudence of the court.⁴³ Thus under the Court's current Constitutional jurisprudence, Congress's Commerce Clause power is not sufficient grounds to force states to answer to claims in federal court.

The *Seminole Tribe* decision greatly eliminated the Indian tribes' bargaining power with respect to compelling negotiation for Tribal-State Compacts, by effectively limiting instances when the tribes can invoke the enforcement provisions of the IGRA. Tribes are now forced to

³⁸ See *Seminole Tribe of Florida v. Florida*, 11 F.3rd. 1016 (11th Cir., 1994); (The Circuit Court also dismissed the tribes argument that the *Ex Parte Young* doctrine applied to permit suit against the Governor in his official capacity for failure to negotiate basing its decision on the lack of subject matter jurisdiction).

³⁹ See *Seminole Tribe of Florida v. Florida*, 115 S.Ct. 932 (1995).

⁴⁰ See generally, *Seminole Tribe*, 517 U.S. 44.

⁴¹ See *Seminole Tribe*, 517 U.S. at 59; See generally also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

⁴² See *Seminole Tribe*, 517 U.S. at 59; See generally also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

negotiate at a disadvantage because they are precluded from suing states to compel negotiation (unless the state has expressly waived its right against suit).

III. Tribal Sovereignty and the Ability of States to Tax Tribal Governments

A. Sovereignty

Indian Tribes have an elusive and ambiguous status in the framework of US law.⁴⁴ Their political status is neither that of a domestic state or a foreign nation.⁴⁵ However, for many purposes tribes are considered sovereign nations.⁴⁶ Chief Justice Marshall characterized tribal status as “domestic, dependent nations” and noted the uniqueness of the relationship in the *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831).

Under The Internal Revenue Code Indian tribal governments and their political subdivisions are treated as states for federal tax purposes relating to various deductions, issuance of tax exempt bonds, estate taxation, deferred compensation, excises taxes, etc.⁴⁷ Although no direct statutory authority exempts from or subjects Indian tribes to taxation the Internal Revenue Service (IRS or Service) has long taken the position that tribes and federally chartered tribal corporations are tax exempt entities for federal tax purposes.⁴⁸ In fact the Service notes that although 26 U.S.C.A. § 61 states all income is taxable regardless of source “The federally chartered Indian tribal corporation shares the same tax status as the Indian tribe and is not taxable on income from activities carried on within the boundaries of the reservation.”⁴⁹ In Revenue

⁴³ *Seminole Tribe*, 517 U.S. at 64-66; *see generally also* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (upholding congressional abrogation of state’s sovereign immunity pursuant to legislation under the commerce clause).

⁴⁴ RICHARD D. POMP & OLIVER OLDMAN, *STATE AND LOCAL TAXATION*, Vol. III, pg. 15-1 (5th ed 2005).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See* 26 U.S.C.A. 7871(a)-(d); *See also* Rubin Ranat, *Tribal-State Compacts: Legitimate Or Illegal Taxation Of Indian Gaming In California?*, 26 *WHITTIER L. REV.* 953, 960-963, 2005.

⁴⁸ *See* Rev. Rul. 67-284, 1967-2 C.B. 55,58; *See also* Rev. Rul. 81-295, 1981-2 C.B. 15, *See also* Ranat, *supra note 47*, at 960-963.

⁴⁹ Rev. Rul. 81-295, 1981-2 C.B. 15; *See also* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157, n.13 (1973),

Ruling 94-16 the Service held that “[n]either an unincorporate Indian tribe nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income.”⁵⁰ Tribes are not taxable entities whether acting as an unincorporated or federally incorporated entity and thus any income earned from any activity is like wise not taxable, “[h]owever, a corporation organized by an Indian tribe under state law is subject to federal income tax on its income, regardless of the location of the activities that produced the income.”⁵¹ Additionally, this is also the case for individual Indians; they are subject to tax like any other individual under the Internal Revenue Code.⁵²

It has long been established under Federal Constitutional jurisprudence that States do not possess the right to impose income tax on individuals or corporations operation solely on tribal lands.⁵³ In *Oklahoma Tax Commission v. Sac and Fox Nation* the Supreme Court declared that “[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.”⁵⁴ Furthermore, non-Indians doing business on tribal lands with Indians are generally not subject to taxation by the

⁵⁰ Rev. Rul. 94-16, 1994-1 C.B. 19.

⁵¹ Rev. Rul. 94-16, 1994-1 C.B. 19.

⁵² See generally 26 U.S.C. § 61 (2006)

⁵³ In re Kan. Indians, 72 U.S. 737, 761 (1866) (holding state of Kansas did not have authority to impose any species of levy, sale, and forfeiture, or a levy and sale for taxes on Indian tribes); See also In re N.Y. Indians, 72 U.S. 761, 770-771(1866) (holding that the land comprising the Indian reservation is not subject to taxation or levy and sale for default on said tax liability as long as title remains in the hands of the tribe); See also *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (holding that by imposing a person income taxation a reservation Indian whose entire income derives from reservation sources, the state interfered in matters reserved solely to the province of the Federal government and the Indians themselves). See also *Moe v. Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (holding that in absence of congressional consent the state was disabled from imposing person property tax, vendor license fees, or sales tax on Indians conducting business on Indian lands); See also *Ranat*, *supra* note 47, at 963.

⁵⁴ *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 128 (1985)

state because to do so would infringe upon the tribal government's sovereignty.⁵⁵ The Supreme Court struck down a state tax imposed on non-Indian corporations registered to do business in the state but engaged in operations solely located on an Indian reservation as pre-empted by federal law.⁵⁶

B. Fee vs. Tax Under the IGRA⁵⁷

The IGRA provides that a Tribal-State compact "may included provisions relating to: . . . (iii) the assessment by the state of such activities in such amounts as are necessary to defray the cost of regulation such activity; . . . (iv) taxation by the *Indian tribe* of such activity in amounts comparable to amounts assessed by the State for comparable activities"⁵⁸ The plan language of the IGRA only provides that States may assess amount related to reimbursement of cost incurred in the course of regulating the Indian gaming industry. Furthermore, the language specifically vests the power to tax solely with the tribe itself. The IGRA continues by clarifying the aforementioned requirements: "Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . authorized . . . to engage in a class III activity."⁵⁹ The IGRA explicitly denies the states the authority to impose taxes, fees or other charges upon Indian tribes other than amounts necessary to pay for regulation of class III activities.

In determining whether an assessment is a fee or a tax, the general rule is; a tax provides revenue for the general support of the government while a fee imposes a specific charge for the

⁵⁵ *Ramah Navajo School Board, Inc. et al. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

⁵⁶ *White Mountain Apache tribe et al. v. Bracker et al.* 448 U.S. 136 (1980), (holding state's motor carrier licenses and use fuel taxes invalid).

⁵⁷ *See generally also Moe v. Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463

⁵⁸ 25 U.S.C.A. § 2710(d) (3)(C)(iii)-(iv) (emphasis added).

⁵⁹ 25 U.S.C.A. § 2710(d) (4).

use of public facilities or services.⁶⁰ The test to determine whether an assessment is a tax or fee consist of three criteria: 1) whether the primary purpose of the assessment is regulatory rather than revenue raising; 2) whether the assessment is proportionate to the services provided; and 3) whether the assessment is for a service voluntarily undertaken by the payor.⁶¹ For the purposes of intergovernmental immunity fees are voluntary and paid in exchange for a particular defined benefit where as taxes, conversely, are imposed by a sovereign without regard to choice and generally do not provide specific benefits.⁶²

Under the rule established in *McCulloch v. Maryland*, federal instrumentalities (such as federally chartered banks or Indian tribes in this case) are generally immune from taxation by a state unless such taxation is specifically authorized by Congress.⁶³ In determining whether an assessment is a tax under the McCulloch rule the courts will conduct an examination of the assessment to determine if it is imposed on a nondiscriminatory manner, whether the assessment is a fair approximation of the cost of the benefit received, and whether the assessment is formulated to produce revenues that will not exceed the total cost to State of the benefit supplied.⁶⁴ Since the IRGA specifically prohibits taxation by states of Indian tribes the assessments in Tribal-State compacts must pass muster under one of the aforementioned tests.

IV. Recent Developments in Case Law Since the Seminole Tribe Case

In November of 2004 the Tenth Circuit handing down its decision on appeal from a district case involving the Northern Apopos Tribe of Indians who sued the State of Wyoming

⁶⁰ See generally *Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.*, 600 So.2nd 1159 (Fla. App. 1 Dist., 1992).

⁶¹ See generally *Bolt v. City of Lansing*, 587 N.W. 2nd 264 (Mich. 1998); See generally also *Dean v. Lehman* 18 P.3rd 523 (2001).

⁶² See generally *City of Vanceburg, Ky., Federal Energy Regulatory Commission*, 571 F.2nd 630 (C.A.D.C. 1997)

⁶³ See generally *McCulloch v. Md.*, 17 U.S. 316 (1819); See generally also *McClanahan v. Arizona State Tax Commission*, 411 U.S. 166 (1973).

⁶⁴ See generally *U.S. v. State of Me.* 524 F.Supp. 1056 (D.Me. 1981).

for failing to negotiate in good faith with the tribe for a Tribal State gaming compact.⁶⁵

Wyoming statutes prohibit commercial gaming, but allows “any game wager or transaction” for persons with a social relationship and for non-profit purposes.⁶⁶ Thus, the court concluded that the person and purpose requirements did not apply to the tribe under the IGRA and held that the state must negotiate with the tribes on the full gamut of casino type games.⁶⁷ The case was upheld on and en-banc rehearing.⁶⁸

The court detailed the two approaches to application of the IGRA good faith requirement to types of games that are subject to negotiation. First, the Wisconsin analysis takes a categorical approach, requiring the court to determine the general scope of the law.⁶⁹ If the state permits any Class III gaming the state must negotiate with the tribe for all forms of Class III gaming because the state is regulating rather than prohibiting gaming.⁷⁰ Second, the Florida analysis takes a game specific approach in which the court must determine whether the state permits a specific game at issue.⁷¹ Thus under the Florida approach the state must negotiate with the tribes for any games that it permits for any purpose but is not required to negotiate with tribes for games that it prohibits for all purposes.⁷² This distinction is important to tribes wishing to enter into new Class III Tribal-State compacts or expand current gaming operations to specific games that are not currently authorized under state law.

V. State / Indian Tribe Gaming Compacts: A fee or a Tax

A. In general

⁶⁵ Northern Arapaho Tribe v. Of Wyoming 389 F.3d 1308, 1308 (C.A.10 Wyo.,2004)

⁶⁶ *Id.* at, 1311-1312

⁶⁷ *Id.* at 1308, 1312 (C.A.10 Wyo., 2004).

⁶⁸ *See generally* Northern Arapaho Tribe v. Of Wyoming, 429 F.3d 934 (C.A.10 Wyo., 2005)

⁶⁹ *See generally* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F.Supp. 480 (W.D.Wis.1991).

⁷⁰ *See* Northern Arapaho Tribe v. Of Wyoming 389 F.3d at 1311.

⁷¹ *See, e.g.,* Coeur d'Alene Tribe v. Idaho, 842 F.Supp. 1268, 1278 (D.Idaho 1994) (citing Seminole Tribe of Florida v. Florida, 1993 (S.D.Fla. Sept.22, 1993)).

Revenue sharing provisions contained in the various Tribal-State compacts display a wide range of creativity in structuring and amount. Fees demanded by states for the right to engage in Class III gaming range from 3% to in excess of 25% in some cases.⁷³ Provisions of exclusivity are the norm in Tribal-State compacts, but a closer look at some of the provisions shows that exclusivity is not always “substantial” and sometimes not even present at all.

B. Selected State provisions

1. California

a. Initial Compacts

In March of 2000 California voters passed Proposition 1A, authorizing the Governor to enter into Tribal- State compacts with various Indian tribes to established gaming on Indian lands.⁷⁴ Following the passage of Proposition 1A , 61 tribes negotiated compacts with California.⁷⁵ The compacts gave the tribes substantial exclusivity to operate Class III gaming slot type machines on there respective reservations in exchange for a portion of the tribes annual gaming revenues payable to the state run “ Indian Gaming Revenue Sharing Trust Fund”⁷⁶ and “Special Distribution Fund.”⁷⁷ Under the compacts the “Indian Gaming Revenue Sharing Trust Fund” was to receive annual payments totaling \$1.1 million dollars collectively for per machine license fees payable by the individual tribes with respect to the number of machines operated.⁷⁸

⁷² See *Northern Arapaho Tribe v. Of Wyoming* 389 F.3d at 1311.

⁷³ Michael J. Anderson, Presentation to the 2005 Federal Bar Association, Selected Tribal-State Gaming Compact Revenue Sharing Provisions, pg. 371-374. (April 14-15, 2005). (Unpublished Paper Presented at the 30th annual Federal Bar Association Indian Law Conference).

⁷⁴ CAL. CONST. ART IV § 19.

⁷⁵ See CALIFORNIA GAMBLING CONTROL COMMISSION, TRIBAL-STATE COMPACT LIST, *available at*: <http://www.cgcca.gov/compacts/Compacted%20Tribes.htm>.

⁷⁶ CAL. GOV. CODE § 12012.75

⁷⁷ CAL. GOV. CODE § 12012.85

⁷⁸ CALIFORNIA GAMBLING CONTROL COMMISSION, TRIBAL-STATE GAMING COMPACT BETWEEN THE FEDERALLY RECOGNIZED INDIAN TRIBE AND THE STATE OF CALIFORNIA, at §4.3.2.1 *available at*:

<http://www.cgcca.ca.gov/enabling/tsc.pdf> [hereinafter CAL. MODEL COMPACT]; *See also* CAL. GOV. CODE § 12012.75

The pre license fee ranges from \$0 to \$4350 depending on the amount of slot machines operated by a tribe.⁷⁹ These fees collected in the “Indian Gaming Revenue Sharing Trust Fund” are distributed to the various non-gaming tribes of California.⁸⁰

The quarterly payments to the “Special Distribution Fund” are derived form a percentage of the revenue earned by the tribe’s gaming operations.⁸¹ The revenue percentages payable by the tribe to the “Special Distribution Fund” are base on a sliding scale and is derived from the number of machines operated during the relevant time period.⁸² The percentages range from 0% for up to 200 machines, 7% for 201-500, 10% for 501-1000, and 13% for machines over 1000.

Monies from the Special Distribution Fund may be used for the following purposes:

- (a) Grants, including any administrative costs, for programs designed to address gambling addiction.
- (b) Grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming.
- (c) Compensation for regulatory costs incurred by the State Gaming Agency and the Department of Justice in connection with the implementation and administration of tribal-state gaming compacts.
- (d) Payment of shortfalls that may occur in the Indian Gaming Revenue Sharing Trust Fund. This shall be the priority use of moneys in the Indian Gaming Special Distribution Fund.
- (e) Disbursements for the purpose of implementing the terms of tribal labor relations ordinances promulgated in accordance with the terms of tribal-state gaming compacts ratified pursuant to Chapter 874 of the Statutes of 1999. No more than 10 percent of the funds appropriated in the Budget Act of 2000 for implementation of tribal labor relations ordinances promulgated in accordance with those compacts shall be expended in the selection of the Tribal Labor Panel. The Department of Personnel Administration shall consult with and seek input from the parties prior to any expenditure for purposes of selecting the Tribal Labor Panel. Other than the cost of selecting the Tribal Labor Panel, there shall be no further disbursements until the Tribal Labor Panel, which is selected by

⁷⁹ *Id.* at §4.3.2.2(a)(2)

⁸⁰ CAL. GOV. CODE § 12012.75

⁸¹ CAL. MODEL COMPACT , *supra* note 74, at §5.0.

⁸² CAL. MODEL COMPACT , *supra* note 74, at §5.1(a).

mutual agreement of the parties, is in place.
(f) Any other purpose specified by law.⁸³

The statute gives priority to the payment of short falls in the Indian Gaming Revenue Sharing Trust Fund, then to appropriations to the states gambling prevention programs, then to the State's gambling control and regulation boards, and finally to support local governments impacted by gambling.⁸⁴

Even though the subsection (f) of Cal. Gov. Code. 12012.85 seems to provide the legislature with an open invitation to raid the fund for any purpose it sees fit, including projects benefiting the general welfare of the state, the federal district court has upheld the validity of the Special Distribution Fund on the basis that it is funded for primarily for a regulatory purposes.⁸⁵ The "Indian Gaming Revenue Sharing Trust" likewise withstood scrutiny on the basis that it was funded primarily in nature by licensing which is explicitly authorized under the IGRA.⁸⁶ The 11th amendment sovereign immunity restrictions on the ability of Indian Tribes to sue the states in the holding of the *Seminole Tribe of Florida v. Florida* do not apply in this case because California has waived its sovereign immunity.⁸⁷

The *In re Gaming Related Cases* seems to reach the right result regarding the Indian Gaming Revenue sharing fund, because as the court notes the fund is directly related to the compensation of non-gaming tribes by gaming tribes for their non use of the limited amount of licenses available for Indian gaming in California.⁸⁸ In regard to the Special Distribution Fund, the court applied the doctrine of *ejusdem generis* to construe the compacts general appropriation

⁸³ CAL GOV. CODE § 12012.85(A)-(F).

⁸⁴ CAL. GOV. CODE § 12012.85(G).

⁸⁵ See *In re Indian Gaming Related Cases*, 147 F.Supp.2d 1011, 1016 (2001); See also *Lent*, *supra* note 7, at 452 (2003) for analysis of the California gaming cases upholding both funds due to their licensing and regulatory purposes despite the open ended spending provisions).

⁸⁶ *Id.*; see also 25 U.S.C.A. § 2710 (d)(3)(C)(i).

term in section 5.2(e) of the compact as authorizing other expenditures only in the related areas of enumerated specifically in the section 5.2.⁸⁹ However, given the definition of a tax and fee discuss above in Part III.B. *supra*, one must question whether the amounts exacted from tribe bear a proportional relationship to the cost borne by the State.⁹⁰ Unfortunately the court did not reach this argument and the author can only speculate that had the court decided the case on this ground it may have reached a different conclusion. This argument is growing in importance's as California continues to up the ante on the amounts required under new and renegotiated Tribal-State compacts.

b. New Developments

In June of 2004, the State of California renegotiated Tribal State Compacts with five Indian Tribes.⁹¹ The terms of these Compacts include a \$1 billion dollar payment to be financed over 18 years. This initial \$1 billion dollar one time payment figure is derived from estimating the sum of the annual payments of \$100 million dollars required by the tribes over 18 years which represents 10% of current net wins (up to 18% of tribal net profits on casinos).⁹² This payment is purported to be consideration for exclusivity from non-Indian competitors and subject to the use restrictions in Cal Gov. Code § 12012.85. Following the repayment of the bond the tribes will be expected to contributed annual payments expected to total an additional \$700 million dollars collectively over the life of the contract.⁹³

⁸⁷ See Cal Gov't Code § 98005.

⁸⁸ In re Indian Gaming Related Cases, 147 f.Supp.2d at 1018.

⁸⁹ *Id.*

⁹⁰ See generally, U.S. v. State of Me. 524 F.Supp. 1056 (D.Me. 1981).

⁹¹ Governor Schwarzenegger Signs ReNegotiated Gaming Compacts With Five Indian Tribes, Press Release, (6/21/2004) available at: http://www.governor.ca.gov/state/govsite/gov_html (last viewed 5-22-2006).

⁹² See *Id.*; See also § 4.3.3 of each of the amended contracts, available at: <http://www.cgcc.ca.gov/compacts> (last viewed 5-22-2006).

⁹³ *Id.*

Furthermore these new contracts will increase the cost under the progressive rate schedule for annual slot machines licenses up to \$25,000 per additional machine allowed above the current limits of 2000 representing an estimated additional 15% of net wins on such additional machines for certain tribes.⁹⁴ Additionally, contributions to the “Indian Gaming Revenue Sharing Trust Fund” will increase to \$2 million per year collectively. For example the Rumesy Band of Wintun Indians’ Tribal-State compact calls for payments to the Revenue Sharing Trust Fund in the amount of:

Additional Gaming Devices in Operation	Annual Fee Per Gaming Device
(i) 1,763 to 2,000	\$11,000
(ii) 2,001 to 2,500	\$12,000
(iii) 2,501 to 3,000	\$13,200
(iv) 3,001 to 3,500	\$17,000
(v) 3,501 to 4,000	\$20,000
(vi) 4,001 to 4,500	\$22,500
(vii) 4,500 and above	\$25,000 ⁹⁵

Several new compacts were also negotiated. For example, Section 5.2 of the Fort Mojave Indians Tribal-State compact calls for no payment to the Revenue Sharing Trust Fund for under 700 machines, a payment of \$900 per machine for 701 to 1100 machines, and \$1950 for 1101 to 1500 machines but only if the tribe earns over \$25 million.⁹⁶ The fee schedule in section 4.3.1 for payments to the Special Distribution Fund are:

- (i) As long as the Tribe has over 1,000 members, its payment of the Net Win shall be based on the following schedule:

⁹⁴ See AMENDMENT TO THE TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE PALA BAND OF MISSION INDIANS, at §4.3.1, available at: <http://www.cgcc.ca.gov/compacts/Pala%20amendment.pdf> (last viewed 5-22-2006).

⁹⁵ AMENDMENT TO THE TRIBAL-STATE GAMING COMPACT BETWEEN THE RUMSEY BAND OF WINTUN INDIANS, A FEDERALLY RECOGNIZED INDIAN TRIBE, AND THE STATE OF CALIFORNIA, § 5.2, available at: <http://www.cgcc.ca.gov/compacts/Rumsey%20amendment.pdf> (last viewed 5-29-06).

⁹⁶ TRIBAL-STATE GAMING COMPACT BETWEEN THE FORT MOJAVE INDIAN TRIBE, A FEDERALLY RECOGNIZED INDIAN TRIBE, AND THE STATE OF CALIFORNIA, § 5.2, available at http://www.cgcc.ca.gov/compacts/fort_mojave_compact.pdf (last viewed 5-29-06).

Annual Net Win Percentage
\$0-\$50 million 10%
Over \$50 million to \$100 million 14%
Over \$100 million to \$150 million 18%
Over \$150 million to \$200 million 22%
Over \$200 million 25%

(ii) If the Tribe's membership falls between 500 and 1000 members, its payment of the Net Win shall be based on the following schedule:

Annual Net Win Percentage
\$0-\$50 million 11%
Over \$50 million to \$100 million 15%
Over \$100 million to \$150 million 18%
Over \$150 million to \$200 million 22%
Over \$200 million 25%⁹⁷

In the above compact, one can hardly see the relationship between the state's charging inversely proportionate higher percentages of net wins when resulting lower tribal membership occurs to the state's purported justification of exclusivity or defraying regulatory costs. This provision creates the appearance that the state of California wants a bigger piece of the pie when wealth may be consolidated among fewer tribal members.

In June 2005, Governor Swwharzenegger negotiated new amendments to the existing Tribal-State compacts with the Quechan and Yurok tribes.⁹⁸ The 2005 compacts include provisions for tribal contribution to the State ranging from 10% to 25% of net wins based on a sliding scale.⁹⁹ The state will receive 10% of the first \$50 million net win, 14% of the \$50-\$100 million net win, 18% of the \$100 to \$150 million net win, 22% of the \$150-\$200 million net win

⁹⁷ *Id.* at § 4.3.1.

⁹⁸ Governor Swwharzenegger Announces Indian Gaming Agreements, press release (6-16-2005) *available at*: http://www.cgcc.ca.gov/compacts/Quechan%20and%20Fort%20Yuma%20Compacts_061605.pdf (last viewed 5-22-2006)[hereinafter Cal. Indian Gaming Release 2].

⁹⁹ Cal. Indian Gaming Release 2, *supra* note 94; *See also* AMENDMENT TO THE TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE YUROK TRIBE, *available at* http://www.cgcc.ca.gov/compacts/Yurok_Compact.pdf; *See ALSO* AMENDMENT TO THE TRIBAL-STATE COMPACT

and 25% of the net win over \$250 million.¹⁰⁰ Interestingly the amendment to the Quechan compacts have a provision in which the percentage reaped by the state on the initial \$50 million net win increase from 10% to 12% if tribal membership falls below 2500.¹⁰¹ Additionally the Quechan contract contains a provision committing the tribe to a payment of \$900 dollars to non gaming tribes for each gaming devices operated in excess of 700 machines, if the Tribe earns more that \$75 million annually.¹⁰²

The compacts also contain various labor, liability, insurance, and notice provisions as well as the right to cease payments if the a non tribal entity legally offers slot machines with in 55 miles of the tribes casinos.¹⁰³

2. Michigan

In 1990 pursuant to the IGRA, 25 USCA § 2710 (d)(3)(A) six tribes in the state of Michigan filed an action against the Governor of Michigan for failing to negotiate in good faith.¹⁰⁴ In 1993 after three years of litigation the court entered a Consent Judgement with the contingent upon the approval of Class III gaming Tribal-State compacts by DOI.¹⁰⁵ The Consent Judgements provided that the tribes would pay the State of Michigan 8% of net wins and local governments 2% of net wins from slot machines operated pursuant to the compacts.¹⁰⁶ These provisions were placed in the Consent Judgement and not contained in the tribal state compacts

BETWEEN THE STATE OF CALIFORNIA AND THE QUECHAN TRIBE, available at:

http://www.cgcc.ca.gov/compacts/Quechan_Compact

¹⁰⁰ Cal. Indian Gaming Release 2, *supra* note 94

¹⁰¹ Apparently this provision is intended to prevent the increase in tribal per capita distributions in the event of decreased membership rolls by increasing the required distribution to the state.

¹⁰² Cal. Indian Gaming Release 2, *supra* note 94; *See also* AMENDMENT TO THE TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE QUECHAN TRIBE.

¹⁰³ Cal. Indian Gaming Release 2, *supra* note 94; *See also*: AMENDMENT TO THE TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE YUOK TRIBE; *See also* AMENDMENT TO THE TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE QUECHAN TRIBE.

¹⁰⁴ *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, Governor of Michigan, 93 F. Sup. 2d at 851

¹⁰⁵ *Id.*; THE MICHIGAN GAMING LAW WEBSITE, MICHIGAN GAMING: OVERVIEW, available at:

<http://www.michigangaming.com/Overview.html#over-Indian> (last viewed on 5-23-06).

¹⁰⁶ *Id.*

presumably to avoid scrutiny by the DOI and characterization as an improper tax on Indian Gaming under the IGRA of the local payments which were pegged to local tax rates.¹⁰⁷ The Consent Judgment also contained an exclusivity provision that invalidated the tribes obligation to make payments to the state in the event that additional licenses were authorized by the state to engage in Class III gaming in the state of Michigan.¹⁰⁸

In 1996 voters in the state of Michigan passed “Proposition E” resulting in the Gaming Control and Revenue Act which authorized the construction and operation 3 privately owned casinos in Detroit.¹⁰⁹ Shortly thereafter the Tribes ceased making payments and sued the State of Michigan in Federal court for declaratory judgment invalidating the provisions requiring payments.¹¹⁰ The court held that the mere enactment of the law was insufficient to infringe on the tribes’ exclusivity.¹¹¹ However, in 1998, when the governor entered into Tribal-State compacts with four new tribes, and the original seven threatened to cease payments, and actually did so in February 1999 when the new compacts took effect. The governor filed a motion to compel payment.¹¹² This time the court held that the exclusivity provisions of the original contracts had been violated.¹¹³ The tribes no longer had to make the 8% payments to the state but it did up hold the 2% revenue sharing provisions with local governments because they were not conditioned on substantial exclusivity.¹¹⁴

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Sault Ste. Marie Tribe of Chippewa Indians v. Engler, Governor of Michigan*, 93 F. Sup. 2d at 851; *See also* MICHIGAN GAMING CONTROL AND REVEUE ACT, MICH. COMP. LAWS §432.201-226 (2006); *See also* THE MICHIGAN GAMING LAW WEBSITE, *supra* note 105; *See also* Lent, *supra* note 7, at 452 (2003).

¹¹⁰ *Sault Ste. Marie Tribe of Chippewa Indians v. Engler, Governor of Michigan*, 93 F. Sup. 2d at 851

¹¹¹ *Id.* at 853.

¹¹² *Id.* at 853-855.

¹¹³ *Id.* 93 F. Sup. 2d at 855.

¹¹⁴ *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler, Governor of Michigan, Consent Judgment, Civil No. 1:90 CV 611, paras 6,8, available at: http://www.michigan.gov/documents/SSM_v_Engler_Stip_Consent_70619_7.pdf (last viewed 5-23-06); *See also*; Lent, *supra* note 7, at 459 (2003).*

The new 1998 compacts contain a limited exclusivity clause that the 8% payments due under the compact were conditioned upon no other entities being authorized to conduct gaming operations except for the other tribes and the three casinos in Detroit.¹¹⁵ Nine tribes currently operate 17 casinos in Michigan most of which are located in the Upper Peninsula.¹¹⁶ Substantial Exclusivity seems to be the mode for avoiding characterization of the revenue sharing agreements as a tax. Although one must question, the substantiality of the exclusivity Michigan offers.

3. New Mexico

Twelve tribes negotiated Tribal-State compacts with New Mexico in 1997 that contained a revenue sharing provision providing for 16% of slot machine net revenues.¹¹⁷ The Secretary of the DOI expressed concerns about the lack of a substantial exclusivity agreement, considering the compacts allowed the state to authorize a state lottery, and many types of fraternal and charitable organizations to operate gaming devices as well as allowing the operation of gaming devices at racetracks.¹¹⁸ But the DOI took no action and let the waiting period expire at the request of the tribes, and the compacts were approved by default.¹¹⁹ The tribes signed the agreements despite their displeasure with the terms in hopes of arbitrating the agreement to obtain terms that were more favorable to them.¹²⁰ The tribes deposited the amounts due under the revenue sharing agreements in escrow and in 2001 after years of litigation all but two of the tribes had settled

¹¹⁵ COMPACT BETWEEN THE THE NOTTAWASEPPI HURON BAND OF POTAWATOMI AND THE STATE OF MICHIGAN, § 17 (a)-(c), *available at*: http://www.michigan.gov/documents/NHB_Compact_70601_7.pdf (last viewed on 5-23-06).

¹¹⁶ *also* THE MICHIGAN GAMING LAW WEBSITE, *supra* note 105

¹¹⁷ Lent, *supra* note 7, at 452 (2003).

¹¹⁸ *See* Grover, *supra* note 29, part III.B.3.

¹¹⁹ STATE OF NEW MEXICO GAMING CONTROL BOARD, NEW MEXICO GAMING HISTORICAL PERSPECTIVE, *available at*: <http://www.nmgcb.org/tribal/history.htm> (last viewed 5-22-06); *See also* Grover, *supra* note 29, part III.B.3.

¹²⁰ *See* Lent, *supra* note 7, at fn. 84.

their disputes and entered into new gaming contracts.¹²¹ In 2004 the Mescalero Apache Tribe settle and in 2005 the Pueblo of Pojoaque tribe also settled their case and both entered into the new compacts.¹²²

The new Tribal State compacts reduce the revenue sharing provision to 8%.¹²³ But the compact still contain similar provisions allowing the state to authorize fraternal and charitable organizations, and even race tracks, to engage in the operation of class III gaming machines.¹²⁴ The DOI approved the compacts (notwithstanding the obvious lack of exclusivity) citing that the geographic area of exclusivity was sufficient.¹²⁵

4. Arizona

Governor Hull began negotiating the renewal of Tribal-State compacts in Arizona in 2000, which after some litigation, concluded in 2002, and by 2003 Governor Napolitano and six tribes signed the new standard form contract.¹²⁶ The Arizona standard form contract provides for a graduated revenue sharing agreement. The Tribal contributions are purportedly consideration in exchange for substantial exclusivity covenants with the state. The amount of the tribe's class III net wins to be contributed amount to:

- (1) One percent (1%) of the first twenty-five million dollars (\$25,000,000.00);
- (2) Three percent (3%) of the next fifty million dollars (\$50,000,000.00);
- (3) Six percent (6%) of the next twenty-five million dollars (\$25,000,000.00)
- (4) Eight percent (8%) of Class III Net Win in excess of one hundred million dollars (\$100,000,000.00).¹²⁷

¹²¹ *Id.*

¹²² *Id.*

¹²³ STATE OF NEW MEXICO GAMING CONTROL BOARD, PROPOSED TRIBAL STATE CLASS III GAMING COMPACT, § 11 (C) (2), *available at*: http://www.nmgcb.org/tribal/adv_ops/2006-1.pdf (last viewed 5-22-06).

¹²⁴ *Id.* at § 11 (D) (2) (a)-(d).

¹²⁵ DEPARTMENT OF THE INTERIOR, LETTER FROM NEAL A. MCCALED, ASSISTANT SECRETARY FOR INDIAN AFFAIRS TO THE HONORABLE GARY JOHNSON, GOVERNOR OF NEW MEXICO (Nov. 21 2001).

¹²⁶ ARIZONA DEPARTMENT OF GAMING, TIMELINE, *available at*: <http://www.gm.state.az.us/timeline.htm> (last viewed 5/17/06).

¹²⁷ ARIZONA TRIBAL STATE COMPACT, § 12 (b), *available at*: <http://www.gm.state.az.us/compact/final.pdf> (last viewed 5/17/06).

Tribal Contributions received by Arizona under the compact are distributed to special social welfare funds created by statute.¹²⁸ The Tribe is required to make 12% of their respective revenue sharing distribution directly to local towns, cities, and counties “for governmental services that benefit the general public, including public safety, mitigation of impacts of gaming, or promotion of commerce and economic development” or the Commerce and Economic Development Commission Local Communities Fund.¹²⁹ The Tribe must distribute the remaining 88% of its required contribution to the Arizona Benefits Fund.¹³⁰ The monies contributed to this fund are distributed according to A.R.S. §5-601.02. Section (H) provides:

3. Monies in the Arizona benefits fund, including all investment earnings, shall be allocated as follows:

(a)(i) Eight million dollars or nine percent, whichever is greater, shall be used for reimbursement of administrative and regulatory expenses, including expenses for development of and access to any online electronic game management systems and for law enforcement activities incurred by the department of gaming pursuant to this chapter. Any monies that are allocated pursuant to this sub § 3(a) that are not appropriated to the department of gaming shall be deposited in the instructional improvement fund established by section 15-979.

(ii) Two percent shall be used by the department of gaming to fund state and local programs for the prevention and treatment of, and education concerning, problem gambling.

(b) Of the monies in the Arizona benefits fund that are not allocated pursuant to subdivision (a):

(i) Fifty-six percent shall be deposited in the instructional improvement fund established by section 15-979 for use by school districts for classroom size reduction, teacher salary increases, dropout prevention programs, and instructional improvement programs.

(ii) Twenty-eight percent shall be deposited in the trauma and emergency services fund established by § 36-2903.07.

(iii) Eight percent shall be deposited in the Arizona wildlife conservation fund established by § 17-299.

(iv) Eight percent shall be deposited in the tourism fund account established by paragraph 4 of subsection A of § 41-2306 for statewide tourism promotion.¹³¹

¹²⁸ *Id.*; See also A.R.S. §5-601.02(H) (2006); See also A.R.S. § 41-1505.12 (2006).

¹²⁹ ARIZONA TRIBAL STATE COMPACT, § 12 (b); See also A.R.S. § 41-1505.12.

¹³⁰ A.R.S. §5-601.02(H) (2006).

¹³¹ *Id.* at (H)(3).

The final sentence of this paragraph state that “ the State shall not impose any tax, fee, charge, or other assessment upon the Tribe’s Gaming Operations.”¹³² However maybe it should read no *other* tax, will be levied because the A.R.S. §5-601.02(H)(3) provisions obviously allocate monies for the general support of the welfare of the state, and that, possess all the incidences of a tax.

5. Oklahoma -- The compact machine approach

In November of 2004 Oklahoma voters approved the Legislature referred “State-Tribal Gaming Act.”¹³³ The following year 29 tribes entered into Class III Tribal-State gaming compacts with Oklahoma.¹³⁴ The compacts provide tribes with “substantial exclusivity” in exchange for fee of 4% of the first \$10,000,000 of adjusted gross revenues from slot machines, 5% of the next \$10,000,000 of adjusted gross revenues from slot machines, and 6% of all of adjusted gross revenues from slot machines above \$20,000,000.¹³⁵ The compact also requires a fee of 10% of adjusted gross revenues from non-house banked common pool type games such as Texas hold ’em poker games.¹³⁶ In addition to the monthly payments of the percent of net revenues discussed above the tribes must also pay a \$50,000 initial start up fee for administration and oversight expenses.¹³⁷ The revenues received from tribal gaming and race track facilities go predominately towards primary and secondary education with 12% going towards scholarships for children of low income families attending post secondary education programs.¹³⁸

¹³² ARIZONA TRIBAL STATE COMPACT, § 12 (c).

¹³³ OKLAHOMA TRIBAL-STATE GAMING COMPACT STATE COMPLIANCE AGENCY (SCA), *available at*: http://www.ok.gov/OGC/About_Tribal-State_Gaming_Compliance_Unit/ (last viewed 5-23-04)

¹³⁴ OKLAHOMA OFFICE OF STATE FINANCE GAMING COMPLIANCE UNIT, COMPACTED TRIBES, *available at*: http://www.ok.gov/OGC/Compacted_Tribes/index.html (last viewed on 5-24-06).

¹³⁵ MODEL TRIBAL GAMING COMPACT BETWEEN THE _____ TRIBE AND THE STATE OF OKLAHOMA, part 11. A. 2. a., *available at*: <http://www.ok.gov/OGC/documents/Model%20Compact.pdf> (last viewed on 5-24-06)

¹³⁶ *Id.* at part 11. A. 2. b.

¹³⁷ *Id.* at, part 11. C.

¹³⁸ *See Racino Revenues Fall Off Pace*, *available at*:: <http://www.kotv.com/news/?97850> (last viewed 5-23-06).

The exclusivity clause provides that if a state authorizes a non-tribal entity to participate in Class III gaming within 45 miles of the tribes gaming facility the state must assess a fee 50% of gross revenues on the newly established non-tribal entity and remit that portion to the tribe as liquidated damages.¹³⁹ Furthermore, tribes agree not to locate gaming facilities within 20 miles of another recipient of a Class III tribal gaming license.¹⁴⁰

Every electronic game and play must be recorded to ensure compliance with the act.¹⁴¹ Following every play on a terminal, the data must be maintained electronically via an electronic accounting system¹⁴² and viewable electronically or via printed report and must include basic information including the amount paid in, the game played and the result and prize awarded.¹⁴³ The state law requiring these so called “compact games” are unique in the area of tribal gaming, however, as of the beginning of 2006 many tribes have yet to install such machines, in fact, the Apache Nation of Oklahoma’s casino which opened up on May 9, 2006 was the first fully compacted casino in the state.¹⁴⁴

6. Louisiana

In Louisiana the Jean Band of Choctaw Indians and the state entered into a compact in 2002 that was disapproved because the revenues sharing agreement in the compact reflected that which was imposed as a tax on state sanctioned commercial river boats.¹⁴⁵

7. Ohio – The New Battle Ground State

A noteworthy development in recent years has been the attempt to move Indian gaming to off reservation locations in municipalities. The attempts to expand tribal gaming activities to

¹³⁹ MODEL TRIBAL GAMING COMPACT BETWEEN THE _____ TRIBE AND THE STATE OF OKLAHOMA, part 11. E.

¹⁴⁰ *Id.* at, part 11. A. F.

¹⁴¹ O. S. § 270 (D) (2006).

¹⁴² *Id.*

¹⁴³ O. S. § 271 (5)(B) (2006).

off reservation facilities have generated a fervor of debate among tribes, politicians, scholars, and the public. Some commentators question the social cost of gambling with regard to rapid pace of expansion in tribal and state-sanctioned gaming.¹⁴⁶ “[T]he availability of gambling is linked to an increase in problem gambling [which] is linked to a wide variety of social problems and crimes. This indicates that if access to gambling is limited, an area will not experience the social and criminal problem associated to cities and states with legal forms of gambling.”¹⁴⁷ In Ohio, “[I]legal slot machines and casinos have been proposed by politicians to solve the state's financial problems and rejuvenate waning interest in horse racing. . . . [I]f casino and slot machine initiatives fail, the racetracks in Ohio will soon be forced to close their doors.”¹⁴⁸

As of 2006, Ohio allows pari-mutuel betting at horse racetracks, and a state and multistate lottery but does not allow any casino type games.¹⁴⁹ Moreover, Ohio currently does not have any federally recognized tribes with lands in trust located in Ohio upon which Indian gaming could be conducted. In fact, the IGRA prohibits tribal gaming on land acquired in trust after the statutes enactment in October 17, 1988, however, there are several exceptions provided in the statute.¹⁵⁰ The first exception applies if the tribe did not have a reservation as of the above date.¹⁵¹ The second exception applies if a federally recognized tribe and a state agree to permit gaming on newly acquired lands, but only if the Governor of the state consents.¹⁵² Finally the

¹⁴⁴ Ron Jackson, *Apache Tribes Get OK to Open Casino*, THE OKLAHOMAN, May 6, 2006, available at: <http://newsok.com/article/1836582/> (last viewed on 5-23-05).

¹⁴⁵ Anderson *supra* note 73, at pg. 373.

¹⁴⁶ See generally Aaron V Burton, *Social Marketing Aimed at Evangelical Christians: Pushing an Anti-gambling Agenda Social Marketing Campaign Planbook Prepared for The National Coalition Against Legalized Gambling* (Unpublished Paper on File with the author to be Presented at the Ohio Communication Association Conference, Oct. 7th 2006).

¹⁴⁷ *Id.* at 14.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ Blake A, Watson, *Indian Gambling In Ohio: What Are The Odds?*, 32 CAP. U. L. REV. 237, 246.

¹⁵⁰ *Id.* at 240; See also 25 U.S.C. § 2719(a)-(a)

¹⁵¹ 25 U.S.C. § 2719(a)(2); See also Watson, *supra* note 149, at 240.

¹⁵² 25 U.S.C. § 2719(b)(1)(A); See also Watson, *supra* note 149, at 240.

relevant exception (currently faced by Ohio) provides that lands placed in trust for a federally recognized tribe pursuant to the settlement of a land claim or established as the initial reservation of an Indian tribe recently acknowledged by the secretary may be used for tribal gaming.¹⁵³

Current measures to introduce Indian Gaming in Ohio include an attempt by the Eastern Shawnee tribe of Oklahoma to establish gaming facilities in several Ohio counties which are currently not part of any an Indian Reservation but are the subject of a broad based tribal land-claim.¹⁵⁴ The tribe has already signed casino agreements with several communities in anticipation of a favorable decision on its land claim. However the Supreme Courts decision in *The City of Sherrill v. Oneida Indian Nation of New York* __ S.Ct. __ no. 03-885 reversing and remanding 337 F.3rd 139 in which the court denied of the tribes land claim citing doctrine of latches and the length of time between the time the claim arose and filing as acting as a waiver of the tribe's claim and their sovereign rights over the territory. The recent denial of certiorari in *Cayuga Indian Nation of NY. v. Pataki* __ S.Ct. __, 2006 WL 283872., has all but foreclosed other tribes' land claims such as the one in Ohio by the Eastern Shawnee Tribe of Oklahoma.¹⁵⁵

Off reservation gaming measures have yet to be approved in Ohio and battle ground states such as it will likely be at the for front of the tribal gaming debate in the years to come. However, moves to initiate off reservation gaming have been under taken in California and most recently Barstow, Oklahoma.¹⁵⁶

VI. Conclusion

A. A View to The Future

¹⁵³ 25 U.S.C. § 2719(b)(1)(B)(i)-(ii); *See also* Watson, *supra* note 149, at 240.

¹⁵⁴ Rick Armon, *U.S. Supreme Court's Refusal to Hear N.Y. Case is Bad News for Ohio Efforts.*, AKRON BEACON JOURNAL, (Sun. May 21, 2006) available at: <http://www.ohio.com/mld/ohio/news/14633123.htm> (last viewed on 5-24-2006).

¹⁵⁵ *Id.*

The current trend of states to demand an increasing share of net wins from tribes under newly negotiated or renegotiated Tribal-State has prompted some tribes to diversify their operations from strictly casinos to other for profit activities.¹⁵⁷ The Tulalip Tribe of Washington has chartered its own City, Quil Ceda village that is home to shopping, gaming and hospitality businesses.¹⁵⁸ Quil Ceda is located on the reservation and is the first federally chartered municipality since the District of Columbia.¹⁵⁹ The tribes issued tax-exempt bonds pursuant to the Indian Tribal Government Tax Status Act of 1982 to finance projects developing the infrastructure around Quil Ceda.¹⁶⁰ The IRS issued a ruling “that Quil Ceda, as a wholly controlled political subdivision of qualifying tribes, has the authority to issue bonds.”¹⁶¹ The incorporation offers many advantages, such as fending off attempts to annex Indian lands, creating investment incentives for outside business to enter Quil Ceda without binding the entire tribe, and keeping the remainder of the reservation rural.¹⁶² Although the city is located within a reservation, retailers who lease parcels are still subject to state sales taxation by virtue of federal law.¹⁶³ Tribal members are currently lobbying for the return of some of the sales tax revenues generated at Quil Ceda to the reservation in the form of a revenue sharing bill, but efforts have fall short as of early 2006, however a lawsuit against the state is a possibility.¹⁶⁴

¹⁵⁶ Staff Reporters, *City Council to Reconsider Casino Initiative Position*, DESERT DISPATCH, (Mon. May 22, 2006); See also Richard Halstead, *Casino Showdown Builds*, MARION INDEPENDENT JOURNAL, (May 15, 2006).

¹⁵⁷ See Margaret Graham-Tebo, *Betting On Their Future, Flush With Casino Cash, American Indians Are Laying the Creative Legal Groundwork for New Ventures*, ABA JOURNAL, (May 5, 2005), available at: www.abanet.org/journal/redesign/05fnatam.html (last viewed 5-31-06).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See 26 U.S.C. § 7871 (c),(d); 26 U.S.C. § 130.

¹⁶¹ See Graham-Tebo, *supra* note 157; See also 26 U.S.C.A. § 7871(d).

¹⁶² See Graham-Tebo, *supra* note 157.

¹⁶³ *Id.*; see generally also, *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 128 (1985) (holding explicit federal authorization is required for state taxation of activities conducted on Indian lands).

¹⁶⁴ *Id.*

The incorporation of Quil Ceda is a monument to the IGRA's aspiration goals of fostering tribal independence.¹⁶⁵ Nevertheless, Quil Ceda is not the only venture the Tulalip tribe has started with casino profits, It also operates a for profit public golf course.¹⁶⁶ Additionally the Casino revenues have help the tribe expand current tribal infrastructure including the construction of a foster home, assisted living center for elders, and a tribal health center.¹⁶⁷

B. In Summary

As tribal gaming facilities increase in number and move off traditional reservations, the attempt to characterize state fees as bargained for consideration or improper taxes will become even more convoluted due to minimal guidance by the courts in this area. The growing trend of many states to structure revenue sharing agreements in the form of graduated scales based on percentages of net wins makes it hard to argue that the fees charged by states bear any rational relationship to services they provide.¹⁶⁸ Furthermore, the increasing amounts of the percentages of net wins demanded by states (such as California) only further attenuates the argument that the amounts charged are not taxes but rather reimbursement for regulatory costs. Finally the growing number of compacts entered into with Tribal entities in states such as California, Michigan, Oklahoma, and Mississippi which have authorized non-tribal entities to compete with tribes in the gaming industries (albeit geographically limited) displaces their argument that the revenue sharing provisions represent payment for a valuable service (providing substantial exclusivity) from the state rather than a guise for an unauthorized tax.

¹⁶⁵ 25 U.S.C.A § 2701 (4); 25 U.S.C.A § 2702 (1).

¹⁶⁶ See Graham-Tebo, *supra* note 157

¹⁶⁷ *Id.*

¹⁶⁸ See *supra*, Part.V.B, For examples See Arizona, California, Oklahoma Tribal-State compacts.

The erosion of the tribal bargaining chip of threat of lawsuit has likely vanquished any hope of good faith negotiations.¹⁶⁹ However, the IGRA has left a gaping loophole for tribes to enter into states without a reservation, and as the casinos come to the few states that have cashed in, we are likely to see more pillaging of Indian profits. In any event, many states are poised to continue to reap the immense benefits of Tribal gaming until the trend folds. This author can only hope that more tribes follow the lead of the Tulalip Tribe of Washington and establish self-sufficiency before the luck runs out on the roll with the Indian Casino.

¹⁶⁹ *See generally* Seminole Tribe, 517 U.S. 44.