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UNIVERSITY OF OKLAHOMA

GRADUATE COLLEGE

INTEREST GROUP FEDERALISM: INDIAN GAMING AND THE STATUS OF INDIAN TRIBES IN THE AMERICAN POLITICAL SYSTEM

A Dissertation

SUBMITTED TO THE GRADUATE FACULTY

in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

By

W. DALE MASON
Norman, Oklahoma
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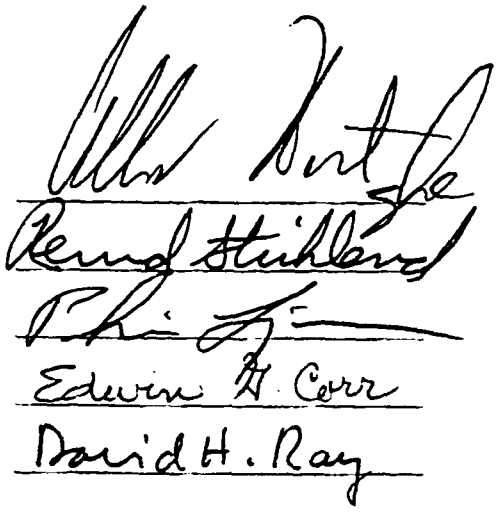
INTEREST GROUP FEDERALISM: INDIAN GAMING AND THE STATUS OF INDIAN TRIBES IN THE AMERICAN POLITICAL SYSTEM

A Dissertation APPROVED FOR THE DEPARTMENT OF POLITICAL SCIENCE

BY



ACKNOWLEDGEMENTS

"What is Past is Prologue" is palpably true in American Indian policy. In no other area of policy and law is the past given such expression in the present. In researching this dissertation, the effects of past policies, congressional acts, and court opinions were ever present. Past events have shaped Indian policy, Indian-white relations, the way Indians live their lives, and the sovereign status of tribal governments. For example, the history of Oklahoma tribes has helped shape contemporary state politics and culture. That the Five Civilized Tribes are more successful in reaching agreement with the State on some issues is partly the result of their past political development in Indian Territory.

In New Mexico the past is defined in terms of centuries; and Indian-white relations extend back 350 years. Political decision-making among the Pueblos is quite different from that of the Navajo and Apache tribes and can be traced back to the time before the entrada. I personally observed the continuing currency of past events on present realities when I interviewed the Governor of Pojoaque Pueblo, Jake Viarrial. The Pueblo itself had ceased to exist as a separate entity early in this century when its few remaining residents were urged to move elsewhere. However the Pueblo began to re-form in the 1930s. The Pueblo had lost its religious societies and kivas, and its first governor was Hispanic. For me, sitting in Governor Viarrial's office less than a mile from both the

Pueblo's casino and the Pueblo's new kiva, paid for from casino profits, personified the continuity and change in Indian life.

There exists in Indian history almost a Hegelian thesis-antithesis-synthesis process. Researching this dissertation was a journey through that process. I was fortunate to have selected a topic to study in a state where events provided a continuing shaping and reshaping of the direction I was headed. Indian gaming provided an opportunity to continue what has been a long journey - to determine the status of Indian tribes in the American political system. The events in New Mexico over a period of three years alerted me to changes not only in data but other research possibilities. It was also fun, heady, and exciting to be so close to such momentous events.

Along the way I have met some very impressive, dedicated, and brilliant people. As I explain in the Introduction, three separate interviews helped shape the early direction of this project. Two of those individuals, Gary Pitchlynn (Choctaw) and Frank Chaves (Sandia Pueblo) continued to play important roles in providing information and guiding me in the right direction when I strayed. Gary was more than generous with his time and insightful comments. Frank Chaves was perhaps the most influential person I met during the course of my journey up and down the Rio Grande. Frank opened the door that permitted me to see from the inside how the tribes were

playing the political game. Frank is one of the most dignified and dedicated men I have ever known in public life.

Through Frank Chaves I was able to have fairly regular contact with the tribes' political consultant, Rex Hackler. Rex is a pro who himself was experiencing a different kind of campaign, where more than winning at the polls was at stake. Frank also introduced me to Odis Echols, perhaps the state's most influential lobbyist.

Along the way, especially this year, serendipity seemed to be guiding the research. After chasing him for more than a year and a half, a last chance encounter with attorney Kevin Gover (Pawnee) in the Round House led to an evening of political insight from him and his sister Lisa Gover. It was an enjoyable evening and demonstrated the brilliance of the man who guides the tribes' political strategy. Attorney Richard Hughes was consistently helpful with up to the minute information and analysis of the legal situations in which the tribes found themselves. I was also fortunate to interview several Pueblo Governors and Councilmen, including Governor Viarrial, the most colorful and volatile of the Pueblo leaders. LaDonna Harris, President of Americans for Indian Opportunity kindly spent five hours with me one day and opened her gaming files to me. Dr. Elizabeth Rosenthal kindly provided a place to stay in Santa Fe and encouragement at a crucial point in the research. In addition to Gary Pitchlynn, others in Oklahoma were helpful, including Ada attorney Jess

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On an even more personal level I want to thank all of the faculty members who have served on my Graduate Committee: Allen Hertzke, Rennard Strickland, Ed Coor, David Ray, Phil Lujan (Kiowa-Taos), Susan Zlomke, Jon Hale, and Bill Hagan. No graduate student ever had committee members more supportive than these individuals. They provided personal support and intellectual challenges. Prof. Hertzke was especially crucial in providing guidance, enthusiasm, and keeping me on track. To each and everyone member of my committee I owe a debt of thanks.

I have benefited from some remarkable teachers at OU: Allen Hertzke, Ron Peters, Susan Zlomke, Betsy Gunn, Ed Coor, Al Trachtenberg, Tom Hagan, and Rennard Strickland. In some way, each helped shape the way I think about, write about, and approach problems. Arguably no one can receive a Ph.D. in Political Science from the University of Oklahoma without the cooperation and support of Geri Rowden. She has for six years been a supporter, a butt kicker, a facilitator, and a friend. This has continued since I moved to Gallup, New Mexico. She

too is one whose support I cannot begin to repay. Mickey Ward and Mary France have also been patient and helpful.

Department Chair Ron Peters has at times facilitated my research, including providing unexpected but very needed financial support. Professor Stephen Sloan became a friend and supporter. His good humored encouragement has helped during some rough times. Professor Cindy Simon-Rosenthal was a friend when I needed one.

Others over the years have provided personal encouragement and friendship, including Angie Vaught, Bruce Poolaw, Wanda Faber, Erich and Tammy Frankland, Gayle Lawn-Day, Eric Shabuya, Deb St. John, Angela Jones, Terry Garrett, Mike and Alyce Rieck, and Jeanne Harris. My sister Linda has given me her moral support over the years and was a source of endless encouragement and advice during my move to Gallup.

I owe a thanks to my Spring 1995 "American Politics and Indian Cultures" students. They helped me achieve a fundamental breakthrough in understanding Indian policy from a different perspective. It was a very special class. I also owe a thanks to Richard Fenno for his insightful advice: "Put 'Indians' behind the colon." Although I have been at UNM-Gallup less than three months, I appreciate the support of Behavioral and Social Sciences Chair Dr. Helen Zongolowicz at the University of New Mexico at Gallup. Department Secretary Erlinda Torres, Assistant Professor of History Bruce Gjeltema, Joan and Professor Harry Sheski, and AVS Secretary Janice E.

Van Lierop have demonstrated kindness and understanding. I owe Joan Sheski a large debt of gratitude for her prompt and thorough proofing of the manuscript. When it looked as if the "reading copy" of this manuscript would never get printed, Janice E. Van Lierop came to my rescue and made sure that it indeed did get printed.

Aside from the members of my Committee, the member of the academy most responsible for this dissertation is Dr. Norman Thomas, former Chair of the Political Science Department at the University of Cincinnati. Literally, I would have achieved nothing academically without his support, encouragement, and suggestions over a period of nearly 17 years. During my undergraduate years he provided personal support and advice during a very difficult time in my life. He also suggested the topic for my Masters Thesis and recommended OU as the place to pursue my Ph.D. In addition to this, our politics were compatible, both of us considering ourselves New Deal Liberals.

I wish that my mom and dad were alive to see their son achieve what they so long wanted and encouraged him to do. My mom always wanted me to be a doctor; I think she would accept the fact that I didn't get the title from a medical school. She did not live long enough to see me begin this journey. My dad did. For my first three years at OU, dad was my friend and confidant and I know how proud he was of what I was doing. I lost them much too soon.

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ABSTRACT

This dissertation seeks to answer the question, "What is the status of Indian tribes in the American political system at the end of the twentieth century" by studying how New Mexico and Oklahoma tribes have attempted to protect their gaming interests. The findings indicate that this status is unique in theory and vulnerable in practice. Tribal governments have commonly understood attributes of both sovereigns and interest groups. Their vulnerability is apparent when certain conditions occur, including the political Zeitgeist.

CHAPTER 1: INTRODUCTION

The status of American Indian tribes in the American political system is unlike that of any other participant seeking to achieve its goals within the constitutional and political structure of American politics. The anomalous political status of tribes flows from their having retained vestiges of aboriginal sovereignty and from their constitutionally established relationship with the federal government. The literatures of several disciplines and subdisciplines have not fully explained the status of tribes within the framework of American politics. For some purposes tribes act as sovereign entities similar to states. For other purposes tribes act as interest groups. For still other purposes they act as both simultaneously. But no definition is fully explanatory because of the ability of tribes to act in ways that states and interest groups (or states as interest groups) are unable to do.

More than two hundred years after the Founding and one hundred and twenty five years after the ending of the treaty making process, the political status of Indian tribes continues to evolve. Over the past thirty years, Indians have played an increasingly active role in shaping and implementing Indian policy. The ability of tribes to perform the functions of governance has been strengthened and there is a large number of active Indian organizations that support tribal sovereignty. The historic concerns of

that support tribal sovereignty. The historic concerns of Indians, such as health care, education, religious freedom, law enforcement, and taxation remain significant issues for tribes and Indian organizations.

There are new concerns as well. Economic development, hazardous waste storage, and gaming, among other issues, have emerged in the last decade-and-a-half as new areas of policy requiring the attention of tribal governments. Of these, gaming has become possibly the most visible and contentious issue in Indian Country. Since the 1987 Cabazon decision by the Supreme Court and the 1988 Indian Gaming Regulatory Act (IGRA), Indian gaming has become the focus of many tribes in their efforts to assert their sovereign status and achieve economic independence.

For those tribes engaged in this activity, gaming is both a means to an end and an end in itself. The revenue raised from gaming operations can help tribes gain new political and economic independence and provide funds for long neglected tribal needs. Gaming also represents a stand for political independence as tribes assert their sovereign right to determine for themselves what they can control on tribal lands. It is an issue that is helping to define the limits of state involvement in Indian affairs and the shape of federalism generally, from law enforcement to taxation. Finally, gaming is providing an opportunity and the

financial resources for tribes to use their political status to achieve their policy goals.

New Mexico provides an opportunity to view in all its complexity how Indians have used their anomalous political status to protect tribal gaming. Using their sovereign status and following Cabazon and IGRA, a number of Pueblos and two Apache tribes are operating gaming establishments and have signed Class III gaming compacts with the State of New Mexico. Having been earlier blocked in these efforts, tribes followed two paths. The first, including filing suit in federal court under IGRA and lobbying the state legislature for a change in the State's gaming laws, is in accordance with their sovereign status. The second, active involvement in New Mexico political campaigns, follows the path of interest groups rather than a sovereign power, as generally understood. For example, several Pueblo tribal councils and the Mescalero Apache Tribe formally endorsed and made campaign contributions to candidates in the 1994 gubernatorial election based solely on the candidates' position on Indian gaming.

Oklahoma provides an interesting counterpoint to the gaming related political activities of New Mexico tribes. Barred from the kinds of gaming operations permitted in New Mexico, Oklahoma Indian tribes have not had the same opportunities under federal and state law to expand games of chance. However, while there has been political opposition

to expanded Indian gaming in Oklahoma, four gaming compacts have been successfully negotiated. Another difference between Oklahoma and New Mexico is the much lower level of political activity by Indian tribes in the former.

Indian gaming, then, is clearly an issue ripe for research by political science. By attempting to discover the status of Indian tribes in the political system it is also possible to inform the discipline's understanding about federalism and interest group activity. Both are fundamental to the American political system. The research question for this dissertation, then, has been

> "What is the status of American Indians in American politics in the late 20th Century and, as seen in the issue of Indian gaming, how do they use this status to achieve their goals?"

METHODOLOGY

The research for this dissertation was qualitative in nature and comprised 1) an in-depth analysis, review, and reconsideration of the relevant literature of American politics, Indian policy, and Indian gaming, 2) interviews with significant participants and observers of these topics and observations of significant events, including rallies and legislative sessions, 3) archival material relevant to Indian policy, including the Fred Harris Collection at the Carl Albert Center, 4) on-going, in-depth research and analysis of various news sources covering Indian gaming.

The result of this research was a "thick description" of how tribes have advanced their gaming and other interests by using the resources available to them as a result of their unique political status and, in turn where this status places Indian tribes in the political system in the late 20th Century.

1. Literature Review

The background of this research attempted to discover those areas of American politics that are relevant to the study of Indian policy and those that are not, including where and how Indian policy fits in current understandings of the institutions and processes of American politics. By focusing on Indian gaming the research sought to place Indian policy within a context that informs both Indian politics and the American political system. Given the dearth of political science literature relating to this topic, as well as its relative newness as a policy issue, other disciplines were sought out to further the goal of this research.

Whether one defines politics as "the authoritative allocation of values" or the process of "who gets what, when, where and how," American Indians would seem a natural subject for political scientists, particularly those who specialize in American politics and government. A relatively small but significant part of the United States government is devoted to allocating federal resources to

Indian individuals and tribes. A considerable bureaucracy in the Department of Interior - the Bureau of Indian Affairs - and in the Department of Health and Human Services - the Indian Health Service - is concerned solely with implementing Indian policy (much of the money appropriated for Indian services, especially in the BIA, is for administrative overhead). An entire title of the U.S. Code - Title 25 - is devoted to Indians. Significant portions of Title 18, the federal criminal statutes, are concerned with defining Indian Country and specifying jurisdiction over crimes committed therein.

The United States Senate has a permanent standing committee on Indian Affairs and the Congress has "Plenary power" over Indian affairs (Cohen 1982, Newton 1984). The United States Supreme Court has played a major role in determining Indian policy almost since the creation of that institution (Wilkinson 1987).

Indian issues are also of concern to state and local governments, thus giving Indian policy an intergovernmental and federalism component (Monette 1994). While by law some states have jurisdiction in Indian Country for some purposes, states are generally barred from jurisdiction in Indian Country unless Congress has expressly granted them such power (Cohen 1982). States and tribes are often in conflict over the extent of tribal sovereignty, particularly as it relates to the status of non-Indians in Indian Country

or to the enforcement of treaty rights. Recently, for example, there have been serious disputes in Wisconsin over hunting and fishing rights, and in Oklahoma over the extent of state taxing powers on tribal lands.

The complexity of Indian history and culture makes the study of American Indian policy and politics both perplexing and challenging. However, Indian politics and policy is an area that the discipline of Political Science has long neglected, as Wilmer, Melody, and Murdock argue in a June 1994 PS article. Most of the scholarly work dealing with Indian politics has been done by researchers in other disciplines. The only truly comprehensive study of American Indian policy is that of historian Francis Paul Prucha (1984). Of the two works concerning Indian policy published in the 1980s, one was edited by sometime Political Scientist Vine Deloria, Jr. (Lakota) (1985), and the other by Arrell Morgan Gipson, an historian (1986). Sharon O'Brien, professor of government at the University of Notre Dame, international relations specialist and one of the few recognized Political Science authorities in Indian policy has written one of only two textbooks on tribal governments (1989). The other was written by Howard Meredith (1993). Policy analyst Emma R. Gross published a work on contemporary Indian policy in 1989. A 1992 work on recent developments in Indian policy was edited by two anthropologists, George Pierre Castile and Robert L. Bee.

Bee has also written one of the few studies of Indian-congressional relations (1979).

In an 1989 article in Teaching Political Science, Anne Merline McCulloch noted that the major journals of Political Science rarely publish articles about Indian politics. Over the past thirty-five years only three special issues of journals related to the discipline were devoted to American Indians: in 1958 and 1978 the Annals of the American Academy of Political and Social Sciences and a 1988 issue of the Policy Studies Journal. In 1993 the latter journal published an article by Daniel McCool on Indian water rights.

The question of tribal governments and federalism has only recently been given consideration in the discipline. Publius, a journal devoted to the study of federalism, published its first two articles about Indians in 1993 (McCool 1993a and Wilkins 1993). That same year Publius also mentioned the increasing tribal-state conflict over gaming in its annual review of the "State of American Federalism" (Pagano and Bowman 1993). In 1972 the Bureau of Indian Affairs published the only comprehensive study of the relationship between Indians and the states (Taylor 1972).

Because of the role of law and the federal courts in Indian policy, much of the significant work in theoretical issues of Indian law and policy can be found in law reviews or in the published works of legal scholars specializing in

Indian law. Felix R. Cohen is perhaps the most influential thinker in Indian law since Chief Justice John Marshall. His 1942 Handbook of Federal Indian Law and the 1983 revision remain the significant treatise on the source of Indian sovereignty. In the late 1950s, the Interior Department published a version of the Handbook that reflected current policy considerations rather than the Cohen's interpretation and restatement of Indian law. Today this version is universally rejected as an statement of law.

Russell Lawrence Barsh alone (1982) and with James Youngblood Henderson (1980) have provided criticism of the dominant liberal view of Indian law espoused by Cohen. In a number of works Robert A. Williams (Lumbee) has provided brilliant analyses of the roots of American Indian policy as far back as the Middle Ages (1983, 1990). One Political Science contribution to this line of inquiry is Frances Svensson's 1979 Political Studies article "Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes."

Deloria, alone (1985) and with Clifford Lytle (1983 and 1984) has delved into the roots of contemporary Indian policy and law. Oklahoma City College of Law Dean Rennard Strickland (Cherokee-Osage) has been a prolific authority on the connection between Indian law and policy and the significance of current attitudes in the development of both

(1983, 1986, 1991). Shattuck and Norgen (1993) published the most recent book on the current state of Indian law.

There are numerous outstanding historical studies of individual tribes and their relations with the United States. Contemporary Indian policy has been less well investigated by historians. One of the major exceptions is the work of Alvin Josephy (1971 and 1984). Another is the brief study of President Nixon's Indian policy by Jack D. Forbes (1981). Much of the work on the activism of the late 1960s and early 1970s has been done by non-academics (Johansen 1979, Wyler 1982, Matthiesson 1983). The current author published an article on the activities of the Nebraska American Indian Movement in a special edition of the Journal of the West devoted to Indian leadership (1984). Levitan alone (1969, 1973, 1976, 1980, 1985, 1990) and with Johnson (1975) investigated federal programs designed to aid the poor, including American Indians. Sorkin in 1971 published a study of federal programs and in 1978 a study of Urban Indians.

While many of the above cited works consider in-depth Indian policy, Indian politics, and the nature of Indian sovereignty, none of them delve into the place of tribal governments in the American political system. Nor does the interest group subfield within Political Science shed light on the place of Indian tribes in the American political system. Ironically, one of the seminal works on

subgovernments focused on Indian policy (Freeman 1955, 1965). But it provides an incomplete and outdated picture of Indian policy. More recently Daniel McCool investigated water policy from the perspective of subgovernments in Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water (1987).

The sovereign status of tribes, the constitutional plenary power of Congress in Indian affairs, the federal treaty obligations, and the trust relationship exercised by the federal government place Indian policy outside of classic descriptions of subgovernments and iron triangles.

The literature on interest groups in American political life often explores their theoretical place in the system, including the great debate over pluralism and elitism (Bently 1908, Truman 1951, Latham 1952, Dahl 1956 and 1961, Mills 1959, and Almond and Verba 1965). Schattschneider (1960), McConnell (1966), and Lowi (1969, 1979) sought to demonstrate that the political system is dominated by powerful economic interest groups that have the resources to influence government. But none of these brilliant works touched on Indians as individuals or as tribal governments.

The literature on interest group formation seems off the mark in discussing Indians. Olson's membership benefits, and the works of Salisbury (1969), Salisbury, et al. (1992), and Moe (1991) have not and probably can not apply their

theories to tribal governments as sovereign interest groups, and to individual members who are born into the group.

As the research progressed and new avenues were explored, two other areas of literature were found to be lacking, agenda setting and the role of United States Attorneys. Kingdon's influential work on agenda setting virtually ignores the role of federal courts in setting political and legislative agendas (1984), a flaw he did not correct in his 1995 edition. Henschen and Sidlow partially remedy Kingdon's shortcomings in this area (1989). James Eisenstein has written the only comprehensive work on the role of U.S. Attorneys (1978) but omits several key issues raised by this study. David Burnham's 1996 investigation into the Department of Justice is highly critical of the power exercised by U.S. Attorneys, but his observations are largely outside the scope of this study.

The literature about Indian gaming is sparse but growing. Nearly all of the initial academic considerations of gaming first appeared in law reviews. To date most of the published work on Indian gaming has focused on either the legal and constitutional questions or the economic impact of this increasingly significant phenomenon. Among the former are law review articles that have explored various aspects of IGRA. These include articles concerning the constitutionality of IGRA (Bisset 1988); the IGRA and the Eleventh Amendment (French 1993, Ahola 1993, Jones 1993,

Wiseman 1993); the interstate commerce clause (Hyde 1993); state jurisdiction over Indian gaming (Kading 1992, Locher 1993); and IGRA's "good faith" provision (McCay 1991-1992). Several law review articles have looked at Indian gaming in specific states: Oklahoma (Ridgeway 1993), Rhode Island (Belliveau 1993, Florida (Baradakjy 1994) and Washington (Wenzel 1994/1995). A 1993 Creighton Law Review article by Roland J. Santoni provides an excellent overview of the background and legislative history of IGRA.

Other studies and publications concerning Indian gaming have dealt from different perspectives on the issue. Thomas I. Wilson published an early article on Indian gaming and economic development in a 1989 issue of the Michigan Bar Review. The National Journal's 1993 review of Indian gaming focused on the political and legislative aspects as well as the economic conditions of gaming (Moore 1993). The Christian Century in February raised questions for the church community dealing with ethics and economics of Indian gaming (Magnuson 1994). A June article in State Legislatures approaches the economic development aspect of Indian gaming from a partly inter-governmental perspective (Zelio 1994).

Other studies and publications concerning Indian gaming have approached Indian gaming from related issues. They have appeared in policy center publications, publications of general interest, and those specializing in public policy.

Several scholars have also published or presented brief looks at other aspects of this difficult issue. The National Policy Center has issued a monograph (Robinson 1994) and an early 1994 CQ Researcher devoted an issue to gaming, much of which concerned gambling in Indian Country.

Two book length treatments of Indian gaming have been published. Indian Gaming and the Law is a compilation of papers presented at the 1989 North American Conference on the Status of Indian Gaming (Eadington 1990). A 1995 book detailing the battle for Indian gaming at the Cabazon Band of Mission Indians, Return of the Buffalo: The story Behind America's Indian Gaming Explosion does not provide the story promised in the title. Much better is the 1995 book by gaming expert Robert Goodman. While critical of governments expanding legalized gaming, Goodman acknowledged that there is a difference in Indian gaming.

Three recent works have explored differing political aspects of Indian gaming. In his 1994 "Retained by the People:" A History of American Indians and the Bill of Rights, John R. Wunder presents a brief case study of Indian gaming in Nebraska. Montana State Political Scientist Professor Franke Wilmer published a 1994 monograph entitled Indian Gaming: Players and Stakes (Wilmer 1994). C. Randall Morrison, a Bureau of Indian Affairs employee presented a paper on IGRA and federalism at the 1994 Southwest Social Sciences Conference (Morrison 1994).

2. Where the Literature Falls Short

While Freeman's work was ground breaking, it did not adequately explain the full complexity of Indian policy (Freeman 1955, 1965). It is especially inadequate in light of subsequent developments in Indian affairs. And as Daniel McCool has noted, "there appears to be an optimal policy environment for the classic subgovernment portrayed in the literature (McCool 1990, 278) and Indian policy may fall outside that environment. Cater (1963), Berry (1989), Thurber (1991), Helco (1978), and Salisbury, et al. (1992) seem to fall short. Those who have studied specific policy domains are concerned with essentially private interests, see Lowi (1969,1979), Salisbury, et al.(1992). Ripley and Frankland (1982, 1987) Browne (1990), and Thurber (1991).

The recent proliferation of interest groups is true of organizations with goals furthering Indian sovereignty generally and individual programs. Not only do Indian organizations have representatives in Washington, D.C., so do many Indian Tribes. There has been little attention paid to this, Walker (1980) being the exception. Helco (1978), Walker (1983), Schlozman & Tierney (1983), and Lunch (1987) consider this phenomenon without reference to Indian tribes. Schlozman and Tierney (1983), Cigler & Loomis (1983,1995) and Foreman (1995) have investigated how groups work to achieve their goals in Washington. None looked at tribal governments.

The sovereign status of tribes and its implications have not only been ignored by the interest group literature, but by the federalism literature as well. Daniel J. Elazar's observation that tribes have "associated statehood within the American federal system" is a tacit recognition of the sovereignty retained by tribes (Elazar 1992, 16). But he did not fully explain what this meant in broader constitutional terms nor its implications for intergovernmental relations.

The lack of attention to the role of tribal governments in the intergovernmental relations literature is glaring in light of the policy of self-determination. The increasing sophistication of Indian tribal governments and Indian organizations generally is occurring at a time of increasing tribal state/conflict and a national political movement to devolve power to the states.

Tribal governments have a much larger stake in broader federalism concerns. Being included in legislation on a par with state governments raises the same concerns about competitive and coercive federalism that states have. Scope of conflict and benefit coalitions would seem to be appropriate frameworks for analyzing the place of tribal governments in federalism, particularly on issues involving economic competition between tribes and states.

Analysis of Indians and federalism permits a further investigation into the significance of tribal sovereignty as

a motivating factor in Indians' political participation. Federalism provides a way to determine if the interests of tribal governments are indeed the same as other non-tribal governmental organizations. Going beyond Salisbury, et al.'s study of who non-Indian interest groups work with, a similar question can be raised in the context of Indian policy among Indian and non-Indian interest groups.

As we see, the literature of Political Science, Indian policy, and Indian gaming leaves undetermined the place of American Indian tribal governments in the American political system.

The sovereign yet amorphus status of Indian tribes appears to place tribes somewhere between states and interest groups. For some purposes and under some conditions tribes resemble state governments.[1] This sovereignty is acknowledged in Law and is exercised by federally recognized Indian tribes. These governments perform similar and parallel functions to those of all other governments in the American federal system, subject only to voluntarily agreed limits or limits imposed by federal law. The federal trust status of tribes also provides an obligation on the part of the federal government owed to no other group of citizens or level of government.

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[1] This dissertation will not consider at any length the question of the place of American Indian tribes in the international arena. This is a fascinating and important line of inquiry beyond the scope of the present research.

Like other levels of government which engage in typical interest group activities, tribes testify before Congress and attempt to achieve their individual and common tribal goals by presenting issues directly to elected officials. Tribes also attempt to directly affect the electoral process through tribal endorsements of and contributions to candidates for elective office. In the case of Indian gaming, tribally owned enterprises also donate to candidates who indicate their support of the tribal activity.

There is no example of this kind of duality in the Political Science interest group or federalism literature. The singular sovereign status that has developed for tribes has resulted in political entities that have a legal standing and pragmatic flexibility unlike any other in the American political system. This status of tribes as something more than either a government or an interest group provides an opportunity to demonstrate the lack of literature and the uniqueness of Indian tribes in the American political system. This duality also raises questions relative to the normative arguments about the good or evil of interest groups. For example, what is the role of sovereign tribes in a society based on pluralism? Does the sovereign status of tribes provide constitutional and political protection to individual Indians that members of traditional interest groups lack?

Indian gaming provides a unique opportunity to observe tribes acting in their dual roles. It appears that tribes are making use of the opportunity this duality offers and are seeking the most opportune arena available to protect their ability to control Indian gaming. Gaming also provides an opportunity to observe the actions of other non-tribal Indian organizations and lawyers in their support of tribal efforts in this area. To what degree, for example, are the goals of these organizations linked to sovereignty and how are they able to use this to achieve their own ends?

Indian gaming demonstrates tribes attempting to influence a variety of policy makers and political processes at several levels. In advancing their gaming interests, tribes and tribal representatives have been involved in tribal-state negotiations, law suits, congressional lobbying, presidential consultation, and political campaigns. In many instances they have been joined by other non-tribal Indian organizations.

Gaming may also bring into sharper focus the policy agenda setting process. Arguably federal court decisions regarding Indian gaming in the early and mid-1980s were the catalyst for congressional action leading to the Indian Gaming Regulatory Act in 1988. These decisions motivated not only Indian tribes but also state officials and the non-Indian gaming industry to pressure Congress into a decision.

3. Interviews and Observation

To the extent possible, interviews followed the "phenomological" approach used by Hertzke in his study of the lobbying activities of religious groups (Hertzke 1988), which in turn followed Fenno's study of congressional committees (1973). Interviews conducted during this research were not in the form of a survey questionnaire. Some interviews and the situations in which they were conducted loosely resembled Fenno's "participant observation" model (Fenno 1990) and classic "field research" models (Schatzman & Strauss 1973, Emerson 1983). Attending two pro-gaming rallies, being admitted to the tribal campaign operations, and "hanging out" during parts of two legislative sessions did resemble Fenno's "soak and poke" methods.

Generally, interviews were conducted with individuals having some knowledge of or involvement with Indian politics and/or Indian gaming. While these may be termed "elite interviews" (Dexter 1970), there was a wide variety in the backgrounds of the individuals selected. For example, it was necessary to be aware of cultural differences between the interviewer and the interviewee that can lead to misunderstandings on the part of each. Adjustments to the questions or methods were made accordingly (Briggs 1989).

Following Dexter, interviews were conducted so as to be "willing, and often eager to let the interviewee teach him what the problem, the question, the situation is - to the

limits, of course, of the interviewer's ability to perceive relationships to his basic problems..." (Dexter 1970, 5-6). Cross-cultural interviews can present unique situations that can require modifications in the interviewer's usual methods. As Briggs has noted, it sometimes becomes necessary in such cases "to permit respondents to 'wander off the point' and provide 'irrelevant' information at times, that is, to permit a bit more egalitarian distribution of the control over the interaction" (Briggs 1989, 28). This occurred several times during this research.

Interviews were conducted with elected and appointed tribal representatives, leaders of Indian organizations, attorneys and other individuals who are or have been involved in some aspect of Indian gaming, state officials, and members of the New Mexico and Oklahoma legislatures and their staffs. Personal interviews were conducted in-person in New Mexico and Oklahoma. When travel was not possible, interviews were conducted by phone. This was especially the case for gathering information on the ever changing environment of Indian gaming in New Mexico.

The author was fortunate late in the research to be permitted access to the individuals responsible for planning and executing New Mexico tribes' political strategy to save Indian gaming in the state. This was made possible by the relationship developed over a period of two years with Frank

Chaves (Sandia), Co-chair of the New Mexico Indian Gaming Association. On Chaves' word, the author visited the "War Room" established for the purpose of coordinating the tribes' campaign. The relationship and contact with the tribes' political consultant continued through the duration of the research.

Three separate interviews contributed to the author's understanding of Indian gaming as a political issue. The first was with Frank Chaves in Albuquerque. Chaves pointed out that the Indian Gaming Regulatory Act was a violation of Indian tribal sovereignty and that sovereignty was about economics. The second significant interview took place with Gary Pitchlynn (Choctaw), attorney for the Ponca Tribe of Oklahoma in Oklahoma City. He pointed out that one of the significant differences between the level of gaming in New Mexico and Oklahoma was the United States Attorneys with federal jurisdiction over Indian gaming. The third seminal interview was with Oklahoma State Senator Kelly Haney (Seminole) who pointed out that the tribes themselves define sovereignty in different ways, making concerted inter-tribal action difficult.

4. News Coverage

In order to remain up-to-date with the ever changing world of Indian gaming, the Lexis-Nexis databases were consulted regularly. Court cases and legislative activities were consulted in the Lexis database and news publications

were regularly consulted in Nexis. The archival database in Nexis was very helpful in gathering background data on the history of Indian gaming. Subscriptions to Indian Country Today, the Albuquerque Journal, the Santa Fe New Mexican, and The New York Times were maintained, as well as a subscription to the monthly industry publication Indian Gaming. Other journals, periodicals, and regional, national, and Indian newspapers were also consulted. Although a new area of law, as time passed, a number of law review articles began to appear exploring various aspects of the issue.

5. Archival Material

Archives can be a significant source of information about Indian policy, particularly at the national government level. Archival research was done in the collected papers of individuals active in Indian issues, looking particularly for documents relating to interest group activity and intergovernmental relations. See Mason (1994) for an example of this type of research as it relates to Indian policy.

Research has been conducted at the following archives or collections:

Lyndon B. Johnson Library (Austin Texas)
Carl Albert Center for Congressional Studies (Norman, Oklahoma): the Carl Albert, Fred R. Harris, and Happy Camp Collections
Angie Debo Papers, Oklahoma State University (Stillwater, Oklahoma)
Kent Frizzell Wounded Knee Papers, University of Tulsa

LaDonna Harris, president of Americans for Indian Opportunity (Bernalillo, New Mexico): Indian gaming files

THE PRODUCT OF THE RESEARCH: A THICK DESCRIPTION AND A DEEP UNDERSTANDING

The result of the research obtained by these qualitative methods was a "thick description" (Geertz 1983) of how the status of Indian tribes is apparent in the issue of Indian gaming and a conclusion about the political status of tribes based on that description. The description resulted from the research amassed by the methods outlined above. It included what is done, how things are done, by whom, to whom, and when the activity occurred. Interpretation followed, based on the Hertzke-Peters notion that "Understanding politics is a matter of interpretation more than it is a matter of explanation" (Hertzke & Peters 1992, 12).

The description of how tribes interact in the non-Indian political environment was informed by political science understandings of federalism and interest group activity. First determining and describing what tribes do to further tribal interests led to an interpretation of that activity in light of current political science understandings. For example, after investigating tribal activity in the electoral process, it was possible to determine if interest group literature explaining the

lobbying activities of state and local governments fully accounts for this tribal activity.

Nearly all of the Nexis database comprise non-Indian sources. To counter this non-Indian bias, Indian news sources were consulted, in particular Indian Country Today, the leading national Indian owned and operated newspaper.

As Ethnographer Clifford Geertz has noted,

> Studies do build on other studies, not in the sense that they take up where the others leave off, but in the sense that, better informed and better conceptualized, they plunge more deeply into the same things....A study is an advance if it is more incisive - whatever that may mean - than those that preceded it; but it less stands on their shoulders than, challenged and challenging, runs by their side. (Geertz 1983, 55).

This dissertation does in fact build on previous understandings of the status of American Indian tribes, federalism, and interest group activity. A fuller understanding of each of these areas emerged, however, as the description of gaming-related activity was interpreted in light of previous studies and new data.

CHAPTER 2: INDIAN POLICY & CONFLICT IN THE AMERICAN POLITICAL SYSTEM

The roots of United States Indian policy lie deep in the conflicting world views of two peoples: one reared in the Euro-American tradition of liberal democratic society and the other in tribal-based communal societies. This fundamental conflict was present before the creation of the American republic and remains today, setting the boundaries for debate over the direction of Indian policy generally. Whether a given policy is "anti-Indian" - - removal, termination - - or "reform" - - Indian New Deal, self-determination - - each era of Indian policy is set within this ideological battleground. The practical application of liberal principles to Indian policy has in turn been guided by the United States Constitution and the American political system.

In noting the many eras of Indian history, policy, and law, Charles F. Wilkinson has observed that "each of these periods needs to be reconciled with the egalitarian and libertarian laws and traditions of the majority of society" (Wilkinson 1987, ix). Put simply, the policies that drove Indians from their homelands and deprived them of their communal liberty had to be reconciled with the principles of individual liberty, equality, and government by consent that were at the heart of the United States' republican form of government. The justification could be found in the belief that the uncivilized natives were not qualified for equal

treatment under the law while their treatment must nonetheless be legal. Applying the "opportunistic use of law" (Harring 1995) has often meant that policy was in reality "Genocide at Law" (Strickland 1986).

The original inhabitants of the "New World" displayed a wide variety of cultures. Some tribes were nomadic, others sedentary; some were highly organized with a recognized central authority; others were loosely organized, widely dispersed geographically, with shifting loci of authority. But as diverse as they were, they differed in fundamental ways from Europeans in their personal, political, spiritual, and property relationships.

Native American Indian nations, tribes, and bands were largely self governing, communal, and tribally based. According to Sharon O'Brien, "to be a member of a tribe meant sharing a common bond of ancestry, kinship, language, and a political authority with other members" (O'Brien 1993, 14). These interpersonal and kinship relationships were part of a worldview quite different from that of the European "discoverers" and their descendants. Indian conceptions of the sacred and time itself were very different from non-Indians. Vine Deloria, Jr. has noted, "Western European peoples have never learned to consider the nature of the world discerned from a spatial point of view....The very essence of Western European identity involves the assumption that time proceeds in a linear

fashion..." (Deloria 1975, 76). This difference can deeply affect Indian-white relations because each culture approaches a problem from a different understanding of its source and meaning in time and space.

Perhaps the most significant difference between Indians and the Euro-Americans was the former's relationship to land and property ownership. The difference was significant both in substance and in what it meant for subsequent policies. Individual Indians were generally recognized by their societies as having a right to some personal property. But, as historian William T. Hagan has noted, personal property rights did not generally include land.

> Private property rights in such items as cooking and eating utensils, weapons, and jewelry were respected among the Indians. Private property in land, as we understand the concept, was not known. Springs, cultivated fields, and particular hunting or gathering grounds in some instances might be considered the exclusive property of certain families, bands, or tribes. However, the members of that family, band or tribe, would all share equally in the property concerned (Hagan 1956, 127).

Similarly, Jemez Pueblo scholar Joe S. Sando has written that

> Concepts of land ownership, and its use have always differed between aboriginal Americans and European invaders. While the Europeans' main purpose has been commercial exploitation, Native Americans have always practiced alternative uses of their land; for example, certain areas were mainly for religious significance (Sando 1982, 16).

To a people whose culture, economy, and governance were based on ideas of the Enlightenment and what has come to be known as liberal democracy, the ways and worldviews of the

Indians were anomalous at best, threatening at worst. A society which valued and protected the individual's pursuit of property and which relied on a government of written laws, popular consent and ordered processes could not long accept in its midst a people so vastly different. Reconciling the differences in world views was made both more difficult and imperative by the desire of the Americans for Indian resources, chiefly land at first and raw materials in later years. The values implicit in the American political system established the framework for the dominant society's relationships with American Indians. Individual ownership of land personified the values of individualism and served as the basis for Wilcomb E. Washburn's observation that "The principal point of dispute between white and Indian historically has been land" (1995, 143).

According to political scientist Theodore J. Lowi, the British philosopher John Locke "...was the proximate source" of the founding of the American republic (Lowi 1995, 5). According to Lowi the founders' "Constitution made the United States the first and probably only polity to be formed self-consciously according to Locke's blueprint" (Lowi 1995, 4). This "blueprint" provided the basis not only for the principles of natural rights and consent of the governed enunciated in the Declaration of Independence; it

also provided the ideology of individualism and private property inextricably linked to liberal society.

If Locke is the "blueprint" for the "American republic," native America, or at least his understanding of it, was the blueprint for much of Locke's own conceptions of the state of nature and the nature of property. In a phrase reminiscent of the Book of Genesis, Locke wrote in the Second Treatise of Government, "Thus in the beginning all the world was America..." (Locke 1980, 29). According to Locke, Indians were in the first stage of human development; they were without either money or private property (Grant 1987, 160).

Legal scholar Robert Williams (Lumbee) contends that Locke "legitimated the appropriation of the American wilderness as a right, and even as an imperative, under natural law" (Williams 1990, 248). This is consistent with political scientist Michael Paul Rogin's observation that liberal society is "the unchallenged primacy of propertied individualism across the political spectrum....Liberalism insisted on the independence of men, each from the other and from cultural, traditional, and communal attachments" (Rogin 1987, 135). American Indian policy has been formulated and implemented in a political system founded on this ideological imperative. The necessity of treating Indians with sometimes minimal attention to law legitimized policy and policy was driven by the additional imperative of

transforming Indian culture into one guided by "propertied individualism."

Whose Sovereignty?

From before the founding of the Republic the nation dealt with Indian tribes as it dealt with all foreign sovereigns - through negotiated treaties. The founders made Indian affairs a national concern in Article I, Section 8 of the Constitution. Congress, in the Indian Commerce Clause, was given power to regulate trade with the Indian tribes, the basis for that institution's "plenary power" in Indian affairs (Newton 1984).

In a fundamental way, the parameters of the dispute over the status of Indian tribes in the American political system were best articulated in the era of Jacksonian democracy. The sovereignty of tribes and the power of national and state governments to decide questions of Indian policy were significant political and constitutional questions during the 1820s and 1830s. On one side was the strong states' rights position advocated by state officials, especially in the southeast, and strongly supported by President Andrew Jackson. This view held that Indians as individuals could be and should be subject to state jurisdiction. It followed that Indian political institutions inside a state were illegitimate. This view

interpreted the Indian Commerce Clause so narrowly as to make it nearly inoperative within state borders.

On the other side was the view that tribes were sovereign. Indian tribes and nations claimed to hold all of the rights and powers of self-governance that they held prior to the coming of the Europeans. They claimed power over their own people and the right to make decisions on a par with non-Indian governments. The treaty relationship seemed to confirm this belief. When tribes ceded land or authority over their land or individuals, they claimed to do so voluntarily through negotiations.

Others in between, notably Chief Justice John Marshall, recognized a diminished sovereignty vested in Indian tribes and nations based on their aboriginal status. The extent of this sovereignty and under what conditions and against what authority it could be exercised were questions of historical and constitutional interpretation and political expediency.

Echoes of these strongly held views have been heard ever since in debates over Indian policy. Advocates of a particular policy in a given era often fall back on these early arguments modified in form if not in tone. While Andrew Jackson's often incendiary views on Indian sovereignty are rarely cited as support for a particular policy, the underlying assumptions behind his views have often determined acts of Congress and court decisions. Marshall's description of tribes as "domestic dependent

nations" has been used to justify policies that have both strengthened and weakened tribal sovereignty. Almost all Indian policy is the progeny of the conflicting views of Jackson and Marshall.

One point not in dispute among policy makers, however, was the view that the Euro-American way of life was superior in all forms to the Indian communal tribalism. Neither Jackson nor Marshall questioned the assumptions of liberal democratic political institutions, the importance of private property individually owned, or the righteousness of Christianity. All agreed this was the proper course for Indians to follow.

The Marshall Trilogy and Jacksonian States' Rights

Three decisions written by Chief Justice Marshall provide the ideological and legal basis for Indian law and policy. Marshall's articulation of the nature of Indian land title and his descriptions of federal-state-tribal political relations established the parameters for the essential relationship federal and state governments have with Indian tribes. The latter two cases of the Trilogy also provide an insight into federal-state relations generally, and the relationships among the three presumably coequal branches of the federal government.

The liberal concern with the formalities of law and the primacy of property rights were given doctrinal support in

Indian policy by Marshall's interpretation and application of the Doctrine of Discovery in an early 1820s property dispute. Tracing its roots to the "discovery" of the New World by European explorers, Marshall in Johnson & Graham's Lessees v. McIntosh, 21 U.S. 543 (1823), established the limits of Indian land title. In resolving the title of a single piece of property which had been transferred separately to different parties by both an Indian tribe and the United States government, Marshall and the Court held that the Indian title was inferior to that of the United States.

The Chief Justice was faced with a conundrum: the Indians were obviously on the land before the Europeans, but the Europeans, and subsequently Americans, had taken possession of much of the New World. How could this be legal? To answer that question, Marshall engaged in an anthropological and Lockean analysis of the nature of the "heathens" (575) and their use of the land. According to Marshall, those "...inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness..." (588). The aboriginal people therefore did not have a title to the land that could be transferred to others.

The act of "discovery" gave the discovering European power an ownership title in the land good against Indians and other European powers alike. As Marshall stated it,

> This principle was that discovery gave title to the government by whose subjects or by whose authority, it was made against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it (573).

This right was assumed by the U.S. when it gained independence.

According to Vine Deloria, Jr., "the doctrine was to apply to uninhabited countries only" (Deloria 1985, 105-6). However, Marshall had to resolve the problem of land ownership in an inhabited country. He acknowledged that the aboriginal peoples had some kind of land title, but it was of a lesser kind. Marshall claimed the "the rights of the original inhabitants were, in no instance entirely disregarded; but were necessarily impaired."

> They were admitted to be the rightful occupants of the soil with a legal as well as just claim to retain possession of it, and to use it according to their discretion (573).

> Conquest gives a title which the courts of the conqueror cannot deny...(588).

> ...the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to others (591).

The legal justification for continued American expansion into the western frontiers was thus provided by Marshall. Indians could exercise their right to occupy the land so long as the original conquerors' successors did not need it, but they could not transfer that right to anyone but the United States. When the land was needed and ready to be put to a better use, the United States could extinguish the aboriginal title of occupancy. Deloria and Lytle have written, "Every legal doctrine that today separates and distinguishes American Indians from other Americans traces its conceptual roots back to the Doctrine of Discovery and the subsequent moral and legal rights and responsibilities of the United States with respect to Indians" (Deloria & Lytle 1984, 2).

Having dispensed with the question of land title in McIntosh, Marshall and the Court were soon drawn into one of the major political controversies of the age: the continuing presence of unassimilated Indian tribes in Southeastern United States. The Cherokee Cases involved not only the sovereign status of Indian tribes, but also questions touching on the very meaning of the constitutional relationship between national and state governments, and among the branches of the national government itself.

The stakes were high for all parties. For the Cherokee Nation, and by extension all Indian tribes and nations, it was political, economic, and cultural sovereignty. For the

states it was their right to exercise sovereign power within their borders without interference from the national government. For the national government generally, it was the power to assert its authority under the Supremacy Clause. Kiowa Indian law scholar Kirke Kickingbird has noted, "The Union was in fragile condition from the tug of war between the powers of the state government and the power of the federal government. Federal control of Indian affairs was merely one part of this struggle" (Kickingbird 1993, 308).

Within the national government, the stakes for each branch were, by the nature of the Constitution, different and conflicting. For the president, a political promise and a political philosophy clashed with a different political philosophy and constitutional interpretation enunciated by the Chief Justice of the United States Supreme Court. Congress was pulled between the political demands of the president and his allies, and those who opposed the president politically or who supported the moral position of the Cherokees (Prucha 1969, Norgren 1996).

The Cherokee Cases were precipitated by the State of Georgia's unwillingness to continue to tolerate the presence of an organized sovereign Indian nation within its borders. In 1802 Georgia and the United States signed a compact providing that Georgia give up its claims to western lands in return for the federal government extinguishing Indian

land title in the state (Prucha 1986, 66). A quarter century passed and the federal government had done nothing to fulfill its part of the deal. Giving urgency to the Georgian desire to terminate the Cherokees of their separate status was the discovery of gold on Cherokee lands.

The Georgia legislature unilaterally extended its sovereignty over the Cherokee Nation. In a series of laws, Georgia incorporated the territory of the Cherokee Nation into several counties, extended Georgia laws to Cherokee land, annulled Cherokee law, and forbade non-Indians from entering Cherokee lands without receiving permission from the State. According to Norgren, "The Georgia politicians' ultimate hope was that these laws would make it impossible for the Cherokees to resist a treaty of removal" (Norgren 1996, 47).

Cherokee Nation Principal Chief John Ross and tribal attorneys sought a legal test of Georgia's law. They appeared to have one when a Cherokee named George Tassels was tried and convicted in Georgia court for the murder of a Cherokee man on Cherokee land (State v. George Tassels, 1 Dudley 229 (1830)). Cherokee Nation attorney William Writ appealed Tassels' conviction to the U.S. Supreme Court. However, Georgia officials ignored a United States Supreme Court order to appear before it and proceeded to hang Tassels. As Jill Norgren notes, "The state would not submit to federal judicial reviews of its laws" (Norgren 1996, 97).

The next opportunity for a test case arose when the Cherokee Nation sought to sue the State of Georgia in a case of original jurisdiction in the United States Supreme Court in 1831 (Cherokee Nation v. Georgia, 30 U.S. 1 (1830)). Article III, Section 2, clause 2 of the U.S. Constitution gives the Supreme Court original jurisdiction in cases "in which a State shall be a party." The Cherokee Nation sought to prohibit Georgia from enforcing its laws within the Nation's borders, arguing that it was "a foreign state, not owing allegiance to the United States, nor to any State of the Union, nor to any prince, potentate or State, other than their own" (Cherokee Nation v. Georgia, 2). The question for the Court was "is the Cherokee Nation a 'State' within the meaning of Article III?"

In possibly the most significant Indian law decision in history, Chief Justice Marshall answered "no." While claiming sympathy for Indian people, Marshall found that tribes were neither states in the Union or foreign nations, writing that "The Indian Territory is admitted to compose a part of the United States," and that Indians "acknowledge themselves in their treaties to be under the protection of the United States." The Chief Justice found a unique place for Indian tribes.

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage (15).

Marshall went on to describe Indians in dicta that would have a profound effect on the future of Indian-government relations.

> Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; they rely upon its kindness and its power; appeal to it for relief of their wants; and address the President as their great father (15).

Because the Court decided Cherokee Nation on the narrow jurisdictional question the substantive question of the power of Georgia to assert its sovereignty over the Cherokee Nation was not addressed. That would occur, however, in the last of the Cherokee Cases, Worcester v. Georgia, 31 U.S. 515 (1832). Samuel Worcester was one of several missionaries arrested for violating Georgia law by entering Cherokee lands without first obtaining a State license and signing a loyalty oath to the State. Worcester and Rev. Elizur Butler were tried, convicted, and sentenced to four years at hard labor. They appealed their conviction to the U.S. Supreme Court.

There was no jurisdictional issue in Worcester; the Court considered the legality of the Georgia laws. In ultimately finding Georgia's acts unconstitutional, Marshall also backed away from his strong language in Cherokee Nation. In reviewing treaties between the United States and the Cherokee Nation, Marshall found that the latter had acknowledged itself to "be under the protection of the United States of America." However, "Protection does not

imply the destruction of the protected" (551). The treaty relationship between the U.S. and the Cherokee "was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master" (555). All of the treaties and laws

> manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but granted by the United States (557).

As to Georgia's assertion of authority over Cherokee lands, Marshall looked to Congressional Article I, Section 8, clause 3 power "To regulate Commerce with foreign Nations, among the several States, and with the Indian tribes."

> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union" (557).

Linking the political status of the Cherokee Nation and the constitutional power of the United States government, Marshall wrote,

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which, the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States (560).

The missionaries and the Cherokee Nation won a clear legal victory in the Supreme Court. However, the prevailing political climate was not in agreement with the Court. The Jackson administration's policy of removal continued to have momentum and the President's states' rights ideology supported Georgia's refusal to acknowledge the Court's decision. Indeed, as in the two previous Cherokee Cases, the State had not bothered to enter an appearance before the Court in Worcester. On hearing of the Worcester decision, Jackson is said to have remarked, "John Marshall has made his decision, now let him enforce it." Whether or not he actually said this, Jackson's own inaction sent a clear signal to the states and Indian tribes.

Andrew Jackson's response to Worcester is not surprising. He combined a strong sense of nationalism and belief in the expansionist destiny of the United States with an equally strong conviction that the Constitution recognized a significant degree of sovereignty in the individual states. Jackson's most recent biographer, Robert V. Remini, notes Jackson believed that "protecting state sovereignty was to guarantee individual liberty" (33).

Indian removal furthered Jackson's political agenda and ideology. Remini writes that

> The policy of removal formed an important part of Jackson's overall program of limiting federal authority and supporting states' rights. Despite the accusation of increased executive authority, Jackson successfully buttressed state sovereignty

> and jurisdiction over all inhabitants within state boundaries (279).

Indian policy consistent with broader political goals and philosophy was not unique to Jackson; it has generally followed that a president's Indian policy is driven by or at least consistent with the broader goals he has established for his administration. This is also generally true of congressional Indian policy. The parameters of what is politicaly possible often drive Indian-government relations. This in turn can operate to defeat the political and policy goals of Indians.

The Cherokees, while proclaiming their sovereignty, had fought to preserve it within the boundaries of the American Constitution and political system. In the end, however, neither the laws, institutions, nor processes of the United States provided the Cherokee Nation with the recognition and protection it sought. Rennard Strickland notes the poignancy of the Cherokees' efforts to withstand Georgia's onslaught.

> They turned first to the Executive and were told to move west. They next turned to Congress and were again told to move west. They finally turned to the Supreme Court and were told that their rights would be protected. This may have been the cruelest of all the answers given, for the Court had neither the power nor the will to grant this protection (Strickland 1994, 114).

Turning to the electoral process and the presidential campaign of 1832, the Cherokees found a supporter in Henry Clay, but Jackson's overwhelming victory meant a political

defeat for the Cherokee Nation (Remini 1994, Strickland 1994). The Cherokee Nation was removed west along the Trail of Tears in 1838.

Marshall, Jackson and their Indian policy progeny

The opposing views of Indian sovereignty, the relationship among tribal, state, and federal governments, and the place of individual Indians in American society provide a framework for understanding the ebbs and flows of Indian policy. While Indian policy can be summarized chronologically or by era, another way to review and evaluate the permutations of Indian affairs is to divide policy initiatives by their emphasis on tribal, state, or federal authority. This framework not only demonstrates the alternating policy of termination and recognition of tribal self-governance; it is also demonstrates how closely cultural assimilationist policies are related to the political status of tribal governing entities.

"Dependent"

Evidence of the dependent status of tribes is most clearly seen in the "trust relationship" maintained by the federal government with tribal governments, assets, and members. Expanding on Chief Justice Marshall's notion of the U.S. as guardian of its tribal wards, Congress has created bureaucratic structures to oversee the most minute

activities occurring on Indian land. An entire section of the United States Code, Title 25, deals solely with Indian affairs; a sizable and largely inefficient bureaucracy, the Bureau of Indian Affairs, is responsible for carrying out the government's trust responsibilities. Created as the Office of Indian Affairs by Secretary of War John C. Calhoun in 1824, Congress formally established the agency in the War Department in 1832 and transferred it to the newly created Interior Department in 1849.

Two specialized areas of concern to the federal government have historically been Indian education and health. The BIA continues to operate day schools and a limited number of boarding schools. The Indian Health Service, created as part of the Public Health Service by Congress in 1954, (68 Stat. 674) is responsible for providing health care to Indians living on or near Indian land. A number of departments and agencies have offices whose purpose it is to deliver their services to Indians, including the Department of Housing and Urban Development and the Farmers Home Administration.

The early development of the federal Indian bureaucracy had less to do with carrying out a trust responsibility than it did with efforts to "civilize" and assimilate Indians. As reservations were created throughout the west in the latter half of the 1800s, bureaucrats in the Indian Office, from the Commissioner of Indian Affairs to reservation

agents, implemented policies designed to transform individual pagan tribal Indians into individualistic Christian liberal farming Americans. To this end, administrative directives and regulations were issued to implement congressional policy and treaty provisions. The ultimate goals were, as Parman has written, "destroying tribal authority, eradicating native religions, and changing Indians into farmers," especially after passage of the General Allotment Act in 1887 (Parman 1994, 1).

The reservation was where regulations could be enforced and Indians be coerced toward the transformation desired by government officials and "reformers" who believed they knew what was best for Indians. Because the transformation of Indians from savagery and paganism was thought to lie in changing their behavior, many of the regulations were directed at curbing traditional Indian cultural and spiritual practices as well as other "immoral" activities.

Massachusetts Republican Senator Henry Dawes was perhaps the most influential public official in Indian policy in the last quarter of the 19th century. As congressman, senator, Chairman of the Senate Committee on Indian Affairs, and as Chairman of the Dawes Commission, Dawes led the efforts resulting in the loss of much of the western Indian land holdings. Senator Dawes' public statements reflected the sentiments of many "friends of the Indians" that Indians must emerge from communal tribalism

into propertied individualism. In 1883, Dawes related an experience with some Indians still in their primitive communal state.

> The head chief told us there was not a family in that whole Nation that had not a home of its own. There was not a pauper in that nation and the nation did not owe a dollar. It built its own capitol...and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they own their land in common ...and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and their citizens so that each can own the land he cultivates, they will not make much more progress (O'Brien 1993, 76).

The role of reservations in teaching Indians the benefits of "civilization" was nowhere more clearly stated than in the opinion of an Oregon Federal District Court Judge. Upholding the Secretary of the Interior's power to promulgate rules for the courts of Indian offenses, the judge described these courts as "....mere educational and disciplinary instrumentalities..."

> In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man (U.S. v. Clapox, et al., 35 F. 575 (1888)).

Even with the late twentieth century policies of self-determination and self-governance stressing tribal sovereignty, the dependency bureaucracy is still in place. Not only does the BIA act as trustee for Indian resources, it also determines what groups are entitled to be given

"recognition" as legitimate sovereign Indian tribes. Absent a determination by either the BIA administratively or Congress legislatively, a group claiming to comprise an Indian tribe receives no federal benefits or protections nor does it have a sovereign government-to-government relationship with the United States.

In 1978 the BIA published criteria for groups seeking legal acknowledgment as an Indian tribe (25 C.F.R. #83). The Bureau created the Federal Acknowledgment Branch to review the applications of such groups and determine if they meet the criteria. Congress can also acknowledge a tribe's existence by passing legislation granting it recognition. In October 1993 the BIA, as required by law, published in the Federal Register a list of 550 recognized tribes and Alaska Native villages.

As trustee for Indian resources, the BIA has responsibility for protecting individual and tribal holdings. The history of the BIA's incompetence in this area is well documented and continuing. The 1989 Final Report and Legislative Recommendations of the Special Committee on Investigations of the Senate Select Committee on Indian Affairs declared that the Committee had "found fraud, corruption and mismanagement pervading the institutions that are supposed to serve American Indians" (Final Report 1989, 5).

Paternalistic federal control over American Indians has created a federal bureaucracy ensnarled in

> red tape and riddled with fraud, mismanagement and waste. Worse, the Committee found that federal officials in every agency knew of the abuses but did little or nothing to stop them (5).

The Committee found, for instance, that BIA hiring practices had failed to weed out convicted child molesters as teachers at Bureau schools, and that tribal natural resources, such as oil and gas in Oklahoma, had been stolen.

The BIA's breach of its fiduciary responsibilities to Indian people is nowhere more apparent than in its mismanagement of trust funds. Since the 1830s the Bureau has held individual and tribal Indian assets in trust. The BIA has responsibility for over 1,500 tribal accounts belonging to more than 200 tribes, amounting to $2.1 billion; another $453 million is held in the Individual Indian Money (IIM) accounts of 390,000 people (Calbom 1996, Echohawk 1996). This money belongs to tribes and individuals and is derived from mineral resource royalties, land settlements, leases, and other assets unrelated to federal program expenditures. Beginning in the late 1980s, a series of congressional and General Accounting Office investigations documented the mismanagement of tribal assets by the federal government.

A May 1996 GAO Report charged that the BIA could not "reconcile" $2.4 billion in transactions involving trust funds due to missing records and a lack of audit trail (McCain 1996). The magnitude of the trust fund loss led Native American Rights Fund (NARF) Executive Director Walter

Echohawk to call it "the largest and longest-lasting financial scandal ever involving the federal government" (Echohawk 1996) while Jeff Barker of The Arizona Republic has called it "one of the quietest scandals in American history" (Barker 1996).[1] In 1994 Congress passed the American Indian Trust Fund Management Reform Act and created the Office of Special Trustee for the American Indians to be responsible for the BIA's financial trust services. While it has made progress in reconciling some accounts, it has been unable to resolve the on-going administrative problems. Other efforts to make sense of the problem include the Intertribal Monitoring Association, and a Task Force on Trust Fund Management of the House Resources Committee.[2]

Dependence on the federal government becomes painfully clear during times of national budgetary constraints. During the early 1980s and then again following the 1994 congressional elections, financial support for Indian programs was jeopardized by the prevailing political currents calling for cutbacks in federal domestic expenditures. Since the days of Kennedy's New Frontier, federal support for Indian programs had been gradually expanded. New programs created during the Great Society

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[1] In a play on the Clinton Administration's Whitewater scandal, some Indians have termed the BIA scandal "Redwater" (Flynn 1996).

[2] A class action lawsuit was filed by the Native American Rights Fund on behalf of IIM account holders in June 1996.

designed to alleviate poverty nationwide included Indians as a target group (Deloria 1985). The Nixon administration continued to expand Indian programs as well and included Indian tribes in such administrative policies as "New Federalism" and revenue sharing (Mason 1992).

The election of Ronald Reagan in 1980 brought a decided shift in national spending priorities and Indian programs were not exempt from the budgetary realignment. While Morris (1988) and many Indian leaders saw the Reagan cutbacks as pointedly anti-Indian - "termination by accountants" - other observers point out the Indians were merely caught in the administration's larger policy goals. Hazel W. Hertzberg wrote that these cuts were "simply being applied mechanically to Indians, for whom they are even less appropriate than for the rest of the population" (1982, 15). Vine Deloria, Jr. similarly observed in 1985 that "The present posture of Indian policy is not distinguishable from other domestic objectives" (1985b, 255).

This was also true of the cuts made in Indian program funding by congress following the 1994 mid-term elections. As the new Republican majority went about enacting the "Contract With America," cutting domestic spending was high on the agenda of those determined to balance the federal budget. Senate Interior Appropriations Subcommittee chairman Slade Gorton of Washington concisely placed Indian budgets in the context of the Republican agenda.

> The dynamics of debate about spending have changed since the 104th Congress began. Instead of racing to get more money for this program and that program, we are - at the American people's behest - putting ourselves on the road to a balanced budget and reversing the trend of explosive government growth. Again, no one can or should expect to be exempt from the inevitable cuts which ensue from balancing the budget (Gorton 1995).

While the Indian program cuts were consistent with Republican ideology, they were also the result of congressional power politics. While the Senate Committee on Indian Affairs and the Senate Appropriations Committee were chaired by men generally sympathetic to Indian issues - John McCain of Arizona and Pete Domenici of New Mexico respectively - the subcommittee on Interior Department appropriations was chaired by long time tribal antagonist Gorton. In 1978, as Attorney General for the State of Washington, Gorton successfully argued Oliphant v. Suquamish Indian Tribe before the U.S. Supreme Court, a decision that eliminated tribal criminal jurisdiction over non-Indians. In the 1995 budget debate Gorton presented senators with the choice of supporting either funding Indian programs or other worthwhile Interior projects, many having more relevance to constituents than did BIA expenditures (Van Biema 1995). Efforts by Domenici and Senator Daniel Inouye (D-HA) to restore money to the BIA meet with resounding defeat on a 61 to 36 vote (Cong. Rec. 1995, S11976). Such liberals and generally pro-Indian senators as Edward Kennedy (D-MA),

Barbara Boxer (D-CA), and Minority Leader Tom Daschle (D-SD) voted with the majority.

While the Supreme Court has occasionally reaffirmed and even strengthened tribal sovereignty, it has also reinforced dependency and supported states' rights at the expense of tribal self-governance. Two such decisions were U.S. v. Kagama, 118 U.S. 375 (1886), and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In 1881 Brule Lakota Chief Spotted Tail was shot to death by Crow Dog, an opponent of Spotted Tail's policy of accommodation with the federal government. Justice was dispensed according to traditional Brule law but not to the satisfaction of federal authorities.[3] Crow Dog was arrested, charged with murder, and convicted in a Dakota territorial court. In Ex parte Crow Dog, 109 U.S. 556 (1883), the Supreme Court overturned Crow Dog's conviction on the basis of treaty guarantees and a policy of allowing Indians to govern their internal affairs according to tribal law. Neither territorial nor federal law made it an offense for one Indian to murder another Indian on Indian land.

According to Harring, "Crow Dog's case is important because it is a bridge between the ambiguous and ineffective sovereignty language of Worcester and the complete subjugation of tribal sovereignty during the late nineteenth

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[3] The Crow Dog and Spotted Tail families agreed on a resolution to the incident that involved the former paying $600 and giving eight horses and one blanket to the latter (Harring 1994, 110).

century" (101). Crow Dog demonstrated what many non-Indians believed to be a loophole in the law. The outcry against the Court's ruling led Congress to pass the Major Crimes Act in 1885 (23 Stat. 385) making seven offenses perpetrated by one Indian on another violations of federal law. The constitutionality of the Act was decided by the Supreme Court in United States v. Kagama, 118 U.S. 375 (1886) when it upheld the murder conviction of a Klamath Indian in Northern California. In enunciating the "the Supreme Court's first statement of the plenary power doctrine" Justice Samuel Miller echoed John Marshall's language.

> These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights....The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers is necessary for their protection, as well as to the safety of those among them whom they dwell (384).

Further evidence of the diminished political standing of tribes and the extraordinary reach of congressional plenary powers in Indian affairs came in 1903. The Court, in Lone Wolf v. Hitchcock, 187 U.S. 553, upheld the right of Congress to alter the Treaty of Medicine Lodge with the Kiowa by approving an agreement allotting the reservation without the requisite valid signatures of adult male tribal members. Harring notes that Lone Wolf "shifted the method of weighing tribal sovereignty from a complex balancing function in the federal courts to Congress's plenary power to simply do with the tribes whatever it chose" (147).

Congress used its vast plenary powers to enact policies conducive to state assumption of jurisdiction over Indian lands.

"States' Rights"

Of immediate concern to frontier states during the early days of the republic was achieving peace so their citizens could pursue the pastimes of civilization. This at first required a military presence or a negotiating team. As peace was achieved through warfare or treaty, state officials began to demand that the remaining natives be sent somewhere else. The resulting federal policy provided two alternative solutions that were implemented in different ways during different eras - removal or assimilation.

Removal of individual Indians from the presence of whites could be achieved by a literal removal of the people enmass from their homeland to a distant land out of the way of white settlement, or it could be achieved by breaking up communal land holdings, issuance of individual allotments of private land, and subsequent "opening" of the "surplus" land to white settlement. Both strategies effectively disrupted the cultural, spiritual, and political life of the affected peoples. Both effectively extended state jurisdiction over the former Indian lands, if not the people themselves.

As discussed above, the Removal policy came to fruition under President Andrew Jackson, although Thomas Jefferson

was the first to raise it as possible way to resolve the Indian question. Initially tribes in the southeast were targeted for removal to an unorganized territory beyond the Mississippi River. Later, tribes west of the Mississippi were also forced to relocate in what had come to be called "Indian Territory." While Removal put tribal Indians out of the way of white settlement, Prucha argues that

> In some respects the policy and the process brought increased rather than lessened interference in domestic Indian affairs on the part of the Great Father. And when the emigrant Indians were settled in their western homes, the drive for education, civilizing, and Christianizing them took on new vigor (Prucha 1986a, 65).

As the treaty making process continued and tribes ceded more and more land, the government established the reservation system. As each tribe or group of tribes received land for their exclusive use, the intrusion of the federal government became greater as the authority of the Great Father was exercised directly by reservation agents. Reservations meant that Indian land holdings were reduced and room was made for white settlement. This was a crucial step to statehood.

The Dawes Severalty Act or the General Allotment Act of 1887 (24 Stat 388-391) "represented a comprehensive attempt to create a new role for the Indian in American society" (Cohen 1982, 130). While demonstrating the dependency of Indians, it also ultimately strengthened state sovereignty by extending the reach of state law over former Indian

lands, and, eventually, over "citizen" Indians themselves. In addition to its political consequence, the Dawes Act also was a clear demonstration of assimilationist policies of the federal government in the final decades of the 19th century.

The Dawes Act authorized the president to allot tribal lands. Each tribal member would receive a specified number of acres, with the head of the household getting the largest allotment. "Surplus" land left over after each tribal member received his or her allotment was opened for white settlement. The allotments would be held in trust by the Secretary of the Interior for a period of twenty-five years; at the end of the trust period the individual would be given title to the land in fee simple. An Indian would become a U.S. citizen on receiving his or her allotment. In 1906 the Burke Act (34 Stat. 182) postponed citizenship for an allotted Indian until the end of the trust period and gave the Secretary of the Interior the power to issue a patent in fee before the end of the trust period if the Indian allottee could be shown to be competent.

The loss of land under the allotment policy was dramatic. In 1881 Indians held more than 155 million acres; by 1890 Indian land holdings were 104 million acres; by 1900, 77 million acres (Prucha 1986, 227). The Burke Act sped up the process; sixty percent of the more than 2,600 allottees receiving competency certificates gave up their

land (Cohen 1982, 136). Allotment continued until 1934 when congress passed the Indian Reorganization Act.

While the IRA brought reform to Indian policy and slowed the incursion of non-Indians and state law into Indian land, it was a relatively short-lived era. Indian policy went through one of its most dramatic changes after the Second World War. Notwithstanding the emphasis of the IRA and Indian New Deal on tribal revitalization, from the mid-1940s until at least the late 1950s Indian cultural and political sovereignty were threatened by a renewed emphasis on getting the federal government out of the Indian business. Individual Indians, tribal governments, and Indian lands were made vulnerable to state jurisdiction. Assimilation, eliminating the Indian land base, and the end of tribal political sovereignty once again were the goals of policy makers. Congress passed a series of bills to achieve these ends, the most significant being the Indian Claims Commission Act; House Concurrent Resolution 108; Public Law 83-280; and a series of "termination acts."

A continuing problem for state and federal officials was the growing number of land claims being pressed by tribes alleging that the government had cheated them or otherwise violated the law. To bring an orderly end to this mountain of litigation Congress passed the Indian Claims Commission Act in 1946 (60 Stat 1049) creating a three person commission to hear tribal claims against the United

States.[4] The Commission could only hear claims filed prior to August 13, 1951. If the Commission found against the United States in a particular claim, it could only award monetary damages; no land could be returned to a tribe. By the time the Commission went out of business in 1978 it had awarded more than $818 million (Prucha 1986, 342). The process of settling claims "appeared to be not a bold stroke to correct all past injustices, but simply a necessary preliminary step toward termination" (Prucha 1982, 343).

The policy pronouncement setting out the goals of termination was House Concurrent Resolution 108, passed in 1953 (67 Stat. B132).

> Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the Unites States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to end their status as wards of the United States, and to grant them all of the rights an prerogatives pertaining to American citizenship;

The Resolution divided tribes into categories of readiness for being the objects of the policy. All of the tribes located within California, Florida, New York, and Texas were slated for termination "at the earliest possible time." S selected tribes in several other states were also targeted for early termination.[5]

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[4] The Commission was expanded to five members in 1967.

[5] In 1947, B.I.A. Commissioner William Zimmerman testified before a Senate committee that services could be withdrawn from tribes based on a three tier rating: those

Termination, endorsed by the Hoover Commission, was achieved through individual "termination acts" withdrawing federal recognition and protection one tribe at a time. Between 1954 and 1962, Congress passed 14 termination acts affecting over 100 tribes in 8 states (Cohen 1982, 811). As the Handbook of Federal Indian Law notes, these "acts ended the special federal-tribal relationship in most, but not all respects for the terminated tribes" (Cohen 1982, 811).

The impact of these laws on individuals and tribal sovereignty was sweeping. The trust relationship between the tribe and federal government came to an end; most federal Indian services were no longer available to members of terminated tribes; Indians living on former tribal land would henceforth be subject to state jurisdiction; tribal rolls were closed; and "tribal sovereignty and tribal jurisdictional prerogatives were effectively, though not technically ended" (Cohen 1982, 813).

Terminating individual tribes provided one way of getting the federal government out of the Indian business; another was turning responsibility for the remaining reservations over to the states. Congress took this pro-states' rights step in 1953 by passing Public Law 83-280 (67 Stat 588-590). Historian Donald L. Fixico has termed P.L. 280 "a reform measure that called for liberating the tribes

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tribes that could haveservices withdrawn immediately; those which would be ready in ten years; and those that would need more than ten years (Prucha 1986, 343).

from federal trust dependence and placing them under state jurisdiction" (Fixico 1986, 111), a goal clearly consistent with termination.

One of the most far reaching pieces of legislation passed during the termination era, P.L. 280 transferred criminal and civil jurisdiction over Indian Country to California, Nebraska, Minnesota (except for the Red Lake Chippewa Reservation), Oregon (except for the Warm Springs Reservation), and Wisconsin (except for the Menominee Reservation).[6] Sections 6 and 7 of the law made it possible for any other state to assume either type of jurisdiction if it so chose. States with provisions in their constitutions or enabling acts limiting jurisdiction over Indians would have to first amend them.[7]

Tribes were given no opportunity to approve or reject state assumption until Congress passed the Indian Civil Rights Act of 1968 (U.S. 82 Stat. 73). Thereafter, tribal consent was required before a state could assert its jurisdiction. States already exercising P.L. 280 jurisdiction were also given the opportunity to "retrocede" it back to the federal government.

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[6] In 1958 the new state of Alaska was added as a mandatory P.L. 280 states (72 Stat. 545).

[7] Ten states have assumed some type of jurisdiction over at least some of the tribes located in their borders: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington (Cohen 1982, 362-363 fn125).

Consistent with the general thrust of termination was the "relocation" program of the 1950s and '60s. Described by Prucha as "a corollary of termination" (1986, 355), relocation was designed to move individuals and families from rural reservations to cities. There they could receive the benefits of an increasingly urbanized America while freeing them from dependence on the federal government. The program began among the Navajo and Hopi in the late 1940s and became a major activity of the BIA by the mid-1950s (Prucha 1986, Fixico 1986). For many relocated Indians urban life was alien. The promises of BIA employees were often unfulfilled. Coping with urban pressures and disconnected from culture, land, and family, the outcome of relocation was often unemployment, alcohol and drug abuse, and contact with the criminal justice system. Rather than lessening the reach of the BIA, relocation ultimately required the federal government to provide additional services to a growing urban Indian population. Another unanticipated result of relocation was its catalytic effect in providing a pool of young activists who would have a profound impact on Indian life in the late 1960s and 1970s.

Termination and relocation came to an effective end in the 1960s. In 1962 the Ponca Tribe of Nebraska became the last tribe terminated by Congress (U.S. 76 Stat. 429). In his 1970 Special Message, President Nixon asked Congress to repeal House Concurrent Resolution 108. However, it was not

until 1988 that Congress did so: "The Congress hereby repudiates and rejects House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of Federal relations with any Indian Nation" (U.S. 102 Stat. 431). A number of terminated tribes were restored to their previous status, including the three terminated Oklahoma tribes, the Wyandotte, Peoria, and Ottawa Tribes in 1977 (U.S. 92 Stat. 246).

Thirty years after House Concurrent Resolution 108 was passed, when removal in either of its forms was no longer possible and assimilation was no longer the overriding policy of the federal government, state officials have found new ways to assert claims on Indians and their land. These most often have involved state attempts to "shrink Indian country...as a way of divesting or voiding tribal sovereignty" (Valencia-Weber 1995, 1281). Shrinking Indian trust land coincides with state attempts to tax individual Indians or business ventures on Indian land.

As Robert N. Clinton argues, the United States Supreme Court has increasingly ruled against tribes in disputes with states. According to statistics compiled by the Iowa College of Law, between 1986 and 1990 tribes won twenty percent of the time in cases decided by the Court, and only fourteen percent of the time between 1990 and 1995. This failure rate is even more dramatic when compared to the 60-70 percent success rate enjoyed by tribes between 1959 and

1986 (Clinton 1995, 1056-57).[8] According to Clinton, "the Supreme Court's historic sympathy for enforcing tribal claims against hostile state and other non-Indian interests collapsed in 1986" (1057). As Richard A. Monette has pointed out, the Court's reinterpretation of Federalism under the influence of Chief Justice Rhenquist and Justice Sandra Day O'Connor has had a sometimes negative impact on tribal sovereignty (Monette 1994).

While Court support for states' rights has reasserted itself in recent years, it has been a factor in the past, particularly in the area of criminal and civil jurisdiction in Indian Country. In U.S. v. McBratney, 104 US 621 (1881), the Court ruled that state courts have jurisdiction over crimes in Indian Country involving only non-Indians. In a decision that seems somewhat inconsistent with others handed down the same year, the Court held in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), that tribal courts have no jurisdiction over non-Indians charged with a tribal criminal offense because it was "inconsistent with their status" (208). Further limiting tribal jurisdiction and sovereignty was the Court's finding in Montana v. United States, 450 U.S. 544 (1981), that the Crow Tribe had no

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[8] According to Clinton, "Each opinion was rated as a tribal win or loss depending on the manner in which the Court's opinion affected tribal rather than individual, Indian interests (Clinton 1995, 1957 fn2).

authority to regulate fishing by non-Indians on non-Indian portions of its reservation.

Recent cases consistent with these assertions of state authority of tribal authority include Duro v. Reina, 495 U.S. 676 (1990), which held that a tribal court has no jurisdiction over Indians who are not members of the tribe but charged with violating a tribal criminal ordinance; and Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), where the Court ruled that the Yakima Nation could not regulate business activities of non-Indians on non-Indian land located on the reservation.

"Nation"

Diametrically opposed to state authority in Indian Country is the idea, and sometimes policy, that Indian tribes are nations with sovereign powers. In a tacit recognition of an aboriginal sovereign status, the United States conducted treaty relations with Indian tribes from shortly after independence from Britain was declared until 1871. According to Historian Francis Paul Prucha, 367 treaties were ratified by the United States government between 1778 and 1868 (Prucha 1995, 1); however a large number of treaties negotiated between representatives of the United States and Indian tribes and submitted to the Senate

were never ratified, especially those with California tribes.

The very act of treaty making was a recognition of at least "a measure of autonomy" (Prucha 1995, 2). As Washburn notes, "The treaty system...explicitly recognizes the fact that the United States government formerly acknowledged the independent and national character of the Indian peoples with whom they dealt" (1995, 57). A treaty, in the view of Vine Deloria, Jr., "is nothing more than a construct to describe the relationship of political entities" (Deloria 1985. 108). But as he also notes, the significance of treaties varied over time and in 1871 Congress ended the treaty-making process with the tribes. In a constitutional and political conflict, the House objected to the continuation of a process that required it to fund treaty obligations but prevented it from participating in decisions about what its obligations should be. This battle reflected not only inter-institutional prerogatives; ending the treaty-making process tacitly recognized the rapidly diminishing independent status of tribes.

Not until the Indian Reorganization Act (IRA) (48 Stat. 787) was passed in 1934 did the federal government begin to take steps to recognize an independent political voice for Indians.[9] This was the vision of John Collier, reformer,

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[9] Oklahoma and Alaska were not included in the IRA. For a discussion of law extending most of the IRA's provisions to Oklahoma tribes, the Oklahoma Indian Welfare

social worker, and Franklin D. Roosevelt's Commissioner of Indian Affairs: "The IRA was part of Collier's attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism" (Cohen 1982, 147). Reversing fifty years of policy, the IRA halted the loss of Indian land holdings by stopping the allotment process and extending the trust periods indefinitely. Unallotted surplus lands could be returned to the tribe.

Tribes were given the opportunity to organize under a constitution adopted by tribal members. The tribal governments could hire legal counsel; prevent the sale, lease or encumbrance of tribal land and assets; and negotiate with other units of government. Tribes could incorporate business councils to manage tribal property.

A tribe could exempt itself from the Act by a vote of its members. The BIA conducted tribal elections over the next few years and encouraged tribes to organize under the IRA. A unique aspect of these elections was that a non-vote was counted as a yes vote. Many tribes thus organized under IRA's provision notwithstanding the fact that a majority of those voting had rejected the proposal. On many reservations the more traditional Indians led the opposition to incorporation. The most important tribe to reject the IRA was the Navajo Nation. While as Prucha notes, "The vote to accept the Indian Reorganization Act did no more than

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Act, see Chapter 6 below.

identify tribes to which the legislation could be applied," the tribal governments established under the IRA "became the basis for later developments in tribal autonomy" (Prucha 1986, 324, 325).

Initiatives begun in the Kennedy Administration, and accelerated under Johnson and Nixon in the 1960s and 1970's, brought about another dramatic change in Indian policy. By de facto ending termination and turning responsibility for federal programs over to the tribes, Presidents Johnson and Nixon set in motion a process that by the 1990s resulted in dynamic thriving tribal governments. The bi-partisan continuity of "self-determination" was the result of a consensus among Democrats and Republicans that the policy was consistent with the broader domestic goals of the two presidents responsible for its development. Both Presidents demonstrated the significance of self-determination by sending special messages on Indians to Congress: Johnson in 1968, Nixon in 1970.

Tribes were treated as other governmental units in many Great Society programs, including the Office of Economic Opportunity. A significant advance for tribes in the Johnson Administration was the BIA initiative permitting tribes to contract to operate BIA programs free of local Bureau control (Carmack 1985). Nixon expanded the emphasis on tribal control of federal programs and proposed legislation that became the Indian Self-Determination and

Education Act of 1975 (88 Stat. 2203). The Act gave legislative sanction to the contracting procedures that had begun under Johnson and provided greater tribal control over the education of Indian children.

Other advances in tribal governance occurred in the 1970s. In a move with significant implications for tribal sovereignty and the future of Indian children, Congress passed the Indian Child Welfare Act in 1978 (92 Stat. 3069). For decades Indian children had been removed from their parents and reservations by private and public social services agencies in the belief that they would be better off in a "stable" home, one usually with white parents. Congress acted to halt this practice by recognizing a tribal interest in the future of children born to tribal members. Tribal courts were given a role in custody questions involving Indian children and tribes and individual Indians could intervene in such matters.

While federal Indian programs suffered severe cutbacks during the 1980s, Presidents Reagan and Bush reaffirmed the policy of self-determination and the term of art became "government-to-government relations" between the federal and tribal governments. In 1991, at the urging of several tribes, Congress took the policy of self-determination contracting procedures to a new level. It amended the Indian Education and Self-Determination Act to provide for a "Self-Governance Demonstration Project" (105 Stat. 1278).

The seven tribes participating in the Project[10] would be able to assume the delivery of specific of BIA services, eliminating the local BIA bureaucracy. Over the next few years additional tribes took part and Indian Health Services programs were made eligible for contracting. In 1994 Congress passed legislation making the Self-Governance Program permanent (108 Stat. 4250).

Just as the Supreme Court had played a significant role in diminishing tribal sovereignty and increasing tribal dependence on the federal government, it eventually supported the reassertion of tribal rights. The new era of judicial support for tribal sovereignty began in 1959 with Williams v. Lee, 358 U.S. 217. In the matter of a lawsuit filed in state court by a non-Indian against a Navajo to recover losses on goods sold in the Navajo Nation, the Court held that the Arizona court lacked jurisdiction; the matter belonged exclusively in Navajo Court. The Court held that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them" (220).

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[10] The participating tribes were the Hoopa Valley Tribe of California, the Lummi Indian Nation, the Jamestown S'Kallam Tribe, and the Quinault Indian Nation, all located in Washington; the Mille Lacs Band of Chippewa Indians of Minnesota; the Absentee Shawnee Tribe of Oklahoma and the Cherokee Nation of Oklahoma.

Three cases decided in the 1970s further strengthened tribal sovereignty. In 1973, in McClanahan v. Arizona State Tax Commission, 411 U.S. 164, the Supreme Court held that Arizona's income tax could not be imposed on Indians earning their income on Indian land. In a lawsuit emerging from litigation over the Indian Civil Rights Act of 1968, the Court ruled against a Santa Clara Pueblo woman who sued her tribe over its denial of membership to her daughter by a Navajo man. The Court held that the suit was barred by tribal sovereign immunity (Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)). A second case decided in 1978, United States v. Wheeler, 435 U.S. 313 (1978), strongly asserted an independent inherent tribal sovereignty in holding that convictions for the same offense in tribal and federal courts did not violate double jeopardy.

Thus we see once again that the political status of tribes is unique, giving tribal governments a position from which to approach issues as other sovereigns in the federal system. This becomes an important factor in tribal attempts to protect their gaming interests. What results in that issue is classic inter-governmental antagonisms involving federal, state, and Indian governments. Much of the contemporary Indian legal and political leadership involved in gaming emerged during the 1960's and 1970's. It is important to understand the roots of Indian political activism on the issue of gaming.

Indian Political Activism

Given the often drastic consequences of policy for Indian people there is a tendency to overlook the significant attempts by many Indian leaders to shape those policies. The reality is that Indian leaders have always addressed the policies being perpetrated on and for them. The Indian Wars were fought by tribes protecting their sovereignty. It is often lost sight of in popular culture that the great Indian/cavalry battles were fought by a people resisting the imposition of foreign values and an alien political system. Indian leaders such as Crazy Horse, Sitting Bull, Chief Joseph, Tecumseh, and Geronimo were, as historian Alvin Josephy has called them, "Patriot Chiefs."

Warfare was not the only way Indians attempted to influence policy. As indicated by the nearly 100 years of treaty-making, diplomacy was an avenue many tribal leaders traveled to protect their people's interests. Some tribes also attempted strategies that would today be viewed as inside and outside lobbying efforts to achieve their policy goals. Viola documents in colorful detail the numerous delegations of Indian leaders that visited Washington to meet with administration and congressional officials (Viola 1995). Often Indian leaders made direct appeals to the American people. As noted above, the Cherokees launched a sophisticated public relations campaign to defeat removal. Other later Indian leaders such as the Oglala Lakota warrior

Red Cloud toured eastern American cities to arouse popular support for Indian issues.

One limitation on Indian participation in the political process was the denial of citizenship and the right to vote. Indians as a group did not become citizens of the United States until the passage of the Indian Citizenship Act in 1924 (43 Stat. 253). Prior to that time, Indians could become citizens only under certain circumstances, usually through special acts of Congress. In 1884 the Supreme Court held in Elk v. Wilkins, 112 U.S. 94, that John Elk, an Omaha Indian who had severed his tribal connections, was not a U.S. citizen under the meaning of the Fourteenth Amendment. The Indian Citizenship Act, while overturning Elk, also protected the continuing tribal status of individual Indians. As discussed in Chapter 4. citizenship did not necessarily grant the right to vote. Citizenship did, however, enable "reservation Indians to participate in state programs, and such participation makes state laws applicable to them in certain instances" (Cohen 1982, 267).

Organized activities by Indian organizations seeking to influence federal policy became increasingly important in the second half of the twentieth century. The National Congress of American Indians (NCAI), founded in 1944, is the most prominent inter-tribal organization in the nation and can mount effective lobbying efforts on Capitol Hill. As will be discussed in the next chapter, the National Indian

Gaming Association (NIGA) has become a significant actor in gaming issues. Other organizations deal specifically with discrete issues, such as health, education, and natural resources.

While all of these organizations attempt to influence policy with traditional inside political tactics, the 1960s and 1970s saw a different kind of organized Indian activism. This activism was more confrontational and more public than that engaged in by such organizations as NCAI. Beginning with the "fish-in" protests on the Northwest Coast in 1965, young Indians, many the products of the relocation process, began demanding that treaty rights and other guarantees be enforced by the federal government. Confrontations between young "militants" and law enforcement personnel intensified. In November 1969, in a dramatic display of activism, several Indians "occupied" Alcatraz Island.

The organization that became the focus for Indian activism was the American Indian Movement (AIM), founded in 1968 in the Twin Cities to monitor alleged police brutality against Indians living in St. Paul and Minneapolis. Within a few years AIM chapters were founded in a number of cities and reservations. In 1972 AIM leaders organized the "Trail of Broken Treaties," a caravan across the country to highlight Indian grievances. Along the way a list of demands was drawn up for presentation to officials in Washington. These "Twenty Points" called for a return to

the treaty-making process and a stop to state incursion on Indian lands. While in Washington, members of the caravan occupied the headquarters of the BIA for several days before agreeing to leave town. The government ultimately rejected the Twenty Points.

AIM's most serious action occurred in February 1973 when several of its leaders joined some members of the Oglala Sioux Tribe at the Pine Ridge Reservation in South Dakota to protest the rule of the tribal chairman. The result was a more than 70 day occupation of the village of Wounded Knee, site of the 1890 massacre of nearly 300 Lakota people. In the 1973 armed standoff between AIM and federal and tribal law enforcement, two Indians were killed by gunfire and a U.S. marshal was paralyzed by a bullet.

Current Trends

Echoes of Jacksonian states' rights continue to reverberate in Indian policy formulation, making state governments one of the significant new arenas of political activity by Indians. Made possible in large measure by gaming-generated revenue, Indian tribes in several states have the resources to become significant forces in state politics. This is occurring at another potential turning point in American politics and Indian policy. The movement toward "devolution" of federal programs to state governments and significant federal budgetary constraints are once again

threatening not only Indian programs but tribal sovereignty itself. Unlike similar national currents of previous decades, Indians now have a large and sophisticated network of political leaders and organizations capable of effectively mounting opposition to these trends in Washington. However, tribes in many states have not yet developed similar capabilities to challenge actions inimical to their interests in state capitols. The story of Indian gaming parallels many of these concerns.

CHAPTER 3: INDIAN GAMING: THE LAW, THE INTERESTS, AND THE SCOPE OF CONFLICT

Government sponsored gambling has become the revenue raising activity of choice among governments in the United States. In the past decade state, local, and tribal governments have turned to public, legal games of chance to fund services in light of continuing federal budget cutbacks. Every state in the nation except Hawaii and Utah permits some form of gambling, as do the District of Columbia and Puerto Rico. Thirty-six states and the District of Columbia operate lotteries. According to gambling critic Robert Goldman, "Politicians often adopt a hold-your-nose-and-legalize-it position. Frustrated by their failure to find other solutions to stimulate economic growth, city and state legislators have turned to gambling companies to create an economic development policy of last resort" (Goldman 1995, 59). In 1995, Nevada, New Jersey, Illinois, Louisiana each collected more than $200 million in gaming tax revenue; Mississippi, Connecticut, and Missouri each collected over $100 million; gambling tax revenue for all states was $1.9 billion (National Gaming Survey 1996, 2-3).

Americans have not been hesitant about supporting the new gaming establishments. In 1984 Americans wagered approximately $117 billion on all forms of legalized gaming (GAO 1996, n.p.); by 1994 that amount had increased to $482 billion (Some statistics 1995). Since 1976 when New Jersey

became the second state after Nevada to legalize casino gambling, 11 states have taken similar action. Since 1991 six states have approved riverboat casinos; nearly sixty riverboats now operate out of cities in Illinois, Iowa, Mississippi, Missouri, Louisiana, and Indiana (Some Statistics 1995; GAO 1996, n.p.). According to Harrah's Survey of Casino Entertainment, there were 154 million visits to casinos in the United States in 1995, a twenty-three percent increase over 1994 (National Gaming Summary 1996, 1).

Arguably, Indian tribes have led the movement of governments to gaming as a source of revenue. As federal support for tribal activities continued to diminish and alternative economic development activities in Indian Country remained minimal, tribal governments turned first to high-stakes bingo then to other forms of gaming to provide revenue for tribal services. Non-Indian businesses have historically been reluctant to make investments in Indian Country or to enter into joint ventures with tribal governments. Problems often cited include the observations that tribal governments are unstable, unpredictable, and corrupt. Sovereign immunity also stands in the way of business-tribal joint ventures. If a non-Indian invested tribal business goes bankrupt the tribe may not be sued to recover the investors losses. National Congress of American Indians President Gaiashkibos observed, "The harsh reality

is that the financial world has not historically looked towards locating business on Indian reservations" (Goldman 1995, 105).

The dollar figures for Indian gaming are as dramatic as are those for non-Indian gaming. Total revenues from tribal gaming activities in 1988, mostly from bingo, were estimated at $121 million (U.S. Congress. Senate. 1996, 9). Class III gaming - lotteries, casinos, pari-mutuel racing - has been responsible for the subsequent increase. Bingo revenue increased from $300 million in 1989 to $435 million in 1993, while Class III revenues increased from $100.3 million to $2.594 billion (U.S. Congress. Senate. 1996, 9). By 1994, Indian gaming revenue was $4.4 billion (Some statistics 1995).

This latter figure represents the tremendous increase in the number of tribes offering Class III gaming after Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988. In 1990 fourteen tribes in 4 states offered some form of Class III gaming. By 1993, 102 tribes in nineteen states did so (U.S. Congress. Senate. 1996, 9); in December 1995, 126 tribes in 24 states had Class III gaming (List 1996, 1).

Only about one-third of the nation's tribes operate Class III gaming establishments; at least two thirds offer bingo. Some tribes are located in parts of the country that make a profitable gaming venture unlikely. Other tribes have decided not to engage in this kind of economic

enterprise for tribal-specific reasons. Since the passage of IGRA, tribes can only spend their gaming profits on services to members, make charitable contributions, or disperse them to members on a per capita basis. This revenue has allowed tribes with profitable gaming to replace or supplement federal funds.

The Clash of Interests and Ideologies

Congress passed IGRA in an attempt to balance the competing economic and ideological interests raised by the emergence of Indian gaming. The economic interests involved in the spread of various kinds of gambling in Indian Country were fairly straightforward: the tribes, which saw gaming as a source of revenue independent of government control; the states, which were increasingly turning to state-run gaming endeavors; and non-Indian gaming enterprises. The economic conflict was also straight forward: who would control or share in the financial benefits resulting from the money wagered and lost in games operated by Indian tribes? Both the conflict and the interests are consistent with Schattschneider's classic "scope of conflict" arrangement wherein parties with an economic interest in an issue seek the level or arena of government most likely to award them victory (Schattschneider 1960).

There were also ideological conflicts involving fundamental questions of federalism, states' rights, and

Indian sovereignty. These questions, as old as the Republic, found new saliency in the war to control Indian gaming. The political environment for this aspect of the gaming conflict was first the quarter-century federal policy of Indian self-determination, and second, the shift away from a federalism dominated by the state governments to one dominated by the national government.

How IGRA came to be passed is a fascinating study in both of these areas of conflict. It also highlights a significant and overlooked institution of agenda-setting in American politics, the federal courts. John W. Kingdon's study of how issues get placed on the policy agenda[1] neglects the role of the courts (Kingdon 1984). He cites neither the courts as institutions nor the judicial system as a process in one of the "two categories of factors" affecting "agenda setting and the specification of alternatives: the participants who are active, and the processes by which agenda items and alternatives come into prominence" (16). As Henschen and Sidlow observe, the judiciary is "Noticeably absent from his list" of "agenda setters" (1989, 686).

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[1] Kingdon defines an agenda as "the list of subjects or problems to which governmental officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time" (1985, 4).

Kingdon also fails to acknowledge the importance of fundamental constitutional questions in the process of agenda-setting. While it is true that battles over such grand ideas as federalism often cover more basic (and baser) conflicts (Anton 1989, Conlan 1988), such notions are crucial to how the American political system functions. Samuel Beer has noted that American federalism is both an "idea" and a "structure" (Beer 1984, xi). As has been pointed out, Indian policy has often been driven by conflict over who controls Indian Country - the federal government, state governments, or the tribes themselves. The "structure" of the policy arrangement at any point in history has been driven by the "idea" behind that policy. This battle has been engaged again in the issue of Indian gaming, for as Wolf observed "The semisovereign status of Indian tribes is at the heart of the Indian gaming controversy" (Wolf 1995, 67).

Indian Gaming and the Courts

The first significant case establishing the right of tribes to conduct games of chance involved attempts by Florida law enforcement officials to subject Indian bingo to state law. The Seminole Tribe operated bingo games six days a week and awarded prizes in excess of $100.00, both above limits set by state law. Broward County Sheriff Robert Butterfield informed the tribe that he was prepared to make

arrests at the bingo hall on the reservation near downtown Fort Lauderdale. The Tribe was granted a preliminary injunction by a federal Judge for the Southern District of Florida in December 1979.

The following May the District Court held that Florida's gambling laws were civil/regulatory, not criminal/prohibitory. Therefore, notwithstanding the state's assumption of criminal jurisdiction over Indians on Florida reservations under P.L. 83-280, the state limits on bingo did not apply to the Seminole games (Seminole Tribe of Florida v. Butterfield 491 F.Supp 1015). The District Court's decision was upheld the following year by the Fifth Circuit Court of Appeals (Seminole Tribe of Florida v. Butterfield 658 F.2d 310). Both courts looked to the 1976 United States Supreme Court decision in Bryan v. Itasca County (426 U.S. 373) to determine the extent of state jurisdiction granted P.L. 83-280 states.

In Bryan the Court had developed the civil/regulatory, criminal/prohibitory test for P.L. 83-280 states. If a state statute regarding an activity conducted in the state was merely civil and regulatory in nature it was not enforceable against Indian tribes within the state. The Supreme Court held that congress had intended civil jurisdiction in P.L. 83-280 states to apply only in private disputes between Indians and between Indians and non-Indians in Indian Country. If the activity in question was criminal

and prohibited activity, the state had jurisdiction over the activity when conducted in Indian Country.

In Seminole v. Butterfield the district and circuit courts found that while the Florida Constitution prohibited "Lotteries, other than the types of pari-mutuel pools authorized by law..." (Article 10 # 7), the overall public gaming policy of the state was regulatory. The Circuit Court found that, "It is clear from the provisions of the bingo statute in question and the statutory scheme of the Florida gambling provisions considered as a whole that the playing of bingo and operation of bingo halls is not contrary to the public policy of the state" (316). The Seminole Tribe could continue its high-stakes bingo games.

Federal courts around the country heard similar disputes as more and more tribes opened bingo halls operating outside state limits. Federal court decisions dealing with attempts by P.L. 83-280 states to regulate Indian gaming continued to follow the Bryan and Butterfield reasoning. See Oneida Tribe of Wisconsin v. Wisconsin (518 F.Supp. 712) decided by the Western District Court of Wisconsin in July 1981; and Barona Group of Capitan Grande Band of Mission Indians v. Duffy (694 F.2d 1185) decided by the Ninth Circuit Court of Appeals in 1982. The most significant challenge to state authority over tribal gambling activities came from California's attempt to halt

bingo games offered by the Cabazon and Morongo Bands of Mission Indians.

California law permits several kinds of gambling. Like many states, it has legalized bingo games operated by certain charitable organizations, with prizes limited to no more than $250.00. Pari-mutuel horse-race betting is legal and the state operates a lottery. Card games are not illegal under state law and "card rooms" can be found throughout the state where they have not been locally outlawed. California was also one of the original mandated P.L. 83-280 states.

By the early 1980s a number of California's Indian tribes had opened or were planning to open bingo halls or card clubs (DeDominicis 1983). Tribal bingo halls uniformly offered prizes in excess of the state limit. California law enforcement officers just as uniformly considered these actions a violation of the state law they were sworn to uphold. Seeing their duty, several county sheriffs either threatened to close tribal bingo games or actually attempted to do so by executing raids. The eminent action by San Diego County Sheriff John Duffy lead to the Ninth Circuit's 1982 ruling in Barona that California's gaming policy was permissive/regulatory and the tribe's bingo beyond Sheriff Duffy's jurisdiction.

The General Council of the Cabazon Band of Mission Indians passed Tribal Ordinances in February and May 1980

authorizing bingo games and the establishment of "card clubs" offering draw poker (Joint Appendix 1985, n.p.). The Cabazon's card club opened in Riverside County on October 16, 1980. Two days later the Indio City Police Department raided the club and "arrested over 100 officers, members, employees and non-members of the Cabazon Band, and ordered the card club closed, for allegedly violating a local ordinance of the City of Indio which prohibited poker games" (Joint Appendix 1985, n.p..). The Tribe filed suit in the Federal District Court for the Central District of California which held in favor of the City of Indio in May 1981. The Ninth Circuit Court of Appeals reversed the District Court on December 14, 1982 (Cabazon Band of Mission Indians v. City of Indio, 694 F.2d 634). The Court held that Indio's attempted annexation of the Cabazon lands was void and its gaming laws therefore did not apply to the Tribe.

While the Ninth Circuit had now nullified two different state jurisdictions' attempts to stop Indian gaming, other jurisdictions continued to maintain their gambling laws were controlling in Indian Country. On February 15, 1983 sixteen Riverside County Sheriff's officers issued citations to more than thirty individuals, including the tribal officers for violating the county ordinance prohibiting the card games being played in Cabazon's card club (Joint Appendix 1985,

n.p..). The officers confiscated $3,000 in cash, files, records, playing cards, and poker chips.

At about the same time Cabazon was engaged in its on-going conflict with various law enforcement agencies, the nearby Morongo Band of Mission Indians found itself in a similar predicament. On April 23, 1983 the Morongo Band authorized bingo games which would operate contrary to state and county regulations governing bingo. Unlike the Cabazon Band, the Morongo did not authorize a card club.

The California Lawyer noted in September 1983, "There is not much to distinguish the Indian bingo played on three reservations in San Diego and Riverside counties since April 1983 from the games at the American Legion or Catholic churches across the land - except the jackpots of $20,000 and the fact that outside firms share in the profits" (DeDominicis 1983, 29). That was enough for Riverside County Sheriff Ben Clark who made it known that he would not tolerate the Morongo games as they were being offered.

The Cabazon and Morongo Bands sued Riverside County in the Federal District Court for the Central District of California. The tribes sought a declaratory judgement that the county's ordinances did not apply on tribal lands and asked for an injunction preventing Riverside from enforcing them. The State of California intervened on the side of the county. Judge Laughlin E. Waters ruled in favor of the tribes. The Ninth Circuit Court of Appeals affirmed Waters'

ruling, concluding that "the federal and tribal interests at stake here outweigh the State's interest (Cabazon Band of Mission Indians v. County of Riverside 783 F.2d 906 (1986)). The Court of Appeals found "that California's bingo statute is civil/regulatory in nature and does not apply, under Public Law 280, on the Indian reservations" (902). California's argument that the Federal Organized Crime Control Act (18 U.S.C. 1955) barred the tribes' gaming activities was rejected by the Court because "bingo games are not contrary to the public policy" of the State (902).

California appealed and the United States Supreme Court granted a writ of certiorari on June 21, 1987. In its brief California contended that "The State has a vital interest in prohibiting the tribal bingo games here" and that the Court should apply a balancing test recognizing the State's interest in regulating gambling activities on Indian land.

> First, State gambling policy is frustrated if Indian tribes can market an exemption from State gambling laws to non-Indians. Second, the tribal bingo games create a serious risk of organized crime infiltration.....The federal interest is, at most neutral in this case (Brief of the Appellants 1986, n.p.).

Attorneys for the State also argued that P.L. 83-280 gave California civil and criminal jurisdiction over Indian tribes located within the state. The brief urged the Court to reject "the Bryan dictum that state 'civil regulatory' laws do not apply." But even within the scheme established by Bryan, the State argued, "California's gambling laws are

'criminal prohibitory' and hence are included under Public Law 280 in any event" (Brief of the Appellant 1986, n.p.). The State also sought to apply the Organized Crime Control Act to Indian gaming in California since the Act authorizes the application of state and local gambling laws to Indian lands. Twenty-five states (including New Mexico and Oklahoma) joined in three separate amicus curiae briefs in support of California's position.

Attorneys for the Cabazon and Morongo Bands rejected the contention of California that a common law balancing test gave the State jurisdiction over Indian gaming. The Brief for the tribes argued that "The analysis of this case must begin with the well-established principle that absent express congressional authorization, states have no jurisdiction over Indian tribes on the reservations" (Brief of Appellees 1986, n.p.). According to tribal lawyers, P.L. 83-280 conferred no jurisdiction on California that would allow the State to regulate Indian gaming. The tribes also rejected the application of the Organized Crime Control Act to tribal gambling because the statute "does not give appellants jurisdiction to enforce their civil regulatory laws on the reservation". The Brief specifically rejected the application of county ordinances to the Cabazon card club, asserting "That enterprise is identical in all respects to hundreds of other card rooms operating elsewhere in California, including at least five others in Riverside

County" (Brief of Appellees 1986, n.p.). Eighteen tribes and two Indian organizations joined in three amicus briefs in support of the California tribes.

The Supreme Court handed down its ruling in Cabazon on February 25, 1987 (California v. Cabazon Band of Mission Indians, 480 U.S. 202). The six-three decision, written by Justice Byron White, rejected California's position and handed Indian tribes a significant victory in the face of strong states' rights arguments. White reiterated the Court's long held position that tribes have "attributes of sovereignty over both their members and their territory" and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Governments, not the States." White also acknowledged congressional power to confer states with jurisdiction if it "has expressly so provided."

To determine whether Public Law 280 gives states jurisdiction over a certain activity on Indian lands, the Court said "The shorthand test is whether the conduct at issue violates the State's public policy." In reviewing California's gaming laws White wrote, "we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.....we conclude that P.L. 280 does not authorize California to enforce" the California penal code regarding gambling on the Cabazon and Morongo lands. In rejecting State jurisdiction under the Organized Crime Control Act, the Court noted that "There is nothing in

OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not affect."

The Justices reviewed the competing interests at stake in the case before it. Recognizing that the state has an interest in regulating gambling within its borders, the Court also considered whether Congress had pre-empted state jurisdiction. "The inquiry," wrote Justice White, "is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." White noted that President Ronald Reagan had reaffirmed the federal interest in these goals in his 1983 Statement on Indian Policy. Noting congressional acts promoting economic development, the Court found "These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case....The tribes interests obviously parallel the federal interests."

> 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.

Justice John Paul Stevens wrote a dissent in which Justices Anton Scalia and Sandra Day O'Connor joined. Justice Stevens rejected the majority's holding that Congress had pre-empted the issue and wrote that "congress has permitted the State to apply its prohibitions against commercial gambling to Indian tribes," although he cited no statute providing for that jurisdiction. Stevens contended that the State's economic and safety interests were legitimate; when tribal gambling is beyond the reach of State regulation the State loses revenue. Stevens was not as sanguine about the ability of tribal gaming enterprises to remain corruption-free, writing, "I am unwilling to dismiss as readily as the Court does the State's concern that these unregulated high-stakes bingo games may attract organized criminal infiltration."

Cabazon and the lengthy controversy in California mirror other tribal-state gaming disputes around the country. While the civil/criminal question had been laid to rest by Cabazon, the issues of criminal involvement in Indian gaming, economic competition, and the fundamental question of state vs. tribal regulation in Indian Country continued to frame the debate.

Congress Enters the Game

It was the cumulative affect of federal court rulings ending in the Cabazon decision that finally spurred Congress

to action. The federal courts had added import to the increasing pressures of state officials and the non-Indian gaming industry. As Henschen and Sidlow point out, it is not unusual for court decisions to place an issue on the congressional agenda.

> While courts are not the most important actors in the agenda-setting process of Congress, in some significant instances a court decision or series of decisions will provide an impetus for congressional action - or reaction. Moreover, court rulings and interpretations of the law, especially those handed down by the United States Supreme Court, may spur interest groups or other actors to urge Congress to enact new statutes or to amend existing ones in response to judicial policy making (Henschen and Sidlow 1989, 686).

The "interest groups or other actors" were clearly involved in pressuring Congress to address the growing concerns emerging from the spread of Indian gaming made possible in large part by the federal courts.

I. Nelson Rose of the Whittier College School of Law observed in 1990 that "Ever since the Seminole Tribe of Florida won the right in 1979 to run high-stakes bingo games free from government control, the controversy has been fought in legislatures, the press, and cases going all the way to the United States Supreme Court" (Rose 1990, 3). Until Congress reacted to the increasing demands for action and passed IGRA, the boundaries and limits of state and tribal authority in Indian gaming were set largely by federal court decisions. These decisions expanded the

boundaries of tribal control and limited the extent of state jurisdiction over gambling in Indian Country.

As tribes won in court the states widened their efforts to gain control of the issue by turning to Congress. Former Secretary of the Interior Stewart Udall observed, "States and state governments simply said, let's stop Indians, let's make them conform to our law and let's not let them have the freedom to introduce other forms of gaming. Let's stop Indian gaming in its tracks before it gains momentum and enlarges the status quo" (Udall 1990, 26). But as Santoni points out, the tribes and non-Indian gaming interests also "desired legislation that would protect their respective interest" (Santoni 1993, 395).

According to former House Committee on Interior and Insular Affairs Counsel Franklin Ducheneaux, the impetus for congressional action came from the federal court decisions. As he told the Senate Committee on Indian Affairs in May 1996:

> The result of the these early cases, particularly the Barona and Seminole cases, was two-fold: first, as awareness of the holdings filtered trough Indian country, more tribes began to turn to gaming as a source of tribal revenue, and, second, an anti-Indian gaming backlash began to develop. These two developments raised the issue of Indian gaming in the Congress (Ducheneaux 1996).

This interpretation is echoed by Senator Harry Reid (D-NV).

> Following the Supreme Court's ruling in the Cabazon case though, there was little choice except for Congress to enact laws regulating gaming on Indian lands" (Reid 1990, 17).

The search for a legislative response to Indian gaming began its five year odyssey in November 1983 when Congressman Morris Udall (D-AZ) introduced the first bill proposing gaming regulation in Indian country, H.R. 4566. In introducing his bill, co-sponsored by Rep. John McCain (R-AZ), Udall noted the "concern about the attraction of organized crime and other undesirable elements" to Indian operated gaming. The Arizona congressman emphasized that the intent of the legislation was to neither support or oppose gaming and noted that the federal courts had determined that Indian tribes had the right "under certain circumstances" to conduct gaming (Cong. Rec. 1983, 34184). The following year Rep. Shumway (R-CA) introduced a bill to prohibit Indian gaming that was not legal within the state where the tribe was located or that was contrary to the state's public policy (Cong. Rec. 1984, H11018). The first Senate bill to regulate Indian gaming was Senator Dennis DeConcini's (D-AZ) "Indian Gaming Control Act," S. 902, introduced in April 1985.

In the five years following the introduction of H.R. 4566, Senate and House Committees conducted a number of hearings on tribally operated gambling, the first held by Udall's Committee on Interior and Insular Affairs on June 19, 1984. All sides in the controversy staked out their positions; the scope of the tribal-state intergovernmental

conflict and the position of the non-Indian gaming interests were established.

Representatives of state and local governments argued that states should regulate Indian gaming. They made four main points: 1) the need to control criminal activity associated with gambling and the alleged inability of tribes to deal with such crime; 2) the loss of state revenue if tribes or the federal government regulated Indian gaming instead of the states; 3) the lack of experience on the part of tribal governments in regulating gaming; and 4) a lack of faith in the federal government's ability to regulate Indian gaming.

Tribes argued that the regulation of Indian gaming was an attribute of their sovereignty. Those tribes that acknowledged that some order had to be brought to Indian gaming preferred that it be done at the federal rather than state level. The tribes also argued that they alone were entitled to the revenue generated by the games. They answered the law enforcement argument by pointing out that those tribes that had gaming had not had any serious law and order difficulties. Finally, the tribes argued that gaming was a legitimate way to implement self-determination and economic development policies.

The respective arguments of the states and tribes reflect E.E. Schattschneider's observations about conflict.

> The attempt to control the scope of conflict has a bearing on federal-state-local relations,

> for one way to restrict the scope of conflict is to localize it, while one way to expand it is to nationalize it (Schattschneider 1960, 10).

In the tribal-state conflict over gaming, the states and some tribes wanted to localize the issue and maintain control over what they each viewed as their sovereign sphere. Some tribes, realizing complete tribal control was not possible, sought to nationalize the issue and have the federal government intervene to protect tribal interests.

During House and Senate hearings on proposed legislation the scope of the intergovernmental and federalism conflict was most often indirectly stated. However, explicit definition of the conflict as a federalism issue sometimes did emerge. Brian McKay, Attorney General of Nevada, told the House Committee on Interior and Insular Affairs that,

> Excluding high-stakes gaming from state regulation is imprudent law enforcement. State agencies can best police gaming operations, a traditional function performed by these agencies....In our system of Federalism, state agencies are the most appropriate entities to provide regulatory oversight of high-stakes gaming operations (U.S. Congress. House 1987, 263-264).

John Duffy, Chairman of the National Sheriff's Association's Law and Legislative Committee echoed these sentiments in a letter to Senator Mark Andrews (R-ND), Chairman of the Senate Select Committee on Indian Affairs. He wrote that his association believed "that each state has the right to regulate gambling for all its citizens -- Indian and non-

Indian alike. It is a question of states rights" (U.S. Congress. Senate 1986, 609).

Indian tribes saw the question of federalism from a different perspective. Repeatedly, tribal leaders and representatives of Indian organizations stressed the need to protect their sovereignty. Alvino Lucero, Chairman of the Southern Pueblos Governors Council told the Senate Committee that "State assumption of civil and/or criminal jurisdiction over Indian reservations has serious implications for erosion of tribal sovereignty" (U.S. Congress. Senate 1986, 365). Tesuque Pueblo Governor Jim Hena, representing the Gaming Pueblos of New Mexico told the House Committee on Interior and Insular Affairs that, "I want to point out to you that the United States Constitution envisions a federal system which has as its component parts federal, state and tribal governments" (U.S. Congress. House 1987, 381).

State-elected officials saw the conflict as threatening their own sovereignty. Senator Chic Hecht (R-NV) told the House Interior and Insular Affairs Committee that "Legal gaming on Indian Lands should be subject to the same rules and regulations which non-Indian games must abide. Indian gaming should also be taxed the same way" (U.S. Congress. House 1987, 113). An accompanying document expanding on his remarks was entitled "Law Enforcement, Not Indian Sovereignty, Is Key To Legal Wagering On Indian Lands" (U.S. Congress. House 1987, 114).

This view was supported by representatives of the gaming industry. In a prepared statement for the Senate Select Committee on Indian Affairs, counsel for the American Greyhound Track Operators' Association wrote, "A State's laws and regulations relating to gambling represent a consensus of views as to standards of conduct allowable in that State as a whole (U.S. Congress. Senate 1986, 205).

There was support for the Indian perspective on sovereignty among some members of Congress. Senator John McCain (R-AZ) told the House Committee that "Imposing State jurisdiction on tribes, I believe, I am convinced, violates" Congressional responsibility to Indian tribes, and "cuts across the grain of past Congressional policies, encouraging self-determination and self-government" (U.S. Congress. House 1987, 159). Congressman Udall repeatedly asserted that while seeking ways to regulate Indian gaming and accommodating competing interests he would allow nothing to diminish tribal sovereignty.

The Reagan Administration's Position

The Reagan administration generally reacted to congressional activity rather than take the lead on the increasingly controversial issue of Indian gaming. In 1983 the Bureau of Indian Affairs established a Task Force on Bingo that was later expanded to include tribal representatives. BIA Deputy Director of the Office of

Indian Services Hazel Elbert said at the Annual Federal Bar Association Indian Law Conference that "our position was that prohibiting tribes from engaging in such [bingo] operations would be inconsistent with the announced Indian policy of President Reagan" (Indian News Notes, 1983a).

The Reagan administration's position became clearer as officials raised questions about potential organized crime infiltration as well as concerns about which level of government should be responsible for regulating what types of Indian gaming. Interior Deputy Assistant Secretary John Fritz voiced concern at an August 1983 meeting of the BIA Task Force about possible organized crime connections. He also raised concerns about the high percentage many tribes were paying non-Indian management firms to operate their gaming enterprises (Indian News Notes 1983b).

In 1984, Fritz testified before the House Committee on Interior and Insular Committee in support of Udall's H.R. 4566 but urged that action on the bill be deferred. While commenting on administrative difficulties the Interior Department was having in approving bingo management contracts, his major concerns were law enforcement issues. Fritz told the Committee that "The opportunities for skimming and laundering are enormous" (U.S. Congress. House. 1984, 16). He also had doubts about federal regulatory capabilities. According to Fritz, neither the Justice nor

the Interior Department was in a position to regulate Indian gaming (17-18).

Ross Swimmer, an Assistant Secretary of Interior for Indian Affairs under Reagan and former Principal Chief of the Cherokee Nation of Oklahoma, indicated his displeasure with tribal bingo operations. Swimmer appeared to be among those who believed that gaming was not real economic development. In December 1985 Swimmer said bingo "tells you you don't have to work you can just get it by gambling" and that it "sends the wrong signal" (Swimmer 1985b).[2] As Assistant Secretary, Swimmer sought tighter regulation of Indian bingo but opposed state regulation. He maintained that bingo should only be a "stepping stone" toward more diversified reservation economies (Swimmer 1985a). Swimmer was more concerned about what he called "hard-core gaming" (U.S. Congress. House. 1987, 193). "Our preference as to the so-called class III" gaming, he told a House Committee in 1987, was it "either not be allowed in Indian country, or that if it is allowed in Indian country, it should be regulated by the State that has the appropriate regulatory body already in place to do it" (193).

In commenting on pending legislation, including S. 555, the bill eventually amended and passed as the Indian Gaming Regulatory Act, the Justice Department stated its

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[2] As Principal Chief of the Cherokee Nation, Swimmer vetoed a Tribal Council resolution that would have permitted tribal sponsored bingo. See Chapter 4.

"overriding goals." Legislation passed by congress should, first "provide a set of 'bright line' rules that set out the extent to which State gambling laws, both regulatory and prohibitory, apply in Indian country and provide that such rules apply in all States containing Indian country, not just in P.L. 280 States" (U.S. Congress. Senate. 1988, 22). Any Indian gaming legislation should also "balance law enforcement concerns raised by commercial gaming with the understandable desire of the tribes to obtain revenue from this activity, and, consistent with the interests of federalism, must pay due regard to the authority of the States to regulate activities within their borders" (23).

Thus, to the extent that the Reagan administration had a position on Indian gaming, it involved regulatory concerns balancing state, federal, and Indian interests, promotion of Indian gaming as part of its overall Indian policy emphasizing economic development, and the elimination or reduction of possible criminal activity.

Congress Acts

While public hearings were held, private negotiations were being conducted among members of congress, their staffs, and the competing interests. The positions of the tribes and the states were clear. Senator Reid has observed that, "following Cabazon there were two basic positions in regard to Indian gaming."

> On the one hand many tribes believed that the Cabazon decision and the concept of Indian sovereignty meant that gaming on Indian lands should be controlled exclusively by the tribes, with little or no oversight by the federal government. On the other hand, many lawmakers and state and local government officials believed that the states should have to directly regulate gaming on Indian lands.....We were going to have to find some realistic middle ground or face the consequences of continued inaction in this area (Reid 1990, 17).

Ducheneaux notes that "The problem for the negotiators was how to permit the state to have a role in regulation of Indian class III gaming, which Cabazon precluded, through the requirement for a compact without placing tribes at the mercy of a state which would not act in good faith" (Ducheneaux 1996, n.p.).

The Supreme Court's action in Cabazon altered the course of gaming legislation. Cabazon was a legal victory for tribes from because it freed tribes from nearly all state gaming laws. While Cabazon was thus a legal victory for tribes, it altered the scope of conflict, moving it from the legal arena to the political arena. Nothwithstanding their success in the courts, the tribes faced formidable opposition from gaming interests and state government officials. "The practical effect" of the Supreme Court agreeing to hear Cabazon, according to Ducheneaux, "was to substantially weaken the position of the tribes and their supporters, and greatly enhance the bargaining power of the anti-Indian gaming forces." While the Indians were confident the Court would uphold the Ninth Circuit, "The

anti-Indian gaming forces were equally sure that the eventual decision of the Court would be a 'slam-dunk' for them" (Ducheneaux 1996, n.p.). The states demanded "full jurisdiction over all Indian gaming and the right to tax all tribal proceeds" (Ducheneaux 1996, n.p.).

The Report accompanying S. 555, ultimately passed as IGRA, had a somewhat different interpretation of the tribes' reaction to the Court's review of Cabazon.

> Tribes, concerned that the Court's ruling might adversely affect their position on the legislation, became more willing to compromise. Other parties, believing the Court would rule in favor of State regulation, became more adamant about furthering the position in favor of transferring jurisdiction over Indian gaming activities to the States (U.S. Congress. Senate. 1988, 4).

The House passed H.R. 1920, Udall's latest effort at resolving the increasingly difficult issue, on April 21, 1986, three days before the Supreme Court docketed Cabazon.[3] The bill, Udall said, "... accepts the state of law" (Cong. Record. 1986, H 2012). Three classes of gaming were established and a National Indian Gaming Commission was created. A five year moratorium was set on new class III gaming and the General Accounting Office would conduct a study to determine what kind of regulatory scheme would be appropriate for class III Indian gaming. The moratorium provision was a compromise worked out by Congressmen Bill Richardson (D-NM) and Tony Coelho (D-CA). Congressman John

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[3] The Court granted a writ of certiorari on June 10, 1986.

McCain (R-AZ) called H.R. 1920 "an honest attempt to join the conflicting interests of the state and the Indian tribes" (Cong. Record. 1986. H 2012).

While the Senate Select Committee on Indian Affairs reported an amended version of H.R. 1920 in September 1986, no further action was taken before the beginning of the next Congress. It would not be until after the Supreme Court upheld Cabazon that Congress finally enacted legislation regulating Indian gaming.

Two events involving leading members of congress on Indian issues were probably significant in achieving a resolution to the gaming issue. In 1986 the Democrats regained control of the Senate. Senator Daniel K. Inouye (D-HI) replaced Mark Andrew (R-ND) as Chairman of the Select Committee on Indian Affairs. In October 1986 Sen. Andrews had introduced an amendment in the nature of a substitute to H.R. 1920, the bill passed by the House earlier in the year. Andrews called his amendment "a tough law and order bill" giving the states greater authority over class III games (Cong. Rec. Oct. 6, 1986, S15390). Senator Inouye became one of the strongest advocates for Indian sovereignty in Senate history and sought to protect tribal interests in gaming and other issues.

The second important event involving a member of congress was the increasingly poor health of Congressman Udall. In the middle of 1988, faced with the intransigence

of those opposing Indian gaming and "in failing health, Mr. Udall advised his staff that he did not think he could hold his position in the Committee, and even less in the House. In light of that conclusion, it was his decision to cease action on the bill rather than risk the consequences" (Ducheneaux 1996).

Senator Inouye introduced S. 555 on February 19, 1987, six days before Cabazon was decided by the Supreme Court. In floor debate on the bill, Senator Inouye concisely summarized the fundamental issue involved in Indian gaming.

> We should be candid about the interests surrounding this particular piece of legislation. The issue has never really been one of crime control, morality, or economic fairness....At issue is economics. At present Indian tribes may have a competitive economic advantage....Ironically, the strongest opponents of tribal authority over gaming on Indian lands are from States whose liberal gaming policies would allow them to compete on an equal basis with the tribes (Cong. Record. 1988, S12654).

Senator Inouye added, "We must not impose greater moral restraints on Indians than we do on the rest of our citizenry" (Cong. Record. 1988, S12654).

Senator Tom Daschle (D-SD) spoke for many tribes in announcing his opposition to the bill after provisions were added to the bill permitting a larger role for the states.

> My reason for opposing this bill is that those Indian tribes from South Dakota whom I represent have informed me that this bill is unacceptable. The tribes strongly object to any form of direct or indirect State jurisdiction over tribal matters ....As the Friends Committee on National Legislation has pointed out, S.555 represents the first time a State would have jurisdiction over tribal affairs

rather than over individuals (Cong. Record. 1988, S12657).

Daschle was referring to provisions in S. 555 modifying Cabazon to the extent that tribes could only conduct Class III gaming if such games were legal in the state and if a tribal-state compact permitting such games had been concluded. This was included in S. 555 because of demands by state officials that they have some regulatory say over Class III games. It is clear that the legislation was not intended to give states more than a limited regulatory authority in Indian gaming and was not meant to be used by states to thwart tribes in their legitimate interests in conducting legal Class III games.

Senator Inouye told the Senate that

> The compacts are not intended to impose de facto State regulation. Rather the idea is to create a consensual agreement between sovereign governments and it is up to those entities to determine what provisions will be in the compacts.....I do want to publicly state that I hope that States will be fair and respectful of the authority of the tribes in negotiating these compacts and not take unnecessary advantage of the requirement of a compact (Cong. Record. Senate. 1988, S 12651).

Senator Evans said that by including the compacting requirements, "We intend that the two sovereigns - the tribes and the States - will sit down together in negotiations on equal terms and come up with a recommended methodology for regulating class III gaming on Indian lands." Furthermore, "...compacts should not be used as

subterfuge for the imposition of State jurisdiction on tribes" (Cong. Record. Senate. 1988, S12651).

Senator John McCain echoed this when he announced that

> If the States take advantage of this relationship, the so-called compacts, then I would be one of the first to appear before my colleagues and seek to repeal this legislation because we must ensure that the Indians are given a level playing field in order to install gaming operations that are the same as the States in which they reside and will not be prevented from doing so because of the self-interest of the States in which they reside" (Cong. Record. Senate. 1988, S12653).

The Senate passed S. 555 on a voice vote on September 15, 1988. The House took the bill up eleven days later even though it had not been considered in committee. Cong. Udall informed the House that "certain members and committee staff did participate very actively in the negotiations in the Senate which gave rise to the compromise S. 555" (Cong. Record. House. 1988 H8153). Udall termed the bill a "delicately balanced compromise." He said that he sympathized with the "anger and frustration" of the tribes, but felt "that this bill is probably the most acceptable legislation that could be obtained given the circumstances" (Cong. Record. House. 1988, H 8153). The House passed S. 555 on September 27 by a vote of 323 to 84 (Cong. Record. House. 1988, H 8426). President Reagan signed S. 555 into law on October 17, 1988.

IGRA was, according to Santoni, "an amalgamation of ideas presented in bills introduced in Congress from 1983 to 1987" (Santoni 1993, 404). Congressional Quarterly called

the law "a compromise between the tribes, which are extremely leery of any diminution of their sovereignty, and the states, which adamantly oppose any gambling operations within their borders unless they have regulatory authority over them" (CQ, 2730). According to Reid, IGRA, a "fragile compromise," was passed for two reasons.

> First, the bill was as fair as we could make it, and it provided protection to states without violating either the Cabazon decision or the concept of Indian sovereignty. Second, although nobody agreed with every provision of the legislation, it was the only bill that could pass, and there were no alternatives that could become law (19).

National Congress of American Indians Executive Director W. Ron Allen (Jamestown S'Klallam) noted that, "To the extent IGRA diminished tribal sovereignty over gaming, it reflected a compromise. The act transferred to the states authority previously reserved to the federal and tribal governments" (Allen 1996, n.p..). National Indian Gaming Association Chairman Rick Hill said in 1996 that the Association could "not locate a single Indian Nation who formally supported the inclusion of states in the compacting provision" (Hill 1996, 3).

Major provisions of IGRA:

* declares congressional policy to be 1) the provision of statutory basis for "promoting tribal economic development, self-sufficiency, and strong tribal governments;" 2) the protection of Indian tribes from organized crime and "to ensure that the Indian tribe is the primary beneficiary of" gaming and to assure the honesty of the gaming offered; and 3) the regulation of Indian gaming by the federal National Indian Gaming Commission is necessary for the protection of Indian gaming (25 USC 2701(3)).

* establishes three classes of Indian gaming:

Class I: traditional Indian social gaming with minimal prizes would be under the sole jurisdiction of the tribe (25 USC 2703(6), 2710(a)(1)).

Class II: bingo, lotto, pull tabs, punch boards, tip jars, instant bingo, nonbanking card games. These games would be regulated by the tribes and a newly created National Indian Gaming Commission (25 USC 2703(7), 2710(a)(2),(b)).

Class III: all other gaming, including horse racing, casino gambling, dog racing, slot machines, jai alia. These games would be permitted in Indian Country only if legal in the state and if agreed to in a compact negotiated between the state and tribe. States must negotiate in "good faith" with the tribes (25 USC 2703(8), 2710(d)(1).

* creates a three member National Indian Gaming Commission with the power to approve any tribal gaming ordinance and management contractor to close or fine Class II and III gaming operations. The Chairman is to be appointed by the president with the advise and consent of the Senate. The two remaining members are to be selected by the Secretary of the Interior and at least two of the Commission's members must be enrolled tribal members (25 USC 2704-2707).

* tribes in Michigan, North Dakota, South Dakota and Washington are grand fathered to enable them to continue certain card games they were then currently conducting (USC 25 2710(b)(4)(B)(I)).

* revenues from gaming can only be used for tribal government operations or programs, to promote the general welfare of the tribe and its members, to promote tribal economic development, for charitable contributions, and to help fund local government operating agencies (USC 2710(b)(2)(B). Per capita distributions to members under certain conditions (25 USC 2710(b)(3)).

* provisions of the Johnson Act (64 Stat. 1135) banning the importation of gambling devices onto Indian lands in states that do not by law permit them are waived for those tribes conducting Class III gaming pursuant to a tribal-state compact (25 USC 2710(d)(6).

* lands acquired by a tribe and taken into trust after passage of IGRA could not be used for gaming (25 USC 2710(a)) except under certain conditions, including approval by the State's governor (25 USC 2710(b)(1)(A)).

IGRA sets out a procedure for tribes to follow when states have, in their view, failed to negotiate Class III compacts in good faith. A tribe wishing to conduct Class III gaming must request that the "State" begin negotiations on a tribal-state compact (25 USC 2710(d)(3)(A)). If after 180 days from the day the tribe requested negotiations a compact has not been concluded or if the State has not responded to the tribe's request (25 USC 2710(7)(B)(I)) the tribe may sue in federal district court alleging the State has failed to negotiate in good faith (25 USC 2710(7)(A)(I)). The burden of proof lies with the State (25 USC 2710(7)(B)(ii)(II)). If the court finds that the State failed to negotiate in good faith it then orders both parties to conclude a compact within sixty days (25 USC 2710(B)(iii)). If after thirty days no compact has been concluded the court will have the tribe and the State submit compacts to a mediator who will select from the one that best conforms to federal law and submit it to both parties (25 USC 2710(B)(iv) and (v)). If the State agrees to the compact within sixty days of its submission to it by the mediator the compact is considered valid (25 USC 2710(B)(vi)). If the State does not consent to the compact submitted by the mediator within sixty days, the mediator notifies the Secretary of the Interior who will then prescribe procedures under which the tribe may conduct Class III gaming (25 USC 2710(B)(vii)).

Neither the tribes nor the states were satisfied with the new law. While tribes were free of state regulation of bingo and other Class II games, they were prohibited from Class III gaming unless the states agreed to a compact permitting it. As a 1996 Senate Committee on Indian Affairs Report noted, "In IGRA, Congress provided State governments with an unprecedented opportunity to participate in the regulation of Indian gaming on Indian lands pursuant to Tribal-State compacts" (U.S. Congress. Senate. 1996, 7). Advocates of tribal sovereignty believed any diminution of tribal authority was a loss for the tribes. The fact that the ultimate regulator was a federal commission did not lessen their dislike of non-tribal regulation.

While States were given "an unprecedented opportunity" to assert some regulatory role in Indian Country in the area of Class III gaming, they lost in three significant ways. First, they were prohibited from exercising any regulatory control over Class II gaming in Indian Country. Second, since they were barred from exercising regulatory power, states were also prevented from sharing in any economic benefits accruing to the tribes from their gaming operations. Third, they were required by IGRA to enter into negotiations with those tribes wishing to conduct Class III casino style games and could be sued by a tribe alleging its failure to negotiate in good faith. State officials argued this violated <u>their</u> sovereignty by violating their 10th

Amendment rights and abrogating their 11th Amendment immunity from lawsuits.

Nor was the gaming industry entirely pleased with the congressional solution. Organizations representing various kinds of gaming enterprises had made it clear that they wanted state rather than tribal or federal regulation. Furthermore, many saw the real possibility of serious competition from tribal gaming.

The scope of the conflict over Indian gaming had not been constricted by IGRA; the opportunity for expanded conflict had been created. Tribal-state conflict was intensified by the reluctance or refusal of some states to negotiate Class III compacts in good faith. Two central issues became the source of on-going and escalating tensions involving tribal and state governments and members of Congress. First, tribes and states continued to battle over the scope of gaming permitted under IGRA. State officials argued that only those games specifically authorized under state law were available to tribes within their borders. Indian leaders, on the other, argued that the Cabazon standard of general state gaming policy should be interpreted broadly in light of IGRA. Second, notwithstanding state support for compacting provisions, a number of tribes were compelled to file suit against states and their governors for failing to negotiate Class III compacts in good faith. This was a classic

intergovernmental confrontation, sovereign against sovereign on an issue of fundamental import: which government, federal, state, or tribal, had the greater authority in deciding what occurs within their respective borders. The answer would be determined by the federal structure and in turn further refine understandings of American federalism. The Federal Circuit Courts of Appeal split on the constitutionality of IGRA, the immediate issue on which this arrangement would be interpreted. Three circuits, the 8th, 9th, and 10th, rejected state contentions that IGRA violated their sovereign immunity.[4] The 11th Circuit held otherwise.[5]

To continue the fight for control of Indian gaming, states and tribes relied not only on their individual efforts in specific intergovernmental conflicts; each side used national organizations to press their interests at the national level. The National Governors Association (NGA) and the National Association of Attorneys General were the most active and visible groups presenting the states' position on Indian gaming. The governors developed a nearly unanimous policy on Indian gaming in 1993 and reaffirmed it in 1995.

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[4] Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (1993); Spokane Tribe of Indians v. Washington, F.3d (1994); Ponca Tribe of Oklahoma v. Oklahoma, 37 F.3d 1422 (1994).

[5] Seminole Tribe of Florida v. Florida, 11 3d 1016 (1994).

While asserting support for "The efforts of Native Americans to create better and more prosperous lives..." and stating that they "do not seek to prevent Native Americans from pursuing any opportunity available to other citizens of their states," the governors proposed amendments to IGRA enlarging their regulatory role in regulating Indian gaming (NGA 1995). First, the governors wanted an amendment limiting the scope of gaming to include "Only those games expressly authorized by state law..." Second, the governors wanted clarification of what "good faith" means and how it applied to tribes. Further, "In particular, a state's adherence to its own laws and constitution should not be regarded as bad faith." Finally, the governors sought clarification of IGRA's provisions allowing tribes to acquire trust land for gaming purposes (NGA 1995).

The organized effort of gaming tribes was led by the National Indian Gaming Association (NIGA), founded in 1985. Reflecting the status of tribal governments and the unique role of gaming in tribal affairs, NIGA and its activities do not meet the usual descriptions of intergovernmental associations. NIGA is neither a "generalist" nor "specialist" organization according to the usage of those terms in Cigler (1995). NIGA resembles a generalist organization in that it represents tribes carrying on gaming activities. It differs from that type of organization in its focus on one issue while formally representing the

tribes. It is also not really a "specialist" organization for the same reason. According to Cigler, these groups comprise "the professionals who staff government bureaucracies at all levels" (140). NIGA's members are gaming tribes and "other non-voting associate members representing organizations, tribes and businesses engaged in tribal gaming enterprises..." (Fact Sheet n.d., n.p.). NIGA's mission

> is to protect and preserve the general welfare of tribes striving for self-sufficiency through gaming enterprises in Indian Country. To fulfill its mission, NIGA works with the Federal government to develop sound policies and practices and to provide technical assistance and advocacy on gaming-related issues. In addition, NIGA seeks to maintain and protect Indian sovereign governmental authority in Indian Country (Annual Report 1994, n.p.).

Working closely with NIGA on gaming and sovereignty issues is the National Congress of American Indians (NCAI), founded in 1944 (NIPC 1993). NIGA and NCAI joined forces in a Task Force that is a "vehicle for imparting information in person to Tribal leaders and for getting unified consensus direction from the Indian Nations on legislative or policy issues" (Annual Report, 1994, 5). An Attorneys' Work Group comprising tribal lawyers reviews legislation and court decisions. This group is responsible for preparing "the analysis for distribution to Tribal leaders and for leading the later discussion of the analysis with the Tribal leaders as NIGA or NIGA/NCAI Task Force moves to decision on the various issues" (Annual Report 1994, 6). According to Ponca

Tribe Attorney Gary Pitchlynn (Choctaw), these and other more "fluid" groups of elected tribal leaders and lawyers perform a wide range of activities, including advising and accompanying Task Force members who negotiate with congressional and state officials (Pitchlynn 1995b). In August 1993, as pressure on Indian gaming increased, the Association hired the Washington, D.C. public relations firm of Dorf and Staton at a cost of $20,000 per month (Anquoe 1993b).

Non-Indian gaming interests have not been silent on Indian gaming. This is consistent with Schattschneider's observation that "It is the losers in intra business conflict who seek redress from public authority..." (Emphasis in original) (Schattschneider 1960, 40). The most visible representative of the gaming industry's anti-Indian gaming efforts has been New Jersey casino owner Donald Trump. His efforts to have IGRA amended include appearances on Capitol Hill and in the media. He filed a law-suit in New Jersey Federal District Court seeking to overturn the Act and resorted to ridiculing the notion of Indian sovereignty (Anquoe 1993a and 1993c).

In May 1993, several members of Congress from New Jersey and Nevada introduced legislation designed to amend IGRA and place most Indian gaming under state jurisdiction. The rationale for the legislation was the authors' contention that Indian gaming faces a growing threat from

organized crime (Anquoe 1993d).[6] Indian leaders called this legislation the "Donald Trump Protection Act" (Stillman).

In late 1994 the non-Indian gaming industry took the first steps to form an organization to protect its interests. In May 1995, former Republican National Committee Chairman Frank Fahrenkopf became the first president of the American Gaming Association (Camire 1995a). The AGA is not formally opposed to Indian gaming and concentrates its resources on fighting the increasing opposition to gaming nationally.

The National Political Climate and Indian Gaming

After the Republican Party gained control of Congress in 1994 there was a renewed emphasis in national politics on redefining the roles of state and federal governments (Drew 1996). The Contract With America platform of House Republican candidates was a blueprint for reducing federal spending and regulation and shifting the burden of governance to the states. This shift in the political climate occurred at the same time that the Couer d'Alene Tribe of Idaho proposed a controversial national Indian lottery. The convergence of these two events reawakened the stalled congressional efforts to amend IGRA. Both events

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[6] For an extended discussion of the Trump and New Jersey congressional delegation's contentions, see the October 5, 1993 hearing before the House Subcommittee on Native American Affairs (U.S. Congress. House. 1993).

stimulated state officials to pressure Congress to limit the scope of Indian gaming and increase state authority over Class III games.

A number of bills were introduced in the 104th Congress to amend IGRA to curtail Indian gaming or give states more regulatory authority over gambling on Indian lands. The most draconian from the Indian perspective was H.R. 1512 introduced by Rep. Gerald B. Solomon (R-NY) and co-sponsored by Rep. Robert Torricelli (D-NJ). Entitled the "Fair Indian Gaming Act," the bill was a frontal assault on the tenuous balance achieved in IGRA. Good faith burden of proof, scope of gaming, after-acquired lands, and the Couer d'Alene lottery were among the bill's provisions designed to shift the balance to the states.

Among the bills seeking to amend IGRA was Senator McCain's S. 487. This bill as introduced sought to address some of the same issues as the Solomon-Torricelli bill, but McCain attempted to maintain IGRA's balance while addressing some concerns. The bill provided an opportunity for the states and tribes to again lay out their positions. While S. 487 was endorsed by Indian gaming leaders, it was strongly opposed by the National Governors' Association and individual governors.[7] NGA Executive Director Raymond C. Scheppach testified against S. 487 at the July 25, 1995 the

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[7] The one exception was New Mexico's Republican Governor Gary Johnson.

Senate Committee on Indian Affairs hearings, telling the members that the governors were most concerned about the scope of gaming provisions and the trust land acquisition sections of the bill.

Opposition to both provisions was based on the governors' belief that they intruded into state prerogatives. The governors' strong opposition to the national Indian lottery was similarly presented by Scheppach. He concluded his testimony with a pointed reference to present political realities.

> In addition, it appears that S. 487 is inconsistent with the current trend in federal/state relations. In most other areas, Congress is shifting more responsibilities to state and local government. Here, however, there is an attempt to make gaming entirely a federal/tribal issue without regard to the legitimate role of the states. Such an approach appears to be inconsistent with the increasing recognition of state authority (Scheppach 1995).

Letters to Chairman McCain from the governors were equally pointed in their states' rights opposition to S. 487.[8]

* California Governor Pete Wilson (Republican): "the bill provides a federalized 'fast track' compacting process, designed to sidestep the interests and laws of the states" (Wilson 1995).[9]
* Colorado Governor Roy Romer (Democrat): "S. 487 establishes an unnecessary additional federal

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[8] In addition to those cited below, the Committee received letters from the following governors: George E. Pataki (New York); Fife Symington (Arizona); Arne H. Carlson (Minnesota); and Marc Raciot (Montana).

[9] Governor Wilson, a candidate for the 1996 Republican Presidential nomination, reminded the Committee that he had voted for IGRA when serving in the Senate.

bureaucracy in an area where local control should prevail. This is especially inappropriate during a time in history when downsizing and localizing government is paramount" (Romer 1995).

* Michigan Governor John Engler (Republican): "Under S. 487, states would be stripped of virtually any bargaining power, a result which smacks of inequity and a disregard for states' rights" (Engler 1995).

* South Dakota Governor William J. Janklow Republican): "At a time and an era when all levels of government are in agreement that local governments are better able to administer such issues, I am surprised you are proposing the amendments found in S. 487. These matters should be left with the states and I strongly disagree with a law allowing the Secretary of the Interior to decide where gaming should or should not occur within the State of South Dakota. He is not the Secretary of Interior for the State of South Dakota" (Janklow 1995).

The governors' bi-partisan arguments had an effect on the Committee. The August 9 mark-up session eliminated the after-acquired land provision as well as the changes in Class III good-faith mechanisms (Camire 1995b). Word had reached the NIGA a week before the scheduled mark-up session that both McCain and Inouye were going to the meeting with plans possibly adverse to the tribes' interests. This information resulted in an emergency meeting of the organization in Washington three days before the Committee met (Green 1995c). The NIGA/NCAI Task Force withdrew its previous public support of the bill (Hill 1995, 5). A compromise was never achieved and the bill never got out of committee.

Gaming tribes found they faced a second challenge in the 104th Congress in a proposal by House Ways and Means Committee Chairman Bill Archer (R-TX) to tax tribal gaming profits. Although the measure passed the House, NIGA was able to mount a challenge in the Senate and the proposed tax was defeated.

The Supreme Court and Seminole: Back to the States, Back to Cabazon, or Back to the Drawing Board?

While the battles over Indian gaming were proceeding, the Supreme Court demonstrated once again that "the least dangerous branch" is often the most decisive institution in our separated system. In a momentous victory for those advocating "devolution" of authority from federal to state governments, the Court carefully parsed IGRA in handing down its March 27, 1996 ruling in Seminole Tribe of Florida v. Florida (No. 94-12, 1996 U.S. Lexis 2165). The 5-4 decision was as much concerned with the distribution of power in the federal system as it was with Indian gaming. Justice Stevens' strong dissent began, "This case is about power - the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right."

The Court affirmed the 11th Circuit's ruling that IGRA violated state Eleventh Amendment sovereign immunity. In finding that Congress had exceeded its power in granting tribes the right to sue states for failing to negotiate

Class III gaming compacts in good faith, the Court overturned Pennsylvania v. Union Gas Co., 496 U.S. 1 (1989).[10] In writing for the majority, Chief Justice William Rehnquist accepted the tribe's argument that Congress had expressly intended to abrogate the 11th Amendment sovereign immunity of states from lawsuits under its Indian Commerce Clause power. Union Gas, a case involving congressional power to abrogate 11th Amendment sovereign immunity under the Interstate Commerce Clause had held that a clear congressional intent was required to do so. In dicta that is potentially significant for future litigation, Rehnquist asserted that congressional power under the two commerce clauses was indistinguishable. "If anything," wrote Rehnquist, "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."

However, the Chief Justice wrote that Congress had no power to abrogate the Eleventh Amendment under either commerce clause. In doing so, the Court's majority explicitly overturned Union Gas, Rehnquist asserting "Never before the decision in Union Gas had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other

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[10] Associate Justice Clarence Thomas was the deciding vote in Seminole. He joined the four sitting Justices who had dissented in Union Gas.

than the Fourteenth Amendment....We feel bound to conclude that Union Gas was wrongly decided and that it should be, and now is, overruled." The majority also held that the Ex parte Young[11] doctrine was inapplicable in Seminole and the Tribe was therefore barred from suing the State's governor to enforce IGRA.

In two strongly worded dissents, Justices Stevens and Souter sharply criticized both the decision and the majority's reasoning. As with the majority's decision, the central concern of both dissents was the shift in power. Both raised the specter of chaos created by the inability of Congress to have its statutes enforced. Stevens wrote about "the shocking character of the majority's affront to a coequal branch of our government..." Souter, in a dissent delving deeply into historical developments wrote,

> In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right.

While interpretations of the meaning and ramifications of Seminole varied widely depending on whose interests were at stake, all agreed that the Court had effectively provided an opportunity for the states to remove themselves from the IGRA negotiating process. What remained of IGRA's

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[11] Ex parte Young, 209 U.S. 123 (1908), allows state officials in some cases to be sued for non-enforcement of the law.

compacting provisions was also debated. The states contended that as long as they opted out of the process or refused to waive sovereign immunity, tribes could not engage in Class III gaming. Tribal leaders and attorneys, on the other hand, believed they now had the option of going directly to the Secretary of Interior with their Class III gaming proposals (Pitchlynn 1996).[12]

Conclusion

As has been shown, notwithstanding IGRA, Indian gaming has been a continuing and difficult issue for Congress. Indian gaming has been linked by some members of Congress to the need for legislation creating a national commission to study gambling nationwide. The Supreme Court's Seminole decision heightened the pressure and once again demonstrated the agenda-setting nature of the Court; it had, in Henschen and Sidlow's words "created a 'moment:' it opened a policy window" (1989, 723). Five weeks after Seminole was decided the Senate Committee on Indian Affairs held a hearing on the impact of the decisions. Witnesses emphasized the confusion created by the Court's ruling and the need for congressional

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[12] On May 10, 1996, less than two months after the Supreme Court's Seminole decision the Department of the Interior published a "Request for Comments on Establishing Departmental Procedures to Authorize Class III Gaming on Indian Lands When a State Raises an Eleventh Amendment Defense To Suit Under the Indian Gaming Regulatory Act" (Federal Register 1996, 21394).

action. For example, Wisconsin Attorney General James Doyle, a leading advocate for greater state regulation in Indian gaming, told the Committee that "the questions and uncertainty raised by Seminole only reinforce the need for Congress to resolve the critical policy choices before us all" (Doyle 1996).

Within the context of IGRA and the political environment, tribes have attempted to address their economic needs and assert their sovereign rights by engaging in gambling activities. Likewise, state officials have fought to assert a state interest often conflicting with the interest of the tribes located within the state's borders. IGRA provides the backdrop for the scope of this conflict. The success of tribes has been varied as they have attempted to assert their policy goals by means of their unique political status, adjusting to shifting arenas of conflict. When necessary in lawsuits or lobbying congress for favorable gaming legislation, tribes could bring to bear their sovereign status or their interest group status.

Tribal leaders could participate as co-equal sovereigns with state governors in negotiations over IGRA. These deep inside efforts were in turn supported by NIGA and state gaming associations. That the tribes have a higher status than interest groups is seen in the need for both Congress and the Courts to consider the inherent sovereignty of the tribes when contemplating the intrusion of state governments

into Indian County. Cabazon clearly recognizes that status and IGRA attempts to broadly following Cabazon.

The battle for Indian gaming also implicitly recognizes a role for tribes in the federal system, a role that is growing more pronounced. As badly drafted as IGRA was, it on one level forces states to deal with tribes, government-to-government, even while Congress opened the door for state participation in an activity the tribes believe should be entirely under their purview. Gaming itself builds on other activities that tribes are more and more involved in, not as mere recipients of federal largess, but as sovereigns having self-governing roles similar to states in some policy areas.

The actions of tribes in two very different states - New Mexico and Oklahoma - provide an opportunity to investigate this status by focusing on their battle to control Indian gaming.

CHAPTER 4: NEW MEXICO: GAMING AND HARDBALL POLITICS

Following California v. Cabazon Band of Mission Indians and the passage of the Indian Gaming Regulatory Act, a state's public policy concerning legalized gambling establishes the parameters for Indian gaming. It is within this policy and statutory boundary that tribes must pursue their own gaming policy. The success of these efforts to mesh state policy and tribal policy are affected by at least two other conditions: the extent of tribal cohesion within a particular state and the degree of cooperation or antagonism with which a state's political and governmental institutions greet tribal efforts.

Within this state and tribe specific environment, tribes may engage in one or all of three strategies designed to achieve their gaming goals: litigation, lobbying - both inside and outside - and electoral pressure. These strategies are available to the tribes because of their unique political status. The first two strategies are typically used by governmental bodies and interest groups seeking to influence public policy. The last strategy, electoral activities, are reserved for individuals and organized groups having their own political agenda and not having the status of a sovereign government. Indian tribes often have policy agendas requiring action by local, state, or national governments. Because of their political status, tribes are uniquely positioned to act in their capacities as

sovereign entities and as interest groups when approaching the different arenas of government in the American federal system.

In their efforts to protect and expand tribal gaming operations, New Mexico's Indian tribes aggressively pursued all three strategies. This included litigating their position in federal court; attempting to follow the Indian Gaming Regulatory Act and negotiate compacts with the governor on a sovereign-to-sovereign basis; appeals to the general public; and involvement in the electoral process. This multi-front battle was fought by tribes individually and in concert through the New Mexico Indian Gaming Association.

NEW MEXICO AND INDIAN TRIBES

New Mexico lays claim to a unique cultural heritage. In its borders are some of the oldest continuously occupied communities in North America. It is also the birthplace of the most modern of technologies, atomic power. Within New Mexico are found Spanish speaking people who have more in common with Spain than Mexico (Nostrand 1992). The description of the state written in 1940 for the Work Projects Administration Writers' Program's New Mexico: A Guide to the Colorful State is just as apt today: "New Mexico today represents a blend of the three cultures -

Indian, Spanish, and American - each of which has had its time upon the stage and dominated the scene" (WPA 1953, 3).

Politically, New Mexico is also unique among American states. Daniel Elazar classifies the dominant political culture of the state as Traditional-Individualistic, a designation it shares with Oklahoma, Texas, Florida, Kentucky and West Virginia (Elazar 1984, 135). According to Elazar, "The traditionalistic political culture is the most tolerant of out-and-out political corruption, yet it has also provided the framework for the integration of diverse groups into the mainstream of American life" (142). On the other hand, "The traditionalistic political culture contributes to the search for continuity in a society whose major characteristic is change, yet in the name of continuity, its representatives have denied blacks (or Indians, or Hispanic-Americans) their civil rights" (142).

Ronald J. Hrebenar describes New Mexico as belonging to the "Mountain West" distinguishing it from the "Pacific West" of the coastal states, Alaska and Hawaii (Hrebenar 1987, 3). Among the factors that make this region unique is the fact that "The central economic problems of the Mountain West are its lack of water and its enormous size in comparison to its small population" (3). Economically the region also has a "tradition of absentee ownership of factories and natural resources" and weak labor unions (4).

But as Richard Nostrand has written, New Mexico is part of the "Borderlands," "that zone in the Western Hemisphere where the sharply contrasting Latin and Anglo cultures overlap" (Nostrand 1992, 3). The WPA Guide noted, "In the migratory annals of the United States, the direction of movement has been from east to west; in new Mexico (meaning in this instance all the southwestern states originally embraced in the old Spanish province of Nuevo Mejico) that direction did not hold. For three centuries preceding the United States occupation, the trend of settlement here was all from the south" (WPA 1953, 4).

While migration of Spanish and Anglo settlers is important to the political and cultural heritage of the State, the aboriginal and continued presence of American Indians has equally shaped the state. While the alien European-based cultures have had a significant impact on New Mexico Indians, Frank Waters' 1950 observation holds true nearly a half century later.

> The only Indians left as integral groups today exist within the immemorial boundaries of their ancient homeland. The village Pueblos and semi-nomadic Navahos, fringed by the mountain Utes and desert Apaches - these are the last remnants of what we call the Vanishing Americans" (Waters 1984, 18).

There are today twenty-two non-vanished federally recognized tribes in New Mexico, all of whom can indeed trace a long historic presence within the present state boundaries. The Indians of New Mexico are categorized in

two major groups: the nomadic Athabascan tribes and the pueblo tribes. The Navajo, Mescalero Apache, and Jicarilla Apache comprise the first group, while nineteen tribes separated by three language families comprise the pueblo people. (See Table 1.)

TABLE 1

New Mexico Indian Tribe

Tribe	1990 Indian Population
Navajo Nation	143,405
New Mexico	50,563
Arizona	92,842
Ramah Navajo Community	191a
Alamo Navajo Reservation	1,228a
Canoncito Navajo Reservation	1,177a
Jicarilla Apache Tribe	2,375
Mescalero Apache Tribe	2,516
Acoma Pueblo	2,551
Cochiti Pueblo	666
Isleta Pueblo	2,699
Jemez Pueblo	1,738
Laguna Pueblo	3,634
Nambe Pueblo	329
Picuris Pueblo	147
Pojoaque Pueblo	2,134
Sandia Pueblo	358
San Felipe Pueblo	1,859
San Ildefonso Pueblo	347
San Juan Pueblo	1,276
Santa Ana Pueblo	481
Santa Clara Pueblo	1,246
Santo Domingo Pueblo	2,947
Taos Pueblo	1,212
Tesuque Pueblo	232
Zia Pueblo	637
Zuni Pueblo	7,073

a: Navajo tribal land separated from the major portion of the Navajo Nation.
source: 1990 Census of Population: General Population Characteristics: American Indian and Alaska Native Areas.

According to the 1990 Census, New Mexico had the fourth highest number of Indians in the country, 134,355 (Census 1990).

The post-Columbian political history of New Mexico tribes has been shaped by the governance of three separate sovereigns: Spain, Mexico, and the United States. The first Europeans to see what would become the State of New Mexico were four Spanish shipwreck survivors who wandered from Texas to the Gulf of California between 1527 and 1536. An expedition seeking the "seven cities of gold" reached the Zuni Pueblo of Hawikuh in 1539. The following year a major expedition under Francisco Vasquez Coronado began its entrada into the unexplored country along the Rio Grande, visiting the pueblos along the river and eventually going as far as modern day Oklahoma and Kansas.

In 1598 Don Juan de Onate established the first permanent Spanish outpost in New Mexico, making the Pueblo of San Juan the capital of the province. Spanish sovereignty ruled this country almost continuously until 1821 when Mexico declared its independence and took control. Mexico lost the territory north of the Rio Grande in the Mexican-American War and ceded control to the United States in the Treaty of Guadalupe Hidalgo in 1848.

In 1850 the United States Congress passed the New Mexico Organic Act and created the Territory of New Mexico. The Territory included most of what today are the states of

New Mexico and Arizona, as well as parts of Nevada and Colorado. The size of the Territory was diminished in 1861 and 1864 when the Territories of Colorado and Arizona were established. In 1910 Congress passed the Enabling Act paving the way for Arizona and New Mexico to be admitted to the Union. The New Mexico Legislature adopted a Constitution in 1911 and New Mexico was declared the 47th state by President William Howard Taft on January 6, 1912.

The Enabling Act made several references to the Territory's Indian people and lands. In addition to requiring the new state to prevent the "introduction of liquors into Indian country," the Act had the state "disclaim all right and title" to Indian lands "the right or title to which shall have been acquired through or from the United States or any prior sovereignty." These lands were also exempted from state taxes for as long as they maintained their status. Taxes on Indians living off reservation and Indian owned land not part of a reservation were permitted unless prohibited by Congress (36 Stat 557).

The Tribes

The singular history of New Mexico tribes has meant that federal Indian policy has often been singularly applied to New Mexico Indians. This has been particularly true of the pueblo tribes given the unique status of their culture

and land holdings. In his classic and authoritative Handbook of Federal Indian Law, Felix Cohen described the people encountered by Spanish explorers.

> When the Spaniards entered the Rio Grande Valley in the sixteenth century they found certain Indian groups or communities living in villages and these Indians they designated "Indios Naturales" or "Indios de los Pueblos" to distinguish them from the "Indios Barbaros," by which term the nomadic and warlike Indians of the region were designated. The Indians who were called Pueblo Indians were not of a single tribe and they had no common organization or language. Each village maintained its own government, its own irrigation system, and its own closely integrated community life (Cohen 1942, 383).

Jemez Pueblo historian Joe Sando writes that "The Pueblos are an ancient people whose history goes back into the farthest reaches of time" (Sando 1992, 21). The Pueblo of Acoma in west central New Mexico and the Hopi village of Oraibi in Arizona are the two oldest continuously occupied communities in North America. A sedentary farming people, the pueblo Indians have an intricately developed ceremonial life that is jealously guarded by the people. Most pueblo governments combine elements of democracy and theocracy.

Most of the modern Pueblos live on land they have occupied for nearly 1000 years. They are unique among American Indian tribes in that they hold fee title to most of their land "under grants of the Spanish, the Mexican or the United States Government, or by reason of purchases made by the Pueblo" (Cohen 1942, 396). Other pueblo land

holdings are the result of acts of congress or purchase by the federal government.

The character of pueblo culture and land holdings has often led to the denial of their status as Indians under federal law. In 1876 the United States Supreme Court held that provisions of the 1834 Trade and Intercourse Act relating to trespass on Indian lands did not apply to the pueblo people. In United States v. Joseph, a case involving Taos Pueblo, the Court held that pueblo Indians "if, indeed, they can be called Indians" were different in fact and in law from other Indians. Finding that there were no other Indians like the pueblo people within the United States when the 1834 law was passed, the Court differentiated the pueblos from the "nomadic Apaches, Comanches, Navajoes [sic], and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government" (United States v. Joseph 1876). In effect, pueblo people were not Indians.

Thirty-seven years later the Court reversed both its anthropological and legal understandings of the pueblos in a case involving the application of federal law barring the introduction of alcohol into Indian Country. In United States v. Sandoval Justice Van Devanter found that "The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and

industry, are nevertheless Indians in race, customs, and domestic government."

> Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.
> ....
> With one accord the reports of the superintendents charged with guarding their interests show that they are dependent upon the fostering care and protection of the Government, like reservation Indians in general; that although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants (United States v. Sandoval 1913).

The Court thus found that the pueblo people were indeed Indians, "and considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authoritative and controlling." Ironically, the holding in Sandoval has provided the pueblos protection from state efforts to extend its jurisdiction over them.

Sando has written that "Only the vigilance of the Pueblo people has made it possible for them to protect their land and preserve it from destruction" (Sando 1992, 122). An obvious historic example is the Pueblo Revolt of 1680 that temporarily drove Spanish settlers from New Mexico. It has also been evident in at least three twentieth century instances when the pueblos, well organized and with the

support of non-Indians nationwide, influenced congressional action.

The first occurred in 1922 when New Mexico United States Senator Holm O. Bursom introduced legislation that would have led to the loss of the pueblo land base by placing the burden of proof of ownership on the government against the claim of non-Indians. The pueblos organized to fight the Bursom Bill and, joined by such groups as the Federation of Women's Clubs and the Indian Rights Association, saw it defeated. Instead, Congress passed the Pueblo Lands Act in 1924 in an attempt to bring order out of the confusion of land ownership in New Mexico. The Pueblo Land Board was created to determine the boundaries of pueblo holdings and the status of the land within those boundaries. The Act was amended in 1933 to provide for settlement awards to Indians and non-Indians as a result of the findings of the Board (Cohen 1942, Sando 1992).

Nearly fifty years later, at the urging of President Richard M. Nixon, Congress passed legislation returning the sacred Blue Lake to the Taos Pueblo. The Lake had been taken from the Pueblo during the administration of Theodore Roosevelt and made a part of the Carson National Forest under the control of the Department of Agriculture. Taos residents had fought continuously for the Lake's return in the face of strong opposition from such New Mexico politicians as Democratic Senator and former Secretary of

the Agriculture Clinton Anderson. However, the effort was given strong impetus in 1970 when President Nixon included a call for the return of the Lake in his "Special Message" to Congress on American Indians. After a highly organized and visible campaign by the Pueblos and their supporters, Congress passed legislation in 1971 returning Blue Lake to the Taos Pueblo (Gordon-McCutchan 1991).

In 1968 Congress considered legislation introduced by Senator Sam Ervin (D-NC) applying the Bill of Rights to Indian tribes. The Pueblos became concerned because they feared a strict application of the First Amendment's wall of separation of church and state threatened their theocratic form of government. After strong testimony by pueblo representatives before Congress, the legislation was amended to delete this provision from what ultimately passed as the Indian Civil Rights Act of 1968 (Wunder 1994).

There has never been a question of the Indian status of Navajos. Their nomadic culture and periodic warlike ways more clearly met the stereotypical view of "wild Indians." They, along with the Jicarilla and Mescalero Apache, had experiences with the U.S. government similar to many tribes outside New Mexico. All three tribes were at one time or another removed from their homelands and all three, unlike the pueblos, signed treaties with the United States.

After signing a treaty in 1868 they returned to their native lands from their exile at Bosque Rodondo (along with

the Mescalero). The Navajo Nation has become the largest Indian tribe in both population and land base. Most of the Navajo Nation's population lives in Arizona and its capital is in Window Rock. Nevertheless, Navajo presence is strongly felt in New Mexico, politically and economically. Navajos have a major impact on the economies of reservation border towns such as Gallup and Farmington. As noted below, Navajo voters can dramatically affect New Mexico state and local elections and five of the current six Indian members of the New Mexico Legislature are Navajo. However, much of the political activity engaged in by the Navajo Nation is independently pursued. Consistent with historical patterns, there is no close and consistent alliance between Navajos and the Pueblos. While its leaders have voiced support for New Mexico gaming tribes, the Nation has never joined the New Mexico Indian Gaming Association.

The two immediate past presidents of the Navajo Nation have been identified with state and national political parties. Peter McDonald, elected tribal chairman four times (non-consecutively) before being forced out of office, was a vocal Republican. His successor and bitter political rival, Peterson Zah, has close ties to the Democratic Party. Current President Albert Hale was active in the 1996 Clinton-Gore campaign.

While it has no written constitution, the Navajo Nation's government is divided into three branches, with a

popularly elected Tribal Council and President. The Tribal Council was first organized in 1923 by the Bureau of Indian Affairs as a means of facilitating mineral leases to non-Indians seeking to extract the Nation's rich natural resource reserve.

Unlike the Navajo Nation, the Jicarilla and Mescalero Apache Tribes are organized under the Indian Reorganization Act. The Jicarilla Reservation in northwest New Mexico was established in 1887 by Executive Order. It today comprises 742,315 acres. The 460,000 acre Mescalero Reservation was established by Executive Orders in 1873 and 1883. The current longtime Mescalero Tribal Chairman, Wendell Chino, is one of the most prominent Indian leaders in the country.

Conflicts of Interest

In the years since statehood, the interests of Indians and the state government have often collided. Three major areas of Indian/state conflict in New Mexico are of note: water, taxation, and voting rights. Each of these issues involve the ongoing struggle of tribes, states, and the federal government to define the limits and extent of the political status of Indian tribes and individuals. While the immediate parameters of each issue are defined by the New Mexico context in which they are fought over, they are similar in kind and significance

to others played out where ever there are competing tribal/state interests.

Water

Joe Sando has observed that "While the loss of water has been a threat since the advent of the Europeans, it has become the gravest of dangers now that New Mexico has experienced a vast expansion of its population" (Sando 1992, 122). While the 1908 U.S Supreme Court decision in Winters v. United States protected tribal reserved water rights, the demand for water in the high desert of New Mexico has led the state and the Army Corps of Engineers to develop creative mechanisms for sharing this valuable resource.

One such device was the creation in 1925 of the Middle Rio Grande Conservancy District. A political subdivision of state government, the District "was designed to plan, construct and operate a coordinated modern irrigation and flood control project" (Sando 1992, 123). The effects of the District, which a number of Pueblos were party to, have included a redefinition of "reclaimed lands" for purposes of cultivation, diversion of water for non-tribal related uses, and a great deal of on-going litigation.

In 1966, New Mexico filed suit in federal court to determine the rights to water use of the Nambe-Pojoaque River System, a tributary of the Rio Grande. The Tenth Circuit Court of Appeals reversed the District Court's

decision and denied the applicability of state law to reservation water in New Mexico. The Appeals Court held that "The United States has not relinquished jurisdiction and control over Pueblos and has not placed their water rights under New Mexico law" (New Mexico v. Aamodt 1976).

Taxation

In the last two decades, the federal policy of self-determination has encouraged tribal governments to assume more governing responsibility, including the levying of tribal taxes. These taxes have often met resistance from both those subject to the tax and state governments. This conflict is exacerbated when state taxes fall on the same party as tribal taxes. These kinds of economic-based conflicts between sovereigns have occurred in New Mexico.

In the mid-1970s, the Jicarilla Apache Tribal Council voted to impose a severance tax on oil and gas production on the reservation. The tax amounted to, at the wellhead, five cents per million Btus of gas produced and twenty-nine cents per barrel of crude oil or condensate. Over the years, mineral leases had been granted on 69 percent of tribal land. Holders of leases who produced oil and gas were already subject to New Mexico's oil and gas severance tax as well as a tax on oil and gas production equipment.

Several lease holders sought to have the tribal severance tax overturned in federal court. The State of New

Mexico sided with the lease holders in an amicus curiae brief filed with the U.S. Supreme Court. The Court, however, upheld the right of the tribe to impose these taxes (Merrion v. Jicarilla Apache Tribe 1982).

In the late 1980s a non-Indian oil and gas producer on the Jicarilla Reservation, Cotton Petroleum Corporation, sought a refund of the oil and gas severance taxes it had paid to the State. The Jicarilla Tribe supported Cotton Petroleum in its efforts, believing that double taxation by state and tribal governments would tend to dissuade companies from doing business on tribal lands. The Navajo Nation and the Housing Authorities of the Mescalero Apache Tribe and the Pueblo of Laguna also filed amicus briefs in support of the company's position. The U.S. Supreme Court, however, held in a 1988 decision that companies doing business on tribal land and subject to tribal taxes are not exempt from state taxes (Cotton Petroleum v. New Mexico 1988).

A related issue is the attempt by the State to require hunting and fishing licenses of non-Indian sports persons on reservation land. The Mescalero Apache Tribe has developed a thriving tourist industry that includes hunting and fishing opportunities. The tribe has adopted ordinances requiring anyone hunting or fishing on the reservation to purchase a license from the tribe. It has also worked

closely with the federal government to develop reservation wildlife resources.

The state, however, attempted to force non-Indian hunters and fishers on the reservation to purchase state game licenses. In 1977, the Mescalero Tribe sought to prevent the State from arresting non-Indians who were hunting and fishing on the reservation with a license from the tribe but not from the State. In a 1983 decision, the U.S. Supreme Court held that, at least as far as the Mescalero Tribe was concerned, the federal government had preempted this area of law and the State could not enforce its licensing requirements on the reservation (New Mexico v. Mescalero Apache Tribe 1983).

Voting Rights

Indians in New Mexico were not permitted to vote in state elections until 1948. Article 7 Section 1 of the state's 1912 Constitution denied the right to vote to "Indians not taxed." In 1948 an Isleta Pueblo man named Miguel Trujillo attempted to register to vote and was not permitted to do so because he did not pay state property taxes (McCool 1985, 111 and Montoya v. Bolack 1962). A three judge Federal District Court panel held in Trujillo v. Garley that New Mexico's Constitutional voting prohibition violated the Fourteenth Amendment of the United States Constitution. On the same day that Trujillo was decided, a

Federal District Court Judge in Bowman v. Lopez ordered the McKinley County Clerk to register to vote all Navajos in the County and "not exclude them by reason of being residents on the Navajo Reservation" (Montoya v. Bolack 1962). Neither of these decisions was appealed. In 1953 the Legislature eliminated the words "Indians not taxed" from New Mexico law as it applied to voting requirements, but they remained in the state constitution.

New Mexico courts did not rule on the right of Indians to vote in state elections until 1962 when a defeated candidate for Lieutenant Governor contested the election in court based on 2,202 votes cast on the Navajo Reservation in San Juan and McKinley Counties (Montoya v. Bolack 1962). Eliminating the 2,202 ballots would turn a 279 statewide loss into a 63 vote victory. Reviewing the 1868 Treaty with the Navajo as well as state and federal statutes and caselaw, the Court rejected the unhappy candidate's arguments and concluded that

> it is obvious that the Navajo Indian Reservation is not a completely separate entity existing outside of the political and governmental jurisdiction of the State of New Mexico....We are convinced that, for voting purposes, there is nothing in our constitution or in the statutes which prohibits an Indian from voting in a proper election, provided he fulfills the statutory requirements required of any other voter.

In a 1967 special election, the voters of New Mexico, after several failed attempts, finally removed the phrase "Indians not taxed" from the state constitution. The same measure also removed the word "male" before the word

"citizen," thus making the New Mexico Constitution consistent with the 19th Amendment to the U.S. Constitution. The vote was overwhelmingly in favor of the proposed changes, 42,101 to 9,757.

There was one final challenge to the right of Indians to vote in New Mexico, however. In 1975, some residents of the Central Consolidated Independent School District No. 22 in northern New Mexico sought to set aside a school board election and to have the court declare that votes were illegally cast in the defeat of a school bond issue. The school district comprised both Navajo and non-Navajo land and two-thirds of the district's pupils were Indians who lived on the reservation. As the State Supreme Court noted, the residents who brought suit argued "that the Indian citizens who reside on this nontaxable land should not have been allowed to vote in the District bond election since they do not share the burden of repayment of the indebtedness created by the issuance of the bonds. In effect, they contend that there should be no representation without taxation" (Prince v. Board of Education 1975). Citing the Equal Protection Clause of the 14th Amendment and U.S. Supreme Court decisions, the court affirmed the trial court and rejected Prince, et al.'s claim.

Although the court in Montoya v. Bolack had in effect upheld the right of an Indian living on a reservation to vote in New Mexico, it at the same time indicated it was not

entirely comfortable with this situation. The court's views on voting rights and citizenship responsibilities for Indians are worth quoting at length for it is an argument often heard in debates over whether or not Indians should be allowed to vote in state elections. It is an argument that also resonates in other tribal/state conflicts.

> The anomalous situation here existing places the Navajo in a more favored position than other legal residents of the state. They have the right to participate in the choice of officials, but, under many circumstances, cannot be governed by or be subject to the control of the officials so elected. Whether this should be allowed to continue is a matter to be determined by the legislature, after it has considered all of the facts including the wishes of the Indians involved. Just as the constitution does not sanction first or second class citizens, neither does it provide that any one group, large or small, should have greater rights or responsibilities than others (Montoya v. Bolack). (Citations omitted.)

This concern was echoed twenty-six years later in the amicus curiae brief filed by the State of New Mexico in Cotton Petroleum v. New Mexico. Referring to a "double standard," the state Attorney General argued that "The nub of the issue is a single question: Is the reservation part of the state or is it not?"

> When it comes to taxing on the reservation, the answer by Cotton and several amici is no, the reservation is not part of the state. But when it comes to spending for the reservation, to providing schools, roads and health care, as well as access to universities, parks, courts and all other government services tribal members use, the answer is most emphatically yes, the reservation is part of the state and tribal members are citizens entitled under the 14th Amendment to all state services and benefits.

> The more reservations are considered to be separate jurisdictions outside state taxing power, the more the underlying rationale for Indians' state citizenship and consequent entitlement to state services and financial benefits weakens. The political consequences will be that financially strapped legislatures, already prohibited from taxing Indian property and income, will hardly be encouraged to increase state funding for services and benefits on the reservation... (Brief 1988).

The "anomalous status" and the "double standard" of Indians in the political arena means that Indians as citizens and as tribal entities are both threatened and presented with opportunities not available to other American citizens. While this has been true throughout the history of Indian-government relations, it is nowhere more true today than in the area of Indian gaming. The perspective of the Attorney General in the Cotton Petroleum brief is essentially the states' rights position that is at the heart of disputes over Indian gaming.

THE TRIBES BATTLE FOR GAMING

As the U.S. Supreme Court's 1986 Cabazon decision held, a state's public policy towards gaming in general provides the broad parameters for the kind of gaming an Indian tribe can operate. As noted in a previous chapter, using Cabazon as a guide, Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988. It establishes the criteria for Class II and Class III gaming in which tribes are permitted to engage and links them to those games legally permitted in the

states where a tribe is located.[1] Table 2 shows which games of chance are legal in New Mexico.

TABLE 2

Legal Gaming in New Mexico

Class II:

bingo, raffle (60-2B-1, NMSA)

Class III:

Pari-mutuel live horse races (60-1-10, NMSA)
Pari-mutuel simulcast horse races (60-1-25, NMSA)
Parim-utuel bicycle racing (60-2D-1, NMSA)
Permissive Lottery Law for charities (30-19-6, NMSA)

The Permissive Lottery Law allowed charities to conduct gambling that is "...an enterprise wherein, for consideration, the participants are given an opportunity to win a prize the award of which is determined by chance....Consideration means anything of pecuniary values..." (30-19-5, NMSA). This statute provides charities in New Mexico with the legal rationale for conducting "Las Vegas Nights" offering patrons blackjack, keno, poker, craps, roulette, and slot machines. In March 1995 Governor Gary Johnson estimated that charitable organizations in New Mexico were operating more than 1,500 video slot machines. These machines are technically illegal under New Mexico Law

[1] Class I gaming comprises traditional Indian games of chance and are under the sole regulatory authority of individual tribes.

but authorities have generally permitted their continued operation. A New Mexico Appeals Court ruling that charities may legally use electronic pull tabs withstood a challenge in the State Supreme Court when the high court in October 1994 refused to review the Appeals Court decision. Reviewing the scope of legal gaming in the state, the New Mexico Indian Gaming Association contended that "With such expansive gaming in New Mexico the Governor of the State cannot take the moral high ground opposing gaming" (NMIGA 1993).

In the early 1970s and then in again in the early 1980s, at least two Pueblos considered opening dog racing tracks. The efforts by Santa Ana Pueblo were strongly opposed by New Mexico Attorney General Paul Bardacke and Secretary of Interior Donald Hodel in 1985. Santa Ana contended that since pari-mutual betting on horse races was legal under state law, it should also be legal for dog racing. Bardacke held that since pari-mutual betting on dog races was <u>not legal</u>, it would be <u>illegal</u> for the tribes to establish such an enterprise. Hodel endorsed this argument, basing his opinion on the federal Assimilative Crimes Act which makes it a federal crime to commit an act in Indian Country otherwise illegal under state law. This view, that the only gaming allowed in Indian Country is that which is legal under state law, was a central point of debate prior to the

passage of the Indian Gaming Regulatory Act and remained a point of controversy in subsequent years.

High stakes Indian bingo began in New Mexico in 1983 when Acoma Pueblo opened its bingo hall four miles south of Interstate 40, some fifty-five miles west of Albuquerque (UPI 1983a, Chavez 1995). Sandia Pueblo, on the north edge of Albuquerque, opened its 30,000 square foot bingo hall just off Interstate 25 a few months later in January 1984 (UPI 1983b, Chavez 1995). Within a year, Santa Ana and Tesuque Pueblos had also opened bingo facilities.

The Acoma and Sandia bingo operations soon demonstrated the economic benefits such enterprises offered. Acoma's unemployment rate of 78% was reduced by 15% with 35 persons finding work with the gaming operation, eight with food concessions, and two with child care services. By August 31, 1986 gross sales had reached a total of over $700,000. The games were conducted in a building constructed with funds from the Economic Development Administration (Brief 1986).

Sandia Pueblo's bingo produced similar results. Unemployment was reduced from 11.7% in February 1983 to 4% in February 1985. The 35 tribal members employed at the bingo comprised 29% of the Pueblo's total labor force. In addition to the Sandia tribal members finding employment at the bingo, 19 non-Sandia Indians and 73 non-Indians also worked for the facility in June 1986. Between its opening

in January 1984 and July 31, 1986, Sandia bingo revenues amounted to over $1.6 million (Brief 1986).

In November 1988, following the passage of the IGRA in 1988, Sandia Pueblo notified the state of its desire to enter into negotiations with the state for Class III gaming compacts.[2] Because the IGRA is silent as to whom notification should be delivered, Sandia officials sent their request to the New Mexico Office of Indian Affairs, designated by state law (NMSA 28-12-7) as the coordinating agency for tribal affairs (Chaves 1995). Director Regis Pecos (Cochiti Pueblo) accepted notice on behalf of the state, an act Frank Chaves describes as "courageous" (Chaves 1995, Pecos 1996).

Four Months later, in March 1989, Governor Garrey Carruthers informed Pecos that only the governor's office had authority to negotiate gaming compacts with the tribes and requested all records be sent to his office (Pecos 1996 and NIGA 1996). Carruthers then named Ray Shollenbarger, Director of the New Mexico Regulation and Licensing Department, as his gaming negotiator.

There was a lack of clarity about the operation of the IGRA in the first two years after it became law and no Class III compacts were approved for any tribe until 1991. No serious negotiations took place in the last two years of

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[2] By this time, Sandia, Isleta, Acoma, and Tesuque Pueblos and the Mescalero Apache Tribe were operating bingo halls.

Carruthers' administration and in November 1990, former Democratic Governor Bruce King was elected to another term. Negotiations resumed in January 1991 after King took office.

By May 1991, Sandia, Tesuque, and Mescalero had expanded their gaming operations to include video gambling devices, a move that raised serious questions about the scope of gaming defined as Class II and Class III. The tribes contended that the Permissive Lottery Law that allowed charities to conduct "Las Vegas Nights" opened up all types of Class III gaming to negotiation. It was the position of both United States Attorney William Lutz and Governor King that such gambling devices were illegal under both federal and state law. However, negotiations between the state and Sandia Pueblo and the Mescalero Apache Tribe began in the summer of 1991. In September, Mescalero Tribal President Wendell Chino commenting on the progress of negotiations said, "We're getting pretty close" (Yaeger 1991a).

King appointed an inter-agency team to review the proposed compacts and existing tribal gaming operations. Representatives of the state attorney general, Public State Department, Crime Commission, Alcohol Beverage Control Division, Taxation and Revenue Department, Office of Indian Affairs, and governor's office comprised the team (Pecos 1996). They visited the Sandia and Isleta gaming operations to review the tribes' regulatory schemes and security

arrangements. According to Pecos, "for the most part all of us were overwhelmed with the complexity" of the tribes' management of their games (Pecos 1996). The findings of the review team and a December 9, 1991 letter from State Attorney General Tom Udall to King laid the foundation for Class III compacts. Udall pointed to the Mutual Aid Act (NMSA 29-8-1) and the Joint Powers Agreement (NMSA 11-1-6) as authorization for tribal-state gaming compacts (NMIGA 1996)

Negotiations between the two tribes - Sandia and Mescalero - and King's representative, Regulation and Licensing Superintendent Jerry Manzagol, had resulted in compacts by December. In October, Sandia had in fact sent King a signed compact (NMIGA 1996). King, in what was the beginning a tortuous path through the political minefield of Indian gaming, delayed signing the compacts after they were presented to him. The governor said that he would not sign the compacts until the public had an opportunity to see what they contained. The compacts had, he charged, "Gotten into other types of equipment I don't agree with....I don't want to sign something they [New Mexicans] don't want" (Jadrnak 1991).

Having thus far followed the IGRA and negotiated with the state to no avail, Sandia Pueblo and Mescalero continued to follow the law by taking Governor King and the State of New Mexico to federal court. Mescalero filed suit in New

Mexico Federal District in January 1992 charging that King and the state had failed to negotiate "in good faith" as required by the IGRA. Sandia Pueblo filed a similar suit six months later.[3] As the law suits were filed and the legislature debated expanding gaming, King announced his opposition to any additional non-reservation video gaming. He did however, indicate a willingness to consider a statewide lottery.

While the lawsuits were pending in federal court, state and federal authorities in New Mexico presented unified opposition to "illegal" video gaming machines on and off tribal land. U.S. Attorney Don Svet said that "Without an agreement with the state, tribes don't have the right to use them and they're illegal....I'm going to talk to those tribal leaders about the fact that they're illegal, and take the appropriate legal action..." (Hume 1992). Svet said that he would take no immediate action against the tribes pending an investigation.

The state of New Mexico was more forceful in confronting those non-Indian organizations and establishments operating video gaming machines. In a letter to 1,500 liquor licensees, Alcohol and Gaming Division Director Mary Ann Hughes warned that they must dispose of any video gambling machines in their possession. Recipients

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[3] The Jicarilla Apache Tribe and San Juan, Pojoaque, and Isleta Pueblos each filed similar lawsuits in October 1994 as did Acoma and Tesuque Pueblos in early November.

included non-profit fraternal organizations as well as for-profit establishments (Yaeger 1992). In August, State Police executed raids in Albuquerque and Santa Fe, confiscating 74 video machines in the process, including those belonging to the Santa Fe Fraternal Order of Police.

In actions that had ramifications for Indian gaming in New Mexico and nationally, Federal District Court Judge John Conway dismissed the lawsuits brought by Sandia and Mescalero in late 1992. In both cases the Court found that in allowing tribes to bring suit against the states for failing to negotiate in good faith, Congress had acted without authority in abrogating state 11th Amendment sovereign immunity. The Court's holding acted to fundamentally undermine the method established by the IGRA for settling tribal-state Class III controversies. The tribes appealed the decision to the Tenth Circuit Court of Appeals and their cases were latter joined with similar lawsuits brought by the Kickapoo Tribe of Kansas and the Ponca Tribe of Oklahoma.

In 1993 the New Mexico Indian Gaming Association (NMIGA) was created by the state's gaming tribes. The mission of the NMIGA, as adopted by the Association in November 1993, is

> to protect and preserve the general welfare of tribes striving for self-sufficiency through gaming enterprises in Indian Country. To fulfill its mission, NMIGA works to develop sound policies and practices, provide technical assistance and advice on gaming-related issues. In addition, NMIGA seeks

> to maintain and protect Indian sovereign governmental authority in Indian country (NMIGA 1993a).

The tribes had been cooperating on gaming issues without a formal organization since the mid-1980s, relying on what Frank Chaves has referred to as an "ad-hoc committee on Indian gaming" (Chaves 1993). Their efforts included providing congressional testimony during consideration of the IGRA and hiring an attorney to file an amicus curiae brief in the Cabazon case.

By 1993 ten New Mexico tribes had gaming operations of one kind or another: the Jicarilla Apache Tribe, the Mescalero Apache Tribe, and the Pueblos of Acoma, Sandia, Pojoaque, San Juan, Taos, Isleta, Santa Ana, and Tesuque. The gaming facilities employed a total of 597 individuals, paying more than $4.8 million dollars in wages and salaries. A study prepared for the New Mexico Indian Gaming Association by The Center for Applied Research of Denver estimated the total income attributed directly and indirectly to Indian gaming to be more than $65.5 million, with the state collecting $1.3 million annually in tax revenue (NMIGA 1993c).

Governor King's apparent refusal to negotiate in good faith soured his relations with the tribes. They were further strained by his vetoes in 1993 of economic development legislation supported by New Mexico tribes. These included a bill to create an intergovernmental tax credit on oil and gas production from Indian lands (SB 126);

a bill to create a task force to study dual taxation of businesses located on Indian land (HB 982); a bill granting the New Mexico Office of Indian Affairs authority to negotiate Class III gaming compacts (HB 41); a bill permitting wholesale liquor dealers to sell alcohol to tribes with liquor ordinances conforming to state law and approved by the Secretary of Interior (HB 685); and line items providing money to Isleta Pueblo to study the creation of an intergovernmental network to deal with Rio Grande River-related environmental issues, and to the Office of Indian Affairs for a full-time arts and crafts investigator.

The governor signed HB 181, a bill restricting the use of reimbursed funds for Indian tribes with cross-deputized police officers who cite non-Indians to tribal court. While the tribes opposed this legislation, King vetoed similar legislation supported by the tribes which did not contain this restriction (HB 708). In a position paper summarizing these actions, the New Mexico Indian gaming Association noted that "There is general sentiment within Indian country that Governor King, Western Governors' lead Governor for Tribal State Relations, is not responsive to Indian policy issues and needs" (NMIGA 1993b).

Tribal-Democratic Party Relations Strained

These actions and Governor King's refusal to sign gaming compacts jeopardized the relationship that had been

established between New Mexico's tribes and the state Democratic Party. This was occurring at a time when Indian voters were playing a larger role in the state's electoral politics. According to Harris and Harris, "Voter registration drives have greatly increased the numbers of New Mexico Indians who vote in local, state, and national elections" (Harris and Harris 1994, 194-95). The increase in the number of Indians who are registered to vote has in turn benefitted the Democratic Party because when Indians vote in New Mexico they tend to vote overwhelmingly for Democratic candidates. As Hain and Garcia have noted, along with Hispanics, New Mexico's "...Indian citizens are exceptionally concentrated within the Democratic Party" (Hain and Garcia 1994, 249). New Mexico Democratic Party Chairman Ray Powell estimates that half of Clinton's margin of victory in New Mexico in 1994 was due to Indian votes (Powell 1994). Twenty years earlier, according to a study by Leonard Ritt, the Indian vote was "crucial" to the election of Democratic gubernatorial candidate Jerry Apodaca (McCool 1985, 129).

Chairman Powell had been working to build the relationship between the party and tribes since at least the 1992 presidential election. Albuquerque attorney Kevin Gover (Pawnee) had worked with the party's Executive Director to draw up a plan to gain Indian support. According to Powell, this plan set an example for other

states with significant Indian vote (Powell 1994). Gover, an Oklahoma native, became heavily involved in organizing national Indian support for Bill Clinton's presidential campaign against George Bush.[4]

According to Powell, Indian voters were the New Mexico Democratic Party's "most loyal constituency" (Powell 1995). In turn, the Party had worked for the election of Indian office holders and "encouraged" the six Democratic Indian members of the state legislature. Five of the Indian legislators are Navajo, and one is Jemez Pueblo. (See Table 3) for the Indian members of the Legislature in 1995).

TABLE 3

Indian Members of the 42nd New Mexico Legislature, 1st Session

<u>Senate</u>		
John Pinto	Democrat	Gallup
Leonard Tsosie	Democrat	Crownpoint
<u>House</u>		
Wallace Charley	Democrat	Shiprock
Lynda M. Lovejoy	Democrat	Crownpoint
James Roger Madalena	Democrat	Jemez Pueblo
Leo Watchman II	Democrat	Navajo

The 1992 party platform contained a strong plank on tribal sovereignty. The platform committed the party

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[4] Gover's law partner, Cate Stetson, was defeated by one vote in her campaign to become the new state Democratic Party Chair in May 1995.

> to establishing a strong and respectful Government-to-government relationship between the State of New Mexico and the twenty-three Native American tribal governments within the state, and to honor the treaties between the United States and Indian tribes throughout the United States. The state and federal governments should work in partnership with tribal governments to improve Native American health, education, housing, and general welfare. The federal government should develop and implement policies to stimulate sustainable economic development and encourage tribes to develop revenue-raising programs. We believe that lasting progress on these and other issues will occur by following the guidance of Native American tribal governments, which are in the best position to determine which policies and programs will improve the quality of life in tribal communities (Platform 1992).

Gover was a member of the Platform Committee's Drafting Subcommittee.

As the 1994 gubernatorial primary approached, Indian gaming became one issue that distinguished King from his two Democratic opponents, Lieutenant Governor Casey Luna and former federal Bureau of Land Management Director Jim Baca. While King stood by his opposition to expanded gaming, Luna and Baca both promised to sign compacts with the tribes if they were elected. Republican candidates Gary Johnson, David Cargo, and John Dendahl all said they too would sign gaming compacts if successful in their bids to be elected governor.

Lt. Governor Luna's support for Indian gaming resulted in his endorsement by some tribal leaders as well as considerable financial help from gaming tribes. Mescalero Apache Tribal President Chino and Pojoaque Pueblo Governor

Jacob Viarrial publicly supported Luna. Direct tribal financial contributions to Luna's campaign totaled $46,000 while tribal gaming enterprises contributed $15,290. (See Table 4).

TABLE 4

Tribal Contributions to Casey Luna for Governor

Pojoaque Gaming, Inc.	$ 5,000
Pojoaque Gaming, Inc.	5,000
Pojoaque Gaming, Inc.	290
Pueblo of Pojoaque	10,000
Pueblo of Pojoaque	15,000
Pueblo of Sandia	5,000
Sandia Indian Bingo	4,000
Pueblo of Santa Ana	10,000
Pueblo of Acoma	5,000
Jicarilla Apache Tribe	1,000
Isleta Gaming Palace	1,000
Total	$ 61,290

source: File #2: "Casey Luna 1994 Candidate Reporting."
New Mexico Secretary of State.

After gaining 60 percent of the delegates at the state Democratic party convention, King faced a tough primary challenge from Luna and Baca. King won the June primary election with 39% of the vote while Luna received 36% and Baca 25%. Construction company owner Gary Johnson won the Republican primary with 35% of the vote to former state representative Dick Cheney's 33%.

After the primary, Governor King resumed discussions concerning gaming compacts. In July, he and tribal representatives met with a mediator sent by Secretary of the Interior Bruce Babbitt at the request of Congressman Bill Richardson. As negotiations were reopening, at least two Pueblos took steps to enlarge their gaming operations. The Santa Ana Pueblo, fifteen miles north of Albuquerque, signed an agreement with the Lady Luck Gaming Corporation of Nevada to build and develop a $25 million casino and hotel (Casino 1994). That same month, Tesuque Pueblo's Camel Rock Gaming Center managers began making plans to offer card games (Van Eyck 1994a) and San Juan Pueblo's Ohkay Casino began offering poker tables to customers (Van Eyck 1994c). These games, if banked by the house, were Class III and not permitted under New Mexico law. However, U.S. Attorney John Kelly acknowledged that non-banked card games would be Class II.

Kelly himself played a role in reducing at least some of the tension in the increasingly volatile gaming issue. On July 1 Kelly signed a "standstill" agreement with Acoma, Isleta, Pojoaque, Sandia, San Juan, Santa Ana, Tesuque Pueblos and the Mescalero Apaches regarding the number of permissible video gaming machines. Each Indian gaming tribe would be limited to 275 video machines. This required Sandia and Tesuque to remove some of their machines to meet the new limit. The tribes also agreed to provide the U.S.

Attorney's Office and the F.B.I with information about their gaming operations. Kelly said that "What we're trying to do here is just maintain the status quo and do it responsibly" (Van Eyck 1994b). Mew Mexico Indian Gaming Association Co-chairman Frank Chavez said that the agreement was temporary "and the issue is getting Class III compacts."

In early August, as the fall gubernatorial race began to take shape, Governor King appeared to soften his opposition to expanded Indian gaming. At a press conference the Governor acknowledged the "possibility" of his signing the compacts before the election. "I kind of like to get elected," King said, "so I wouldn't say it didn't have anything to do with it [his softened stance]" (Cole 1994a). Cate Stetson, Kevin Gover's law partner and attorney for Pojoaque, Santa Clara, and Tesuque Pueblos said that she thought that King "wants to solve it more than when it was a little problem" (Cole 1994a).

King's public position on the issue was further muddied by a late August meeting he had in Santa Fe with Navajo President Peterson Zah to discuss gaming. When Zah said that Navajos were interested in casino-style gambling, King said, "That's further than I'd like to go" (Oswald 1994). King also announced that he had received a draft compact from the gaming Pueblos and Mescalero Tribe. He said it "carries Indian gaming way beyond what I would expect to go" (Oswald 1994).

In mid-September, King finally made it clear what his position was regarding the compacts: he would not sign them before the November election. King said that he could not sign compacts permitting expanded Indian gaming because what the tribes wanted was against New Mexico law. "I took an oath to uphold the constitution and laws of the state of New Mexico," King said, "and I have no authority as an executive officer to allow any group of citizens to do anything illegal" (Van Eyck 1994d).

While Indian leaders were not surprised, neither were they forgiving. Pojoaque Pueblo Governor Jacob Viarrial said "I think Gov. King has proven he's very anti-Indian....Gov. King is hurting us and we're very, very unhappy and very hurt. It would be a sad day for Indian people if King were to get elected." Tesuque Governor Paul Swazo also spoke of the political repercussions: "This is the death blow for his life" (Van Eyck 1994d).

It had appeared from the primary results that Governor King might have a rough race ahead of him, particularly in a year that was shaping up nationwide as being anti-incumbent at the polls. King's reelection was further threatened by continuing divisions within the Democratic Party unrelated to Indian gaming, and by the presence of a well known third party candidate, Roberto Mondragon.

Throughout the fall campaign, Lieutenant Governor Casey Luna resisted all efforts to have him endorse his former

running mate. These included a personal plea by President Clinton when he came to New Mexico in October to campaign for King and incumbent Democratic United States Senator Jeff Bingaman. In a private meeting with Clinton arranged by New Mexico Congressman Bill Richardson, Luna reiterated his continuing opposition to King's reelection (Robertson 1994a). Later in October, Luna bought Mondragon $250 worth of air time on a Las Vegas, New Mexico radio station.

Mondragon, a former Democratic Lieutenant Governor, was running for governor as the candidate of New Mexico's Green Party. The popular Mondragon posed a particular threat to King in the heavily Hispanic northern counties, such as Rio Arriba. But Mondragon's campaign was hampered by lack of funds and only a frantic fund raising effort by the Green Party late in the campaign prevented him from withdrawing from the race.

Mondragon's continued presence in the race was looked on favorably by the tribes which, in fact, strategically but quietly supported Mondragon's campaign (Gover 1996). Among the contributor's to Mondragon's last minute plea for financial support were the Santa Ana Discount Smoke Shop ($10,000) and the Sandia Indian Bingo ($1,000) (Peterson 1994a).

An added twist to both the governor's race and the Indian gaming controversy was presented by two gaming referenda, one before the voters of New Mexico, the other to

be decided by residents of the Navajo Nation. In 1993, after several years of debating the expansion of legalized gambling in the state, the New Mexico legislature passed H.J. Res. 11, a proposed constitutional amendment which the voters would have to approve. The result was the appearance on the November 1994 ballot of Constitutional Amendment 8 - Issue 8 - asking the voters to decide whether the New Mexico Constitution should be amended to permit a state lottery and video gambling machines. If the referendum passed, the legislature would have to enact regulations governing the lottery and the newly legal games.

The gubernatorial candidates differed in their stance on Issue 8. Reflecting his opposition to expanded gaming, Governor King opposed the passage of the issue, although he said that he would ask the legislature itself to create a lottery. Gary Johnson took a position similar to King's. Declaring that he was in favor of a state lottery but opposed to video gaming, Johnson came out against Issue 8. Roberto Mondragon's views on the referendum were not as clear. While joining King and Johnson in favor of a lottery, the Green Party candidate indicated that he favored continued video games for fraternal and non-profit organizations (Race 1994). The New Mexico Indian Gaming Association took no position on Issue 8.

Navajo voters faced a similar ballot issue when tribal President Peterson Zah vetoed a Navajo Council resolution

legalizing gambling in the Nation in August. In his veto message, Zah said "The Navajo people must be given the opportunity to vote on the question of whether they favor the establishment of gaming operations on Navajo land" (Navajo 1994). Two Navajo Nation Chapters, LeChee and Cameron, had earlier voted resolutions opposing gaming.

Soon after King's final declaration against expansion of Indian gaming, Republican candidate Johnson and Green Party candidate Mondragon affirmed their commitment to negotiating compacts. Johnson said that the real gambling issue "is sovereignty." He also said that he would like to see the state "have a portion" of tribal gaming revenues. Mondragon agreed with the latter point as well (Van Eyck 1994e).

In early September the Tenth Circuit Court of Appeals handed down a decision in the Sandia and Mescalero suits against the state. The Court combined the two New Mexico suits with one by the Ponca Tribe against Governor David Walters and the state of Oklahoma and another by the Kickapoo Tribe against the state of Kansas (Ponca Tribe of Oklahoma v. Oklahoma). Overturning the District Courts decision, the Appeals Court held that the 10th and 11th Amendments did not bar the tribes from bringing suit against the state under the IGRA. The Court found that Congress may abrogate a state's 11th Amendment sovereign immunity under the Indian Commerce Clause of the Constitution (Article I

Section 8). According to the Court, this was the intent of Congress in passing the IGRA.

The Court also found that the IGRA's "good faith" negotiation requirement did not violate the 10th Amendment since the Act does not require the states to actually do anything else. A finding by a federal district court that a state had not negotiated in good faith merely shifted the action to the Secretary of the Interior.

While the Court's 10th and 11th Amendment decisions were a victory for the tribes, the Court also ruled that suits against Governor King and Oklahoma Governor David Walters were barred by the Supreme Court's ruling in Ex Parte Young. This case established the conditions under which a state official may be sued for enjoining federal law violations. By having the major issues involving the IGRA and tribal-state negotiations on Class III gaming decided in their favor, New Mexico tribes believed they were in a much stronger position to push for their desired gaming ends. Soon after the Tenth Circuit's decision, the Jicarilla Apache Tribe and the San Juan, Pojoaque, Isleta, Acoma and Tesuque Pueblos filed suits in federal district court alleging the state had not negotiated in good faith.

In late September, Pojoaque Pueblo became the first tribe formally to endorse Johnson over King. The Pueblos's Governor, Jacob Viarrial, announced that the tribe would donate at least $20,000 to Johnson's campaign (Van Eyck

1994f). Isleta Pueblo soon followed with its own endorsement of Johnson. Santa Ana, Acoma, and Tesuque Pueblos and the Mescalero Apache Tribe would eventually endorse Johnson.

By the end of the campaign, seven tribes had formally endorsed or contributed to Johnson's campaign, as had the Ten Southern Pueblos Governors Council.[5] Tribes and their gaming operations contributed a total of $189,000 to Johnson's campaign, more than ten percent of Johnson's general election total of $1.17 million (Massey 1994).[6] This included a contribution of $20,000 made the day before the election by the Mescalero Apache Tribe. As the Albuquerque Journal noted, "Johnson said during his campaign that he was not necessarily opposed to Mescalero plans for a high-level nuclear storage facility on tribal land near Ruidoso" (Massey 1994). King and Mondragon had both announced their opposition to the proposed facility.[7] Table

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[5] Governor King did receive personal endorsements from some Indian leaders, including Santa Ana Pueblo Governor Andrew Gallegos and Santo Domingo Pueblo Governor Ernie Lovato. Navajo Nation Vice President Marshall Plummer also endorsed King.

[6] Governor King raised $916,556 for the general election; Mondragon raised $47,062 (Massey 1994).

[7] In a January 31, 1995 referendum, the Mescalero Apache Tribe voted 490 to 362 to reject the proposed nuclear-waste storage facility (Fleck 1995).

5 is a list of contributions made by tribes and tribal enterprises.[8]

TABLE 5

TRIBAL CONTRIBUTIONS TO GARY JOHNSON'S CAMPAIGN

Isleta Bingo	50,000
Sandia Pueblo	50,000
Santa Ana Pueblo	25,000
Santa Ana Golf	20,000
Southern Sandoval Investment, Ltd. (Owned by Santa Ana Pueblo)	20,000
Mescalero Apache Tribe	20,000
Acoma Pueblo	4,000

Source: Albuquerque Journal, December 25, 1994.

During the campaign, King sought to make an issue of the financial support Johnson was receiving from the tribes and called on the Republican candidate to return the contributions. King said that the tribes' campaign contributions appeared to him "like a hell of an obligation" (Robertson 1994b). King also asked Johnson to be specific about the kinds of gaming he would agree to. Johnson was also criticized for his tribal contributions by opponents of Issue 8.

Both King and Johnson campaigned in Indian Country. King toured the Navajo Nation, accompanied by Democratic State Senator John Pinto, one of two Navajos in the New

[8] Tribal financial support for Johnson continued after the election. Post election contributions were received from: Pojoaque Gaming ($30,000), Isleta Bingo ($10,000), Acoma Pueblo ($5,000), Santa Ana Pueblo ($5,000), and Santo Domingo Pueblo ($500) (Norrell 1995).

Mexico Senate. Late in the campaign, Johnson attended a rally at Santa Ana Pueblo and visited Window Rock, Arizona, capitol of the Navajo Nation. While at Window Rock, Johnson met with President Zah and spoke about tribal-state conflict and tribal economic development.

In a December 1994 column in the Albuquerque Journal, New Mexico Indian Gaming Association Co-chairmen Frank Chaves and Greg Histia explained the tribes' involvement in the fall campaign. Accusing former Governor King of "doubletalk and empty promises," Chaves and Histia praised Johnson for having promised to respect tribal sovereignty "as a basis for carrying out the government-to-government relationship that exists between the state and tribes." The tribes' support of Johnson was not, they wrote, based solely on his promise to sign Class III compacts.

> First and foremost, Johnson agreed to talk with us, listen to our concerns on many issues, and respond to us openly and honestly (Chaves and Histia 1994a).

Chaves and Histia argued that making campaign contributions enabled the tribes to act to protect the "investment in the future" that gambling represents and

> to help Gary Johnson, in the hope that he would be able to continue his dialogue with us. This is the political system we are all a part of.

"We did not create this campaign contribution system," they wrote, "yet we have long been victimized by the manner in which others have often used the system to deprive us of property and use of our resources."

The November election resulted in a changed climate for gambling in New Mexico, both Indian and non-Indian. Gary Johnson defeated Governor King by a surprising margin of 49% to 40% with Green Party candidate Mondragon receiving a respectable 11% (Peterson 1994b). Issue 8 passed with 54% of the vote, apparently changing at least part of the debate over the scope of gaming permitted in New Mexico (Cole 1994a). However, at the same time New Mexico voters were expanding legalized gaming in the state, voters of the Navajo Nation rejected a referendum legalizing gaming in that jurisdiction by a vote of 27,022 to 21,988 (Arviso 1994). Navajo voters also defeated their incumbent chief executive, Navajo Nation President Peterson Zah. Zah, a strong supporter of President Bill Clinton, lost by 4,543 votes out of more than 55,000 cast.

In mid-December, Governor-elect Johnson chose attorney Fred Ragsdale, a member of the California Chemehuevi Tribe, to begin negotiations with the tribes. Johnson said that negotiating compacts with the tribes "is more than just keeping a campaign promise....it is the right thing to do" (Robertson 1994c). The governor elect said that the compacts should include provisions dealing with types of gaming; revenue sharing; regulatory mechanisms; safety codes; and employee background checks.

The overall New Mexico gaming picture became more confused in early January 1995 when the state Supreme Court

found Issue 8 to be unconstitutional. Supporting the position of both anti-gaming activists and New Mexico Attorney General Tom Udall, the court held that linking the lottery and other types of gambling in one referendum violated Article XIX, Section 1 of the New Mexico Constitution. By combining the two forms of gambling in one issue, the legislature had engaged in "logrolling," a practice

> Whereby the legislature joins two or more independent measures to ensure that voters who support any one of the measures will be coerced into voting for the entire package in order to secure passage of the individual measure they favor (State ex rel. Clark No. 22,489 (1995) N.M. Lexis 4).

Not only were the lottery and video games significantly different enough to require separate issues, the Court found that the ballot language describing Issue 8 "contributed to the logrolling..." and "exacerbated the problems inherent in the vice of logrolling" (7).

The Ragsdale negotiations and the continuing political and legal fallout from Issue 8 presented the legislature and non-Indian gaming interests an opportunity to assert their interests in the future of gambling in New Mexico, on and off Indian land. Some state law makers demanded that the legislature have a role in reviewing if not in approving any compact concluded between the governor and the tribes. Although the legislature would have had to address the implementation of Issue 8 had the Court upheld its

constitutionality, the effect of the ruling was to increase the pressure on legislators to once and for all settle the status of gaming in New Mexico.

In the weeks leading up to the January 16 start of the 60 day legislative session, the Legislative Council's Subcommittee on Gaming held a series of public hearings on a wide variety of gambling related issues.[9] The hearings were designed to help provide legislators with guidance as they began to consider gaming legislation. Witnesses included some of the leading experts on gambling in the nation, including Professor William N. Thompson of the University of Nevada at Las Vegas and Professor I. Nelson Rose of Whittier College. Other witnesses included gaming officials from states with various kinds of legalized gambling, horse racing and other gambling interests, law enforcement officials, and representatives of New Mexico's Indian gaming tribes, including New Mexico Indian Gaming Association Co-chair Frank Chaves.

New Mexico's non-Indian gaming interests began to lobby the legislature and the public to demand that tribes not be given an unfair advantage. Two broad groups were concerned with protecting if not expanding their present status: for-

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[9] The Legislative Council is one of the permanent "interim committees" that meet while the legislature is not in formal session. Its membership consists of eight members from each house, including the Speaker of the House, Senate President Pro Tempore, and each House's minority leaders (Hain & Folmar 1994).

profit enterprises such as race tracks and gambling paraphanalia providers, and non-profit charitable organizations.

The intensity of interest in what the legislature was going to do to resolve New Mexico's gaming status is apparent in the number of gambling related lobbyists registered with the Secretary of State. Individuals and firms representing horse racing, video devices, gambling equipment suppliers, and gambling consultants registered as lobbyists. See Table 6 for non-Indian gaming related organizations with registered lobbyists during the 1995 legislative session.

TABLE 6

Non-Indian Gambling Interests With Registered Lobbyists for the 1995 New Mexico Legislative Session.

Citation Bingo
International Gameco, Inc. *
Vending, Amusement & Music Operations, Assoc.
Video Lottery Technologies *
Webcraft Games, Inc. *
Ruidoso Downs, Inc.
Automated Wagering International *
Lady Luck Gaming Corp. *
Sunland Park Race Track
Santa Fe Racing, Inc.
Scientific Games *
SODAK *
Hubbard Enterprises *
Vending, Amusement and Music Operations
New Mexico Horsemen's Association
Nuevo Sol Turf Club, Inc.

* Firms located outside New Mexico

Source: "Registered Lobbyists and the Organizations They Represent: 1995." New Mexico Secretary of State.

Most firms had registered lobbyists from the state in which they were located as well as from New Mexico. While many lobbyists for non-Indian gaming represented other firms or interests, none represented an Indian tribe. Ruidoso Downs, one of the three permanent horse racing tracks in the state, was represented by lobbyists who also represented, among others, Phillip Morris, the New Mexico Hotel and Motel Association, SODAK, AT & T, and the New Mexico Beverage Alcohol Wholesalers. Representatives for International Gameco, Inc. also represented, among others, General Motors, the New Mexico Press Association, the Santa Fe Railroad Co., the New Mexico Petroleum Marketers Association, and Ruidoso Downs. Ray Shollenbarger of Santa Fe represented Ruidoso Downs, Santa Fe Racing Co., and Webcraft Games, Inc. Shollenbarger had acted as former Governor Carruthers' gaming negotiator.

Shollenbarger also had strong political and personal ties to Governor Johnson. A lawyer and former alcohol and gaming director, Shollenbarger and his wife Kay had contributed nearly $8,000 to Johnson's campaign. Mrs. Shollenbarger had been an employee of the Johnson campaign and after the election worked in Johnson's office assisting in filling state government jobs. Mr. Shollenbarger had served in Johnson's post-election transition team. After a lawsuit was filed in April challenging Johnson's authority to sign gaming compacts with the tribes, Jonathan Sutin, an

attorney in Shollenbarger's law firm, Sutin, Thayer & Browne, was retained to represent the Governor before the state Supreme Court (Cole 1995d). SODAK, located in Rapid City, South Dakota, is the exclusive distributor of International Game Technology (IGT) video gambling machines to Indian tribes. Former Secretary of the Interior and New Mexico Republican Congressman Manuel Lujan joined the company's board of directors in 1993.

Indian interests also registered lobbyists. (See Table 7.) Those registered as lobbyists for New Mexico tribes or other Indian organizations often represented other groups. These tended not to be of the same economic clout as the interests represented by non-Indian gaming lobbyists. Odis Echols of Albuquerque was an exception. He represented six pueblos, the New Mexico Indian Gaming Association as well as the New Mexico Dietetic Association, the New Mexico Nurses Association, the Northwest Bank of New Mexico, and the City of Bernalillo. Significantly, Echols also represented Nuevo Sol Turf Club and Scientific games, two non-Indian organizations with an interest in the outcome of gaming legislation. Echols, a former state senator, is widely acknowledged to be one of the state's primier insiders. An Associated Press study of reports filed with the Secretary of State's office found that Echols spent more money during the 1995 legislative session - $33,468 - than any other

lobbyist (Massey 1996a). This was nearly half of what all registered gaming lobbyists reported spending.[10]

Other tribal lobbyists with signifcant non-Indian clients included Vincent J. Montoya, also of Albuquerque, represented the Jicarilla Apache Tribe and the Belen Consolidated Schools, the City of Belen, El Paso Electric Co., Los Lunas Board of Education, Lovelace Health Systems, Inc., the Wine Institute, and the Village of Bosque Farms. Susan Williams, one of Kevin Gover's law partners represented the Pueblo of Pojoaque.

TABLE 7

Indian Tribes & Organizations with Registered Lobbyists
For the 1995 New Mexico Legislative Session

Acoma Pueblo
Santa Ana Pueblo
Sandia Pueblo
San Juan Pueblo
Pojoaque Pueblo
Isleta Pueblo
Laguna Pueblo
San Ildefonso Pueblo
Jicarilla Apache Tribe
Navajo Nation - Office of the President
New Mexico Indian Gaming Association
The Eight Northern Indian Pueblo Council
New Mexico Office of Indian Affairs

Source: "Registered Lobbyists and the Organizations They Represent: 1995." New Mexico Secretary of State. 3/8/95.

[10] The Associated Press reported that lobbyists for gaming interests spent around twenty-fice percent of all reported lobbying related expenditures during the first half of 1995 (Massey 1996).

The opponents of gambling were also represented but at a very low level of visibility and institutional clout. The New Mexico Coalition Against Gambling had three registered lobbyists, including Guy C. Clark, the organization's leader. Coalition Lobbyist Nima D. Ward also represented the Human Needs Coordinating Council and the Rocky Mountain Synod Evangelical Lutheran Church in America.

Additional indicators of interest group activity in the legislature are the individuals and organizations testifying before the Senate Select Committee on Gaming. According to Committee records, ten hearings were held during which representatives for a wide variety of groups appeared. By far, the most numerous of the individuals appearing before the Committee were those associated with non-Indian for-profit gaming. Tribal representatives were also quite visible. As was the case throughout the debate on gaming, the least numerous representatives before the Committee were those opposed to expanded gambling generally. Table 8 shows the organizations testifying before the Committee.

TABLE 8

Non-gaming Interests:	Gaming Interests:
Lutheran Office of Governing Ministries in New Mexico	New Mexico Horseman's Assn. horse racing jockeys, owners, trainers, breeders, agents
New Mexico Coalition Against Gambling	Sundland Park
Alamagorda Int'l. Order of Eagles	Ruidoso Downs
Scholastic Inc. of Albuquerque	Santa Fe Downs
Veterans, fraternal clubs reps.	San Juan Down
Albuquerque Boys & Girls Clubs	IGT
Santa Fe Eagle Club	Nevada Gaming Control Board
"citizen"	Hubbard Industries
"6th grader"	Racing Resources Group,Inc.
	Ruidoso businessmen
	Video Lottery Technology International Game Co.
	New Mexico Hospitality Retailers Assn.
	Giant Southwest Convenient Stores
	Coin Operators of New Mexico
	Automated Wagering Int'l.

Governmental:	Indian:
New Mexico State Racing Comm.	Pueblo of Pojoaque
Mayor of Eagle Nest, NM	Pueblo of Santa Ana
Sandoval County Commission	Nat'l. Indian Gaming Assn.
State Agency on Aging	
Municipal League	
State Senator Shannon Robinson	

source: New Mexico Senate Select Committee on Gaming, 1995.

Non-Indian gambling interests also attempted to influence public opinion outside the legislature, particularly as they claimed to be affected by Indian

gaming. On Sunday, January 29, the New Mexico Racetrack & Horsemen Association took out nearly identical full-page advertisements in the sports sections of both the Albuquerque Journal and the Santa Fe New Mexican. Under a bold five line headline that read "When It Comes to Economic Development, Gaming and Horse Racing are your Winning Combination," the ad read, "Ask your legislator to support the Gaming Control Act." This was followed by an assertion that "New Mexico's Indian Pueblos have petitioned our government to give them a virtual monopoly on gaming." The result of this, according to the ad, would be the possible "extinction" of New Mexico's horse racing industry.

Touting the economic impact of the industry, the ad declared that the horse racing industry was "merely" suggesting "that the economic-development opportunities of gaming be shared by the Indian communities so that everyone benefits" (Association 1995 and Friends 1995). The ad in The New Mexican did not have the Association's disclaimer. The bottom of the ad read, "Friends of New Mexico's Horse Racing Industry." The Albuquerque Journal ad contained both the Association disclaimer and the "Friends" notation. The ads were part of a $30,000 campaign by Santa Fe Racing, Inc., operator of racetracks in Santa Fe and Albuquerque.

On February 7, Gov. Johnson announced that negotiations had produced an agreement acceptable to him and the tribes. "These compacts," Johnson said, "are predicated on a

government-to-government relationship" between the tribes and the state of New Mexico (Cole 1995a). The signing of the compacts was delayed in order to protect the ability of the fraternal and charitable organizations to conduct their casino nights.

Having acted as interest groups with a political agenda in the previous year's gubernatorial campaign, the tribes were now received in the governor's office as sovereigns entering into a government-to-government relationship with the State of New Mexico. In a ceremony in the governor's office attended by eleven gaming tribes, Johnson signed the compact on February 13. Tribes signing the compact were: the Taos, San Juan, Santa Clara, Pojoaque, Tesuque, San Felipe, Santa Ana, Sandia, Isleta, and Acoma Pueblos, and the Jicarilla and Mescalero Apache Tribes.[11]

As Johnson said at the signing, the final signed version of the compacts and side agreements contained changes designed to address concerns that had been raised following the initial announcement. Calling the signing of the compact "an historic event in our state," Johnson continued,

> This compact is essentially a government to government agreement -- and it helps define the relationship between Indian sovereign nations and the state of New Mexico. It describes and defines what is already occurring in New Mexico today (Johnson 1995b).

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[11] Johnson signed a compact with Nambe Pueblo on March 1 and with San Ildefonso Pueblo in early April.

Johnson pointed out that without a compact achieved through negotiations between the state and tribes, the federal government "would force a compact on the state." The result would be no state role in Indian gaming and no share in the revenues such games would generate, both guaranteed by the negotiated compact.

The uniform compact was signed by each tribe individually. It provided for: 1) authorization for "any and all Class III Gaming"; 2) mechanisms for state review of tribal gaming records; 3) tribal regulations and audit procedures; 4) licensing requirements and background checks for casino employees; 5) standards for gaming equipment, supplies, and suppliers; 6) casino patron liability; and 7) criminal prosecution under federal law (Compact 1995).

A separate side agreement provided for revenue sharing with the state in order "to compensate the State and Local Government(s) for maintaining market exclusivity of tribal gaming" (Agreement 1995, 2). The tribes agreed to share "Three Percent (3%) of the First Four Million Dollars ($4,000,000) of net win at each Gaming Facility derived from Class III games of chance" and "Five Percent (5%) of the net win over the first Four Million Dollars..." (Agreement 1995, 3). Sixty percent of the total revenue to be shared would be paid to the State of New Mexico and forty percent to a "Local Government" to be determined by each tribe. The side agreement would be terminated "If the State permits any

expansion of non-tribal Class III Gaming in the State." A state lottery, gaming operated by "fraternal, veterans or other non-profit membership organization," and electronic gaming devices operated by horserace tracks on racing days were excluded from this requirement (4-5).

The signing of the compacts did not resolve all of the questions concerning non-Indian gaming nor were all legislators agreeable to the compacts themselves. The legislature continued to debate the future of legalized gambling in New Mexico. Pressure from non-Indian gaming interests continued to be visible and intense on both the legislature and on the governor.
Indian gaming interests also made their presence felt and Governor Johnson stood by his commitment to the tribes.

Representatives of the state's horse racing industry argued that without the draw of video gambling at their tracks their livelihood was threatened. They claimed that competition from other forms of legalized gambling was threatening their very existence. Ruidoso Downs faced competition from the Mescalero Apache casino; Sunland Park, located in extreme southern New Mexico, competed for gambling dollars with the Texas Lottery and the Texas Tigua Tribe's bingo and card games. They therefore lobbied intensively for a change in the law that would allow them to offer their patrons such additional entertainment.

The Senate created a Select Committee on Gaming to handle the legislature's expected heavy gaming related workload. The Committee was chaired by Democratic Senator John Arthur Smith of Deming. Other members were Democrats Joseph Fidel of Grants, Pete Campos of Las Vegas, Fernando Macias of Mesilla, and Republicans Emmit Jennings of Roswell, Leonard Lee Rawson of Las Cruces, and Don Kidd of Carlsbad. Neither of the chamber's two Indian members was appointed to the Committee. The regular relevant standing committees handled gaming bills in the House.

One of the most heated gambling questions was whether or not to eliminate all types of non-parimutuel gaming, including the casino nights operated by fraternal and charitable organizations. Some legislators, most notably Reps. Max Coll (D-Santa Fe) and Richard Knowles (R-Roswell), argued that by eliminating all electronic gaming, pull tabs, and casino nights the state would be in a better position to oppose the expansion of Indian gaming. Understandably, the non-profit organizations that benefitted from such legal forms of gambling opposed these efforts, although they did acknowledge that competition from Indian gaming was hurting them financially. In an op-ed article in the Albuquerque Journal, Richard B. Archuleta of the Charitable Gaming Committee contended that "Charity gaming dropped from 350-400 patrons per session to less than 200, while Indian halls

regularly have far in excess of 1,000 customers (Archuleta 1995).

Although the legislature at times seemed preoccupied with the gaming question, the answer appeared elusive. As the Secretary of the Senate Select Committee on Gaming told this interviewer, the issue seemed "to have a life of its own" and the more legislators tried to get control of it, the more out of control it became (North 1995). At least thirty-nine gaming related bills were introduced into the legislature. The legislature's general uncertainty on the issue is clearly seen in the contradictory bills that passed one or both houses during the session:

* HB 29: passed both houses, vetoed by the governor. Would have outlawed slot machines and casino nights operated by fraternal and charitable groups.

* SB 510: passed Senate, failed in House. Would have permitted off-track betting on horse races.

* HB 1090: passed House, failed in Senate. Would permit electronic gaming machines at horserace tracks.

* SB 1052: passed Senate, failed in House. Would have created a state lottery and permitted electronic gaming machines at horseracing tracks, large hotels, fraternal and veterans clubs, and some bars and restaurants.

* SB 1151: passed Senate, failed in House. Would permit veterans and fraternal clubs to have no more than 25 electronic gambling machines.

* SB 853: would create a state lottery. Passed both houses and signed into law by Gov. Johnson.

The conflicts and indecision over what to do about gaming were vividly demonstrated in the Senate two days

before the close of the session. In the course of one evening and afternoon, senators voted four times on whether or not to forbid gambling interests from making campaign contributions. The first effort succeeded 20 to 8 as an amendment by Senator Roman M Maes of Santa Fe. It passed even though Senator Joseph J. Carraro, a restaurant owner, pointed out that he might be prevented from donating to his own campaign if he installed gambling devices at his establishment. Carraro later successfully amended the amended version of the bill and removed the Maes amendment on a tie breaking vote by Lieutenant Governor J. Walter Bradley.

Senator Maes tried again with an amendment to HB 1090, this time with what he termed the "Carraro fix." For the first time in the debate on this issue there was concern raised about its impact on Indian tribes. Senator Duncan Scott worried that a ban on contributions by gaming interests would "disenfranchise American Indian tribes." Without the ability to make campaign contributions, he argued, tribes would be "completely removed from the political process." Maes replied that "they have a right to vote" and that money is not the only way for Indians to participate in politics. The amendment failed 19 to 23.

One last effort was made late in the day when Senator Don Kidd offered a similar amendment to the same bill. This time it passed 26 to 16. HB 1090 passed 32 to 10.[12]

Johnson's position during the remainder of the session was firm. The only additional legalized gaming he would support would be a state lottery and slot machines at racetracks and the veterans and fraternal groups. Both of these options were permitted by the compacts he had signed with the tribes. This was a blow to the horserace industry. Its position had evolved from advocating slot machines at the tracks to calling for full blown casinos. The work of Kevin Gover, Odia Echols, Rex Hackler and James Rivera, two political consultants brought in by Gover, was largely responsible for defeating the efforts of the tracks to open their own casinos (Hackler 1996a and 1996b).

Hovering over the legislators as they grappled with the issue was the impending approval of the Indian gaming compacts and the presence of Indian and non-Indian lobbyists. The horse race track lobbyists were especially active in attempting to pass legislation allowing track casinos. R.D. Hubbard, owner of Ruidoso Downs, was very visible at the Capitol and attended a meeting of the horse racing industry with Gov. Johnson. Hubbard threatened to close his track if the legislature did not vote to approve

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[12] The account of these events is based on notes made by the author at the time they occurred on March 17, 1995.

track casinos. A group calling itself "Citizens for a Level Playing Field" met with Johnson to argue for track casinos. Among the least visible if not the least passionate gaming lobbyist was Guy Clark of the Coalition Against Gambling. The only people appearing for his anti-gambling rally at the Capitol were members of the press.

As the legislature rushed to complete its work and as gaming appeared more complex each day, Senator Leonard Tsosie (D-Crownpoint), one of two Navajos in the Senate, submitted a substitute version of SB 1132 entitled "The Level Playing Field Act." The bill would require non-Indian gaming profits be paid to the state and would give tribes approval of any new off-reservation gaming in the state. The bill was clearly designed to draw attention to the charges being leveled against Indian gaming by turning them around on its critics. On behalf of the NMIGA, Frank Chaves issued a statement declaring,

> With unbelievable gall, wealthy track owners demand "a level playing field. If they were allowed to expand their racing operations to include casino gambling, where would their profits go? The same place their horse racing profits go: their own pockets" (Indians 1995).

Continuing to express his displeasure at the compact, House Speaker Raymond G. Sanchez introduced House Joint Resolution 11, "A Joint Resolution Expressing Disapproval of the Manner in Which the Governor of the State of New Mexico Executed the Compact that Provides for the Conduct of Casino Gaming with the Indian Tribes." The Resolution reasserted

Sanchez's view that the governor had rushed approval of the compact without adequate legislative review. It expressed disapproval of both the substance of the compact and the authority of the governor to enter into such agreements. The Resolution asked first that the compact be withdrawn, and second that the Secretary of the Interior disapprove of the compact "until the completion of a process that assures the proper accommodation of the interests of all the citizens of New Mexico" (HJR 11). The House passed the Resolution on March 15 by a vote of 34 to 30, two days before 11 of the 13 compacts were given formal approval by the Interior Department.[13]

Secretarial approval of the compacts did not end Sanchez's efforts to assert his will in Indian gaming. While congratulating the tribes on the approval of the compacts, Sanchez continued to insist that the "health and welfare of all New Mexicans" be protected. He asked the tribes to raise the age requirement from 18 to 21; not cash Social Security or payroll checks at casinos; provide support for programs for problem gamblers; and not expand the existing scope of Indian gaming in New Mexico (Griego 1995). Tribal representatives agreed to meet and discuss these issues, but Frank Chaves said that scope of gambling

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[13] Approval of compacts signed by Nambe and Acoma Pueblos was delayed due to their late submission to the Interior Department (Cole 1995d).

issues were "market driven" and "not-negotiable" (Chaves 1995).

The legislative sound and fury produced by the gambling issue resulted in only one significant change in the status of legalized gambling in New Mexico: at long last the state would have a lottery. The tribes and Governor Johnson were clearly the major winners on this issue. The governor kept his commitment to the tribes and the tribes maintained their preeminent position in gaming in the state. At the same time the tribes and governor held firm to their positions, legislators and gaming interests were unable to develop a coherent gaming policy that met either of their goals.

ANALYSIS

As we have seen, New Mexico tribes used three strategies - litigation, lobbying, and electoral pressure - in a Schattschneider-like search for the sphere of conflict most likely to result in the desired policy (Schattschneider 1960). The tribes often engaged in conflict in the judicial, legislative, executive, and political spheres simultaneously. This is consistent with the state's political culture. Garcia and Thomas have noted that "Interest groups in New Mexico operate in four sectors in attempting to influence public policy in their favor....elections and campaigns; the legislature; the executive branch; and the judiciary..." (1987, 99).

Four factors make such multi-faceted strategies both possible and necessary. First, the state's political, social, and institutional arrangements facilitate such action. Garcia and Thomas contend that "the fragmentation of political power and of the policy making process provides an almost ideal environment for interest groups in terms of the flexibility and variety of tactics available to them" (101). Second, the status of tribes as sovereigns with extensive political, cultural, economic, and social interests makes it likely that they will be confronted with challenges and opportunities across political arenas, as they were in the case of gaming. Third, in the area of gaming, multi-level strategies are also required by the parameters of tribal/state conflict established by the Indian Gaming Regulatory Act. Fourth, the resources generated by Indian gaming permitted the tribes to participate at a highly visible and effective level of political activity.

Cigler and Loomis have noted that "most groups and interests seek to narrow the scope of conflict" (1991, 392). The IGRA in many respects narrows the conflict artificially. Tribes seeking to engage in Class III gaming must negotiate with the state, and, failing fruitful negotiations, go to federal court. New Mexico tribes followed the law and engaged in the required narrow conflict. But by entering the electoral process tribes expanded the conflict in order

to bring about a change in the arena of narrow conflict, namely the governor.

The two arenas of conflict, the narrow arena of government-to-government negotiations and federal lawsuit, and the broader electoral arena, are both open to tribes because of their flexible political status. New Mexico tribes were not limited in the scope of conflict open to them when seeking to protect and expand their gaming activities. Again, the financial resources generated by the tribes' gaming operation provided them the flexibility required to implement their multifaceted strategy.

The nature of gaming as a policy issue and its central role in defining the extent of tribal sovereignty motivated tribes to coalesce and engage in a multi-front campaign to protect tribal gaming specifically and tribal sovereignty generally. At times the tribes' tactics were reactive, at others proactive. At all times they appeared ready and able to bring to bear the multiple resources available to them in their dual roles as sovereign entities and interest groups.

In fighting to uphold tribal sovereignty, the tribes were at the same time fighting to hold on to an instrument of great potential economic power. Both of these tribal interests, sovereignty and economic development, found opposition among those seeking to limit tribal gaming opportunities. Governor King and two U.S. Attorneys at times sought to limit the exercise of tribal sovereignty by

refusing to allow the expansion of Indian gaming. Non-Indian gaming interests fought to maintain what they considered a "level playing field" for tribal gambling operations. Their actions directly and indirectly threatened the economic foundation of Indian gaming, as did the acts of government itself. This is not surprising given the context of interest group activity in the state. A number of observers have classified New Mexico as a state where interest groups are strong (Morehouse 1981, Zeigler 1983, Hrebenar & Thomas 1987). In none of these surveys of the state's interest group activity, however, were Indians or Indian tribes cited as influential groups.

While elected and appointed officials at times placed obstacles in the path of the tribes' efforts to achieve their goals, it was the cooperation of two other officials that ultimately allowed the tribes to succeed. The change from King to Johnson in the governor's office is the most significant development, from both political and policy perspectives. Governor King's philosophical opposition to gaming and his states' rights interpretation of the scope of Indian gaming and Indian sovereignty were replaced by Johnson's need to fulfill a campaign pledge.

United States Attorney John J. Kelly proved to be less of an adversary than previous occupants of that office. While he refused to allow uncontrolled expansion of Indian gaming, the standstill agreement he reached with the tribes

on the number of allowable video slot machines permitted the tribes to continue their gaming operations uninterrupted. Arguably it also strengthened their hand in negotiations with whomever sat in the governor's office, since the continued existence of the machines implied an endorsement of the tribes' scope of gaming interpretation.

Kelly also publicly supported the negotiations between the tribes and Johnson (Kelly 1995). Indian leaders found Kelly to be easier to work with than previous U.S. Attorneys. With a background in Indian Law, Kelly did not have to learn the intricacies of this complicated field and discussions between him and the tribes proceeded more smoothly (Chaves 1995). It is important to note that Kelly is the former law partner of one of the leading tribal attorneys, Richard Hughes (Hughes 1995a). Kelly's actions through the first half of 1995 appear to support Eisenstein's observation that personal experience is often important in how a U.S. Attorney exercises his or her discretion (Eisenstein 1978).

The strength of the collective tribal effort to protect and expand Indian gaming is in large measure due to the ability of the tribes to present a united front. The Pueblos have a centuries long history of cooperation and have three significant organizations that bring them together to discuss and make policy as well as operate programs: the All Indian Pueblo Council, the Southern

Governors Council, and the Eight Northern Pueblo Council. The nineteen pueblo governors represent their people on the All Indian Pueblo Council. "According to tribal legends and oral history," writes Joe Sando, "the All Indian Pueblo Council has existed for many centuries, and 1598 is used by the people as its date of origin because that is the recorded meeting date with the Spaniards under Governor Juan de Onate" (Sando 1992, 16).

As the New Mexico Business Journal observed, New Mexico's Indian "communities are diverse and have long histories of inter-relationships with one another, both positive and confrontational" (Journal 1995). For the most part, confrontation among the tribes was absent in the issue of gaming.

In their chapter on New Mexico in Hrebenar and Thomas' Interest Group Politics In the American West, Garcia and Thomas noted

> The comparatively small Indian population in New Mexico (9 percent), the similarity of governmental issues affecting different tribes, and the importance of these issues combine to produce a solidarity to a far greater extent than is seen among Hispanics, even though Indians are more culturally heterogenous, their voting participation is lower, and the relevance of state government to their lives is more obscure (1987, 95).

Thus, while there are cultural, political, and other differences that cause New Mexico's twenty-two Indian tribes to act independently, on the issue of gaming, the relevance of state government was clear and the interests of the

Pueblos and the two Apache tribes converged. This allowed the tribes to present a stronger united front in pressing their demands. In this sense, the combined inter-tribal effort meets Alan Rosenthal's definition of a coalition: "...a loose collection of organizations that cooperates to accomplish common objectives" (Rosenthal 1993, 150). There was no disagreement among the gaming tribes on the broad questions of tribal sovereignty and scope of gaming. The Navajo Nation was not a significant actor on the gaming issue. Without any legal gaming on the reservation it was not as immediately necessary for the Navajo government to become involved in this issue and, has been noted, the Navajos do not have a history of joining the Pueblos in political action.

The NMIGA might also be considered a kind of public interest group working in an "interest group sector," defined by Cigler as "a set of organized groups that share broadly similar policy concerns..." (Cigler 1995, 132). Cigler observes that public officials join public interest organizations "not only to advance policy positions, but also to promote core political-system values: responsiveness, representativeness, accountability, equity, efficiency, and effectiveness" (Cigler 1995, 132). The NMIGA association seeks each of these within the context of Indian gaming and Indian sovereignty, the tribes' most significant "political-system value."

Inside Lobbying: The Executive Branch

As Reed and Fort note, the executive power is "fragmented" in New Mexico (Reed & Fort 1994, 19). Executive responsibilities are distributed constitutionally and by statute across a number of elected and appointed bodies. The lobbying efforts by the tribes with New Mexico's governors primarily consisted of campaign contributions, or the withholding of them, and negotiations designed to lead to a Class III gaming compact. The Indian Gaming Regulatory Act requires tribes to attempt to negotiate with state officials on Class III gaming issues. The New Mexico tribes began this process almost immediately after the IGRA took effect.

The negotiating process required by the IGRA is clearly of an intergovernmental relations nature, one unique in American federalism. While it is designed as a mechanism to resolve tribal-state differences, it may in fact exacerbate them. As in New Mexico, these difference may involve policy differences as well as fundamental differences over the nature of Indian sovereignty itself. The question of the scope of gaming permitted under the IGRA is also fundamentally a question of the scope of state and tribal sovereignty.

In a December 1993 letter to the author, Governor King outlined his position regarding Indian gaming and tribal-state relations. While reiterating his past support of

tribal sovereignty, King wrote, "I do not believe distinctions between state and tribal governments need to be clear-cut. There is room for overlapping responsibilities and cooperative undertakings." He cited cross deputizations of law enforcement as an example.

But gaming was clearly a different matter to the Governor. "On the question of gaming," he wrote, "I have insisted that tribal governments should be permitted to offer any form of gaming otherwise legal in the state and should be able to offer it under their own rules and jurisdiction" (emphasis added).

He further wrote,

> However, I do not believe that I as governor am obligated or even entitled to grant a particular group of citizens the right to engage in activities otherwise illegal in my state (King 1993).

This was still Governor King's position after leaving office. In March 1995, soon after his successor had signed compacts with New Mexico tribes, King repeated his opposition to compacts that permitted games not specifically permitted under New Mexico law. He added that Johnson was "giving everything to the Indians" (King 1995).

King's interpretation of the IGRA is quite different from that of the tribes and his view of tribal sovereignty recalls a states' rights position going all the way back to President Andrew Jackson: tribes are within the borders of a state and Indians should be subject to the same laws as all other "citizens" of the states wherein they reside.

This irreconcilable difference in interpretation of the scope of both tribal/state sovereignty and of the IGRA doomed negotiations between the tribes and King to failure. King could not be lobbied out of his position.

King had adopted what Wolf describes as "a two-phase strategy to stymie Indian gaming operation" (Wolf 1995, 53). The first part of the strategy is to "delay or refuse to negotiate compacts with the Indians." Then, when tribes follow the IGRA and sue in federal court, "states assert that the constitutional defense of sovereign immunity, under the Eleventh Amendment, bars such suits" (53). Both of these strategies were followed by King.

Newly elected Governor Gary Johnson did neither. He told the Senate Committee on Indian Affairs in June 1995 that "Adopting compacts with the Indian tribes is not based on some philosophical idea of whether gambling is right or wrong. Rather, it is the result of federal law..." Taking a position striking different from King's, Johnson said that "all Indian gaming in New Mexico is consistent with New Mexico state law and public policy" (Johnson 1995b).

Whether or not he had a better grasp than King of Indian sovereignty generally or the scope of Indian gaming specifically, his willingness to carry through on his campaign commitment meant that the tribes had a responsive ear. The responsiveness of the governor's office was strengthened by the appointment of Fred Ragsdale as the

governor's gaming negotiator. As was the case with U.S. Attorney Kelly, Ragsdale knew the area of law he was negotiating and there was no lag time required for him to learn the complexities of Indian law and gaming policy. As Frank Chaves noted, with Ragsdale they "negotiated regulatory issues as opposed to law" (Chaves 1995). Negotiations between Ragsdale and tribal attorneys apparently were conducted without significant impediments to achieving the mutually desired end: a Class III gaming compact.

Johnson told the Senate Committee that in negotiating the compacts "the most important goal was to use the negotiation and compacting process as a model for future state and tribal affairs." He pointed to a recent "tribal summit" that his administration held with Indians on a variety of issues as resulting from "the ground work" laid by the gaming negotiations (Johnson 1995b).

Inside Lobbying: The Courts

While it is well established that interest groups have increasingly turned to the judicial process to achieve their policy ends (Epstein & Rowland 1986), the IGRA establishes a unique set of circumstances that may lead tribes to federal court. By providing that tribes may bring suit in federal district court against states that do not negotiate Class III compacts in "good faith," the IGRA provides a forum in

which to resolve tribal/state conflict. It also leads to a major role for attorneys in the gaming policy area.

As we have seen, the Sandia Pueblo and Mescalero Apache Tribe were the first New Mexico tribes to sue under the IGRA. While these tribes and those who filed subsequent similar lawsuits were direct parties in a tribal/state conflict, New Mexico tribes have also come to the aid of non-New Mexico tribes involved in similar disputes. This legal support by New Mexico tribes for other tribes engaged in legal battles with states is not confined to the issue of gaming.

When there are significant questions of tribal sovereignty interests involved in litigation before the U.S. Supreme Court, attorneys for New Mexico tribes have often supported the tribe's position by filing amicus briefs. Because the boundaries of tribal sovereignty and Indian policy have so often been established by Supreme Court decisions, that venue has historically been the one which tribes have turned to assert or defend their rights.

The 1980s provided several major opportunities for the Court to further define the limits of tribal sovereignty. At the same time, interest groups generally (Epstein & Rowland 1986) and tribes specifically were attempting to influence judicial policy making. O'Connor & Epstein (1981 and 1983), Shapiro (1984), and Bradley & Gardner (1985) have noted the increased use of amicus curiae briefs by interest

groups before the Supreme Court. None of these researchers looked at the role of amicus briefs in Indian law cases.

A number of New Mexico tribes filed amicus curiae briefs with the Supreme Court supporting the position of the Cabazon Band of Mission Indians in its significant and historic 1986 litigation against California's efforts to regulate their bingo operations. Sandia, Acoma, Tesuque, and San Juan Pueblos joined in an amicus brief filed by Albuquerque Attorney L. Lamar Parrish. Alan R. Taradash of Albuquerque submitted a brief on behalf of the Jicarilla Apache Tribe and the Pueblos of Isleta and Santa Ana. All of the briefs supported Cabazon's assertion that California lacked jurisdiction to interfere with the Band's bingo games.

New Mexico lawyers active on behalf of Indian tribes in the state are also engaged in supporting the efforts of other tribes seeking to protect sovereign interests. As we have seen, the Albuquerque law firm of West, Gover, Stetson, and Williams (later Gover, Stetson, and Williams) has been a major player in Indian issues and state politics. Similarly, the firm filed amicus briefs on behalf of a number of tribes supporting other tribes with cases before the Supreme Court in the 1980s and '90s. In 1983 the firm filed an amicus curiae brief on behalf of the Cheyenne River Sioux Tribe of South Dakota, the Standing Rock Sioux Tribe of North and South Dakota, and the Association on American

Indian Affairs in Solem v. Bartlett. This case involved the question of whether or not Congress had diminished the Cheyenne River Sioux Reservation in South Dakota, thus giving the state jurisdiction to try an Indian accused of a crime committed on the disputed land. The court held that the reservation had not been diminished and that South Dakota did not have jurisdiction.

In 1988 Gover Stetson & Williams filed amicus briefs in two significant Supreme Court cases, Cotton Petroleum Corporation v. New Mexico and Berndale v. Confederated Tribes and Bands of the Yakima Indian Nation. The first was filed on behalf of the Crow Tribe of Montana, the Shoshone Tribe of the Wind River Reservation, the Arapaho Tribe of the Wind River Reservation, the Yavapai-Apache Tribe, the American Indian Resources Institute, the National Congress of American Indians, the Apache Tribe of the Mescalero Reservation Housing Authority, and the Pueblo of Laguna Housing Authority. The second brief was filed on behalf of the Swinomish Tribal Community.

The following year, the firm filed an amicus brief in one of the most significant recent cases affecting tribal criminal jurisdiction. In Duro v. Reina, the firm filed on behalf of 14 tribes, bands, and reservations, none of which were from New Mexico, and the Association on American Indian Affairs. The issue in this case was whether or not a tribe could exercise criminal jurisdiction over non-tribal

Indians. The court held that a tribe only had criminal jurisdiction over its own members. The brief filed by Gover, et al. had argued that the tribe involved in the dispute, the Salt River-Maricopa Indian Community of Arizona, did have jurisdiction over the non-tribal member charged with discharging a firearm on the reservation.

Four facts should be noted about this activity by Gover, et al. First, in all four of these cases, Gover, et al. had argued on behalf of tribal sovereignty against efforts by the states to curtail it. In all but one case the party supported by the firm lost before the Supreme Court. This is notable given the recent literature attempting to discern the effectiveness of amicus briefs (O'Connor & Epstein 1982, Ennis 1984, Hedman 1991). Second, nearly all of the tribes represented by the firm were located outside New Mexico. Third, only one of the cases involved an issue of direct concern to tribes located in New Mexico, Cotton Petroleum. Four, in two of the cases the firm represented one of the oldest non-Indian pro-Indian rights interest groups in the country, the Association of American Indian Affairs of New York City.

New Mexico tribes were directly affected by one of the most significant cases of the decade concerning the rights of states to impose severance taxes on businesses operating on Indian lands and already subject to tribal taxes, Cotton Petroleum Corporation v. New Mexico. In addition to the

brief filed by Gover, Stetson & Williams, amicus briefs were also filed by attorneys for the Jicarilla Apache Tribe of New Mexico and by the Navajo Nation's Department of Justice. Both supported Cotton Petroleum in the company's efforts to avoid paying the New Mexico state tax. The case was of special concern to the Jicarilla since it was the tax on Cotton Petroleum's Jicarilla Apache Reservation wells that was at issue. The Court subsequently held that New Mexico could impose its tax on Cotton Petroleum absent a congressional statute preempting the state from doing so. (As will be seen in subsequent chapters, amicus briefs in tribal/state disputes in the U.S. Supreme Court has become a significant tool by which tribes can attempt to assert tribal sovereignty in the face of state opposition.)

Inside Lobbying: The Legislative Branch

The extent of the formal participation of the New Mexico legislature was in its power to change the parameters of the state's gaming policy. By first demanding that governors sign Class III compacts and then with the signing of the compacts finally taking place, the tribes were in large measure driving the discussion of expanded gaming in New Mexico. A series of legislative sessions, culminating in the 1995 session, wrestled with the conflicting pro- and anti-gaming interests attempting to influence the Legislature's decisions. With the support of Governor

Johnson, the tribes have emerged from these legislative battles with their gaming rights untouched.

Tribal leaders and representatives were not on the sidelines of the legislative process, however. As noted above, tribal representatives appeared before legislative committees considering gambling legislation and most tribes had registered lobbyists with authority to represent their interests before the Legislature. The introduction of the "Level Playing Field" bill by Senator Tsosie with the support of the NMIGA was a not so subtle reminder to the public and lawmakers of what was taking place among the competing gaming interests in the final days of the legislative session. Finally, and perhaps most significantly, the deep inside work of Odis Echols and Kevin Gover in the final days of the legislative session was an example of lobbying at its most basic and sophisticated level.

The legislature is also a forum for partisan politics and ongoing issues of checks and balances among the three branches of New Mexico's government. This was apparent in the demands made by some legislators that Johnson submit the Indian gaming compacts to the Legislature before signing them and Democratic House Speaker Sanchez's efforts to assert a role in issue. He did this by making public his criticisms of the compacts and his private meetings with Indian leaders. By the latter action, the tribes recognized

the pragmatic political need that Sanchez had to provide himself political coverage on the issue (Chaves 1995).

It is also important to note that after the end of the legislative session two legislators joined with the Executive Director of the New Mexico Coalition Against Gambling to file suit challenging the governor's power to sign the compacts. State Representatives George Buffett (R-Albuquerque) and Max Coll (D-Santa Fe) asked the New Mexico Supreme Court to invalidate the compacts on the grounds that Johnson lacked statutory authority to enter into the gaming agreements with tribes without legislative consent (Peterson 1995a).

At the Congressional level, New Mexico Indian tribes were active in efforts to shape the nation's Indian gaming policy. Tribal and NMIGA representatives testified at congressional hearings dealing with Indian gaming. Examples of this include testimony before the Senate Select Committee on Indian Affairs by Pueblo of Santa Ana Tribal Administrator Roy Montoya and Acoma Governor Mule L. Garcia, Frank Chaves, Sandia Governor Esquipula Chaves, and Donald L. Walker, President of Sandia Indian Management Co. in 1985; Herman Agoyo, Chairman of the All Indian Pueblo Council in 1987; and Wendell Chino, President of the Mescalero Apache Tribe in 1992. Similar appearances were made before the House Interior and Insular Affairs Committee.

New Mexico tribes were also represented on the joint National Congress of American Indian/National Indian Gaming Association Task Force and Negotiating Team. These two bodies were created to assist the Senate Select Committee on Indian Affairs resolve tribal/state differences over gaming. The Negotiating Committee meet with representatives of state governments to attempt to resolve these differences in face-to-face meetings. Isleta Pueblo Governor Alvino Lucero and Pojoaque Governor Jacob Viarrial served on the Task Force. Frank Chaves served on the Task Force and the Negotiating Committee. Attorneys Susan Williams and Henry Buffalo served on the Task Force, Negotiating Team, and the work group established to work out the details of any possible compromise with a similar group representing the states (NMIGA 1993b).

Outside Lobbying: Public Relations

While the major substantive work to protect and expand Indian gaming was done before government bodies, the tribes did not ignore the public at large. As Alan Rosenthal notes, for groups engaging in outside lobbying, "One way to generate support is to place an emphasis on communications" (Rosenthal 1993, 167). The gaming tribes communicated their position to the public individually and collectively through the New Mexico Indian Gaming Association.

The work of the NMIGA was crucial to both inside and outside lobbying. Association Co-chair Frank Chaves was frequently interviewed by the media. He and Co-chair Greg Histia co-authored several op-ed articles for the Albuquerque Journal.

While it engaged in outside lobbying, the NMIGA was not a traditional interest group related grassroots organization (Rosenthal 1993). Its base comprised the tribes that had gaming operations, principally the Pueblos of the Rio Grande. It was not a mass membership organization and the interests of its constituency were narrow and outside the frame of reference of both most public officials and the public at-large.

In September 1994, the NMIGA came to the public defense of U.S. Attorney John Kelly. Kelly, with whom the tribes had earlier reached a standstill agreement on the number of allowable video gambling devices, had been attacked by the director of the New Mexico Coalition Against Gambling for having a conflict of interest involving his involvement in a business in dispute with Sandia Pueblo. The Association charged that Kelly had "become the stand-in target" for those opposed to Indian gaming (Defends 1995).

The tribes individually attempted to convince the New Mexico public of the benefits of Indian gaming. Isleta Pueblo, for example, ran thirty second television commercials presenting Indian gaming in a positive light and

Tesuque Pueblo Governor Paul Swazo wrote a column for the Albuquerque Journal presenting the tribes' economic argument for gaming (Swazo 1994). The Isleta ads came at a time during the gubernatorial race when the anti-gambling Association for the Protection of Community was attacking Indian gaming in general and Johnson's support for compact negotiations in particular.

Arguably, one of the best public relations outlets available to the tribes was their casino advertisements. Slick promotional advertisements appeared in various media outlets, including radio and television. The Isleta Gaming Palace was often seen in commercial spots on Albuquerque television stations.

The tribes also attempted to directly utilize their casino patrons to lobby law makers. For example, the Isleta Gaming Palace made pre-addressed postcards available to their patrons urging members of the New Mexico Legislature and New Mexico's congressional delegation to support Indian gaming. Patrons could sign these cards and leave them in a box for mailing by casino employees. The cards read:

> I urge you to support Indian Gaming in New Mexico. I do!
>
> Indian Gaming provides well-run, legitimate entertainment for thousands of New Mexicans and visitors every day.
>
> Indian Gaming is a governmental enterprise supporting the tribes and surrounding area by creating jobs, new tax revenue and new business revenues within the state of New Mexico.

> I request that you support our Native American friends and oppose any effort that limits or reduces Indian Gaming. I will be supporting Indian Gaming With My Vote!.

Outside Lobbying: Political Campaign

Having failed in their efforts to sway Governor King and negotiate Class III compacts on a sovereign-to-sovereign basis, the tribes sought to remove the obstacle, namely the Governor himself, and turned to the political arena. In the American political system neither units of government nor associations of government officials endorse political candidates (Cigler 1995). There are legal and practical reasons for that. First, it would be illegal to use government funds for partisan purposes and many states prohibit partisan activities by public employees. Second, what might be called "professional courtesy" insures that an organization comprising elected officials will not seek the removal of others similarly situated. Third, partisanship could destroy the unity needed for achieving the common goals of elected or appointed officials holding comparable offices. Finally, government officials have other ways of getting their agenda before other relevant public decision makers.

These constraints are generally absent among Indian tribes. So long as federal and state funds are not used, tribes are free to dispose of their resources as they see fit. While tribes run the risk of any individual or

organization that contributes to a losing campaign, they also enjoy the benefits when they back a winner, as the tribes in New Mexico did in 1994. Given the relatively small numbers of registered Indian voters in New Mexico, campaign contributions and endorsements guaranteed that their voice would be heard. The interest of New Mexico's tribes was seen as lying with a governor other than King.

Partisanship mattered a great deal less than the candidates' willingness to support the tribes on an issue critical to their sovereign and economic interests. Hence, while first endorsing Democrat Casey Luna in the gubernatorial primary, the tribes supported the Republican nominee when King won renomination.

CHAPTER 5: "WE'LL REMEMBER IN NOVEMBER"

The future of Indian gaming appeared secure after the compacts had been signed and the legislature had adjourned without changing the gaming status quo in New Mexico. Tribal gaming operations expanded rapidly and full scale casino gambling became a reality along the Rio Grande. The months between March and July 1995, however, were like the brief blooming of a high desert flower. The harsh realities of New Mexico politics soon threatened the new vitality of tribal economic life and tested the ability of the tribes to assert their political status and stave off the political and legal challenges to the gaming compacts. Defeating the threats to what tribal leaders believed was their legal right to offer Class III gambling under the compacts required a campaign that would bring to bear all of the resources and political acumen gained in their previous battles and made possible by gaming revenues.

The impact of decisions made by non-Indian political institutions and the deficiencies of the Indian Gaming Regulatory Act became apparent in New Mexico in the latter half of 1995. Two decisions by the New Mexico Supreme Court cast doubt on the status of the compacts and created a political and legal crisis for tribal, federal, and state officials. The Court's decisions demonstrated again the vulnerability of tribes to political questions that, on their face, have little if anything to do with Indian

policy. Their practical effect was to threaten not only the economic revival underway in Indian Country in New Mexico but the fundamental ability of the tribes to conduct their own affairs free from the vagaries of non-Indian politics. Accordingly, the tribes proceeded to demonstrate their continued willingness to enter the political arena to protect their interests.

If anything, gaming became even more important to the tribes in the months following the signing of the compacts. While continuation of the gaming operations remained a fundamental question of sovereignty for the tribes, their economic importance dramatically increased. Tribal gaming operations were expanded and became full-blown casinos. Card tables were added and the banks of video slots enlarged. Tesuque Pueblo moved out of its bingo hall and temporary casino into the newly constructed Camel Rock Gaming Center. In November, two weeks before the Court's first decision, San Felipe Pueblo opened the doors of its Casino Hollywood with 20,000 square feet of gaming space, just off Interstate 25 halfway between Albuquerque and Santa Fe (Hartranft 1995). Taos Pueblo added additional video slots to its small casino, the northern-most in the state (Lujan 1996).

The evidence of the success of the gaming operations is first apparent in the amount of money taken in by the tribal casinos. The ten Class III gaming operations made a net

profit of $46 million in 1995 (Peterson 1996a). New Mexico Indian Gaming Association Co-Chair Frank Chaves told the Senate Select Committee on Gaming that the casino "directly" employed 2,924 people and were responsible for creating an additional 8,436 jobs. According to Chaves, citing a study done for the Association, Indian gaming was responsible for $7.6 million dollars in New Mexico gross receipt taxes and $4.3 million in state income taxes.[1]

Robbie Robertson of the Center for Applied Research told a joint hearing of several House committees that during 1995 New Mexicans spent $172 million on Indian gaming in the state, out of a total $231 taken in by the casinos for the same period of time. The tribes spent $184 million on their gaming operations, including $48 million in wages and salaries. Of the $136 million spent by tribal casinos on goods and services, $124 million was spent within the state. While Robertson acknowledged that businesses that compete for leisure dollars lost $154 million dollars to tribal casinos, a "countervailing" $216 million was spent by tourists who came to New Mexico to gamble.[2]

Beyond the aggregate dollar amounts is what casino

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[1] While the tribes and their Indian employees are not subject to either of these state taxes, non-Indian employees must pay state income taxes and firms doing business with the casinos are subject to the gross receipt taxes.

[2] The quoted figures from Chaves and Robertson are from notes taken by the author while observing the hearings on January 17 and February 3, 1996 respectively.

revenues enabled the tribes to do that, absent gaming revenue, they otherwise could not have done. Restricted by the Indian Gaming Regulatory Act (25 USC 2710 (11)(b)(2)(B)) in how they may use gaming revenue, New Mexico tribes used their profits on a wide variety of services for tribal members (NMIGA 1996b).

* Isleta Pueblo's youth programs are completely funded by the Isleta Gaming Palace Revenue
* Santa Ana Pueblo expanded its police force and funds scholarship programs
* Sandia Pueblo operates a Wellness Center for tribal members of all ages
* Acoma Pueblo is investing in its outdated water system

At least two tribes were using gaming revenues to invest in significant cultural needs. The Pueblo of Pojoaque had lost significant aspects of its spiritual and cultural heritage, including its sacred societies and kiva. Gaming revenues enabled the Pueblo to build a new kiva, the spiritual ceremonial center of all pueblo people (Viarrial 1996, NMIGA 1996).[3] In another example of what might seem an ironic use of the fruits of an activity often questioned as immoral, the Taos Pueblo Tribal Council voted to expand its small casino specifically for the purpose of using the revenues to purchase a piece of property to act as a buffer to protect the Pueblo's sacred Blue Lake (Lujan 1996). The

[3] As part of its economic development plan, Pojoaque Pueblo purchased the "Downs at Santa Fe" racetrack in September 1995 (Trujillo 1995).

loss of the gaming revenue would in all probability lead to the Pueblo losing the land and its subsequent development for tourism by non-Indians.

The New Mexico Supreme Court Rules: Act I

Only four months after the compacts were signed the future of Indian gaming in New Mexico was once again a controversial issue. In July the State Supreme Court handed down its decision in New Mexico ex rel. Clark v. Johnson (1995 N.M. Lexis; 904 P. 2d 11 (1995), the lawsuit filed by gaming opponents after the compacts were signed. In a decision that had as much importance for the office of the governor as for Indian gaming, the Court unanimously held that Governor Johnson had exceeded his constitutional authority in negotiating and signing the gaming compacts.[4] The Court held that Johnson had violated the principle of

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[4] New Mexico is the second of three states where the separation of powers issue has been an issue in connection with Class III compacts. In 1992 the Kansas Supreme Court held that while the governor had the power to negotiate a Class III compact with the Kickapoo Tribe, she had "no power to bind the State to the terms thereof" absent specific legislative delegation (Kansas, ex re., Stephan v. Finney 251 Kan. 559; 836 P.2d 1169; 1992 Kan. LEXIS 130). See also Burr 1992 for background. Similarly, on the day after the New Mexico Supreme Court decided Citation Bingo in November 1995, the Supreme Court of Rhode Island held that the state's governor had authority to negotiate a Class III compact with the Narragansett Tribe but "absent specific authorization from the General Assembly," he has "no express or implied constitutional right or statutory authority to finally execute and bind the state to such a compact by his execution thereof" (Narragansett Indian Tribe of Rhode Island v. Rhode Island 1995 R.I. LEXIS 267).

separation of powers by performing a legislative function. Without legislative authorization, the court said, Johnson not only signed compacts he was not authorized to sign, but had in effect legalized certain types of for-profit gaming not permitted under New Mexico law.

> We have no doubt that the compact and agreement authorizes more forms of gaming than New Mexico law permits under any set of circumstances....The legislature of this State has unequivocally expressed a public policy against unrestricted gaming, and the Governor has taken a course contrary to that expressed policy....Further, even if our laws allowed under some circumstances what the compact terms "casino-style" gaming, we conclude that the Governor of New Mexico negotiated and executed a tribal-state compact that exceeded his authority as chief executive (25-26).

The Court rejected Johnson's contention that the state's Joint Powers Agreement Act (NMSA 1978, ## 11-1-1 to -7) and Mutual Aid Act (NMSA 1978 ## 29-8-1 to 3) gave him the requisite authority to negotiate the gaming compacts. Furthermore, the Court held that Johnson's argument that the IGRA was controlling was "inconsistent with core principles of federalism" (39). It noted that Congress could have legalized all forms of gaming on Indian lands but in passing the IGRA had chosen not to do so. Moreover, "We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law" (41). Finally, the Court prohibited "all actions to enforce, implement, or enable any and all of the compacts and revenue-sharing agreements..." (43).

Two weeks later, the Court issued an amended order and stay of execution, giving additional force to its earlier holding. The Court declared "that the compacts executed by the Governor are without legal effect and that no gaming compacts exist between the Tribes and Pueblos and the State of new Mexico. Thus New Mexico has not entered into any gaming compact that either the Governor or any other state officer may implement" (Text 1995).

While the legality of gaming was not a direct issue before the Court in Clark, the justices nevertheless made it clear that they narrowly interpreted New Mexico's gambling statutes. The Court clearly viewed the state gaming law as prohibitory and criminal rather than permissive and regulatory. It drew a sharp line between what was permitted under the Permissive Lottery Law (NMSA 1978 # 30-19-6) and forms of "for-profit gambling." Justice Pamela B. Minzer wrote that "New Mexico has expressed a strong public policy against for-profit gambling by criminalizing all such gambling with the exception of licensed pari-mutuel horse racing" (24). For those who could see into the future, these words would send a clear signal that the court was not finished with the issue of gambling in the state.

The broader political implications of the decision were as significant as the more narrow issue of gaming. In a system of government generally acknowledged as one with an already weak chief executive (Reed and Fort 1994), the

further limitations imposed on the governor were significant. As one observer noted, New Mexico's governors would now be limited to their appointive and line item veto powers (Gover 1996). Clark also began to raise questions among some about the political motivation of the court's decision. A unanimous decision by a Democratic court on a question involving a Republican governor who had defeated the incumbent Democrat with the assistance of Indian tribes seemed to many Indians as not coincidental. This feeling would intensify with a decision handed down by the Court later in the year.

The reaction to the decision and amended order by Indian and non-Indian officials was swift. Tribal leaders argued that the compacts were valid because they had been approved by the Secretary of the Interior in conformity with the IGRA. They therefore would continue to operate their casinos consistent with the compacts (Cole 1995f). New Mexico Indian Gaming Association Co-Chair Frank Chaves said, "I can tell you that our position is that the compacts have been approved in accordance with federal law and the Indian Gaming Regulatory Act" (Hartranft, Lumpkin, and Gallagher 1996). Governor Johnson also continued to hold the position that the compacts were valid (Cole 1995e). New Mexico Attorney General Tom Udall, however, said that he believed the compacts were invalid (Cole 1995f).

To further complicate matters for the state, in

accordance with the compacts' revenue sharing agreement, the Pueblo of Sandia sent a check for $291,000 to the New Mexico Treasurer's Office (Cole 1995c). By the second week of August the tribes had forwarded nearly $900,000 to the state. Treasurer Michael Montoya accepted the money but was criticized for doing so by Udall (Massey 1995a).[5] Montoya soon thereafter decided to return the money to the tribes (Massey 1995b and 1995c), although he did not do so until May 1996 (Massey 1996a).

United States Attorney John Kelly's response to Clark provided further evidence of the wide discretionary authority of that official's office and the personal nature of that authority (Eisenstein 1978). During the same period of time that the U.S. Attorney for the Northern District of Oklahoma was preparing to act against a tribe in his jurisdiction, Kelly resisted mounting pressure to move against New Mexico's Indian casinos. Increasingly, in the weeks following Clark, Kelly was criticized by state legislators, anti-gaming advocates, and the press for not closing the casinos.

While acknowledging the significance of the State Supreme Court's ruling, Kelly urged the state's elected officials to quickly resolve the issue in a special session of the legislature. He said that any action by the U.S.

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[5] Tribal shares of this money were: Isleta, $304,992; Sandia, $290,839; Santa Ana, $ 142,373; Tesuque, $87,841, Pojoaque, $82,689; and Acoma $11,169 (Massey 1996c).

Justice Department would be "inappropriate and premature" (Cole 1995i). "We intend, at least for the near term," he said, "to defer to what I hope will be fruitful state/tribal efforts to resolve, locally, the issues raised by the New Mexico Supreme Court" (Johnson's Compacts 1995). The U.S. Attorney also held separate meetings with Governor Johnson and the legislative leadership to discuss the growing controversy.

While Kelly advocated a political solution to the Indian gaming crisis, the state's top elected officials took significantly different positions that reflected their own responsibilities. While first standing adamantly behind the compacts as negotiated, Johnson soon indicated a willingness to renegotiate their details, a prospect immediately rejected by Frank Chaves (Cole 1995h). In early August Johnson wavered even more, suggesting the Laguna and Santo Domingo Pueblos and the legislature negotiate the compacts requested by the two tribes. These compacts, Johnson said, could then replace the ones he had himself negotiated with the 14 other tribes (Cole 1995j).

House Speaker Raymond Sanchez's role was potentially the most crucial if a political resolution was to be achieved. The Albuquerque Democrat had held meetings with the tribes during the legislative session on the compacts. After the Court decided Clark he announced his willingness to talk with Johnson about resolving the issue.

The tribes continued to press their position that the compacts were valid as negotiated. In "An Open Letter to Governor Gary Johnson From 11 People Affected By Indian Gaming" published in the Albuquerque Journal, tribal leaders thanked the governor for his past support and urged him to hold the line. The paid advertisement expressed the leaders' "gratitude,

> not so much for keeping your word, for in a simpler world a man keeping his word would not be exceptional, it would be expected. Rather, our gratitude is for your courage and for all your efforts to bring the state and tribal governments together in mutual respect for the benefit of all people. You are one of the few who understand the contributions made to this state by Indian people, Indian culture, and Indian owned natural resources....Take heart, Gary Johnson. Do not lose your honesty in a time of dishonesty, Do not fall victim to cynical and opportunistic politics. Remain resolute in your belief that great nations, like great men, should keep their word (Letter 1995).

The New Mexico Supreme Court Rules: Act II

With the January 1996 legislative session nearing and a political solution apparently no closer, the State Supreme Court on November 29 handed down another decision that raised the stakes for not only those already involved in the controversy, but expanded the scope of conflict to include a whole new set of interests. Overturning the 1994 Appeals decision in Infinity Group, Inc. v. Manzagol, the Court found the "Power Bingo" computer game to be an illegal "gambling device" under New Mexico law (Citation Bingo, Ltd. v. Otten, 1995 N.M. Lexis 426). The court surveyed federal

and state gaming statutes and concluded that only an express statutory authorization has ever permitted electronic gaming devices.[6] The court noted that New Mexico's legislature had never enacted such a statute.

The unanimous decision written by Justice Richard E. Ransom reaffirmed the court's view that new Mexico has a "strong public policy against gambling" (20) and declared that "With limited exceptions, gambling is a crime in New Mexico" (6). Asserting that only the legislature can legalize forms of gambling, the Court concluded, "It is for the people acting through their duly elected representative, and not for this Court, to effect any change in the public policy against gambling" (23).

The impact of Citation Bingo was even more profound than that of Clark. Not only was Indian gaming in question; the compacts had specifically tied tribal gaming to those forms legal in the state. The Court's finding that "Las Vegas Night gambling" was not legal under the Bingo and Raffle Act also meant that all of the fraternal, veterans, and charitable organizations that operated video gaming devices were now in violation of state law. On December 4 the state Regulation and Licensing Department notified the non-profit organizations that electronic gaming machines

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[6] The court cited the sections of the IGRA that classified "electronic or electromechanical facsimiles of any game of chance" as Class III while "electronic, computer, or technological aids" were Class II.

were illegal. Within two days of this notification state agents began conducting raids to assure compliance with the law (Taugher and Robertson 1995).

Kelly Shows His Hand and Then Deals

In the six weeks following the State Court's latest decision, Kelly escalated the threat to the tribes and then stepped back from direct confrontation with them. Kelly first responded to the decision by pointing out that the ruling in Citation Bingo overturned the 1994 Infinity decision that had been interpreted as the "judicial authorization for putting slots and other electronic gambling devices in Indian casinos." He went on to say that "This is the kind of decision that prosecutors and policy-makers alike will applaud, because it takes the guesswork our of interpreting state law" (Cole 1995k). Kelly also said that he was going to consult with the Justice Department on how to proceed. In a December 8 meeting requested by the tribes, Kelly asked tribal leaders to voluntarily close the casinos. For their part, the tribes made it clear they would keep the casinos open and operating (Cole, Sandlin and Hartranft 1995).

Less than a week after his meeting with tribal leaders Kelly finally acted to end Class III Indian gaming in New Mexico. On December 14 Kelly faxed letters to each of the leaders of the ten casino tribes informing them that they

must cease operations by January 15 (Hughes 1995b). In a press release Kelly said, "The leaders of the New Mexico tribes are among this state's most law-abiding citizens. I doubt very seriously that the tribes will do anything other than comply with this request" (News Release 1995).

In his letter, Kelly informed the tribes that if the casinos were not closed by the deadline he would initiate forfeiture proceedings in federal court that would result in the government taking possession of the tribes' gaming equipment Kelly 1995). He repeated his assurance, made at the meeting with the leaders the previous week, that he did not intend to physically seize the machines by "calling law enforcement to the reservations." Kelly said that he was basing his actions on the Citation Bingo case "whose reaffirmation of the scope and purpose of the state's gambling laws has far-reaching implications for the future of Indian gaming in New Mexico."

Kelly was also clearly looking at the political climate in the state, noting that the legislature was to go back into session on January 16 and would probably be considering the question of Indian gaming. He wrote that "Among the factors which I considered in rejecting" the suggestion that the casinos remain open during the duration of the session "is the fact that there is no evidence of a consensus, either within the Legislature or as between the Legislature and the Governor, on the gambling issue." The tribes were

given until December 22 to respond to his ultimatum (Kelly 1995).

According to one tribal attorney, the response of tribal leaders was "harsh and not the least conciliatory" (Hughes 1995b). In a December 22 letter, Acoma Pueblo Governor Ron Shutiva informed Kelly that the tribe's casino would remain open, asserting that the state Supreme Court's ruling "does not affect Acoma Pueblo's rights under the Compact" it had signed with Johnson. "Problems with the Gaming Compacts arise from the State side," wrote Shutiva. "The Governor's authority and state approval process are not among things that Acoma pueblo controls" (Shutiva 1995). In his letter to Kelly, Isleta Pueblo Governor Alvino Lucero recounted the story of how the compacts came about. "Our Pueblo has acted conscientiously and honestly at all times," the Governor wrote.

> Congress could not have intended for tribes to enter into compacts for gaming which was permitted by the state, for tribes relying on those compacts to establish and expand gaming operations, or moreover to obligate themselves to expend future monies truly investing for the future of their people, only to have the compacting state change its mind and try to back out of the compact. It could not have the intent of Congress to permit states through either treachery or legal trickery to reach this result (Lucero 1995).

By January 3 all but two of the tribes had replied in writing to Kelly's letter; none had agreed to close their casino (News Release 1996a). That same day the nine gaming

pueblos[7] filed a motion in federal court for an injunction against Kelly, Secretary of the Interior Bruce Babbitt, and Attorney General Janet Reno to prevent them from interfering with their gaming operations (Complaint 1996, Memorandum 1996). By including both Babbitt and Reno in the action tribal attorneys hoped to demonstrate the apparent inter-agency conflict: a representative of the Justice Department was pursuing the tribes for an activity officially approved by the Department of the Interior.

As the legislature began its January session and as the tribes escalated their campaign for compact ratification, both Kelly and tribal leaders signaled their willingness to step back from the increasingly bitter approach of a direct confrontation. Anti-Kelly sentiment had been growing among Indians since his December 14 letter and tensions were generally growing across New Mexico Indian Country. The threats by Pojoaque Governor Jake Viarrial and Isleta Pueblo Governor Alvino Lucero to close the highways that ran through their pueblos got a great deal of attention, not only in the state but nationwide, and caused state law enforcement personnel to begin planning for that eventuality (Eichstaedt and Cole 1995, Baker 1995, McClellan and Linthicum 1996, Viarrial 1996). Governor Viarrial told CNN that "We're prepared to die or go to prison in order to save

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[7] Pueblos of Santa Ana, San Juan, Tesuque, Acoma, Sandia, Isleta, Pojoaque, San Felipe, and Taos.

that valuable way of making a living for our people" (CNN 1996).

As a result of talks between Kelly and tribal representatives, a stipulation was presented to Federal District Court Judge Martha Vasquez. Each side agreed to halt further proceedings against the other and seek an expedited court decision on the legality of the tribes' casinos. While Kelly agreed not to proceed with forfeiture actions against the casinos, the tribes agreed to comply with the ultimate decision of the court and to close the casinos if the court found "that the tribal casinos are operating in violation of federal law..." (Stipulation 1996, 2). The tribes also agreed to "refrain from taking any and all action to close public highways and thoroughfares crossing Indian land in New Mexico, or otherwise interfering with the public's right to travel...[and] renounce the use of force or violence in the pursuit of their goal of keeping the casinos open and agree to take no action that would otherwise violate applicable state or federal law" (Stipulation 1996, 2-3).

After receiving editorial and public praise for his December ultimatum to the tribes (Now 1995), Kelly was severely criticized for entering into the stipulation. An editorial in the Albuquerque Journal charged that he had

given in to threats of violence (Threat 1996).[8] Guy Clark and State Representatives Max Coll (D-Santa Fe) and George Buffett (R-Albuquerque), the plaintiffs in Clark, asked the federal court to allow them to intervene in the case. Their attorney, Victor Marshall wrote in his petition that, "Although the U.S. Attorney has officially stated that the casinos are operating illegally, he appears to be negotiating non-enforcement of the laws" (Shoup 1996).

Kelly responded to the criticism in a column in the Albuquerque Journal, re-asserting his opinion that the tribal casinos were illegal. He argued that his ultimate goal of closing the casinos would still be accomplished but without having to send U.S. Marshals to seize the gaming machines. "The real story this week," he wrote, "is about 'conflict defused'" (Kelly 1996).[9]

The Tribes Raise the Ante

In the aftermath of their success in achieving signed compacts, the tribes' unified political activity had subsided (Hughes 1995b). However, following the second Supreme Court decision, Kelly's intervention, and the approach of the legislative session, the tribes began a well

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[8] At least one Pueblo Governor, Jake Viarrial, believed that the road blockade threats was the tactic that led Kelly to back away from the forfeiture action (Viarrial 1996).

[9] Federal District Judge Marsha Vasquez approved the stipulation and rejected Marshall's intervention petition.

funded and highly coordinated campaign to protect their interests. Directed at both public officials and the public at-large, the tribes' campaign comprised both inside and outside strategies. Brought in to coordinate the effort was Rex Hackler, the Bernalillo campaign consultant recruited by Kevin Gover in the waning days of the 1995 legislative session. Odis Echols, whom Hackler described as the "lord god king of all lobbyists" (Hackler 1996a), was again the ultimate insider. Walking the halls of the Roundhouse and buttonholing legislators and other lobbyists, Echols attempted to protect and advance the interests of the 14 sovereigns for which he was working.

As the 1996 thirty day legislative session opened, the tribes began executing what Echols and Hackler termed a "three tier" lobbying effort (Hackler 1996a, Echols 1996). The first tier comprised Echols and his assistants working the legislative process inside the Roundhouse. The second tier consisted of the public relations campaign and the casino employees who contacted their legislators. The final tier was the tribal leaders and attorneys. A budget of over a half million dollars supported the combined effort (Echols 1996). Echols called this "the largest single lobbying effort" in the thirty legislative sessions he had worked, as a senator and lobbyist (Echols 1996). The strategic goal included providing an environment in which it would be easier for legislators to support the tribes and vote to

ratify the compacts (Gover 1996).

Coordinated by Hackler out of a suite in the Hotel Santa Fe,[10] the tribes conducted what in many respects resembled any political campaign. Hackler's desk was a large table in what was normally a bedroom but which had been converted into the "War Room." The telephone was rarely silent. Over the doorway leading into this room hung a red, white, and blue hand-lettered sign proclaiming "Warriors Only." On top of a television set usually tuned to CNN was a box for "Lobbying Forms." Hanging on the wall behind the TV were five full page ads that had recently appeared in the state's major newspapers. Leaning next to the dresser were large color photographs exhibited at a State Senate hearing to illustrate the importance of Indian gaming to New Mexico tribes. Assisting Hackler were Tribal members and casino workers on loan to the campaign. As one person would leave for the Roundhouse, another would come in for her marching orders. This was the command center for a new dimension in American politics: the sophisticated, highly coordinated, well financed campaign by New Mexico Indian tribes to win the hearts, minds, and votes of the state's electorate and legislators. Their message was simple and direct: "Ratify the Compacts."

This message was most visible in the media, public rallies, and in the work done at the casinos themselves.

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[10] The Hotel Santa Fe is owned by the Picuris Pueblo.

The tribes used their usual casino advertising budgets to buy air time to push support for Indian gaming (Echols 1996). The thrust of the messages was three fold: no more broken treaties; Indian gaming is working for New Mexico; and don't let the feds decide this question for New Mexicans. Both television and radio ads urged those who heard them to contact the legislature. Clearly, the ads offered the public a variety of reasons to support the tribes. An argument that simultaneously appealed to morality, economic self interest, and a mistrust of the federal government presumably would reach many, if not most, New Mexicans.

The first rally, held the day before the opening of the legislative session, took place on a brilliant January New Mexico morning at the Pueblo of Isleta along Interstate 25, fifteen minutes south of downtown Albuquerque. Supporters of Indian gaming begin to gather early at the Isleta Gaming Palace. As some headed toward the highway with their support-Indian-gaming signs, others begin to line up in front of the refreshment tent, or join others seeking to register to vote in a tent erected for that purpose, or simply grab a good seat in front of the large canopy covered stage and wait for the day's events to begin. As the crowd grew, the casino parking lot filled to capacity and people begin leaving their cars along the Interstate. By the time the rally was under way, parked cars lined I-25 in front of

the Pueblo's gaming facility for nearly a mile in both directions. Police from Albuquerque, Bernalillo County, the Highway Patrol, and Isleta Pueblo parked in the median with emergency lights flashing, attempting to keep through traffic flowing and pedestrians safe in their journey across the highway and up the hill to the rally.

Passing the inflated and moored bright yellow Isleta Gaming Palace hot air balloon, those heading to the rally began to hear the eclectic selection of recorded music coming from the speakers near the stage; a little country, some classic rock, and a smattering of Dakota Sioux folk signer Floyd Westerman. An interview with a former Governor of Isleta Pueblo was conducted amid the merging sounds of Westerman's "Custer Died For Your Sins" and the drums and chants of singers from Laguna Pueblo preparing for their performances later in the day. Part revival meeting, part old time political rally, 5,000 New Mexicans gathered to send a dual message to the state's elected officials: "Ratify the Compacts" and "We will remember in November."

Casino employees were bused to Isleta. Most wore t-shirts and buttons printed by their employers urging support for Indian gaming. Hand painted signs with slogans about gaming, voting, and sending messages to elected officials were carried by gaming supporters of all ages and ethnicities. Three reoccurring themes were, "Save our (my) job(s)," "We will remember in November," and "No more

broken treaties."

Speakers included many elected Pueblo officials, some of whom renewed talk of road blockades and raised the possibility of closing the pueblos to outsiders. Several woman casino employees recounted their experiences of moving off the welfare rolls into productive secure employment. To demonstrate the national significance of what was occurring in New Mexico, National Congress of American Indians Executive Director Ron Allen and National Indian Gaming Association Chairman Rick Hill appeared and assured the tribes of their organizations' support and the support of tribes nationwide.

A second rally was held two weeks later at the Roundhouse. Despite a bittersnow storm late the previous night, more than 300 people gathered in front of the capitol, a building designed to resemble the Zia Pueblo sun symbol. Twelve busloads of people from around the state, including four or five from the Navajo Nation had to cancel due to road conditions (Hackler 1996c). As at the Isleta Rally, tribal leaders and casino employees emphasized the importance of ratifying the compacts. National support was again demonstrated by the presence of a representative of the Oneida Nation of Wisconsin and Tim Wapato, Executive Director of the National Indian Gaming Association. There was a significant change in the tone of this rally, however. The confrontational language of Isleta was muted and

speakers representing non-Indian gaming interests took the podium. Among the latter were representatives of the fraternal and veteran organizations whose fund raising gaming had been halted by the court's Citation Bingo decision. Also speaking, and appearing somewhat uncomfortable, was a spokesman from the New Mexico Horsemen and Breeders Association.

The visible presence of non-Indian gaming organizations represented a strategic change for the tribes. Unlike the 1995 session, this time the tribes figured that their best chance of success lay in a joint effort with others who had been adversely affected by the state supreme court. This resulted in a piece of legislation Hackler termed the "everybody wants something bill" (Hackler 1996c). The fraternal, charitable, and veterans groups, along with the racetracks and resorts sought to be included in whatever form of legalized gaming emerged from the legislature. The tribes agreed and participated in the drafting of the omnibus legislation.[11]

The casinos themselves provided a valuable outlet for pro-gaming outreach among New Mexicans. As mentioned, the casinos provided manpower for the campaign. Beyond this source of manpower were the customers who streamed through the casino doors twenty-four hours a day. To motivate this

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[11] Towards the end of the session Frank Chaves told the Santa Fe New Mexican that joining forces with the other gaming interests might have been a mistake (Peterson 1996c).

unorganized mass of potential electoral support, the tribes publicized their campaign among the poker tables and slot machines. Cards supporting Indian gaming were distributed, collected and mailed to legislators by the casinos. Several casinos printed pro-gaming bumper stickers and lapel pins, most of which had some variation on the message "I support Indian gaming and I vote." Business size cards with the following message were available at several casinos:

> The money used to make this purchase at your business today came from employment in the Indian Gaming Industry! Please pass this card to your management. Thank You!

The public campaign seemed to have an effect. An Albuquerque Journal poll published on January 21 reported that by a margin of 60% to 33%, New Mexicans favored the legislature allowing Indian casino gaming (Poll 1996). Support for all kinds of gaming at a variety of venues did not have the same level of support as Indian gaming. By a margin of 47% to 43% New Mexicans opposed legalizing video slots at race tracks; only 22% favored video slots in bars and restaurants; 53%, however, favored legalizing the machines for fraternal and charitable organizations. A strong majority of 56% of the respondents also agreed that the legislature should act on gaming during its current session (Poll 1996).

While the outside public relations and campaign-style activities were underway Echols, tribal leaders, and attorneys were active inside the Roundhouse, testifying at

hearings, building coalitions, rounding up votes, writing legislation, and working to reach an agreement with the significant legislators. After discussions with Senate President Pro Temp Aragon, the tribes announced they were willing to modify the compacts if the legislature would ratify them. This represented a change in strategy by the tribes and was initiated by them (Gover 1996, Shutiva 1996).

Many of the concessions were relatively minor and had been raised in previous discussions with legislators. These included a minimum age of 21, closing four hours a day from Monday to Thursday, and no free food and liquor at the casinos. Other concessions were more substantial, including increasing the revenue sharing requirements. The current three percent up to $4 million and 5% of any amount over that would be changed to 3% of the first $4 million, 5% of the next $6 million and 6% over revenues of $10 million (Cole 1996a).

One of the most potentially significant activities by a tribal attorney was the drafting of legislation to rectify the constitutional quandary raised in Clark. In an effort to avoid the separation of powers issue used by the court to nullify the compacts negotiated by Johnson, Richard Hughes tackled the procedural question of joint executive-legislative compact approval (Hughes 1995a and 1996). Based largely on a similar Kansas statute, Hughes drafted a bill that was the basis for legislation introduced by House

Speaker Sanchez (HB 703) and Senate President Pro Tem Aragon (SB 684).[12] The bills would create a Joint House-Senate Committee to review compacts negotiated by the governor and recommend to its respective bodies whether approval should be granted. Hughes and Sanchez testified on behalf of HB 703 before a combined hearing of several House committees sitting to take gaming-related testimony (Tribal lawyer 1996). Hughes' behind the scene role was not openly noted in the press but was alluded to in an Albuquerque Journal editorial on the legislation. The editorial observed,

> The terms specified in advance in the Sanchez-Aragon bill inure only to the benefit of the Indian side of the negotiations - not a surprising turn of events since the bill reportedly was drafted by a lawyer for one of the gaming tribes (Legislative Compact 1996).

The fate of this legislation was indicative of the ultimate success of the tribes during the session. Aragon's version passed the Senate, but Sanchez saw his bill killed in the House Judiciary Committee. Similarly, the omnibus gaming bill passed the Senate but was unanimously defeated by voice vote when brought to the floor of the House. The

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[12] The author of this dissertation informed Richard Hughes of Oklahoma's Tribal-State Relations Act and provided him a copy of it in the early stages of Hughes' work on the New Mexico bills. Following the Finney decision nullifying the Kickapoo compacts, the Kansas legislature passed a statute creating a provision for legislative approval of Class III compacts negotiated by the governor. As of September 1995 two Kansas tribes had ratified Class III compacts under this law. The Kansas statute was deemed more consistent with the New Mexico Constitution than the Oklahoma statute is and thus served as the model for the bill drafted by Hughes (Hughes 1996).

status of gaming in New Mexico was thus the same at the end of the session as it had been ever since Clark and Citation Bingo. The only legal gaming in the state were bingo, paper pull tabs, and pari-mutuel horse and bicycle racing, and the state lottery, scheduled to begin in April. As far as the state was concerned, the compacts were null and void.

Analysis

The tribes' strategic response to late 1995 and early 1996 threats was in effect an attempt to control the scope of conflict of the gaming controversy. What was remarkable was the ability of the tribes to respond to the shifting fronts of the battle and continue to adjust to the ever changing rules of the game. At each step of the process, from the first request for compacts made during Governor Carruthers' administration, to the federal law suit against Governor Bruce King, to the gubernatorial campaign to the signing of the compacts, to lobbying the legislature, the tribes had mobilized the appropriate resources to participate at the appropriate level. As time went on, the field of battle continued to change. Each time the tribes appeared victorious in one arena of the political or legal system another arena nullified the victory.

The shifting arenas of battle led Frank Chaves in January 1996 to ask the Senate Select Committee on Gaming, "Who is the State?" There were two fundamental problems

facing the tribes in their struggle that made Chaves' question significant. First, in a separated system of shared powers among independent branches, checks and balances not only prevent the concentration of power. They also mean that a policy question is not finalized until the three branches have at least resolved the process of policy formulation. For groups with a policy interest, such as Indian tribes, this system means that the possibilities of the scope and arenas of conflict shifting are great. New Mexico tribes were thus caught in a classic institutional conflict over the legitimate constitutional scope of power of the state's three institutions.

The second reason for the salience of Chaves' question results from the Indian Gaming Regulatory Act itself. Section 2710(3)(A) of the Act provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the state shall negotiate with the Indian tribe in good faith to enter into such a compact.

Nowhere does the IGRA define "the state," or specifically, to which state official the Indian tribe must make its request. Clearly, this ambiguity is a tacit recognition of federalism and the right of a state government to determine its own constitutional and administrative procedures. As has been noted, for Indian tribes wanting to negotiate Class

III compacts with "the state," this ambiguity can stall and even prevent the expansion of their gaming options. As described in the previous chapter, New Mexico tribes faced this dilemma when they first wanted to begin such negotiations in 1988 and decided to make the request to the Office of Indian Affairs (Chaves 1995). Governor Carruthers then removed the Office from the process and conducted the negotiations between his staff and the tribes (Pecos 1996). Then, once the compacts had been negotiated, signed by a subsequent governor, and approved by the United States Secretary of the Interior, the tribes were told that the gaming allowed as a result of the process was illegal.

Consequently, as they had in the past, the tribes engaged in a simultaneous multi-front battle: in the federal court, in the Roundhouse, and among the public at-large. The tribes were defending their sovereignty and the fruits of that sovereignty - the economic opportunities made possible by the casinos. Protecting that status again required them to bring to bear all of the options available to them.

A cartoon in the July 19, 1996 Albuquerque Journal graphically captured the problem: Two Indian men stand in front of a wall that has vertcial lines leading downward from the words "New Mexico State Government" to three windows marked "Executive," "Legislative," and "Judicial." In the windows are the heads of Governor Johnson, Senator

Aragon, and Chief Justice Baca, overwhich appear, respectively, the words "Yes!" "Maybe..." and "No!" One of the Indian men holds a peace of paper marked "Indian Gaming compacts;" the other comments, "It's the same old story - white man speak with forked tongue..."

Importantly, losing this battle could limit their options in the future. Being prohibited from operating casinos would not only be a diminishment of their self-governing powers. It would also reduce the financial resources that had helped to make the tribes a significant actor in new Mexico politics. While they would still have the opportunity to make political endorsements and register tribal members to vote, the tribes would lose the ability to mount the kind of campaigns that had given them influence in the gubernatorial race and allowed them to appeal directly to the public during the 1996 legislative session. The greater meaning of a loss is that, as Office of Indian Affairs Executive Director Regis Pecos said, an infringement in one area of sovereignty threatens all other areas of sovereignty (Pecos 1996). Without gaming resources the tribes' fight to protect and expand all aspects of their sovereignty would be curtailed.

Inside Lobbying: The Executive Branch

For the first time in nearly a decade the tribes did not have to worry about convincing the state's chief

executive to support them. But Johnson's support was largely verbal and not substantive. Although he publicly continued to support Indian gaming, the governor did little before or during the session to advance the issue in the legislature (Hughes 1995b). He did make a strong appeal in his State of the State Message, but it came at the end of the speech and was not included in the bound version distributed to the public (Johnson 1996). The reaction to that address indicated the apparent weakness of Johnson's influence in the legislature. Not once during the address was the governor interrupted for applause (Jadrnak 1996); an editorial in the Santa Fe New Mexican critiquing the Message was entitled "The sound of no hands clapping" (Sound 1996).

Notwithstanding his public support for Indian gaming, Johnson did not present his own legislation for compact approval until the second week of the session. House Majority Leader Michael Olguin (D-Socorro) blamed the governor for the legislature's failure to ratify the compacts, saying, "I believe he turned his back on the Native Americans" (Bluster 1996). But whether he could have delivered Republican votes is questionable since Senate Minority Leader opposed any legislative action on gaming (Hughes 1996, Bluster 1996). Olguin contended that gaming was issue that "went way beyond party, and the governor did not coach his Republican legislators as to what would be best for everyone" (Olguin 1996).

Inside Lobbying: The Courts

While the political battle was fought in the legislature and in the court of public opinion, the tribes simultaneously fought in the court of law. Attempting to seize the initiative from Kelly, the tribes had counter-sued in federal court. As has been shown, this led to the January stipulation that set the stage for what could be the ultimate determination of the legality of tribal casino gaming in New Mexico. The tribes took this step while still working for a legislative solution. The tribes could not afford to rely on the political arena alone.

Inside Lobbying: The Legislative Branch

Gaming dominated the thirty-day legislative session; the intracacies and conflicting interests seemed at times to overwhelm the legislature. House Majority Leader Michael Olguin wrote in the Albuquerque Journal that gaming was "by far the most complicated and controversial issue ever to be thrust upon this Legislature" (Olguin 1996). In the end, gaming's social, political, and economic ramifications seem to have paralyzed legislators and prevented any action on the compacts.

The tribes were inside players within the Roundhouse. Not only did tribal leaders, attorneys, and casino employees testify at legislative hearings; individual legislators were lobbied by both elites and non-elites. As mentioned above,

casino employees personally contacted their own legislators. At the same time, according to Echols' strategy, tribal leaders and attorneys worked behind the scenes to negotiate a solution, round up votes, form coalitions, and draft legislation. They took the offensive and attempted to define the issue on their terms. The tribes worked with whomever could further their interests but their efforts ultimately fell short. As Rex Hackler said after the session had ended, the tribes "did everything right and still got beat" (Hackler 1996d).

There were at least three reasons for the legislature's failure to ratify the compacts. First, partisan politics was a significant dynamic in the battle for Indian gaming and the tribes found their interests a pawn in party positioning. During the administration of Governor Bruce King the Democratically controlled legislature passed legislation giving the governor power to negotiate gaming compacts; King vetoed the bill. Now that there was a Republican who supported Indian gaming and who in turn had been supported by the tribes, the Democratically controlled leadership balked at approving the Republican negotiated compacts. "The shifting political winds" noted Senator Leonard Tsosie (D-Crownpoint), "catches the tribes in a crossfire" (Tsosie 1996).

The partisan battles went beyond the more narrow issue of Indian gaming. Budgetary differences between the

governor and the Democratic majority were deep. The Senate also refused to confirm several of the governor's appointees to state office. There were also fundamental differences over the scope of state government itself. As Santa Fe New Mexican reporter Barry Massey wrote following adjournment, "Whether the issue was the budget, prisons or nominations, the outcome in the Legislature usually hinged on a philosophical or partisan battle between the Democrats who control the House and Senate and the conservative Republican occupying the governorship" (Massey 1996b). As House Minority Whip Kip Nicely (R-Albuquerque) said, "Really, the underlying theme of this whole session has been: Who is in charge of this place?" (Massey 1996b).

Second, the Democratic leadership of the legislature was unable to develop a consensus around gaming and was thus unable to deliver a bill to the governor. While the "something for everyone" bill hammered out by Aragon and pro-gaming lobbyists passed the Senate, it was quickly killed in the House. Sanchez was not able to build a consensus for any gaming legislation, including his bill to create a process for compact approval. His inability to free that legislation from Committee was a surprise and demonstrated the risk of supporting any gaming legislation in the House, even in light of the polls showing overwhelming approval for Indian gaming.

While some legislators suggested that the significant

divisions on gaming among the public killed gaming's chances (Peterson 1996b), there is a third and even more intriguing possibility for the legislature's failure to act. Kevin Gover argues that what was at stake in the battle over Indian gaming was a redistribution of political and economic power in the state, a battle that the entrenched establishment was determined to win (Gover 1996). To Gover this explained the opposition of such groups as the Santa Fe County Chamber of Commerce, the Albuquerque Business Alliance, and most of the Republican Party. Regis Pecos argues that it is the money generated by Indian gaming that lead to the "heightened confrontation" (Pecos 1996). In a statement that was daringly candid, anti-gaming attorney Victor Marshall told the Los Angeles Times, "Politically, non-Indians are not going to allow Indians to make hundreds of millions of dollars in profits without getting a piece of the action - either everybody does it or nobody does it" (Sahagun 1995). Hackler believes "this whole thing is not about gaming," but about "money and power" (Hackler 1996d).

What is curious is that while the sources of Indian support were quite apparent, the opposition was much more amorphous. As Hackler said, it was difficult to put a face on the opposition (Hackler 1996a). Four names were consistently linked to efforts to kill Indian gaming: Max Coll, George D. Buffett, Guy Clark, and Victor R. Marshall. The first three were the plaintiffs in Clark and Marshall

was their attorney. Clark, a dentist from Corrales, was the leader of the New Mexico Coalition Against Gambling, an apparently under-staffed and under-funded organization. Representative Coll, a Santa Fe Democrat was Chairman of the House Appropriations and Finance Committee and Representative Buffett was a senior Republican member of the same committee.

Marshall, an Albuquerque attorney, was involved in other efforts to legally end gaming in the state. First, he had filed an amicus curiae brief for Clark, Coll, and Buffett in the Citation Bingo case. Second, he filed suit against several banking institutions on behalf of a group of people alleging that they had suffered losses at Indian casinos. The suit was filed under a Civil War era New Mexico anti-gambling statute (Cole 1996b). Third, he sent a letter to the Financial Institutions Division, the state banking regulator, asking it to revoke approval of Automatic Teller Machines at Indian casinos, since, he contended, the casinos were illegal (Cole 1996c). The use of ATMs to withdraw welfare payments at Indian casinos had become a public issue, one that the tribes indicated they were willing to address.

Clark himself continued his public opposition to gaming which he claimed to be based on a moral objection to the activity, as was much of the opposition among the general public (Day 1996). He was a frequent visitor to the

Roundhouse, including testifying before legislative committees. Clark also filed a complaint with the Federal Communications Commission over the airing of casino advertisements and pro-compact commercials paid for by the casinos (Linthicum 1996).

Whatever the sources of opposition were, tribes had to deal with their political consequences. As Alan Rosenthal has noted, "Any lobbyist who ignores the politics of the state and of the legislature cannot possibly succeed at the job. Politics drives the process" (Rosenthal 1993, 89). Because of traditional political inclinations as well as because of the locus of legislative power, tribal leaders focused on members of the Democratic Party, particularly Aragon and Sanchez. Both of these powerful leaders were inclined to support the tribes but Sanchez was careful not to jeopardize his obvious ambition to run for governor. Personality politics emerged when Aragon and the tribes agreed to certain concessions in the compacts and Sanchez held back, notwithstanding his own extensive negotiations with tribal leaders over the past year (Hackler 1996c, Gover 1996).

Protecting their traditional alliance with the Democratic Party was made difficult by tribal support for Republican Gary Johnson in his 1994 race. Gover and others, including pueblo governors, worked to maintain the relationships with party leaders. For example, Pojoaque

Governor Viarrial attended a recent $10,000 a plate Party fundraiser in Washington, D.C. and sat at Vice President Al Gore's table (Viarrial 1996). Tribes bought ten of the forty tables at the Democratic Party fund raiser at the opening of the 1996 New Mexico legislative session (Gover 1996).[13]

One important factor in the legislative effort to get the compacts ratified was the unity of the six Indian legislators, two senators and four representatives, all Democrats (see previous chapter). Senator Tsosie noted that having a block of legislators united on the issue was an important factor in furthering the tribes' position (Tsosie 1996). Senator Tsosie was the point man for Indian gaming in the Senate while Representative James Roger Madalena (D-Jemez Pueblo) acted in that role in the House.

There is circumstantial evidence that Indian gaming politics had a role in defeating efforts to override some of Governor Johnson's vetoes left over from the 1995 legislative session. Among that evidence is the fact that Senator Tsosie was only one of two Democrats to vote against override of several pieces of legislation.[14] Tsosie worked

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[13] Rex Hackler himself had strong ties to the Democratic Party, most recently in the successful 1994 reelection campaign of United States Senator Jeff Bingaman (Hackler 1996a).

[14] It is the nature of participant observation that sometimes bits and pieces of interviews, conversations, and observations provide tantalizing bits of information that point in a direction that leads not to a smoking gun but to

closely with the tribal leaders and attorneys on legislative strategy.

The role of tribal attorneys in the lobbying process disproves Rosenthal's contention that "Legal work and lobbying generally do not overlap" (Rosenthal 1993, 25). The work of Gover, Hughes and other lawyers was crucial to the tribes' lobbying strategy. From strategic planning to bill drafting, their work was indispensable.

Outside Lobbying: Appealing to the Public

The tribes' outside campaign in the media paralleled the inside effort. The television, radio, and newspaper ads were designed to define the issue (Hackler 1996a) and give New Mexicans, and ultimately legislators, a reason for supporting compact ratification. As noted, the appeals to morality, self-interest, and anti-Washington feelings, could appeal to a wide segment of the population and apparently did so. The extent that the public relations campaign was successful is due to, first, the strategic planning, second, the flawless execution, and third, the resources available to carry it out.

Rosenthal writes that "The objective of a grass-roots campaign is to prove to legislators that their constituents are concerned about a particular issue" (Rosenthal 1993,

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the sound of gunfire. The speculation about the role of Indian gaming in the over-ride attempts is high priority for further research.

155). The tribes's campaign was designed to accomplish that end. As Rosenthal also notes, an outside lobbying effort "cannot be independent of the inside one" (155). The inside and outside efforts of the tribes were tightly linked; Echols, the tribes' deep inside man, had veto over the outside publicity campaign (Echols 1996).

The United States Attorney

John Kelly continued to demonstrate the crucial role that a United States Attorney can play in public policy. Eisenstein has observed that the "...aggressiveness and interpersonal skills, and the conception of the position's prerogatives - also determine the impact" of the U.S. Attorney (Eisenstein 1978, 196). While he resisted public pressure to move against the Indian casinos after Clark, following Citation Bingo Kelly was no longer able to ignore the changed legal and political environment. He acted only after the questions surrounding the legality of the compacts became extraordinarily muddled. When he did act in December and issued his ultimatum, he apparently was weighing the political considerations. Earlier in the summer he had suggested that a special session of the legislature be called to clear up the legality of the compacts; the timing of the ultimatum's deadline seemed to have been made with similar political considerations. He set the deadline one day before the legislative session was to open. Kelly

apparently believed that this would somehow induce a political settlement (Hughes 1995b), when in fact it may have provided additional reasons for some legislators to strike a wait-and-see pose.

His willingness to continue to negotiate with the tribes in an attempt to defuse the situation is notable, especially when compared to what took place in Oklahoma in September (see next Chapter). As Kelly noted in his Albuquerque Journal article, he did not want to have to send armed United States Marshals to the reservations to confiscate the allegedly illegal machines. Eisenstein has posited that in exercising discretion U.S. Attorneys "represent their locality, and the interests and policy preferences of important segments of the local community sometimes conflict sharply with those of the national administration" (Eisenstein 1978, 197).

But Kelly had a broader problem than his New Mexico critics and their opposition to Indian gaming. For a considerable time after the State Supreme Court reshaped the realm of legal gaming Kelly had no clear indication from Washington what the administration's position was. There was in fact evidence of a lack of coherent policy. While the Interior Department had approved the compacts prior to Clark and Citation Bingo, the Justice Department would not indicate a clear opinion on their continued legality. By mid December, however, Kelly apparently had received at

least a tacit go ahead from the Justice Department to move against the casinos (Hughes 1995b, Gover 1996). A special committee on Indian gaming within the Department of Justice is suppose to review any action contemplated by United States Attorneys on the issue. The committee deferred to Kelly's decision (Becker 1996).

An interesting aspect of Kelly's role is his public visibility. While Eisenstein has noted that "the general public's ignorance of the role of the U.S. Attorney" (Eisenstein 1978, x), Kelly was not only the subject of alternating newspaper attacks and praise. The tribes themselves contributed to making him a visible player in the gaming controversy. In a humorous but pointed incident, Kelly's office phone lines were jammed after the tribes ran a number of radio ads asking listeners to contact the U.S. Attorney's office to let him know the public's views. This occurred after the December meeting between tribes and Kelly and before Kelly sent his ultimatum. Because tribal leaders emerged from the meeting believing that Kelly would take no immediate action they attempted to cancel the air time they had bought. For whatever reason, they were not able to stop all of the ads, resulting in the lines being tied up (Hughes 1995b, Hackler 1996). After that, callers to the U.S. Attorney's office who had a question about Indian gaming were immediately transferred to a recorded message that offered the caller the opportunity to leave his views.

Kelly was also one of the significant targets of speakers and signs at the Isleta rally. Speaker after speaker derisively referred to the U.S. Attorney, some comparing him to General Custer. One hand lettered sign contained Kelly's name inside a circle with a diagonal arrow drawn through it.

Tribal Unity

Inter-tribal unity continued to be the crucial element in the tribes' efforts. While there were disagreements among the pueblo governors, and while Mescalero Apache President Windell Chino maintained a low public profile, the tribal front appeared solid. The threats by Pojoaque Governor Viarrial and Isleta Governor Lucero to close portions of Route 84-285 and Interstate 25 were not supported by most of the other leaders (Hughes 1995b, Vigil 1996). Chino, in fact, spoke out directly against such actions (Chino 1996). But at crucial moments, such as when the decision was made to enter into the stipulation with Kelly, the pueblo leaders came together behind a unified strategy (Viarrial 1996).

Once again, the New Mexico Indian Gaming Association and its co-chairmen were visible in the Roundhouse and in the press. Both Frank Chaves and Ken Paquin testified at legislative hearings and the Association provided data supporting the economic contributions of Indian gaming and

the potential harm if the casinos were forced to close. The Association was indeed acting increasingly like a nascent political party. Its strategic and tactical efforts were fundamentally no different from those employed by political parties, with the exception of a ballot line. This latter attribute will be replicated, however, if the Association or the tribes through the Association become more involved in the active support or opposition of candidates for public office. Kevin Gover believes that the NMIGA already is at least as a significant player in New Mexico politics as the state's two major political parties (Gover 1996).

The gaming tribes provided the finances necessary to run the campaign, paying for television, radio, and newspaper ads, as well as for other related expenses.[15] A significant resource available to the campaign was the manpower provided by the casinos. Casino employees were loaned to the "war room" during the duration of the legislative session to provide whatever legwork was needed. Many employees also participated in the direct lobbying effort in the Roundhouse, calling on their individual legislators, asking that they be allowed to continue in their jobs (Beverly 1996, Viarrial 1996).

The tribal effort was not only coordinated in the

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[15] Documents submitted in March 1996 as evidence in the upcoming federal litigation showed that several tribes contributed $150 per slot tribal machine to the pro-gaming efforts (Peterson 1996e).

public relations and lobbying effort. As already described, tribal leaders unified behind the legal strategy that led to the mid-January agreement with U.S. Attorney Kelly.[16] To achieve this unity, the governors who had advocated direct action had to agree to tone down their rhetoric and not engage in action that could lead to confrontation.

Finally, the public leadership of the Indian effort must be noted. In public, for the most part, tribal leaders presented a united front. While Mescalero Apache President Wendell Chino criticized the threats to close the highways, he did nothing to interfere with the broad strategic and tactical goals of the other NMIGA tribes (Chino 1996). Navajo Nation President Albert Hale spoke to the legislature about the importance of tribal gaming even though his tribe had rejected legalized gaming (Gambling Bill 1996). Pueblo leaders and the leaders of the NMIGA consistently demonstrated a calm public presence in the face of increasingly difficult political and legal obstacles.

While the inter-tribal effort has been described, the inter-ethnic work must also be noted. The non-Indian consultants, such as Hackler and Echols, appeared to have a

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[16] The exception was once again Mescalero Apache President Chino. His tribe joined neither the pueblos' motion for a preliminary injunction nor the stipulation with Kelly. Instead, the Mescalero Tribe asked the Federal District Court for the District of Columbia for a restraining order against Babbitt and Reno. The Court refused and sent the tribe's motion back to the Federal District for New Mexico to be joined with the pueblos' case (Mescalero Suit 1996, Hume 1996).

relationship with the Indian leadership based on trust and confidence. At the level of "campaign workers," Indian and non-Indian casino employees worked together to achieve their common goal. Various participants warmly described the closeness of those who worked long hours in the Hotel Santa Fe "war room."

The Future

The failure of the tribes to convince the legislature to act on Indian gaming in no way alters or diminishes their political status. In fact, in the latter months of 1995 and in early 1996, the tribes demonstrated their flexibility within the political system. New Mexico tribes again demonstrated that being within that system with the status they have is fraught with both possibilities and dangers. Their flexibility was the result of their status and the gaming resources available to them to work within the system. But the historic fragility of that status and of fleeting tribal resources are also apparent. Because of their ambiguous constitutional and political status Indian tribes have more arenas in which to engage their opponents. As the IGRA has shown, tribes are clearly both within and outside of the normal avenues of American politics.

The opportunities for New Mexico tribes to win either a political or legal victory remain. Although the legislature adjourned without resolving the gaming issues raised by

Clark and Citation Bingo, the tribes' efforts did not end; they only moved to other arenas. With the ultimate legality of the casinos still an unresolved question, the tribes will continue a multi- tier effort to be able to continue their gaming operations. The matter of the compacts remained in federal court. Whatever decision is eventually reached by Federal Judge Vasquez, the tribes and New Mexico officials faced months of continued uncertainty over the ultimate outcome. For their part, the tribes prepared to once again take their case to the voters. The 1996 legislative elections would provide an opportunity to exert electoral influence through strategic endorsements and financial contributions. Tribal strategists spoke of becoming involved in districts held by legislators - Democrats as well as Republicans - who had actively opposed them during the session (Hackler 1996b and 1996c, Gover 1996, Peterson 1996b).

Chapter 6: OKLAHOMA: A CLASH OF SOVEREIGNS, A CLASH OF HISTORY

The conditions that resulted in gaming compacts between tribes and the State of New Mexico are absent in Oklahoma. Public policy, institutional attitudes towards Indians, and the degree of cohesion among tribes are all significantly different in Oklahoma. Similarly, the strategies followed by Oklahoma tribes in pursuit of their gaming rights differed in kind and in intensity from those of New Mexico tribes. The differences in strategic approaches were directly related to 1) Oklahoma's gaming policy and how it is interpreted and implemented, 2) the differing political cultures in the two states as reflected in non-Indian officials and institutions and their policies and relationships with Indian tribes, and 3) cultural and historical differences among the nearly forty federally recognized Indian tribes in Oklahoma. Because these three factors are critical to understanding the environment in which Oklahoma Indian gaming is set, it is necessary to explore them in some detail.

Oklahoma's Indian Tribes

No other state in the nation has a history as inextricably linked to American Indians as Oklahoma, Choctaw for "land of the red people." Nor does any other state have as pervasive an Indian presence as Oklahoma.

The 1990 United States Census counted more Indians in Oklahoma than in any other state: 252,420. The Cherokee Nation of Oklahoma is the second largest tribe in the country. As a result of federal Indian policy during the 19th century, there are thirty-nine federally recognized tribes in the state. (See Table 1).

TABLE 1

Indian Tribes in Oklahoma

Absentee Shawnee Tribe	Alabama Quassarte
Apache Tribe	Caddo Tribe
Cherokee Nation	Cheyenne-Arapaho Tribe
Chickasaw Nation	Choctaw Nation
Citizen Band Potawatomi	Comanche Tribe
Delaware Tribe of East Ok.	Eastern Shawnee Tribe
Delaware Tribe of West Ok.	Ft. Sill Apache Tribe
Iowa Tribe of Oklahoma	Kaw Tribe of Oklahoma
Kialegee Tribal Town	Kickapoo Tribe
Kiowa Tribe	Loyal Shawnee Tribe
Miami Tribe	Modoc Tribe
Muscogee (Creek) Nation	Osage Nation
Otoe-Missouria Tribe	Ottawa Tribe
Pawnee Tribe	Peoria Tribe
Ponca Tribe	Quapaw Tribe
Sac and Fox Nation	Seminole Nation
Seneca-Cayuga Tribes	Tonkawa Tribe
Thlopthlocco Tribal Town	Wichita Tribe
Wyandotte Tribe	Yuchi Tribe
United Keetoowah Band of Cherokees	

The cultural and political impact of this Indian presence within Oklahoma has been great. "In fact," write Morgan, et al. in Oklahoma Politics and Policies: Governing the Sooner State, "relatively speaking, the history of Oklahoma is to a large extent a story of Native Americans, their cultures, and their interactions first with Europeans

and later with the United States government" (1992, 35). This "interaction" has often been one-sided as Indian ownership of the land and natural resources flowed into non-Indian hands. The existence of Oklahoma as a state resulted not from a mutually agreed upon decision by the Indian sovereigns of Indian Territory and the federal government, but from unilateral acts on the part of the U.S. government. The circumstances surrounding Oklahoma's birth may in large measure have helped shape the state's political culture.

The state's political culture is the result of its singular geographical position and the interaction of the people descended from those forced to live in and those who anxiously desired to settle in what became Oklahoma. According to Daniel Elazar, Oklahoma is "on the border between traditionalistic and individual political culture areas" (Morgan et al., 1991, xxiii). This is because it geographically lies "at the intersection between the South and the West" and "the fault line between those two spheres runs right through the heart of the state" (xxxiii). Elazar has elsewhere placed Oklahoma in what he terms "the greater South," that area south of the Ohio and Potomac Rivers, west of Lake Michigan, east of the Mississippi "plus Missouri, Arkansas, Louisiana, Oklahoma, and Texas" (Elazar 1984, 140).

The geo-cultural picture of the state is further confused by the classification system of Ronald J. Hrebenar

and Clive S. Thomas. In their fifty-state study of interest group politics in the United States, these scholars place Oklahoma in the Midwest. For their purposes, Oklahoma was excluded from the South because it was "not primarily 'southern'" in "social, economic, or political terms" (Hrebenar and Thomas 1993, 5).

The cultural center of the state is no less difficult to locate. Morgan, et al. write of the "clash between traditional and modern values."

> Oklahoma remains a paradox - a state struggling with its sense of identity, a place where the old and new vie for the attention and allegiance of its people. In some ways still backward and traditional; in other ways, quite modern and up-to-date (Morgan, et al. 1993, 3).

In discussing the social and economic implications of the state's political culture, these authors write, "Historical ties to the land and spatial living arrangements carry with them long-lasting social and economic consequences" (15). This is no doubt true of all people, but arguably more so for the state's Indian population. The "land and spatial living arrangements" of the Oklahoma Indians are the result of historic political and policy decisions that continue profoundly to affect the state's political culture.

How Indians and non-Indians view the history that produced these contemporary "arrangements" is often dramatically different. Clear evidence of this occurred during the observance of the centenary of the various land runs opening Indian Territory to white settlement. For non-

Indian Oklahomans this was a time to celebrate the proud heritage of brave and noble settlers staking claim to the frontier. For many Indians in the state, the recognition of those century old events was a reminder of their brave and proud ancestors forcibly removed to the state, promised the land forever, and finally subjected to laws designed to take that land and eviscerate their tribal identity. As Rennard Strickland has noted, "History is an act of remembrance" (Strickland 1980, xi).

The diametrically different interpretations of the state's history have existed from the beginning. Oklahoma historian Angie Debo wrote that Oklahoma "...had been the slowest of all the states to admit that the liquidation of tribes and of tribal lands to which it owed its existence had not brought all the separated individuals into happy assimilation with the dominant society" (Debo 1970, 408). Historian Arrell Morgan Gibson has termed Indian Territory "a tribal colonization zone..." (Gibson 1976, 14) because prior to the beginning of the removal of tribes to Indian Territory, only a handful of the nearly forty federally recognized tribes in Oklahoma had made use of the future state. The remainder arrived in Oklahoma as a result of forced or voluntary compliance with the national policy of settling all Indians in the trans- Mississippi west in what became known as "Indian Territory."

The most famous removals to Indian Territory are those of the Five Civilized Tribes of the southeastern United States - the Cherokee, Chickasaw, Choctaw, Seminole, and Creek Nations. Each experienced a tragic and nation defining "Trail of Tears" along which thousands of tribal members fell and died. After arriving in their new homelands, these tribes began to reestablish the cultural and political structures which they had so successfully organized in the east. According to Debo, the Five Tribes "had a natural genius for politics. Trained through countless generations in the proud democracy of primitive councils, they found their borrowed Anglo-American institutions in perfect harmony with their native development....Few communities have ever equalled these small Indian republics in political skill" (Debo 1984, 10). These "republics" survived relatively intact until just before statehood.

A handful of members of the Five Tribes had migrated to Indian Territory more than a decade before the Removal Act of 1830. They had entered a land occupied by, among other transplanted tribes, the Osage, Seneca, Quapaw, and Shawnee. In the years following the Civil War as the United States Army one-by-one fought the plains and southwestern tribes in the Indian Wars, more tribes were forced to settle in unfamiliar Indian Territory. The Southern Cheyenne, Kiowa, Apache, Kickapoo, Nez Perce, and Comanche were among the

tribes forced to sign treaties ceding their aboriginal lands in trade for a reservation in Indian Territory.

The result of this colonization process was a territory with the most varied Indian population in the nation. Each tribe or group of tribes had its own unique cultural and political characteristics. Kickingbird notes that "The status and stature of the Five Civilized Tribes in Oklahoma came from their level of political organization. The wild tribes of the Western Plains derived their influence from force of arms" (Kickingbird 1993, 309). As the latter group of tribes became less war-like and more under the sway of government agents, the Five Civilized Tribes, even after the Civil War, continued to assert an independence and political sophistication lacking among the western tribes. This difference became a significant factor in how each group of tribes succumbed to the increasing demands for statehood by white land seekers.

When Congress passed the Dawes General Allotment Act in 1887, it exempted the Five Civilized Tribes and the Osage, Miami, Peoria, and Sac and Fox Tribes. The lands of each were later allotted by separate congressional action (Cohen 1982, 784-785). All other tribes in Indian Territory were allotted under the Dawes Act. The break-up of tribal holdings began the process that led to the opening up of Indian Territory to legal non-Indian settlement and

eventually to statehood. A series of laws paved the way for this to take place.

> The Organic Act, passed in 1890, established two separate territories, Oklahoma Territory and Indian Territory, the latter comprising the Five Civilized Tribes, the Cherokee Outlet, the Cherokee Strip, and the tribes of the Quapaw Agency (26 Stat. 81).
>
> The Curtis Act, passed in 1898, made the civil laws of the Five Civilized tribes unenforceable in federal courts and abolished tribal courts. A commission was established with the purpose of preparing the rolls of members for each of the Five Tribes necessary for the allotment of tribal land holdings (30 Stat. 495).
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> The Five tribes Act, passed in 1906, severely restricted the self-governing powers of the affected tribes by, among other provisions, giving the president authority to appoint the tribes' chief executive and requiring presidential approval of all tribal laws (34 Stat. 137).
>
> The Enabling Act, passed in 1906, provided for the admission of the combined Oklahoma and Indian Territories into the union as one state (34 Stat. 267).

Other laws dealt specifically with the status of the Osage Tribe and its oil and gas holdings and the allotment and restriction of land held by the Five Civilized Tribes. The latter was facilitated by the work of the Dawes Commission and the tribal membership rolls it drew up.

President Theodore Roosevelt proclaimed Oklahoma a state on November 16, 1907 after a constitution had been ratified. The Enabling Act had reserved to the United States the right to make laws affecting the new state's Indians, including "their lands, property, or other rights by treaties, agreements, law, or otherwise, which it would have been competent to make if this law had never been

passed" (34 Stat. 267). Article I of the Oklahoma Constitution disclaims any right or title to Indian lands within the state.

After statehood Oklahoma tribes continued to lose their land, a process speeded up by the discovery of oil throughout the former Indian Territory during the first three decades of the century. The grab for land and the Indians' natural resources produced a group of mostly white men known as "grafters." As Angie Debo documents with such passion and detail in And Still the Waters Run, these men systematically manipulated the law and individual Indians to procure for themselves great wealth and power, often with the complicity of federal employees (Debo 1984). The tragic loss of material wealth paled only to the murder and disappearance of scores of Indians living on desirable land.[1]

The unique history and status of Oklahoma tribes continued to have an impact on policy during the 1930s and the New Deal. Due to the intense lobbying of some assimilationist minded Indians and the power of the Oklahoma congressional delegation, Oklahoma tribes were exempted from the Indian Reorganization Act (Blend 1986 and Clark 1986). The Chairman of the Senate Committee on Indian Affairs was Oklahoma Democrat Elmer Thomas, a man generally opposed to

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[1] Two recent books, one fiction, the other non-fiction, recount the corruption and murder accompanying the oil strike on Osage lands.

New Deal programs, while the House Indian Affairs Committee was chaired by Oklahoma Democrat Will Rogers. (It should be noted that this is not the famous humorist Will Rogers.) After getting Oklahoma tribes exempted from the Indian Reorganization Act (IRA), these two men introduced legislation that became the Oklahoma Indian Welfare Act (OIWA), passed in 1936. With some significant exceptions, this law generally applied the IRA to Oklahoma tribes. Two of the most important of these were the total exemption of the Osage Tribe from this law, and the provision leaving probate matters involving members of the Five Civilized Tribes and Osage Tribe to state courts. Carter Blue Clark has observed that "Exemption of the Osages from the act confirmed that the OIWA was uniquely concerned with oil and gas lands" (Clark 1986, 79).

The OIWA gave tribes the right to organize and adopt a constitution and bylaws, a provision that would later provide a pivotal foundation for the revival of Oklahoma tribal governments. Muriel H. Wright noted that "Oklahoma Indians were conservative in taking advantage of" the OIWA (Wright 1986, 25). Only eighteen tribes organized under the Act between 1937 and 1942. Clark argues that mixed-bloods benefitted most from the OIWA, shifting tribal government away from traditional forms to constitutional democracies. "To many Indians," writes Clark "the Anglo-American system,

election districts, secret ballots, and tribal presidents were alien" (Clark 1986, 79).

Oklahoma tribes were subject to the same ebb and flow of federal Indian policy in the decades after the Indian New Deal. Several Oklahoma tribes were directly affected by the Termination Era of the 1950s. The Wyandot, Peoria, Ottawa, and Modoc Tribes were terminated by acts of congress; a 1959 law concerning the Choctaw Nation was interpreted by the B.I.A. to be a termination act; and, according to Angie Debo, only action by the state's congressional delegation prevented the termination of the Osage Tribe (Debo 1970, 371). As federal Indian policy shifted during the 1960s, Oklahoma tribes began the long process of emergence that would culminate in revitalized tribal governments in the 1980s. Significantly, the self-determination policy had its origins in Oklahoma when several tribes began contracting for services in the Lawton area (Debo 1970 and Carmack 1986, 1991, 1992). Oklahoma tribes also participated in War on Poverty programs such as the Office of Economic Opportunity (Strickland 1980, 79).

Just as Indians across the nation became more motivated politically, so did they in Oklahoma. One of the leading young "militant" Indian leaders of the National Indian Youth Council was Oklahoma Pawnee Clyde Warrior. The Oklahomans for Indian Opportunity was founded in 1965 under the leadership of LaDonna Harris (Comanche), wife of United

States Senator Fred Harris. Mrs. Harris went on to found Americans for Indian Opportunity and served on the National Council on Indian Opportunity created by President Lyndon Johnson.

While tribal governments began performing more administrative duties in the 1960s, the environment for broad and unified Indian political action remained mired in the cultural, political, and legal mindset existing since the years before statehood. Tribes in Oklahoma have for decades had the form of organization. However, the success of their efforts were, and continue to be, generally minimal on a statewide level due to the general inability of tribes to coalesce behind specific issues. Organizations such as the United Indians of Oklahoma and the Inter Tribal Council of the Five Civilized Tribes meet to discuss issues and respond to proposed policy changes. However, unity and coordinated action have generally not been sustained on any given issue because tribal diversity is often more jealously guarded than inter-tribal unity.

The differences among Oklahoma tribes are significant. They result from the historic circumstances of each tribe's Oklahoma experience and from the wide variety of Indian cultures found in the state. While written in a slightly different context, attorney F. Browning Pipestem's observation that "there is no 'Oklahoma Indians' tribe" is

fundamental to understanding the state's complex Indian political environment (Pipestem 1978, 4).

Observers of contemporary Oklahoma Indian affairs often geographically divide the state's tribes into east and west groupings roughly divided by Interstate 35 (Lujan 1995, Anoatubby 1995b, Snake 1995).[2] "East" refers to the Five Civilized Tribes and tribes that generally have their roots east of the Mississippi and north of the Ohio Rivers. "West" refers to plains tribes and tribes with roots in the southwest United States. There are thus significant cultural differences among the tribes that make unity difficult. As University of Oklahoma Communications Professor Phil Lujan (Kiowa-Taos) points out, the differences even include different ways of communicating (1995).

There are also cultural resentments, with the western tribes often viewing the eastern tribes as both more affluent and more politically adept (Lujan 1995, Snake 1995). Chickasaw Governor Bill Anoatubby asserts that there are "philosophical differences" among the tribes. He contends that the Five Civilized Tribes differ "in the way we approach business," including "business as government" (Anoatubby 1995b). There are historic distrusts that linger

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[2] Divisions among the state's Indian tribes may reflect similar divisions in the state generally. Historian Danney Goble has noted that the geographic areas encompassing the two former territories comprising the state remain economically and culturally "distinct" (Goble 1995, 200).

among some tribes, the Osage and Cherokee and the Osage and Kiowa, for example (Strickland 1995). Former Oklahoma Indian Gaming Association President Robert R. Stephens (Chickasaw) observes that the western tribes "don't trust the eastern tribes" and have been "plum put out with some of the dealings" of the Five Civilized Tribes (Stephens 1995).

Jess Green (Chickasaw/Choctaw), an attorney for a number of tribes throughout Oklahoma, argues that there are really five major divisions among the state's tribes: 1) The Five Civilized Tribes; 2) the tribes in extreme northeast Oklahoma (Miami, Eastern Shawnee, Quapaw, et al.) 3; the northern tribes near the Oklahoma-Kansas border (Osage, Tonkawa, et al.); 4) the central tribes east of Oklahoma City (Sac and Fox, Citizen Band Potawatomi, et al.); and 5) the western tribes (Kiowa, Apache, Delaware, et al. (Green 1995c). Green contends that each of these grouping of tribes has characteristics that are similar among the tribes comprising it but are different from the other groupings.

As a result of federal policy there are also contemporary tribes and tribal groupings that do not reflect traditional arrangements. The Muscogee people, now the Muscogee Creek Nation, were a loose confederacy of autonomous towns (O'Brien 1989). The Cheyenne and Arapaho, historically two distinct but allied tribes, were combined during the reservation era to form the Cheyenne-Arapaho Tribe and share a common land base (Wright 1986). Both of

these two groups are thus artificial creations unreflective of traditional indigenous social and political structures.

This Balkanization of Oklahoma tribes has usually meant that unified political action rarely occurs. According to Strickland, Oklahoma tribes "have vastly different approaches to governance" (Strickland 1995). Similarly, Oklahoma State Senator Kelly Haney (Seminole) points out that the tribes even have "different ideas of sovereignty" (Haney 1995). Unlike tribes in New Mexico, Oklahoma tribes, with some exceptions, do not have "age old dealings" with one another (Pitchlynn 1995c). According to Kirke Kickingbird (Kiowa), there are too many differences among Oklahoma tribes "real or perceived" for there to be real unity (Kickingbird 1995).

A significant recent inter-tribal division occurred when four of the Five Civilized Tribes signed compacts with Oklahoma Governor David Walters resolving a dispute over state cigarette taxes. In 1992 the United States Supreme Court ruled that the State of Oklahoma could not tax cigarettes sold at tribal smokeshops to Indians (Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe 1992). The Court also held, however, that the cigarette tax was applicable to sales by tribes to non-Indians. The Court complicated matters for the Oklahoma Tax Commission by protecting the tribe from lawsuits to collect the tax based on tribal sovereign immunity.

Recognizing that the Tax Commission would continue to press for payment of the taxes due on sale to non-Indians, the Cherokee, Chickasaw, Choctaw, and Seminole Tribes and the State began negotiating an agreement to stave off further litigation. The result was a 1992 tribal-state compact providing payments "in lieu of taxes" by the four tribes to the State. It provided that the tribes would pay the state 25% of the estimated tax on these sales. Cherokee Principal Chief Wilma Mankiller said that the agreement was "not a threat to our sovereign status. It is because of our sovereignty that we can take this kind of action" (Tribes 1992). Chickasaw Governor Bill Anoatubby said that he believed "this government-to-government compact is the most reasonable method of settling our disputes. It is a true exercise of tribal sovereignty" (Tribes 1992).

Many other Oklahoma tribes strongly disagreed with the compact and its implication for tribal sovereignty. Inter-tribal meetings were held to protest the compact and to oppose the legislation that would make the compact possible, S.B. 759. Sac and Fox Principal Chief Elmer Manatowa attacked S.B. 759 because it "pre-empts treaty rights, violates sovereign rights, and is unconstitutional" (15 Tribes 1992). Representatives from 22 tribes passed a resolution attacking S.B. 759 as a "violation of the sovereign rights of tribal governments and an infringement to the sovereign status and integrity of Indian Nations,

Tribes and/or Bands whose jurisdiction overlaps that of the State of Oklahoma" (Tribal Leaders 1992).

Tribal unity and opposition to S.B. 759 did not result in the bill's defeat nor did opposition to compacting end such tribal-state agreements. Threatened with continued battles with the Oklahoma Tax Commission, including the possibility of confiscated cigarettes, several tribes came to the realization that the compacts were "not a bad deal" for the tribes (McCullough 1995). By June 1995 a total of fifteen tribes had signed in lieu of tobacco tax payment compacts with the state, including the Sac & Fox Tribe and the Muscogee Creek Nation, two of the strongest opponents of the original compact.[3]

The battle over the tobacco tax demonstrated two important points about the political influence of Oklahoma tribes. First, the Five Civilized Tribes often are able to act individually or in concert in dealing with state government that most other tribes are not. This no doubt results from their long history of political sophistication and willingness to accommodate when necessary. Second, even when a large number of tribes takes a position on an issue and attempts to influence state government, success is not

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[3] In addition to the tribes mentioned, the following have signed the tobacco compacts: Iowa, Apache, Shawnee, Osage, Quapaw, Tonkawa, Kickapoo, Wyandotte, Sac & Fox, Potawatomi (Oklahoma Secretary of State).

likely. It is even more unlikely if the Five Civilized Tribes do not participate.

While tribes generally have been of little significance in Oklahoma politics, individual tribal members have frequently become political powers in the state. A governor, Johnston Murray (Chickasaw); a Speaker of the Oklahoma House, William Durant (Choctaw); at least two members of the state Supreme Court, N.B.Johnson (Cherokee) and Earl Welch (Chickasaw); and four members of the United States House of Representatives, W.W. Hastings (Cherokee), Charles D. Carter (Cherokee), Charles D. Carter (Chickasaw), and William G. Stigler (Choctaw) were enrolled tribal members by birth. One of Oklahoma's first United States Senators was Robert L. Owen "a Virginian of Cherokee descent who had been admitted to tribal membership" (Debo 1984, 20).

Since Statehood, numerous members of the Five Civilized Tribes have served in the state legislature. In addition to Speaker Durant, at least two other Principal Chiefs of the Choctaw Nation were elected to the legislature: E.M. Frye (Senate) and Harry J.W. Belvin (House and Senate).

The irony of politically powerful Oklahoma Indians is twofold. In order for an Indian to achieve political power in Oklahoma he or she must do so as an Oklahoman who happens to be Indian, emphasizing the first loyalty over the second. Once having achieved power in the secular politics of the State, the successful tribal member then does little to

advance the agenda of tribes independent of an agenda for all of Oklahomans. It is probably not coincidental that in recent years those Indians who have achieved statewide electoral success have tended to be mixed bloods not closely identified with tribal politics. While one can argue that this represents a profound success for the policies of assimilation, it clearly does little to further the separate political status of tribes.

How little effect the successes of individual tribal members have had on tribal-state relations is obvious in the on-going serious conflicts between state and tribal governments on a number of issues. The tribal-state conflict in Oklahoma is unlike any other in states with sizeable Indian populations and land bases. In states such as South Dakota and Arizona, state governments attempt to assert their authority in Indian Country even while acknowledging that Indian Country and tribal governments exists within their borders. For much of this century Oklahoma officials have denied that Indian Country existed in the state; that Indians living in their former homelands are beyond the reach of Oklahoma law; and that tribal governments have little more than minimal administrative authority. As Kevin Gover noted in his 1976 Report for the American Indian Policy Review Commission, "because of the Allotment Acts, which caused the reduction of Indian lands, the State of Oklahoma contends that it has exclusive

jurisdiction in the State with the United States having proprietary jurisdiction on trust lands" (Gover 1976, 150).

The belief that somehow Indian land and tribal authority meant something different in Oklahoma was a result of the confusing and contradictory policies of the federal government during the transformation of Indian Territory into the State of Oklahoma. The subsequent decades long confusion about the status of tribes in the state was often shared by tribal leaders. The status of tribal lands was the source of most of the confusion. As Kirke Kickingbird has written, "Misinformed but conventional wisdom tells us that Oklahoma has no reservations except the Osage Reservation" (Kickingbird 1993, 303). This belief is what Pipestem and Rice have termed "The Mythology of the Oklahoma Indians" (1978, 259).

As Kickingbird has noted, even influential Indian leaders publicly professed their own uncertainty about the legal status of Indian land in Oklahoma. In testimony before a Task Force of the American Indian Policy Review Commission in 1976, Cherokee Nation Principal Chief Ross Swimmer said "...in the past seventy years we have acquired land, forty thousand acres, we own it, control it, held in trust for us by the United States but we're still not reservation, never have been and hopefully never will be" (Gover 1976, 151-152). On the applicability of state taxes

on Indian operated business, Swimmer testified "I don't know what the status is of the Cherokees" (152).

Absent a theory or evidence to the contrary, the State of Oklahoma, with the acquiescence of the federal government, acted under the presumption that its criminal and civil laws were enforceable on Indians residing, working, or operating a business on Indian-owned land. In a 1953 letter to Secretary of the Interior Orem Lewis, Oklahoma Governor Johnston Murray, an enrolled member of the Chickasaw Nation, asserted the generally accepted view of tribal-state jurisdiction and its impact on Public Law 83-280.

> When Oklahoma became a State, all tribal governments within its boundaries became merged in the State and the tribal codes under which the tribes were governed prior to statehood were abandoned and all Indian tribes, with respect to criminal offense and civil causes, came under State jurisdiction (Pipestem 1978, 25; Kickingbird 1993, 330).

As Kickingbird has noted, "This hopeful though unfounded belief of Governor Murray became Oklahoma's final comment on Indian jurisdiction for many years" (Kickingbird 1993, 330).

In his 1976 Report Gover wrote, "...the fact is that no one really knows the extent of the powers of the tribes in Oklahoma. The Federal government and the state government carry out policy toward the tribes without an understanding of the status of tribes, and this has resulted in a situation where the tribes do not have the resources they need, or even all of the resources available to other

tribes" (Gover 1976, 139). Among the consequences of this state of affairs was, as Gover noted, "the tribes of Oklahoma do not exercise most of the powers of sovereigns" (141). "After 1950 and until 1977," writes Kickingbird, "Oklahoma exercised all aspects of civil and criminal jurisdiction over Indian lands" (Kickingbird 1993, 331).

The 1970s saw the rebirth and flowering of Indian self-governance in Oklahoma. In 1970 Congress restored the ability of the Five Civilized Tribes to select their own chief executives (84 Stat. 1091). Occurring in the context of the Johnson-Nixon policy of self-determination, Oklahoma tribal self-governance more directly resulted from lawyers and judges rereading treaties and statute books and coming to the awareness that most assumptions about tribal sovereignty in Oklahoma were wrong. The consequence of the challenges to the conventional legal wisdom was a recognition that Indian tribes in Oklahoma had the right of self government over their members and their lands. This right of self-governance included executive, legislative and judicial authority.

As with most advances in tribal sovereignty in Oklahoma, the rebirth of tribal government began in court. Three decisions involving tribes from the two former territories alerted Oklahomans, Indian and non-Indian, that a new era in tribal-state relations was beginning. Taken together, these three cases provided a framework for the

renewed exercise of tribal jurisdiction throughout Oklahoma. The first two addressed the self-governing powers of the Creek Nation, while the third concerned the reach of Oklahoma criminal law in Indian Country.

In Harjo v. Kleppe, the United States District Court for the District of Columbia had to determine to what extent the government of the Muscogee Creek Nation had been terminated at the turn of the century. Allen Harjo, elected representative of Fish Pond Tribal Town and unsuccessful candidate for Principal Chief, challenged the Interior Department's recognition of the Principal Chief as the legitimate government representative of the Creek Nation. In a lengthy decision that considered both the particular history of Creek self-governance and democratic theory, the Court held that the Nation's government had never been completely terminated by the federal government. The Court traced the often conflicting legislative, judicial, and executive acts altering the traditional form of Creek government, including the promises made to the Muscogee by the United States government. The Court noted,

> While the credibility of these promises has been gravely undermined by various federal actions, culminating in the abolition of the tribe's territorial sovereignty, the essence of those promises, that the tribe has the right to determine its own destiny, remains binding upon the United States, and federal policy in fact now recognizes self-determination as the guiding principle of Indian relations. Plaintiffs' claim is, at bottom, simply an assertion of their right to democratic self-government, a concept not wholly alien to American political thought (Harjo v. Kleppe 1976).

The Court established a procedure by which members of the Creek Nation could change their government consistent with what had existed under the Creek Constitution of 1867. The District Court's opinion was upheld two years later by the United States Court of Appeals for the District of Columbia (Harjo v. Andrus 1978). In 1979 the Creek Nation ratified a new constitution "which reopened membership rolls and substantially reshaped the tribe's government (Strickland 1980, 75).

In addition to providing for legislative and executive branches, the 1979 Muscogee Creek Constitution also provided for a judiciary. The Nation's 1982 judicial code established a court system with criminal and civil jurisdiction over tribal members. However, the B.I.A. refused to fund the Nation's courts in 1983, contending that the Curtis Act had abolished the tribe's court system. The United States District Court for the District of Columbia upheld the B.I.A.'s decision in 1987, finding that "...Congress did explicitly abolish the power of the Muscogee (Creek) tribe to maintain a court system and never acted to restore that power" (Muscogee (Creek Nation) v. Hodel 1987).

A year later the Appeals Court reversed the District Court. Overturning the B.I.A.'s decision and reading the law much differently than the lower court, the Appeals Court held that the Oklahoma Indian Welfare Act had repealed the

Curtis Act. Therefore, the Court held, "...the Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction, subject, of course, to the limitations imposed by statutes generally applicable to all tribes" (Muscogee (Creek) Nation v. Hodel 1988).

The question the tribes in the western part of the state addressed was the limit on state criminal jurisdiction in Indian Country. In 1975 a Kiowa named Littlechief was accused of killing his father on a trust allotment in Caddo County. In a "startling decision" (Pipestem 1988, 1) that had far reaching ramifications for tribal self-government, the United States District Court for the Western District of Oklahoma held that the crime was committed in Indian Country as defined by 18 U.S.C. 1151c and thus outside Oklahoma criminal jurisdiction (United States v. Littlechief 1977).

The Oklahoma Court of Criminal Appeals conceded the federal nature of the case against Littlechief and agreed with the Federal Court that Oklahoma lacked jurisdiction to try Littlechief (Oklahoma v. Littlechief 1978). This implicitly overturned the 1936 decision Ex Parte Nowabbi by the same court upholding the conviction of one Choctaw for the murder of another on restricted land. Oklahoma Attorney General Larry Derryberry subsequently issued an Opinion affirming the lack of state jurisdiction in Indian Country located in the state.

> It is clear, then that the State of Oklahoma is without jurisdiction to prosecute crimes committed

upon Indian trust allotment lands defined as "Indian Country" when such crimes are committed by an Indian against another Indian (Derryberry 1978).

In retrospect, Governor Murray's 1953 opinion about the need for Oklahoma to assume PL-280 jurisdiction meant that Oklahoma had no congressionally authorized basis for exercising jurisdiction in Indian Country. Furthermore, the conventional wisdom about the existence of Indian Country in Oklahoma and the nature of the Curtis Act was shown to have rested more on myth than fact.

One of the most dramatic effects of the changes in legal understanding of tribal status was the "rebirth" of tribal courts, "The most important Indian event since statehood" (Strickland 1980, 76). In 1979, following an opinion by the B.I.A. Solicitor, the Court of Indian Offenses for the Anadarko Area was established (Strickland 1980, Arrow 1994). In 1991 similar courts were authorized for the Muskogee Area (Work 1991). By 1993 every tribe in the state had either its own separate tribal court deciding issues arising under tribal ordinance, or a Code of Federal Regulations (CFR) Court applying CFR rules. (See Table 2).

TABLE 2

OKLAHOMA INDIAN TRIBAL & CFR COURT

Tribal Courts	CFR Courts
Absentee-Shawnee Tribe	Apache Tribe
Cherokee Nation	Caddo Tribe
Cheyenne-Arapaho	Comanche Tribe
Chickasaw Nation	Chickasaw Nation
Choctaw Nation	Choctaw Nation
Citizen Band Potawatomi	Delaware Tribe of Western Ok.
Muscogee Creek Nation	Eastern Shawnee Tribe
Iowa Tribe	Fort Sill Apache Tribe
Kaw Nation	Kiowa Tribe
Kickapoo Tribe	Miami Tribe
Otoe-Missouria Tribe	Modoc Tribe
Sac & Fox Nation	Osage Nation
Seminole Nation	Ottawa Tribe
	Pawnee Tribe
	Peoria Tribe
	Ponca Tribe
	Quapaw Tribe
	Seneca-Cayuga Tribe
	Tonkawa Tribe
	United Keetoowah Band of Cherokee
	Wichita Tribe
	Wyandotte Tribe

source: "1993 Directory of Tribal Courts in Oklahoma." Compiled by Arvo Q. Mikkanen. Oklahoma Indian Bar Assoc.

Two events have demonstrated how far tribal justice has come in less than twenty years. First, Volume One of Oklahoma Tribal Court Reports was published in 1994 containing the opinions of Oklahoma Indian Courts (Arrow 1994, 7). Second, in 1992 the Oklahoma Legislature passed a law affirming the state Supreme Court's power to issue standards for the extension of full faith and credit to tribal court decisions (12 Okl. St. #728 (1995)). By June

1995, full faith and credit status had been granted to the Creek Nation, Cherokee Nation, and Seminole Tribal Courts, as well as the Kiowa, Comanche, Apache, Wichita, Caddo, Delaware, Ft. Sill Apache, Ponca, and Tonkawa CFR Courts (Rorie 1995).

While Littlechief made the exercise of tribal jurisdiction possible, it also raised practical law and order problems for all law enforcement officials. As attorney David McCullough has noted, "state law enforcement officials faced the dilemma - brought about in part by the 'checker-board' tribal jurisdiction within the state - of not knowing whether (1) the crime was committed in Indian Country and (2) the perpetrator and/or victim were Indian or non-Indian" (McCullough 1992, 54). This meant that law enforcement officers could not be sure where one jurisdiction began and another ended. In his Opinion noting the absence of state jurisdiction in Indian Country, Attorney General Derryberry also opined that there was nothing to prevent tribal and state law enforcement officers from being cross-deputized (Derryberry 1978). Thus, the issuance of Deputy Special Officers (DSO) commissions to local and B.I.A. law enforcement officers continued for the next several years.

In 1984, Oklahoma Attorney General Michael Turpin issued an Opinion that contradicted the earlier one by Derryberry. He wrote that DSOs violated the state constitution (Turpin

1984). Following this opinion, the Sac and Fox Tribe and the Pottawatomie County sheriff entered into an "intergovernmental cooperative agreement" providing for the cross-deputization of tribal and county law enforcement officers (McCullough 1992, 56). Six years later the Tenth Circuit Court of Appeals held that the arrest of a Cherokee man by the Adair County Sheriff for an offense committed on trust land was invalid (Ross v. Neff 1990).

Ross added to the jurisdictional confusion of law enforcement personnel who were faced with answering calls on what might be Indian land. As Assistant Oklahoma Attorney General A. Diane Hammons has noted, prior to Ross, Oklahoma law enforcement officers "typically responded to those calls and have worried about jurisdiction, if they worried about it at all, after the fact" (Hammons 1991, 108). After Ross, the Oklahoma Highway Patrol refused to allow its officers to enter Indian Country, even at the request of federal officials, unless the Patrol had a specific and detailed agreement with federal agencies. In order to reduce potential liability, the Patrol insisted that these agreements make clear that when called in by federal agencies the state officers would be acting as federal not state officers. County sheriff departments soon adopted this policy for their officers.

In response to the confusion in law enforcement, the Oklahoma legislature passed the State-Tribal Relations Act

in 1991 (74 Okl. St. # 1221-1223 (1995)). There were three significant aspects to this legislation. First, after years of balking, the Legislature acknowledged the federally recognized tribes in Oklahoma. Further, the law commits the State to working "in a spirit of cooperation with all federally-recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments" (Okla. St. 74 # 1221.B.). Six years earlier the Legislature had failed to pass HB 1199, a bill introduced by State Representative Kelly Haney providing for the state and tribes to cooperate on a government-to-government basis.[4]

The State-Tribal Relations Act creates a ten member Joint Committee on State-Tribal Relations (Okla. St. 74 # 1222). The Committee has the responsibility "for overseeing and approving agreements between tribal governments and the State of Oklahoma."

Finally, the Act provides a mechanism for the state and local jurisdictions to enter into "cooperative agreements" with federally recognized tribes. All agreements have to be

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[4] The debate in and out of the legislature on Haney's Bill demonstrated some of the deep anti-Indian antipathy of some state officials. Tax Commission Secretary Don Kilpatrick asked, presumably rhetorically, "Does it mean that every time the Legislature passes a bill, we have to negotiate with every tribe in Oklahoma.... If they are sovereign, how can they vote in our elections?" (Ervin 1985). During floor debate Rep. Ken harris (D-Lawton) referred to the "guerrilla warfare" of western Oklahoma Tribes (Myers 1985).

approved by the Joint Committee and, when necessary, by the Secretary of the Interior (Okla. St. 74 # 1221.C. & D.).

This truly remarkable piece of legislation laid the groundwork and created a process for changed relations between the State of Oklahoma and tribes. The cooperative agreements section was first used to resolve the major problem it was designed to address: law enforcement in Indian Country. The Sac and Fox and Iowa Tribes were the first to have cross-deputization agreements with local law enforcement agencies approved, the former with the Pottawatomie and Lincoln County Sheriff's Departments, the latter with Lincoln County Sheriff. By June 1995 the Cherokee and Choctaw Nations and the Delaware Tribe of Western Oklahoma had also signed cross-deputization agreements. In addition to those signed by individual tribes, the B.I.A. signed similar agreements with many jurisdictions throughout the state where individual tribes have no police forces of their own (Oklahoma Secretary of State).

As the status of Oklahoma tribes was clarified and as federal policy increasingly enabled tribal governments to expand their political and economic reach, several tribes began to assume the duties previously performed by the B.I.A. In 1990, Congress amended the Indian Self-Determination and Education Act to create a demonstration project providing a number of tribes throughout the country

the opportunity essentially to eliminate the role of the B.I.A. in many service areas. The Cherokee Nation of Oklahoma and the Absentee Shawnee Tribe were among the original participants in the Self-Governance Demonstration Project (Public Law 100-472). Congress subsequently made the project permanent, expanded the number of participating tribes, and extended it to the Indian Health Service. By Fiscal Year 1996, eight Oklahoma Tribes will be participating in the Self-Governance Project: Cherokee Nation, Chickasaw Nation, Creek Nation, Choctaw Nation, Absentee Shawnee Tribe, Wyandotte Tribe, and the Kaw Tribe (Wilson 1995). The participation of these in the Self-Governance Project tribes is evidence of the growing ability of Oklahoma tribal governments to operate more fully as sovereign entities.

Oklahoma tribes also developed new economic opportunities on their land. They began to operate smoke shops and gas stations, run bingo games, and issue their own automobile tags. All of these economic enterprises produced revenue for the tribe and at the same time threatened to reduce state revenues because the tribes refused to add state taxes to the goods and services offered. Claiming that state taxes were not enforceable in Indian Country, for example, tribal smokeshops sold cigarettes at reduced cost at what in many cases were structures no larger than a mobile home.

In 1976, Kevin Gover had written that "The unclear status of the Oklahoma tribes effectively stifles attempts at forming tribal enterprises with a reasonable rate of return. The major issue is taxation. The State of Oklahoma and municipalities have been taxing tribal enterprises" (Gover 1976, 153). While tribal status was nebulous and tribal economic endeavors limited, the issue of the applicability of state taxes on Indian land simmered rather than boiled. As Creek Principal Chief Claude A. Cox stated in federal court in 1985, "They [state authorities] never exercised any jurisdiction when we were selling beads and pottery" (Reinhold 1985). This changed as the tribes began to feed the fires with more potential sources of tribal-state tax conflict. As Gover had observed "It cannot be expected that the State of Oklahoma would protect Indian interests because to do so would deprive the state of sources of revenue..." (Gover 1976, 161).

In the latter part of the 1980s and into the 1990s as the tribes exercised these more sophisticated aspects of self-governance, they began to run afoul of the Oklahoma Tax Commission. The Commission came to embody the greatest source of tribal-state conflict, particularly after cross-deputization began to ease some of the criminal jurisdiction concerns. The conflict was heated because it touched on a fundamental question of sovereignty for both the tribes and the State: where and over whom does each sovereign have

jurisdiction to levy taxes to raise the revenue necessary to fulfill its obligations? The Tax Commission stated its position in a paper presented at the 1989 Sovereignty Symposium in Oklahoma City.

> The Tax Commission's position on this issue begins with the perspective that state law provides no exemptions for tribally owned businesses from state tax law requirements and no federal law exists which pre-empts such an application. (Oklahoma Tax Commission 1989).

In five major cases reaching the federal courts, including one involving tribal bingo, the Commission argued that tribal members and operations were subject to all state taxes because, according to the Commission, tribes had no land base separate and immune from the reach of state law. The theory and practice of the Commission towards tribal sovereignty and the extent of state jurisdiction is clearly seen in the positions it took in the four cases reaching the United States Supreme Court between 1988 and 1995. In each case the Commission in effect denied the sovereign status of Oklahoma tribes and the plenary power of Congress in Indian affairs, while asserting state jurisdiction over Indian owned land in Oklahoma.

In 1985 in Oklahoma Tax Commission v. Graham, the Commission sought to enjoin the Chickasaw Nation from engaging in any further business at its Motor Inn located in Sulphur, Oklahoma until it complied with state tax laws. The Nation sought to remove the case to federal court. In its brief to the U.S. Supreme Court arguing against removal,

the Commission for the first time presented its view to that court that there are no reservations in Oklahoma. It made the creative but ahistorical argument that "The reservation system and tribal sovereignty within that system has been disestablished in Oklahoma" (Oklahoma Tax Commission Brief 1988, np.). Furthermore, the Commission argued that there is a "factual distinction " between an "'assimilated' state" and "a 'reservation' state" (Brief 1988, np.). As to the status of the Five Civilized Tribes, the Commission contended that "in the years just prior to Statehood at the turn of the century, these reservations were disestablished" (Brief 1988, np.).

In Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, the Commission argued that the tribe was required to impose the state's cigarette tax on all sales of that item made in tribal smokeshops. To support the reach of Oklahoma law on such transactions, the Commission's brief filed with the Supreme Court contended that "there are no reservations in Oklahoma....the Tribes in Oklahoma have not been set apart from the State on a federal reservation and do not maintain a separate and independent existence apart from the general community" (Oklahoma Tax Commission Brief 1990, np.). The Commission expressed its concern that tribal activities were beginning to have an impact on the affairs of non-Indians.

> The State urges that the Tribe should not be allowed to infringe on the States rights to govern

its internal affairs (Brief 1990, np.).

Two years later, the Commission was again attempting to impose a state tax on tribal land. This time the Commission argued that 1) state income taxes should apply to tribal employees, and 2) the motor vehicle excise and license and registration fees should be paid by Sac and Fox members who owned cars and drove on state roads.[5] Echoing its contention in Potawatomi, the Commission in Oklahoma Tax Commission v. Sac and Fox Nation asserted that Sac and Fox land was not a reservation, having been terminated in 1891 (Oklahoma Tax Commission Brief 1992, np.). Further, "...the extent of Indian Country in Oklahoma consists of plots of trust land of various sizes scattered among land which is otherwise within state jurisdiction" (Brief 1992, np.). Referring to the allotment process, the Commission reasoned that "the Indian tribes in Oklahoma were assimilated into the general society by this process and lost the exclusive autonomy enjoyed by tribes which inhabit federal reservations" (Brief 1992, np.).

In 1995 in Oklahoma Tax Commission v. Chickasaw Nation, the Commission was once again attempting to tax tribal transactions, this time by imposing Oklahoma's motor fuel tax on gasoline sold at tribal gas stations. The Commission also sought to force tribal members employed by the tribe

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[5] The Sac and Fox Tribe imposed its own income tax on tribal employees, whether or not they were tribal members. The tribe also imposed tribal taxes on motor vehicles.

but not living on tribal land to pay state income taxes. Giving up its argument that there is no Indian Country in Oklahoma, the Commission merely argued that for some purposes states may impose its taxes on Indian tribal activities. It further argued that treaties made with the Chickasaw Nation in the 1830s did not free individual Cherokees from the reach of all state taxes (Oklahoma Tax Commission Brief 1995).

The Commission's dealings with the Chickasaw Nation demonstrate the lengths to which it would go to impose its interpretation of the law on Indian land. Chickasaw Nation Governor Bill Anoatubby became the target of the Commission when it placed a lien on his personal property for taxes it claimed were due on the sale of cigarettes at tribal smokeshops (Anoatubby 1995a and 1995b). The Commission also fought the Nation's attempts to purchase tax exempt auto tags for tribal vehicles, claiming there was no provision in state law for the tribe to receive such tags. The Nation succeeded in getting the legislature to change the law which now classifies a tribe as an "American Indian Tribal Association" (47 Okla. St # 1136 (1995) and exempting it from state taxes (Anoatubby 1995b).

Prior to the Supreme Court's decision in Chickasaw Nation denying the State's right to tax tribal gas stations, Governor Anoatubby had attempted to negotiate an agreement with the Tax Commission similar to the Tobacco Compacts

(Anoatubby 1995b). The Commission rejected these overtures, prompting one observer to say that the effort was doomed since Anoatubby was "negotiating with a stump."

The result of these four cases was a rejection by the Supreme Court of the Commission's interpretation of the status of Indian land in Oklahoma. The Court essentially held that Indian Country is Indian Country for purposes of 18 U.S.C. 1151. The Commission's attempts to distinguish "reservation" from "allotted land" was rejected. In what can be read as a direct rebuke of the Commission's argument concerning the alleged "disestablishment" of the Sac and Fox Reservation, Justice Sandra Day O'Connor wrote, "Nonetheless, in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., we rejected precisely the same argument - and from precisely the same litigant (Oklahoma Tax Commission v. Sac and Fox Nation 1993).

Gaming in Oklahoma

Morgan, et al. have referred to Indian gaming as "...the most salient federalism-related issue in Oklahoma today" (1991, 32). While one can make the case that the on-going controversies over the legality of state taxation in Oklahoma Indian Country have produced more conflict, it is true that Indian gaming has further tested the limits of both state and tribal sovereignty. It has taken

considerable litigation to sort out the status of Oklahoma Indian gaming and that activity remains at a relatively low level in the state.

On its face, Oklahoma's gaming policy appears prohibitive. While former state gaming negotiator Linda Epperley notes that "Oklahoma's Constitution does not expressly prohibit or permit gaming" (Epperley 1992, 434), a 1993 Oklahoma Attorney General Opinion asserted that "The criminal statutes of Oklahoma prohibit almost every form of gambling" and that "Oklahoma's gaming laws...are pervasively prohibitory" (Loving 1993). As summarized by Epperly,

> Oklahoma basically defines gambling as a combination of three items: (a) a participant who pays something of value, also known as "consideration", "bet" or "wager"; (2) an outcome determined, at least in part on chance; and (3) winnings which constitute "something of value" (Epperly 1992, 439).

"Something of value" is defined as "money, coin, currency, check, chip, token, credit, property, tangible or intangible" (21 Okla. St. # 965).

Oklahoma law prohibits "poker, roulette, craps or any banking or percentage, or any gambling game played with dice, cards or any device, for money, checks, credit, or any representatives of value..." (21 Okla. St. # 941). Law enforcement officers are required to enforce the state's gambling laws and are subject to removal from office if they fail to do so (21 Okla. St. # 949).

Notwithstanding Attorney General Loving's assertion, several forms of gaming are permitted under Oklahoma law.

For purposes of the IGRA, bingo and pull tabs are legal Class II games in Oklahoma. Also legal are several types of Class III gaming: pari-mutuel horse racing, including simulcast and off-track wagering (Okla. St. 3 # 200 and 205); and raffle-type lotteries (Okla. St. 21 # 1051).

As is the case under New Mexico law, Oklahoma statutes' provisions for charitable gaming seem to widen the scope of gaming available to tribes. For many years charitable organizations and groups supporting charitable activities have conducted so-called "Las Vegas" or "Casino Nights" throughout Oklahoma. Whether or not charitable organizations may conduct these activities was addressed in early 1995 by Attorney General Drew Edmondson. In an Opinion issued in response to an inquiry from Canadian County District Attorney Cathy Stocker, Edmondson declared such events illegal under Oklahoma law (Edmondson 1995). Shortly thereafter the Shawnee Elks Lodge was raided and five persons were arrested and several gambling devices seized (Hutchinson and Sanger 1995).

Since 1993 two proposals to expand non-Indian gaming in Oklahoma have brought the <u>potential</u> of Indian gaming to public notice. The first was Governor David Walters' proposal for a state operated lottery similar to those in 36 other states, including Texas and Kansas. Walters, under mounting public and law enforcement scrutiny for alleged campaign irregularities, led efforts to pass State Question

658 creating a lottery in Oklahoma. Opponents argued that if the lottery proposal passed, Indian operated casinos would soon be common in the state.[6]

Forrest A. Claunch, chairman of Oklahomans Against the Lottery, wrote in a column for the Daily Oklahoma that "A vote for State Question 658 next Tuesday is almost certainly a vote for casino gambling on Indian lands - and tribal lotteries as well, if the tribes want them" (Claunch 1994). U.S. Senator Don Nickles, a member of the Senate Committee on Indian Affairs, echoed this opinion as did former United States Attorney for the Western District of Oklahoma Joe Heaton (Nickles 1994 and Hinton 1994). For reasons possibly having more to do with the state's political culture and the Question's backing by Governor Walters than the potential spread of Indian gaming (Green 1995b), the referendum was soundly defeated 417,586 to 280,152 (Greiner 1994).

A June 1995 proposal by Remington Park Racetrack owner Edward J. DeBartolo Jr. again raised the specter of widespread Class III Indian gaming. DeBartolo, a leading opponent of State Question 658, proposed a statewide referendum legalizing casino gambling in four locations in the state: Remington Park in Oklahoma City, Blue Ribbon Downs in Salisaw, downtown Tulsa, and Love County.

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[6] Organized opposition to SQ 658 was led by Oklahomans Against the Lottery and Horsemen Against the Lottery Threat (HALT). The Daily Oklahoman was also editorially opposed to the referendum.

According to the Daily Oklahoman, Jeff True, executive director of the Oklahoma Quarter Horse Association, "said Remington officials told the horsemen they hoped to obtain some exclusive rights for a period of time, effectively blocking Indian tribes from opening a casino immediately" (English and Hinton 1995).

Evidence that DeBartolo and casino supporters considered the potential of Indian gaming a serious part of their campaign appeared in an advertisement in the Daily Oklahoman the day after the planned referendum effort was announced. DeBartolo, Blue Ribbon Downs Manager Dwayne Burrows, and former Chairman and CEO John H. Williams of The Williams Company took out a full page ad in the form of a letter "To the Citizens of Oklahoma" in support of the casino proposal. It began, "Recent federal court rulings relating to Indian tribes all but assure that casino gaming will come to Oklahoma no matter what" (Ad 1995).

Indian Gaming in Oklahoma

Tribal-run high stakes bingo began earlier in Oklahoma than it did in New Mexico and encountered considerably more active resistance from state authorities.[7] The early

[7] There are anecdotal accounts of high stakes bingo and casino games being operated in western Oklahoma on tribal land by individuals in the late 1970s. However, according to a confidential source, the games were quietly closed down after an investigation by state and local law enforcement agencies.

controversies over Oklahoma Indian gaming were inextricably linked to the re-birthing pains of tribal sovereignty in the state. What tribes could offer in the way of gaming in Oklahoma was also affected by current national trends. In the early 1980s, before Congress addressed the issue, the limits of Indian gaming were usually established in state and federal courts after a tribe began operating games of chance beyond those permitted by state law, usually high stakes bingo. This is what occurred in Oklahoma.

In 1986, Ronald D. Fixico (Creek), then chairman of the United Indian Nations in Oklahoma Gaming and Taxation Committee, told the Senate Select Committee on Indian Affairs that the state's tribes' gaming operations "function in an atmosphere whereas the State is antagonistic toward our efforts to become self-sufficient" (Senate Hearings 1986, 125). A year later he described for the Committee the tribes' "adverse relationship with our State" (Senate Hearings 1987, 106). Fixico's observations were based on the continuing attempts by state and county officials to curtail tribal gaming enterprises. The conflicts centered around the scope of gaming offered by the tribes and the State's attempts to exercise jurisdiction over them, including the imposition of state taxes.

The first serious legal confrontation over Indian gaming in Oklahoma occurred in March 1983 when Ottawa County Sheriff Floyd Ingram attempted to close the Quapaw and

Seneca-Cayuga tribal bingo games (UPI 1983a).[6] Sheriff Ingram alleged that the games violated State law because they were held on Sunday, were operated without a permit, and offered prizes beyond the legal $100 single game and $500 aggregate limits. Subsequently, the Ottawa District Attorney sought an injunction to prevent the tribes from operating the games. The Oklahoma Tax Commission also asserted its authority to collect sales tax from the bingo games. After initially granting an injunction, Ottawa County District Judge Jon Douthitt dismissed the County Attorney's suit, holding that the State had no jurisdiction over the games since they were being conducted in Indian Country.

In July 1985, the Oklahoma Supreme Court reversed Judge Douthitt's decision. The Court, while acknowledging that the bingo games were being offered in Indian Country nevertheless ruled that the State might have jurisdiction "...if, and to the extent that, the activity is shown to affect non-Indians and Indians who are non-members of the self-governing unit" (State ex rel May v. Seneca-Cayuga Tribe of Oklahoma). The Court rejected the tribe's argument that it was protected by sovereign immunity. The case was remanded to the County District Court for further

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[8] The Sheriff also shut down the Picher, Oklahoma Volunteer Fire Department's Sunday bingo game for violating the State law prohibiting such games on Sunday.

determination of the facts consistent with the Supreme Court's opinion.

After the Supreme Court's decision, the tribe asked for and received an injunction from the federal District Court for the Northern District of Oklahoma. The order by Judge Thomas R. Brett barred Judge Douthitt from further proceedings and prevented the State from further attempts at interfering with the tribe's bingo games. While the State appealed Judge Brett's order, all sides agreed that the games would continue (Palmer 1985). The Tenth Circuit Court of Appeals finally handed down a decision in May 1989. Finding that the case "concerns activities that are necessarily primarily of federal interest" and that "the Tribes have a claim to sovereign immunity which shields them from suit in state court," the Court affirmed Judge Brett's order (Seneca-Cayuga Tribe of Oklahoma v. Oklahoma ex rel Thompson). The Court noted the Cabazon decision and the Indian Gaming Regulatory Act in determining federal policy and the State's interest in regulating Indian gaming.

> The state courts thus lack jurisdiction to hear the State's case against the Tribes. The federal nature of the law and of the issues to be decided, combined with this lack of state jurisdiction, reduce the State's interest in this litigation to the vanishing point.

Two years before the Seneca-Cayuga decision, the Tenth Circuit had decided an equally important Oklahoma Indian gaming case, this one directly involving the Tax Commission. One week after the Oklahoma Supreme Court's decision in

Seneca-Cayuga, Tulsa County District Attorney David Moss had filed suit in County Court against the Creek Nation's Tulsa bingo hall. The Tax Commission continued to press the claim it had first made in April that the Tribe owed $800,000 in state sales taxes. The Creek Nation immediately sought an injunction against the State in Federal District Court. Judge James O. Ellison issued a temporary restraining order permitting the bingo hall to remain in operation.

The Creek Nation Bingo Hall sits on an Arkansas River sand bar near downtown Tulsa. The property was part of a 100 acre parcel of land owned in fee simple by the Creek Nation known as the "Mackey site." The Nation owned the two million dollar 27,000 square foot facility and contracted with U.S.A., Inc., a South Dakota company, to manage the bingo operations. The hall offered players some bingo jackpots of $25,000. The tribe used proceeds from the hall "to support tribal operations and tribal health and social services programs" (Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission).

In a December 1985 hearing on the issuance of a permanent injunction, Judge Ellison heard testimony about the status of the Mackey site, Creek legal history, and the State's claim of jurisdiction over the tribe's bingo games. The State argued that the Mackey site was not Indian Country and that there was a significant risk of organized crime infiltration of the tribal bingo games. Witnesses for the

Creek Nation testified about the history of Creek land in Oklahoma, presenting evidence of tribal ownership of the Mackey site. Rennard Strickland testified that the tribe's interest in the land could be traced back to the Treaty of 1832.

Judge Ellison ruled in favor of the Creek Nation on December 20, 1987. He held that the Mackey site was Indian Country and that the State lacked jurisdiction to apply either its gaming laws or its taxes to the Creek Nation Bingo. The State appealed to the Tenth Circuit again claiming that the site was not a reservation and therefore not Indian Country. The State further argued that even if the Mackey site was Indian Country, the State nevertheless had full criminal jurisdiction and taxing authority over the property. Finally, it once again raised the specter of organized crime corrupting the Creek bingo games.

In September 1987, the appeals court upheld Judge Ellison's decision, finding "that under both historical and contemporary definitions, the Mackey site has retained its status as Indian country and land reserved under the jurisdiction of the federal government and the tribe" (Indian Country, U.S.A.). Relying on treaties, federal statutes, and the Oklahoma Enabling Act, the court held that no explicit act of Congress ever terminated existing Creek tribal lands or gave the state jurisdiction over them.

In summary, the Mackey site is part of the original treaty lands still held by the Creek Nation,

> with title dating back to treaties concluded in the 1830s and patents issued in the 1850s. These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. @ 1151(a) (Indian Country, U.S.A.).

In balancing federal, tribal, and state interests, the Court looked for guidance to the U.S. Supreme Court's recently decided Cabazon decision. It found all of the contentions made by the State of Oklahoma to be similar to those California made in Cabazon and rejected by the Supreme Court. Finally, the appeals court upheld the District Court's holding that Oklahoma's sales tax was invalid in its application to the Creek Nation bingo games. The United States Supreme Court denied a writ of certiorari in June 1987.

After Seneca-Cayuga and Indian Country, U.S.A., high stakes tribal bingo was apparently free from state regulation and taxation. Tribal bingo games proliferated throughout Oklahoma during the 1980s. It is difficult to precisely pinpoint the number of bingo operations since many were opened but subsequently closed due to management problems or inter-tribal conflicts. Anecdotal accounts place the number of bingo halls in Oklahoma in the mid-1980s at about 20 to 22 (Kickingbird 1995); citing the Tulsa Tribune, Stefanie A. Lorbiecki placed the number at 24 in a 1985 Tulsa Law Review Article; in 1986 Ronald Fixico told the Senate Select Committee on Indian Affairs that there were "18 gaming operations" in Oklahoma (Senate Hearings

1986, 125); that same year, a nationwide survey conducted by BIA Area Offices counted 24 tribal operated games (18 in the Anadarko Area Office jurisdiction and six in the Muskogee Area Office jurisdiction) (Senate Hearings 1986, 562-579). According to the BIA survey, all of the Oklahoma gaming operation offered bingo, while fifteen offered both bingo and pull tabs. One tribe, the Tonkawa, also offered video card games. In November 1990 the Tulsa World estimated that there were 34 tribal bingo operations in the state (Klein 1990).

While the Creek, Cherokee, and Chickasaw bingo operations were among the most successful and appeared to run fairly smoothly, other tribes were not so fortunate. In its early years, for example, the Absentee Shawnee Tribe's Thunderbird Entertainment Center outside of Norman was engulfed in considerable controversy. A dispute over the enterprise's management required intervention by the federal courts (Singleterry 1988). Among the internal conflicts arising over bingo was one involving the Caddo, Wichita, and Delaware Tribes. The three tribes established a corporation, W.C.D. Industries, Inc., which opened Fortune Bingo in 1992. The hall closed after a dispute over a management contract with a private firm (Hutchison 1992). In the early 1980s the Ponca Tribe's bingo games were plagued with intra-tribal disputes and federal audits (Ponca City 1981).

While many Oklahoma tribes turned to gaming as a potentially lucrative revenue source during the 1980s, the Cherokee Nation was not one of them. The Cherokee Nation Tribal Council voted to establish a highstakes tribal bingo in September 1984 but Principal Chief Ross Swimmer vetoed the Council's legislation. According to the Cherokee Advocate, Swimmer "said gambling enterprises provide no long range employment, usually prove unprofitable and are constantly being tested in court" (Bingo 1984). The Council did not again vote to approve bingo until April 1989 when it voted 7-6 in favor of a gaming ordinance (Council 1989). Eight months later the Council unanimously voted to invest $3 million in bingo facilities in Roland and Tulsa (October council 1989). The Cherokee Nation Bingo Outpost opened in Roland November 15, 1990.[9]

Indian Gaming in Oklahoma: More than Bingo?

Left undecided after Seneca-Cayuga and Indian Country, U.S.A. was what other forms of gaming Oklahoma tribes would be free to conduct without arousing the ire of state and federal law enforcement. A 1991 Tenth Circuit Court of Appeals decision made it clear that the Indian Gaming and Regulatory Act was the relevant federal statute governing

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[9] The Nation later opened two more bingo halls: the Outpost in Catoosa, a suburb of Tulsa in September 1993, and in West Siloam Springs in April 1994 (Cherokee Nation Bingo 1995).

Indian gaming. The Court lifted an October 1987 Northern District Court of Oklahoma injunction against the United Keetoowah Band of Cherokee Indians prohibiting the tribe from selling pull tabs. The injunction had been sought by the State of Oklahoma after the Tulsa County District Attorney seized gambling paraphernalia from the tribe's Horseshoe Bend Bingo Hall the previous October. The Court rejected the State's argument that the federal Assimilative Crimes Act (18 USC ≠13) gave it jurisdiction over gaming in Indian Country.[10] In lifting the injunction the Circuit Court observed that "It appears that a new day has dawned with respect to the regulation of Indian bingo." Furthermore

> A fair reading of the IGRA leads inexorably to the conclusion that this Act now bars federal courts from enjoining Indian bingo by application trough the ACA (United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss 1176).

Passage of the Indian Gaming Regulatory Act signaled that at least some additional forms of gaming ought to be permitted in the state. Tribes began approaching the state with requests for compacts and Governor Henry Bellmon named former Assistant Secretary of the Interior for Indian Affairs Ross Swimmer his gaming negotiator for Class III games.

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[10] The Court first disposed of the State's contention that the United Keetoowah Band of Cherokee Indians was not a "tribe" for the purposes of federal court jurisdiction. The Court pointed out that the Band was a federally recognized tribe incorporated under the Oklahoma Indian Welfare Act.

Negotiations began between Swimmer and the Comanche Tribe in late 1989 on a Class III compact that would allow the tribe to conduct pari-mutuel horse racing in Lawton. A compact was finalized and signed by Governor Bellmon on May 24, 1990. Approval was granted by the Joint Committee on State-Tribal Relations and signed by Committee Chairman Kelly Haney on July 12, 1990 (Compact 1990). However, the compact was never submitted to the Secretary of Interior for approval, thus concluding Oklahoma's first experience with legal Class III gaming (Kickingbird 1995).

The path of Indian gaming in Oklahoma over the next five years was an obstacle course of stalled negotiations, inter-tribal conflict, court reverses, and threats by state and federal officials. The fundamental source of conflict between the tribes and the state was the interpretation of what types of gaming Oklahoma public policy permitted to be conducted under Class II or negotiated as Class III games under the IGRA.

Several plans for expanding tribal gaming never materialized. For example, an effort to have the Ponca tribe become involved in pari-mutuel horse and dog racing failed, apparently "for lack of interest" and financial backing (McNutt 1992). Similarly, discussions of a possible Sac and Fox tribal bingo in the Bricktown section of

Oklahoma City failed to come to fruition.[11] As already noted, the Comanche Tribe's plans for a pari-mutuel track also failed to come about.

Given the IGRA's ambiguity, it is not surprising that some tribes creatively interpreted the Act to permit the offering of legally questionable games. Linda Epperley has written that "The newest social pastime in Indian Law circles is a game of 'one-upmanship' played at the expense of the State of Oklahoma. Participants try to 'top' one another in identifying gambling activities which are not actively prosecuted by law enforcement officials" (Epperley 1993, 443-444). Among the most suspect games were those operated by the Ponca and Tonkawa Tribes. In 1991, both tribes closed their gaming establishments after a Tulsa World investigation revealed that both tribes were offering slot machines and that blackjack could be played at the Ponca facility (Martindale 1991).

The Absentee Shawnee Tribe's Thunderbird Entertainment Complex, after resolving its management difficulties, became, according to the Tulsa World, "one of the favorite places for gamblers" in Oklahoma (Martindale 1992). One of the reasons for this popularity was a creative

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[11] The proposal appeared to have new life in early September 1995. The Black Hawk Gaming & Development Co., Inc. announced that the Anadarko B.I.A. Area Director had approved its application to place a parcel of land in trust for the Sac and Fox Nation to operate a high stakes bingo (Black Hawk 1995).

interpretation of what constitutes Class II games. The Complex, in addition to bingo, offered a form of blackjack called "Bingojack." The game is similar to traditional blackjack except that pingpong balls are used instead of cards. The balls, numbered one through ten, are blown trough a bingo hopper. The balls are lined up in front of the player who is also playing traditional bingo at the same time. The National Indian Gaming Commission later issued regulations placing these types of games in Class III.

Tribal requests for Class III compact negotiations with the state accelerated after David Walters became governor in 1991. Lengthy negotiations between the governor's negotiators and Citizen Band Potawatomi Tribal officials resulted in Walters signing a compact with the tribe on July 10, 1992 (English 1992b, Ridgeway 1993). As Michael W. Ridgeway wrote in an American Indian Law Review article, "the process that led to the Potawatomi gaming compact has been an eye opener" (537). During the course of the negotiations, Governor Walters was represented by two different negotiators, Linda Epperly and Robert A. Nance. While serving as the governor's gaming negotiator Epperly was an employee of the State Tourism Commission. She resigned the former position six months after assuming it, thus requiring the process to begin anew when former Assistant Oklahoma Attorney General Nance was appointed to the job in February 1992 (English 1992a, Ridgeway 1993).

In addition to the change in negotiating personnel, two other significant factors slowed negotiations and ultimately doomed the signed compact. First, after reviewing federal and state law, Nance informed all tribes requesting compacts that only a few games were open for compact negotiations. When Potawatomi attorney Michael Minnis responded with a list of games the tribes wanted to discuss, Nance replied that only video lottery terminals (VLTs) could be considered (Ridgeway 1993, 526).

Nance's position on VLTs led to the second factor that eventually mooted the Potawatomi compact. When informed that VLTs might be brought to the proposed Potawatomi gaming site, the United States Attorneys for all three Oklahoma federal districts indicated that such devices might violate the Johnson Act. Nance informed Minnis that the governor did not want to approve games that violated federal law (Ridgeway 1993, 527). Further, according to Minnis, Walters had said that "he was personally led to believe that he would be prosecuted if the machines [VLTs] were brought in" (Minnis 1995).[12]

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[12] While U.S. Attorney for the Eastern District of Oklahoma John Raley disputes the alleged threat (Green 1995c), the Tenth Circuit cited it in its Green decision: "Oklahoma negotiated for this condition because the U.S. Attorney had informed the state that the importation of VLTs under the Compact could subject both Oklahoma and the Tribe to liability under the Johnson Act..."(Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green 1993).

The compact finally agreed to allowed the Potawatomis to offer VLTs if they were ultimately found not to violate federal law. The compact provided that such a determination could be found if either 1) the United States Attorney for the Western District of Oklahoma declares the VLTs not in violation of the Johnson Act; or 2) a federal district court declares that the importation of VLTs is not a violation of the Johnson Act; or 3) the Potawatomi import VLTs for the purpose of prosecuting a declaratory judgement (Potawatomi Compact 1992, 3). The Tribe also agreed "to defend, indemnify and hold harmless Oklahoma from any liability arising to Oklahoma from the importation of the VLTs under this compact."

Following the U.S. Attorneys' refusal to issue the letter regarding the Johnson Act, the Tribe sought a declaratory judgement in the Federal District Court for the Western District of Oklahoma. The Court held that the importation of VLTs onto tribal land would violate the Johnson Act. The Tribe appealed to the Tenth Circuit which upheld the District Court ruling (Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green 1993). The Potawatomi compact was thus null and void and the Tribe limited to Class II games.

The Potawatomi compact and the resultant court decision were not well received by the state's tribes and the Tribe itself did not receive much support (McCullough 1995).

While criticizing the Tribe's judgement in entering into the compact with the VLT provision, tribes also believed that Walters was not negotiating in good faith as required by the IGRA. According to Gary Pitchlynn, attorney for the Ponca Tribe, four compacts were nearing completion prior to the Green decision. Following the Tenth Circuit's ruling all video machines in tribal establishments were removed. He was directed by the Ponca and Cheyenne-Arapaho Tribes to file suit against Walters and the State of Oklahoma for failing to negotiate in good faith. Although the Cheyenne-Arapaho decided against pursuing the lawsuit, the Ponca Tribe proceeded with its lawsuit in the Federal District Court for the Western District of Oklahoma with the support of some non-Indian gaming interests.

Judge Ralph G. Thompson handed down his ruling on September 8, 1992 holding that the Tribe was prohibited by the Tenth and Eleventh Amendments from suing both the governor and the state. Because the IGRA lacks the option for a state not to act, according to Judge Thompson, Congress exceeded its authority in requiring good faith negotiations between a state and tribe. This section is therefore "precluded by the Tenth Amendment." Judge Thompson went on to find that Congress had not intended for the IGRA to waive the states' Eleventh Amendment immunity from suit nor does Congress have that power under the Indian Commerce Clause. Finally, the Judge held that the suit

against the governor as an individual was "barred by sovereign immunity" (Ponca Tribe of Oklahoma v. Oklahoma 1992).

On appeal, the Tenth Circuit reached a different conclusion concerning both of the constitutional amendment issues. While upholding the District Court's dismissal of Walters, the Appeals Court reversed Judge Thompson on the Tenth and Eleventh Amendment questions. Finding that the IGRA did not coerce states into taking any action, the Court held that the Act did not violate the Tenth Amendment. On the issue of Eleventh Amendment sovereign immunity, the Court found that Congress had intended to waive sovereign immunity in passing the IGRA, even if it did not do so in explicit language. Further, the Court significantly found that "the Indian Commerce Clause empowers Congress to abrogate the states' Eleventh Amendment immunity..." (Ponca Tribe of Oklahoma v. Oklahoma 1994).[13] The decision is on appeal with the United States Supreme Court.

In the early 1990s Oklahoma tribes were involved simultaneously in several federal court cases litigating their understanding of what is permissible under the IGRA. While the Citizen Band Potawatomi and Ponca Tribes were

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[13] The Appeals Court combined the Ponca case with those involving the Kickapoo Tribe and the State of Kansas; the Sandia Pueblo and New Mexico; and the Mescalero Apache Tribe and the State of New Mexico. The District Court in the Kickapoo case, unlike courts in the other three cases, had found that the IGRA did waive Eleventh Amendment sovereign immunity.

pursuing their claims, the Delaware Tribe of Western Oklahoma joined a lawsuit led by the Cabazon Band of Mission Indians of California against the National Indian Gaming Commission.[14] The tribes were fighting the definitions issued by the Commission concerning "electronic, computer or other technological aids" permitted as Class II games (25 U.S.C. # 2703(7)(A)(i); and "electronic or electromechanical facsimiles," assigned Class III status by 25 U.S.C. # 2703(7)(B)(ii).

As Federal District Court for the District of Columbia Judge Royce C. Lamberth noted in his opinion, it is "imperative for the Indians that the definition of aids be as broad a s possible" (Cabazon Band of Mission Indians v. National Indian Gaming Commission (1993). The tribes, many using electronic video pull tab machines, argued that the definitions were much too narrow because the Commission's definition of a "facsimile" reached the video machines. As Chickasaw attorney Jess Green has written, "Indian tribes were uniform in their complaints that NIGC regulations were more strict than the Act" (Green 1994, 7).

Judge Lamberth's June 1993 decision upheld the Commission's definitions as consistent with congressional

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[14] Other tribes involved in the lawsuit were the Eastern Band of Cherokees, the Poarch Band of Creek Indians, the Pueblo of Isleta, Rumsey Rancheria, the San Manuel Band of Mission Indians, and the Spokane Tribe. Alabama, Arizona, California, Colorado, Connecticut, Florida, Idaho, Kansas, Michigan, Mississippi, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming intervened as defendants.

intent under the IGRA. The United States Court of Appeals for the District of Columbia Circuit upheld his decision in January 1994 (Cabazon Band of Mission Indians v. National Indian Gaming Commission (1994) as known as Cabazon II).

Cabazon II had almost immediate repercussions in Oklahoma. On February 4, 1994, the three U.S. Attorneys in Oklahoma sent letters to the tribes informing them that video pull tab machines "are clearly illegal within the State of Oklahoma" and offered to meet with tribal representatives (U.S. Attorney 1994a). Tribes were given until February 15 to remove the machines. If the machines were not removed, the U.S. Attorney's office would "be obliged to take appropriate action without further notice to you in order to enforce the law" (U.S. Attorney 1994a).

In February 23, 1994 letters to Oklahoma tribes, all three United States Attorneys offered "guidance on the current position of all of the United States Attorneys within the State of Oklahoma." The most significant point of the guidance was the following paragraph:

> First. Machines which are prohibited by Cabazon II must be disconnected immediately and covered, or otherwise taken out of the public gaming area of bingo halls or stores, and arrangements made for their orderly removal from Indian country, We consider all machines which display pull tabs on a video screen or display to be in this category, regardless of what mechanisms causes the display to occur or what else the machine does in addition to displaying pull tabs on a video screen (U.S. Attorney 1994b).

The Delaware Tribe removed their machines in mid 1994.

Neither Cabazon II nor the threats by the Oklahoma U.S. Attorneys ended debate over electronic and video gaming devices. A new dispute between tribes and U.S. Attorneys arose over electronic machines that have video components. Unlike the machines at issue in Cabazon II, the devices do not dispense money to the player. John Raley, U.S. Attorney for the Eastern District of Oklahoma and probably the key figure in the on-going tribal/U.S. Attorney disputes (Green 1995c), agreed in March 1994 not to interfere with these machines while a tribe tested their legality.

The Eastern Shawnee Tribe instituted a legal action to determine the legality of its electronic video machines in the Code of Federal Regulations Court, Miami Agency (CFR Court). Soon thereafter and notwithstanding his previous position and the presence of a case in a court of law, Raley contended that the CFR Court had no jurisdiction in the matter. In a January 1995 letter U.S. Attorney for the Northern District of Oklahoma Stephen C. Lewis "demanded the tribe cease use of the devices and abandon the proceedings in CFR Court..." (Green 1995a 11). The tribes complied.

A July 7, 1995 ruling by CFR Judge George Tah-Boone held that the machines used by the Eastern Shawnee Tribe are Class II gambling devices (Captain v. Ross). Based on this ruling, the tribe installed fifty-five of the machines. Two months later, on September 14, law enforcement officers of the Federal Bureau of Investigation, the U.S. Marshall's

Office, and the Oklahoma Highway Patrol raided the Shawnee Tribe's gaming operations and seized the machines on a federal warrant obtained by Lewis (Green 1995d).[15] Lewis took this action because he would not recognize the CFR Court as a competent jurisdiction for deciding what kinds of gaming devices were legal or illegal under IGRA. He also took this action without prior approval of the Justice Department Tribal records and $3,800 in cash were also seized (Eastern Shawnee Tribe). The action against the Shawnee facility was part of a broader investigation that resulted in 36 non-Indian gambling sites in Northeastern Oklahoma and Southeastern Kansas being raided at the same time the warrant was executed against the Tribe (United States Attorney 1995).

In this environment of adverse court rulings and recalcitrant public officials, Oklahoma tribes successfully negotiated two Class III compacts in 1994 and one in 1995. The Miami and Tonkawa Tribes each signed compacts permitting them to operate off-track pari-mutuel simulcast horse wagering (Miami Compact 1994 and Tonkawa Compact 1994). The Miami and Modoc Tribes signed a compact in September 1995 permitting Class III off-track betting at the Miami, Oklahoma gaming site (Butler 1995).

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[15] It is unclear why the Oklahoma Highway Patrol participated in the raid, since, as attorney Jes Green noted, the state had no jurisdiction in the matter (Green 1995d).

Some Oklahoma tribes with roots in other states have attempted to expand gaming to their aboriginal homelands. Recognizing the unique nature of Oklahoma tribal holdings and history, Congress made it possible through the IGRA for tribes to acquire land non-contiguous to their current holdings and use it for gaming purposes (25 USCS # 2719 a). The Eastern Shawnee Tribe operates a bingo across the Oklahoma border in Seneca, Missouri. As early as 1984, the Miami Tribe of Oklahoma investigated the possibility of acquiring potential trust land in Cuyahoga County (Cleveland), Ohio for the purposes of establishing high stakes bingo games in Oakwood (Indian bingo 1984). The Delaware Tribe of Western Oklahoma has several times raised the possibility of opening gaming facilities in New Jersey (Romano 1993 and Block Wildwood 1995). In November 1995 the residents of Wildwood, New Jersey voted 1,081 to 491 to turn over to the Tribe a parcel of land currently used as a parking lot but with the intention of building a tribal casino (Nieves 1995).

Clearly, Oklahoma gaming tribes have had to fight for their right to offer games of chance on a case-by-case, tribe-by-tribe basis. They have done so in the face of inertia on the part of the state's governors and determined opposition by U.S. Attorneys. Each victory or defeat for an individual tribe directly affects the gaming opportunities of all tribes in the state. While the tribes have been

active in court, they have not been active in the political arena. Individual tribal leaders do become involved in non-Indian political campaigns. Wilma Mankiller and Bill Anoatubby, for example, have been active in the campaigns of various Democratic candidates for office (Mankiller endorses 1992 and Anoatubby 1995b). But the tribes themselves have largely avoided non-Indian political campaigns (Morgan, et al. 1991).

The Gaming Association

Unlike the tribes in New Mexico, but consistent with historic patterns, Oklahoma tribes have not been able to unite effectively and lobby for a unified gaming position. An Oklahoma Indian Gaming Association was formed after the IGRA was passed, but it has had neither the visibility nor the cohesiveness of the New Mexico Indian Gaming Association. The OIGA was the successor organization to the Oklahoma Indian Gaming Commission, an outgrowth of the United Indian Nations of Oklahoma (Fixico 1986 & 1987 and Stephens 1995). OGIA's by-laws were based on those of the National Indian Gaming Association (Stephens 1995).

The Association has periodically served as a conduit for information to the state's gaming tribes (Pitchlynn 1995c, Stephens 1995), but it has been faulted for lack of leadership and direction (Pitchlynn 1995c, Snake 1995, McCullough 1995). As Gary Pitchlynn has noted, the

Association reflects "the same old divisiveness" (Pitchlynn 1995c). Attendance at meetings has generally been low and for most of its existence the Association has had minimal financial resources with which to mount a sophisticated and sustained gaming strategy. Given the inherent divisions among the state's tribes, the comparatively low economic stakes of Indian gaming in Oklahoma, and the formidable opposition of state and federal authorities, the ineffectiveness of this organization is not surprising.

The response of the OIGA to the casino referendum proposal demonstrated the difficulty the tribes had in developing a unified gaming strategy (Pitchlynn 1995c, Green 1995b). As Gary Pitchlynn observed, the tribes were "torn about how to react to" DeBartolo's plan (Pitchlynn 1995c). Some tribal leaders thought a successful referendum would help the tribes achieve Class III gaming. Others believed that should a vote to legalize casino gambling fail, gaming opponents could then argue that Oklahomans clearly favored a public policy of limited legal gambling, thus killing Class III gaming for the tribes. Some leaders, such as Lawrence S. Snake, President of the Delaware Tribe of Western Oklahoma, believed that the tribes should push for their own version of a casino referendum (Snake 1995). There was, as Pitchlynn said, "no consensus position" on DeBartolo's proposal (Pitchlynn 1995c).

Ironically, the Association has been active at the national level through participation in the National Indian Gaming Association. Charles Keechi, former President of the Delaware Tribe of Western Oklahoma, served for several years as Chairman of the NIGA. Tribal attorneys such as Jess Green and Gary Pitchlynn have been active in the various strategic and tactical planning committees and task forces of the national association. According to Green, one of the important contributions of the OIGA has been its providing funding for trips to NIGA meetings by Oklahoma tribal leaders. But this is limited and Green's fees are paid by gaming tribes.

At its October 1995 meeting, the Association voted to include tribes from Kansas and Texas in its membership (Burris 1995) and changed its name to the Southern Indian Nations Gaming Association. According to Chickasaw Nation Gaming Commissioner and OIGA's new president, the expanded organization will give the Kansas and Texas tribes a voice in the National Indian Gaming Association (Burris 1995).

Analysis

The efforts of Oklahoma tribes to operate gaming have in large measure been through the more traditional avenues available to governmental units: inside lobbying by tribal representatives with government officials, and litigation in state and federal courts. Among the former were attempts to

follow the IGRA and negotiate compacts with Oklahoma governors. To date, this approach has only been partially successful and has not resulted in expanded tribal gaming enterprises in Oklahoma. Similarly, the litigation path has produced conflicting results. While the Ponca decision can be generally be considered a success, Green and Cabazon II were clearly defeats.

The Class III compact process in Oklahoma has demonstrated three crucial points. First, a governor not committed to the process can produce an outcome detrimental to a tribe's interest. Second, the Potawatomi experience demonstrated that the role of the United States Attorney can be decisive in the ultimate results of tribal-state negotiations notwithstanding the absence of statutory role for the person holding that office. Finally, the process's necessary requirements for one-on-one negotiations demonstrated that such a procedure can have an adverse impact on tribal unity.

The Role of Elected and Appointed Officials

Several tribal attorneys who have been involved in Class III negotiations with the state's governors are convinced that the state's chief executives have not negotiated in good faith. Delays and last minute barriers to completed compacts have derailed efforts by Oklahoma tribes to expand their gaming operations. The appointment

of Oklahoma City University Law Professor Kirke Kickingbird as newly elected Republican Governor Frank Keating's Counsel for Indian Affairs was a hopeful sign to many tribal leaders.

Possibly more detrimental to tribal gaming in Oklahoma than dilatory tactics by governors has been the aggressive action taken by the state's United States Attorneys. These officials have inserted themselves into tribal-state negotiations on Class III gaming issues, issued direct threats to tribes engaging in certain kinds of gaming activities, and evidenced a lack of regard for tribal court processes. As Jess Green has noted about states where tribes and governors have been at odds, "In many areas, United States District Attorneys have recognized the equity problems of such inconsistent positions and have abstained from becoming active forces in Indian gaming" (Green 1995a, 3). This has been the case in New Mexico.

The discretion of U.S. Attorneys is an area of policy implementation overlooked in the political science literature. Former United States Attorney General Griffin B. Bell and Daniel J. Meador have written that this office "is one vested with considerable policy-making implementing responsibility..." (Bell and Meador 1993, 225). The significant differences in the actions of these officials in Oklahoma and New Mexico indicate their potential crucial role in some areas of policy. While there is no empirical

evidence to support why such differences occur, there are at least two reasons they might. The first is the state's political culture. As Morgan, et al. note,

> A state's political culture thus helps to define (1) the structure and functioning of government institutions, (2) the orientations and behavior of political leaders, and (3) public policies made in the name of the people (1991, 8).

Oklahoma's political culture, particularly as it relates to historical questions of Indian-white relations and broader questions of morality may be expositive. As reviewed above, Oklahoma's history of Indian-white relations is marked by ethnic and policy schizophrenia: on the one hand proud of its historical Indian roots, on the other obstructionist in permitting the exercise of tribal self-governance. While Indians are the centerpiece of the State Department of Tourism's "Native America" campaign, other state agencies act to deny the existence of a contemporary Indian political status.

As previously noted, Oklahoma's political culture has strong individualistic and traditional roots. Pari-mutuel horse racing was not legalized in Oklahoma until 1985, several years before restaurant patrons could buy "liquor by the drink." In the 1994 congressional elections Oklahoma gave the Republican Party one of its greatest national victories: The GOP won the governor's office, both United States Senate seats, and five of the state's six U.S. House seats. In 1996 the GOP congressional victory on Oklahoma

was complete. All six districts are represented by Republicans. The religious right was a significant factor in these results (Bednar and Hertzke 1995).

An official's ideology, cultural background, political ambition, and familiarity with a policy issue may each help determine how he or she performs the duties of the position. By the nature of the office, a U.S. Attorney is usually a product of the political culture of the state or district in which he or she serves. In his study of U.S. Attorneys, James Eisenstein noted that "they belong to and identify with the community in which they serve....Thus, local claims on their attention, time, and policies come to rival the demands of national policy and headquarters' directives" (Eisenstein 1978, x).

The ties to Oklahoma politics and culture are clear in the two U.S. Attorneys who have been most opposed to Indian gaming. Stephen Lewis, U.S. Attorney for the Northern District, is a former Speaker of the Oklahoma House as well as the 1992 Democratic candidate for the United States Senate. John W. Raley, U.S. Attorney for the Eastern District, was born in Bartlesville and graduated from Oklahoma Baptist university and the University of Oklahoma Law School. A former Assistant U.S. Attorney for the Western District of Oklahoma, Raley was appointed to his current position by President George Bush in 1990. In a rare occurrence in the world of partisan presidential

appointments, he was reappointed to his position by President Bill Clinton in September 1993 (Judicial Staff Directory 1995).

The second possible reason for the differences in how United States Attorneys exercise their discretion may be derived from purely personal traits. Eisenstein noted that "energetic, dynamic U.S. attorneys make their own opportunities to have a significant impact" (196). Furthermore, aggressive U.S. attorneys appear frequently to believe that they ought to play a major role in shaping the actions of their office" (192). It would appear that the actions of the U.S. Attorneys in Oklahoma are the product of either or both of these factors.

Inside Lobbying: The Courts

In their chapter on Oklahoma in Hrebenar and Thomas' Interest Group Politics in the Midwestern States, England and Morgan write, "The extent of judicial lobbying in Oklahoma is a mystery" (1993, 275). While this may generally be true of other interests in the state, it is less true of Indian tribes in Oklahoma. Much of the advancement in the exercise of tribal authority in the state has resulted from court action either initiated by the tribes or in response to state action against a tribe or tribal member. Attorneys for Oklahoma tribes have also been

active in the past decade as amici in gaming and non-gaming cases heard by the United States Supreme Court.

It is important to put the extent of recent tribal judicial activism in historic perspective. Some of the significant seminal Indian law cases have involved Oklahoma tribes, both before and after their removal from their homelands. The Cherokee Cases of the 1830s establishing the governing principles of Indian law occurred because the Cherokee Nation was resisting the intrusion of Georgia law. Talton v. Mayes (1896), a case involving the reach of Cherokee and federal law in Indian Territory, established that the Bill of Rights did not apply to Indian tribes. Lonewolf v. Hitchcock (1903) resulted from the Kiowa Tribe's contention that allotment violated the Treaty of Medicine Lodge. The outcome was the Court's holding that Congress could abrogate a prior treaty with the Indians merely by passing new legislation, thus strengthening the plenary power of Congress.

As has been pointed out, the resurgence in tribal government activity in the 1970s began with Littlechief and Harjo. The innovative arguments of young attorneys set aside seventy years of "Misinformed but conventional wisdom" (Kickingbird 1993, 303) concerning the status of Oklahoma tribal governments and land holdings (Pipestem and Rice 1978 and Pipestem 1978). Significantly, considering the history of tribal-state relations and notwithstanding the opinions

of the Oklahoma Tax Commission, the court decisions recognizing the status of Indian Country in Oklahoma came in Oklahoma courts.

While questions of state criminal jurisdiction were being settled in state court, three of the Five Civilized Tribes won a significant but ultimately unfulfilled victory in the U.S. Supreme Court regarding the Arkansas Riverbed. In 1966 the Cherokee Nation of Oklahoma brought suit against the State of Oklahoma and a number of oil companies seeking to recover royalties from minerals extracted from the Arkansas Riverbed. The Cherokee Nation, later joined by the Chickasaw and Choctaw Nations, claimed that it owned the land by virtue of the 1830 Treaty of Dancing Rabbit Creek and the 1835 Treaty of New Echota. The Court found in the tribes' favor in 1970 (Choctaw Nation v. Oklahoma).

"The cruel irony" as Rennard Strickland has written, is that the tribes' Supreme Court victory, however, has not been accompanied by success in Congress" (Strickland 1994, 111). For the past twenty-five years Congress has failed to settle the financial claims demanded by the three tribes (Authority nd, Strickland 1994). Even after the Corp of Engineers put a price of $177 million on the riverbed, Congress failed to act, proving once again that a favorable outcome in the courts does not necessarily lead to political success. Strickland draws a parallel to the original Cherokee Cases of the 1830s.

> The Cherokees still wait at the pleasure of the Congress for the appropriation of the funds for property the Court found to have been theirs under the terms of the 1835 Treaty of New Echota, the treaty forced on the tribe after the failure to execute the mandate of the Supreme Court in Worcester v. Georgia. Once again, the tribe, the court, and the American people have come full circle (125-126).

Apart from those legal disputes in which they have a direct interest, attorneys for Oklahoma tribes have filed amicus curiae briefs in major Supreme Court cases involving significant issues of Indian law. In the two Indian gaming cases to come before the Court, California v. Cabazon Band of Mission Indians (1987) and Seminole Tribe of Florida v. Florida (scheduled for oral arguments in the fall of 1995), two Oklahoma tribes supported the tribes involved. The Sac and Fox Tribe's attorney G. William (Bill) Rice joined a brief filed by other tribes and organizations in Cabazon. Gary Pitchlynn, attorney for the Ponca Tribe in its gaming suit against Oklahoma, joined with attorneys for the Poarch Creek Indians and filed a brief in Seminole for the Ponca.[16] Seminole is especially important to the Ponca Tribe because the decision in that case could determine whether or not the Court will grant Oklahoma's request to hear its appeal of Ponca v. Oklahoma.

Several Oklahoma tribes filed briefs in support of the Sac and Fox, Potawatomi, and Chickasaw Tribes in their legal battles with the Oklahoma Tax Commission. Bill Rice,

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[16] The State of Oklahoma filed amicus briefs in these two cases supporting California and Florida.

attorney for the Sac and Fox Nation in that tribe's dispute with the Commission, filed briefs on behalf of the tribe in each of the other three cases, including the two involving the Chickasaw Nation. In Potawatomi and Graham the amici were joined by several other Oklahoma tribes and related organizations. The Inter-Tribal Council of the Five Civilized Tribes also filed amicus briefs in Potawatomi and Graham. Bob Rabon, attorney for the Chickasaw in Graham, filed in the former, while Dennis Arrow, attorney for the tribe in Chickasaw, filed the latter.

Oklahoma tribes filing amici in these three cases did not necessarily confine themselves to Oklahoma lawyers. The Boulder, Colorado based Native American Rights Fund (NARF) filed briefs on behalf of the Cheyenne-Arapaho Tribes in Potawatomi, Sac and Fox, and Chickasaw. The United Indian Nations of Oklahoma joined on the Potawatomi brief. Glenn M. Feldman of Phoenix, Arizona filed briefs for a number of Oklahoma tribes in Graham, Potawatomi, and Chickasaw. Boulder attorney Thomas Fredericks submitted briefs for the Ponca Tribe and Ponca Tax Commission in Sac and Fox. The extent of the involvement of Oklahoma Indian tribes and organizations in these four cases is presented in Appendix .

Oklahoma tribes also participated in some of the most significant Indian law cases of the 1980s by means of amicus curiae briefs. For example, Bill Rice filed in Duro v. Reina for the Sac and Fox Nation, Kickapoo Tribe, and the

Housing Authority of the Sac and Fox Nation; the Cherokee Nation filed in Yakima County v. Yakima Indian Nation; and Michael Minnis filed for the Muscogee (Creek) Nation in New York v. Attea.

As with similar activity by New Mexico tribes, the success of these efforts by Oklahoma tribes was mixed. This lobbying tactic by tribes in Oklahoma again points to deficiencies in the literature concerning interest group activity in the courts. However, it is also clear that tribes in Oklahoma have made considerable use of the court system to achieve their substantive policy goals. Much of this activity, including the gaming cases, has involved efforts by the tribes to assert their contentions about the breadth of tribal sovereignty and the limits of state intrusion in Indian Country. This has been particularly significant in Oklahoma given the State's historic development and the subsequent history of tribal-state relations.

Government-to-Government Relations

Oklahoma tribes have demonstrated that at least some of them are prepared to assert their sovereignty by establishing intergovernmental relations with the State of Oklahoma. Tribal-state agreements are becoming more common, even among tribes initially critical of those types of arrangements. These agreements have come about for at least

two reasons. First, tribal and the State officials have come to recognize the legitimate governing powers of the tribes. As has been shown, this has occurred because of changes in the understanding of the tribes' legal status and because of changes in national policy designed to encourage self-determination and self-governance.

The second reason that the tribes and State are more open to government-to-government negotiated agreements is a practical one: it saves time and money and reduces confusion and contention. It is less expensive for tribal and state governments to negotiate than it is to litigate their differences.

It should now be clear that the Oklahoma Tax Commission's arguments about tribal lands and sovereign immunity are doomed in federal court. Even on those issues where the Commission has won, eg., the applicability of state taxes to non-Indians, the ability of the state to transform that into enforceability is problematical. Thus, the in-lieu of taxes agreement kept tribal and State governments out of another round of expensive litigation. A residual benefit of these agreements for the tribes was the recognition by the State of the authority of tribal governments to negotiate sovereign-to-sovereign.

The cross-deputization agreements also solved a significant practical problem - that of ensuring law and order across jurisdictional lines. These agreements also

resulted from and strengthened the legitimacy of the separate status of Indian Country and the consequent lack of State authority therein.

The success of tribal-state agreements in these areas has not been paralleled in gaming. There are at least three reasons for this. First, the State's gaming policy and its enforcement have significantly limited the willingness of the governors to negotiate Class III compacts. Governors have narrowly construed what is permissible under IGRA, limiting the kind of Class III compact that can be negotiated (Ridgeway 1993). Jess Green, a member of the NCAI/NIGA Task Force, has written that "states such as Oklahoma refuse to honor IGRA yet insist that Indian gaming be restricted by the same federal law" (Green 1995, 3). While governors may justify their actions under narrow federalism grounds, the actions of U.S. Attorneys in the State have been less fathomable (Pitchlynn 1995a). In Oklahoma, "United States Attorneys have become major players in the political process of Indian gaming" (Green 1995, 3).

Second, policy in turn is the result of a political culture that, while in transition (England & Morgan 1993 and Morgan, et al. 1991) has not yet reached the point where political leaders have room to accept the tribes' interpretation of the IGRA. The observation of gambling expert William R. Eadington that this kind of activity "is still viewed by many members of society as a questionable,

if not immoral, activity that attracts questionable, if not immoral, people" (Eadington 1990, vi) seems particularly true in Oklahoma. There appears to be real conflict among voters on the broad issue of legalized or state supported gambling. A decade after approving horse racing and pari-mutual wagering, the lottery referendum was defeated. The immediate opposition that arose to the DeBartolo casino proposal indicates that changing public policy to permit that activity will be difficult.

Outside Lobbying: Not Yet

Finally, the inability of the tribes to unite politically has prevented them from competing effectively in the political arena with those opposed to <u>any</u> gaming expansion, such as religious groups' or those favoring only those forms of additional gaming that enhance their own economic interest, such as DeBartolo. While the tribes have come to strongly assert their individual sovereign status, they have not yet reached the point of collective action. The tribes have used the opportunity available to them under the IGRA to pursue their individual gaming interests. This has meant tribes either litigate or negotiate those interests independent of any joint interests. As has been shown, the general go-it-alone strategy is the result of the historic and cultural differences among the tribes.

Gaming is also a different kind of issue for the tribes than either taxation or cross-deputization. Gaming is potentially a source of additional competition among the tribes as they compete for limited leisure dollars. This kind of potential competition has elsewhere resulted in tribes working at cross-purposes politically, with one tribe or group of tribes attempting to expand their gaming, while another tribe or group of tribes attempts to prevent it. The same thing could happen in Oklahoma.

The obstacles to expanded gaming have not resulted from the inherent political status of the tribes but from their strategic choices and from the Oklahoma political environment. The latter includes public policy and its interpretation and implementation, and the attitudes and levels of responsiveness of Oklahoma public officials.

The fact that Oklahoma tribes have not engaged in outside lobbying and campaign activities to the degree that New Mexico tribes have does not diminish the legitimacy of such actions or call into question the dual status tribes possess. The unique history of Oklahoma tribes and the wide variety of indigenous cultures they represent within the context of Oklahoma's political culture establishes the parameters of tribal options. This can be seen in non-gaming issues such as smokeshop and gasoline taxation and cross deputization. Tribes have attempted to resolve these controversies through direct negotiations and law suits.

For Oklahoma tribes, inside individual tribal lobbying is the preferred method of achieving political and policy objectives.[17]

While the outcome for Indian gaming is thus far more limited in Oklahoma than it is in New Mexico, the political status of tribes in the two states is not fundamentally different nor are the fundamental sovereignty questions. Changes in any of the three conditions - public policy, institutional and official attitudes towards Indians, and the degree of cohesion among tribes - could produce similar results to those in New Mexico.

A change in public policy could result if the DeBartolo casino referendum is passed or if a second referendum schedule for a vote in early 1996 passes. State Question 669 would roll back property taxes and limit future property tax increases. Opponents of the measure have argued that if SQ 669 passes, state and local governments would need to find new sources of revenue. Casino gambling is pointed to as the most likely option. Either of these referenda would expand the Class III gaming opportunities available to Oklahoma tribes.

It is possible that the tribes could become more cohesive and active. One catalyst for this might be the sense of urgency surrounding the cuts made in the 1996

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[17] There are current discussions among some Indian leaders about creating a statewide Indian political action committee.

fiscal year Bureau of Indian Affairs budget (Reeves 1995). Tribes in Oklahoma and around the nation protested these cuts and promised to become active not only to restore funding levels but to oppose those favor the cuts in the 1996 elections. In late October 1996, Chickasaw Nation Governor Bill Anoatubby was proceeding with his plans to organize a state-wide Indian political action committee. At a minimum, he said, the Chickasaw Nation would have a PAC of its own in 1996 (Anoatubby 1995c).[18] Morgan, et al. observed that "Indian political activism" has "not been played out in the mainstream political arena" in Oklahoma (143). This may be about to change.

Absent a change in any of these conditions it is unlikely that official opposition to expanded Indian gaming will occur. However, if such changes did occur, Indian gaming will most assuredly grow in the state. First, a change in public policy would remove the rationale for opposition by both state and local officials. Second, if the state's tribes are able to become actively and effectively involved in supporting public officials who endorse their positions, Oklahoma tribes could have electoral success similar to that of New Mexico tribes.

These factors have individually and in combination affected the strategic choices of Oklahoma tribes and

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[18] In mid-December 1995 an inter-tribal group had begun organizing an Indian PAC, including the selection of officers and coordinators (Indian Leaders 1995).

resulted in an Indian gaming environment much more limited than in New Mexico. Several points of comparison can be drawn between tribal efforts in Oklahoma and New Mexico. First, tribes in Oklahoma and New Mexico have very different traditions of inter-tribal cooperation based in large part on the indigenous status of the tribes within the state. Second, the lack of tribal cohesiveness based on historical and cultural differences has prevented the tribes in Oklahoma from engaging in the kinds of tribal interest group activity utilized by New Mexico tribes, including involvement in political campaigns. Third, gaming tribes in New Mexico coalesced behind the strategic and tactical leadership of such individuals as Kevin Gover. Gover provided the political savvy and leadership that the tribes drew on throughout their struggle. This has been lacking in Oklahoma. Fourth, Gover's strategy and the tribes' commitment would not have been possible without the financial resources made possible by the success of gaming. Gaming revenues provided the war chest that funded the campaign to protect tribal gaming. Fifth, the opposition and obstacles of state and federal officials have forced the tribes into court much more often than the tribes in New Mexico have been. Lawsuits have sometimes been initiated by the tribes and sometimes by the State of Oklahoma. Sixth, the active opposition of Oklahoma's U.S. Attorneys have severely and directly curtailed Indian gaming in the state,

in dramatic contrast to the position of the U.S. Attorney in New Mexico. The seizure of tribal video machines by the U.S. Attorney for the Eastern District of Oklahoma stands in stark contrast to the "stand-down" agreement reached with New Mexico tribes by that state's U.S. Attorney. Seventh, the on-going issue of expanded non-Indian gaming in Oklahoma has added a dimension to the efforts of Indian tribes to expand their gaming that is not nearly as evident in New Mexico. The opponents of non-Indian gaming in Oklahoma have come to rely on the specter of expanded Indian gaming as a rhetorical device to bolster their arguments about the potential harmful effects of widespread gambling. Eighth, notwithstanding the issue of Indian gaming, tribal governments in Oklahoma continue to demonstrate their ability to act as sovereigns and, when conditions are ripe, engage in inter-governmental relationships with the State of Oklahoma.

Chapter 7: CONCLUSION

By studying how New Mexico and Oklahoma tribes have attempted to protect their gaming interests this dissertation has sought to answer the question, "What is the status of Indian tribes in the American political system at the end of the twentieth century" by studying how New Mexico and Oklahoma tribes have attempted to protect their gaming interests. The findings indicate that this status is unique in theory and vulnerable in practice. Tribal governments have commonly understood attributes of both sovereigns and interest groups. One aspect of their uniqueness is their ability to flexibly exercise those attributes under certain favorable conditions. The vulnerability of tribal status is apparent when certain other conditions occur, including the political Zeitgeist. The struggles of Indian tribes to control and expand gaming in Oklahoma and New Mexico have delineated the strengths and vulnerabilities of the tribes. This dissertation has taken an in-depth look at how some tribes have adapted their unique status in the American political system to meet historic challenges and new exigencies.

Five other findings of this study inform the discipline of political science about discrete aspects of the American political system. First, the filing of amicus curiae briefs by tribal attorneys on gaming and related sovereignty issues expands knowledge and understanding of the role of interest

groups in judicial system. Indian issues provide an intriguing insight into how the judicial system is used to further political and policy goals. This is most clearly seen when tribal and state governments oppose each other on issues involving a clash of sovereign interests. Second, and related to the filing of amicus briefs, is the significant role tribal attorneys play in tribal politics. The range of their involvement in tribal issues not only highlights one aspect of tribal politics, but provides new evidence of the pervasive influence lawyers have in American political life. Third, as demonstrated by the New Mexico and Oklahoma studies, the role of United States Attorneys in the policy process is potentially crucial, although largely unexplored by political science. This research builds on the minimal work that has been done in this area of judicial politics. Fourth, Indian gaming demonstrates that an issue of importance to Indian tribes can have an effect on related public policy and politics outside of Indian Country. As we have seen, clashes over Indian gaming in state legislatures can be devisive and nearly paralize a legislative session. A significant example is the New Mexico tribes' strategic campaign activities during the 1994 race for governor. Fifth, the circumstances under which the Indian Gaming Regulatory Act were passed shed new light on the significance of federal court decisions in setting the national legislative agenda.

The Status of Tribes in the American Political System

Indian tribes are unmistakably part of the American political system. Their separate sovereign status is recognized in the Indian Commerce Clause of the United States Constitution. It is not insignificant that Article I, Section 8, Clause 3 gives Congress the power to regulate trade with tribes, states, and foreign nations. Robert N. Clinton has noted of the Commerce Clause, "No power over the Indian tribes was conferred" nor was the new federal government "authorized to manage affairs of the Indians, but rather affairs with the Indians" (Clinton 1995, 1156-1157). For eighty-two years after George Washington was sworn in as president and the First Congress met in New York, the executive and the national legislature managed Indian affairs through legislation and the constitutional treaty making power. The latter was a tacit recognition that Indian tribes had a political status that was unlike the states and more resembled that of foreign nations.

As discussed in Chapter Two, the United States Supreme Court has continually set and reset the boundaries of tribal sovereignty. It has emphasized the inherent independent political status of tribes while recognizing the power of congress to exercise its "plenary power" to diminish that status or permit states to intrude upon it. Congress in turn has alternately acknowledged the separate sovereign status of tribes and devised policies to terminate that

status. The bright line of sovereignty, however, means that tribes have all of their inherent aboriginal sovereignty to the degree it has not been voluntarily ceded by the tribes or unilaterally extinguished by the Congress (Cohen 1942, 1982).

However, court decisions defining the limits of sovereignty do not fully define the political status of tribal governments. The United States Constitution, Supreme Court rulings, and historical fact establish the inherent and residual sovereignty of Indian tribes. Congressional policies have vacillated in their emphasis on it, but inherent tribal sovereignty remains. While the modern forms of tribal government are not those of pre-Columbian tribes (O'Brien 1989), they are recognized as legitimate governing entities by the federal government. In fact, the era of self-determination has strengthened tribal self-governance.

Sovereignty alone does not explain the political status of Indian tribes. Tribes do more than legislate, adjudicate, and administer. They also engage in the political processes of state and national governments in order to protect their sovereignty. Tribes often appear to act in ways similar to other arenas of government seeking to influence political institutions and the policy process. For example, elected and appointed tribal leaders testify at legislative hearings, lobby administrative bodies, and file

law-suits or amicus briefs in litigation in which their interests are at stake.

Tribes also act as classic American interest groups, becoming involved in the electoral process. Engaging in these activities takes them out of the realm of traditional inter-governmental lobbying efforts (Cigler 1995). Many contemporary tribal governments, often fueled by gaming money, make campaign contributions, utilize the media to garner support for their political goals, and mobilize tribal members and employees to bring pressure on public officials. All of these activities are outside the scope of state, county, and municipal governments and very much in the purview of interests groups.[1] However no interest group has constitutional standing giving Congress the sole authority to regulate its activities. While some interest groups have standing to intervene in some discrete issues, none have the sovereign responsibility to govern on behalf of an electorate living on lands that comprise a quasi-national land base. No interest group has an aboriginal sovereignty over members; tribal membership is beyond any Olsen-like scheme explaining why people join groups (Olsen 1971). You do not join a sovereign nation, you are born into it.

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[1] While unionized public employees are often active lobbyists and campaigners, they do so independently of any sanction or direction from the government entity they work for.

Indian tribes increasingly follow a 1991 observation of Senator Daniel K. Inouye (D-HI) to tribal leaders. The then Chairman of the Senate Select Committee on Indian Affairs said "you can maintain and strengthen your sovereignty by using the political process of the United States of America" (Inouye 1991, 7). Gaming as an issue of sovereignty and economic survival has made it imperative for tribes to use every asset and resource available to them to protect their interests. These include the financial resources generated by tribal gaming and the inherent flexible political status of tribal governments. The results have been increased activity by some tribes in the electoral process as well as in the more traditional intergovernmental lobbying areas.

This activity is especially evident with respect to the 1996 presidential election. Voter registration drives took place throughout Indian Country, including that located in Oklahoma and New Mexico. In New Mexico, precincts identified by the Secretary of State saw registration climb from 35,982 in 1994 to 37,480 in 1996(Indians voters 1996). According to attorney Kevin Gover, the national coordinator of the Democratic Native American Steering Committee, "We don't really divide between Republican and Democrat....We divide on whether someone is pro- or anti-Indian. That's the kind of political sophistication we're looking for" (Indians voters 1996).

Tribes and tribal enterprises, usually gaming related, were also making campaign contributions. Among those making significant contributions were the following to the Democratic National Committee: Oneida Tribe of Wisconsin ($40,000), Mille Lacs Grand Casino ($15,000) Abramson and Simpson 1996), St. Croix Tribal Council ($15,100), Oklahoma's Cheyenne Arapaho Business Committee ($100,000)(Ford 1996). Two years earlier the Sault Ste. Marie Tribe of Chippewa Indians endorsed Republican Governor John Engler and gave the state Republican Party $60,000 (Weeks 1995). The Choctaw Nation of Oklahoma made a $5,000 contribution to the congressional campaign of Democrat Darryl Roberts (Choctaw money 1996). Pojoaque Pueblo Governor Jake Viarrial told this author of the Pueblo making a $10,000 donation to a national Democratic Party fund-raiser and sitting at a table with Vice President Al Gore (Viarrial 1996).

These amounts pale when compared to those of the Mashantucket Pequot Tribe of Connecticut, operator of "the Western world's largest and most profitable casino" (Pollack 1996) and California tribes in the 1994 state Attorney General's race. Between 1993 and 1995, the Pequots made "soft money" contributions of $465,000 nationwide, $365,000 (O'Brien 1996) to various Democratic Party committees, including $100,000 to the Ohio Democratic Party (Sloat 1994). In 1994 California tribes, upset with incumbent

Attorney General's negative attitude towards Indian gaming, combined to give over $700,000 to his Democratic opponent (Fresno Bee 1994).

The fight by Indian tribes in New Mexico and Oklahoma over the past decade to control gaming has demonstrated the strengths and vulnerabilities of their political status. This fight, while over a new and complex issue, has occurred within the context of historic tensions in Indian policy and within the United States Constitution itself. Gaming has generated a struggle among sovereigns over the right to control resources and to define the extent of self-government permitted under the constitution. Historic and fundamental conflict over states' rights in the formulation and implementation of Indian policy are central to this struggle, as are the legal and moral commitments made to Indian tribes through treaties, laws, and court decisions. As seen in the different levels of political activities by New Mexico and Oklahoma tribes, unique historic factors specific to the political environment and Indian-white relations play a role in how tribes in a specific state use their political status. However, as noted in Chapter 6, even if a given state's tribes are politically inactive or constrained by the historical factors of the political culture, the fundamental political status of tribes is the same. Just as some states are better at presenting their

case to Congress, so are some tribes better able to put forward their political agenda.

J. Leiper Freeman's Fundamental Error

The discipline of Political Science has mostly ignored Indian politics and policy (See Chapter 1). When it has considered Indian tribes and organizations, the discipline has tended to place them in the context of economically disadvantaged minorities or ethnic groups or under the rubric "interest group." Almost any introductory American government textbook illustrates this. The view that Indian policy is largely one of interest group demands is classically demonstrated by J. Leiper Freeman's work on subsystems (Freeman 1955, 1965).

In his classic, seminal, and now mostly forgotten work on "subsystems" at the federal level, Freeman selected Indian policy to demonstrate the close interaction among congressional committees, federal agencies, and interest groups. Freeman's Indian policy subsystem on first look did - and does - resemble what later were also known as "iron triangles" and "subgovernments." A federal agency, the Bureau of Indian Affairs, administers policies established and funded by congressional committees after hearing from clientele groups. Organizations claiming to represent Indians have a permanent Washington presence, either maintaining independent national offices or hiring agents,

usually attorneys, to represent them inside the Beltway. Freeman observed that this subsystem, like others, "formed little political worlds of their own, slightly apart from the larger political world though interacting with it" (1955, 3).

There were and are several problems with Freeman's application of subsystem theory to Indian policy. His research focused on the New Deal, a period unique in the history of federal Indian policy. While writing of the "persistence" of the "Indian problem" Freeman failed to place Indian policy or the "problem" in its broader historical and legal context (Freeman 1965, 68). Consistent with most political scientists, he did not consider the sovereign status of Indian tribes. This is related to a second and unique problem with Freeman's analysis. As most of the few political scientists who study Indian policy, Freeman fails to cite the significant role of the Supreme Court in establishing the parameters of Indian policy.

Finally, the "Indian organizations" he studied were of a different nature than those involved in policy questions today. When the original version of The Political Process was published in 1955, Freeman emphasized the interaction among clientele groups, congress, and the bureaucracy. However, with the exception of a general description of consultation on the drafting of the Indian Reorganization

Act of 1934, he devoted little attention to Indian-led groups and did not cite a single one.

For the most part, this was not an oversight on Freeman's part, at least not in the first edition of the book. It was not until the 1950s that Indian-led organizations began to influence the development of Indian policy. Since Freeman's study was based in large part on the era ending in the mid-1940s, his failure to note Indian-led groups is understandable in the first edition. By the time Freeman's revised edition was published in 1965, however, Indian-led organizations were becoming quite visible and significant actors in policy matters.

A Unique But Vulnerable Status

That tribes are vulnerable to the political currents and Zeitgeist is clearly seen in the attack on Indian gaming coming at the same time as national politicians and the United States Supreme Court attempt to "devolve" more power to the states. As has been seen in the gaming and other related tribal state conflicts in Oklahoma and New Mexico, "The federalism debate has always greatly affected Indian tribes - and the field of Indian law - and the renewed debate is no exception" (Monette 1994, 618).

Conflict over gaming also demonstrates the historical fact that tribes remain at risk in the American political system. Tribes, although more sophisticated in their use of

the political tools available to them, must nonetheless be vigilant in responding to the demands of other powerful actors in that system. Indian tribes have always been at risk when the avaricious urges of the nation desired their natural resources, whether they be land, water, minerals from the earth, or gambling.

The Use of Amicus Curiae Briefs in Indian Litigation

As has been demonstrated, tribes and Indian organizations have been very aggressive in filing amicus curiae briefs in law-suits before the United States Supreme Court involving gaming and other issues relating to tribal sovereignty. The numbers of briefs filed and the tribal resources expended on them demonstrate how the American judicial system is used by those seeking either to establish a favorable policy or prevent an adverse policy from being promulgated. The coordinated manner in which these briefs are often filed is illustrative of the common ground tribes find on most issues relating to gaming and sovereignty. In addition, how tribal attorneys decide who files which briefs in a given case indicates a sophisticated system of decision-making regarding resources and expertise.

We thus see in tribal amicus activity a clear example of judicial lobbying. When we select discrete litigation pitting states' rights against tribal sovereignty this phenomenon becomes dramatically clear. Inter-governmental

disputes, i.e., states versus tribes, illustrates the significant role courts have in resolving these kinds of questions. The degree of seriousness that each side views such questions is demonstrated by the unanimity of tribes on one side of an issue and that of states on the other. In Seminole Tribe of Florida v. Florida and the three recent Oklahoma Tax Commission cases, states and tribes clearly delineated their different perspectives in the briefs filed with the Court.

Another area of interest in litigation involving tribes and states is the position of the United States government as seen in the amicus briefs filed by the U.S. Solicitor General. In recent years the role of the Solicitor in guiding U.S. Supreme Court action has grown. As in other types of law suits, the Court will often ask the Solicitor General for the government's position on an Indian issue. One way of determining how a particular administration views Indian sovereignty or states' rights questions is to look at which side the government's briefs supports.

The Role of Tribal Attorneys

An issue related to the filing of amicus curiae briefs is the general role of tribal attorneys in tribal politics. The significant role tribal attorneys have played in Indian gaming in New Mexico and Oklahoma has been amply shown in this dissertation. Tribal attorneys have been shown to act

in at least the following capacities: 1) litigator; 2) lobbyist; and 3) political strategist.

As litigators, tribal attorneys are involved in standard client-attorney relationships. They advise their clients of the legal options and strategies available in a potential law suit. They file briefs, offer motions, take depositions, in short, do what all attorneys do when representing a client. The difference is that their client is a sovereign government. Generally, tribal attorneys will have fewer resources available to them than their opposite number representing states or large corporations. The exceptions are those attorneys representing tribes with lucrative gaming operations.

As lobbyists, tribal attorneys engage in all of the activities one would expect them to in advancing the policy goals of their clients. This dissertation has expanded the literature of attorney/lobbyists by providing evidence of their work on behalf of tribes at the state and national level. We have seen an attorney for a New Mexico pueblo draft legislation to be introduced by a legislator. We have also seen the role attorneys played and continued to play as advisors to tribes and participants in the efforts to pass and amend the Indian Gaming Regulatory Act.

Finally, in a role related to the above, tribal attorneys have played significant roles in devising the political strategies implemented to promote Indian gaming.

Attorneys such as New Mexico's Kevin Gover are heavily involved in state and national politics and use their expertise and contacts to further tribal policy positions. At the national level, as members of the various National Indian Gaming Association working groups, attorneys provide significant assistance to tribal leaders in devising coordinated strategies that will advance tribal gaming interests legislatively, politically, and judicially.

The Role of the United States Attorney

It became clear early in the research for this dissertation that the role of United States Attorneys was potentially a crucial variable in the success or failure of tribal attempts to operate gaming enterprises. Arising first in a discussion with Ponca Tribal attorney Gary Pitchlynn, the largely independent discretionary authority of U.S. Attorneys became a focus of this research when it became evident that the differences between New Mexico and Oklahoma gaming tribes were in large measure due to the actions of these federal officials. Much of what Eisenstein argued in his excellent Counsel for the U.S. (1978) was found to be true in the case of U.S. Attorneys and Indian gaming. For example, the influence of local political connections, political ambition, and personal experiences of these officials can be seen as likely motives for the actions of New Mexico's John Kelly and Oklahoma's Steve

Lewis and John Raley. Second, the independent nature of their presidential appointments and their relative freedom from control by the Attorney General gives them broad latitude in the choices they make about law enforcement, again, much in evidence in the two states under study here.

There are, however, at least two additional findings regarding the role of U.S. Attorneys emerging from the present research. First, these presidential appointees, in exercising their independent discretionary power, play a significant policy-implementing role. Absent a clear policy position from the White House or the Justice Department, U.S. Attorneys may choose to implement policy in a variety of ways, none of them necessarily consistent across federal districts. While this has been evident in the diverse actions of U.S. Attorneys in the issue of Indian gaming in New Mexico and Oklahoma, it has also been true within a single state. U.S. Attorneys in two separate California districts have made different judgements about enforcing IGRA within their jurisdictions (Becker 1996).

The issue of policy variance across federal districts and states indicates that federalism is an important matter in the discretionary role of U.S. Attorneys. While Eisenstein discusses the personal connections of a federal attorney to his or her state and community, he generally does so in regard to the political constraints placed on the individual office holder. What is significant about Indian-

gaming and the actions of U.S. Attorneys is that it requires the federal appointee to consider not only federal law, in this case IGRA and the Johnson Act, but state law as well. It requires the U.S. Attorney to interpret state gaming law to determine what kinds of Indian gaming are permissible under federal law. As we have seen in New Mexico, John Kelly waited for two state supreme court decisions before taking actions to close the Indian operated casinos in his state. Similarly, Steve Lewis acted without specific Justice Department clearance and conducted a raid on an eastern Oklahoma Indian tribe based on his interpretation of state gaming law, ignoring a tribal court ruling in the process.

Unmentioned in Eisenstein was the role of U.S. Attorneys in Indian Country generally and Indian policy specifically. Depending on the Indian population and land base of a given federal district, a United States Attorney's office may find itself devoting considerable amounts of its resources to law enforcement in Indian Country. This is certainly the case in New Mexico and Oklahoma, but is even more true in states like South Dakota (Hogen 1996). Law enforcement in Indian Country clearly has ramifications for federalism issues as well as for the future political ambitions of United States Attorneys. Kelly resisted considerable public pressure for a number of years before finally moving to close the Indian casinos in New Mexico and

this could have an impact on any future political ambitions he may have in the state. Oklahoma's Lewis, a former Speaker of the State House of Representatives and one-time candidate for the United States Senate has had a career based largely on electoral politics.

An interesting aspect of John Kelly's position in New Mexico is his emergence as a political figure to be attacked for doing too little or too much regarding the continuing operation of tribal casinos. As noted in Chapter 4, by January 1996, Kelly was the target of attacks by Indians for begining forfiture proceedings against casinos. Kelly aslo took a great deal of heat for his handling of the Mescalero's Apache Casino. Mescalero Apache President Wendell Chino demanded that Kelly be removed for attempting to enforce a Federal Disctric court holding that the Apache Casino was operating illegally. Furthemore, he became the only tribal leader in New Mexico to endorse Republican Presidential candidate Bob Dole, appearing with Dole at an Albuquerque rally in mid-October.

The Impact of "Indian Issues" on Politics and Policy Outside Indian Country

Because there are discrete policy and law subfields with the prefix "Indian" attached to them, the assumption is often made that they operate in a vacuum and have little connection to broader areas of public policy and law. The battles over Indian gaming have demonstrated that an Indian

policy issue can have a major impact on otherwise unrelated issues and the political process itself.

Indian gaming has presented fundamental questions about federalism and inter-governmental relations. IGRA and the Supreme Court's Seminole decision have done more than define the parameters of Indian gaming; they have played a dramatic role in the redefinition of the federal-state balance of power. By limiting the power of Congress to abrogate state 11th Amendment sovereign immunity under the Commerce Clause, the Court has clearly sided with and advanced the current political tide of devolution. The governors and states rights won and Congress lost. The current Court and the Republican lead Congess have shown that federalism is not dead as a fundamental precept of American politics, and that defining its balance is a dynamic process. As we saw in Chapter 2, conflicts over Indian policy in courts and Congress have often played a role in setting the parameters of the balance in federalism.

The political controversies of Indian gaming itself have forced many states to reconsider their own gaming policies, particularly in light of Cabazon and IGRA. In Oklahoma a ballot initiative was begun because supporters of casino gambling in the state claimed that Indians were likely to wind up with a monopoly on Class III gaming if the state did not legalize the activity. We have also seen how Indian gaming issues in New Mexico drastically altered the

conventional wisdom of legal gaming in the state. Furthermore, an unanticipated consequence of Indian gaming and the compacts signed by Governor Gary Johnson and the tribes was a state supreme court ruling sharpening the lines of executive and legislative authority. As demonstrated by the debate over the motor fuel tax in Oklahoma and New Mexico, other issues stemming from the political status or concerns of Indian tribes can find their way onto a state's legislative or political agenda.

The financial resources generated by gaming have enabled some tribes to become significant players in the political process. New Mexico's gaming tribes have demonstrated how a sophisticated political operation can be mounted by tribes with the money, leadership, and determination to do so. In a November 1, 1996 ad in the Albuquerque Journal, Pojoaque Pueblo Governor Jake Viarrial, noting the mounting political attacks on Indians wrote, "So, as a tribe, we have been forced to learn the rough and cruel game of politics (Paid Political Ad., 1996).Chapter 4 and 5 described the well- organized and generously funded effort mounted by tribes in that state to elect a governor favorable to their cause and then win over public opinion and secure the passage of pro-gaming legislation.

Their efforts in turn have had an impact on state politics, including exacerbating partisan differences between the governor and the legislature, and clarifying the

conflicting ambitions of some of the state's leading political figures. As the 1996 election year got underway, tribes made strategic decisions concerning which legislative races to become involved in. Certain encumbants which were perceived as anti-Indian gaming were targeted and contributions made to their opponents. The tribes were bi-partisan in their endorsements. Santa Ana, Pojoaque, and Sandia pueblos were the leading contributors in the June Primary (Cole, 1996e). In addition to contributions made to candidates, five Pueblos made soft money contributions to the Democratic National Committee totaling $44,500 (Cole, 1996f). The November election saw three of the tribally endorsed candidate losing, one Supreme Court Justice candidate, and two candidates for the state legislature. All of the Indian legislators running were re-elected.

New Mexico is not an isolated case. Connecticut's Mashantucket Pequot Tribe, many California tribes, and tribes in Wisconsin and Minnesota have also become active politically because of the gaming issue. Even Oklahoma tribes are making historic efforts in 1996 to become involved in the electoral process, having not only been shut out of expanded gaming opportunities, but also recently engaging in a bitter legislative battle to keep from losing the gains made in Oklahoma Tax Commission v. Chickasaw Nation of Oklahoma.

The Role of Federal Courts in Setting the National Legislative Agenda

The events leading to Congress passing the Indian Gaming Regulatory Act in 1988 were spurred in large measure by federal court rulings handed down in litigation resulting from tribal attempts to expand their gaming enterprises and prevent state governments from exercising any regulatory authority over them. As first lower federal courts and then the Supreme Court itself ruled in favor of the tribes, interest groups opposed to tribal gaming turned to Congress for a remedy and relief. As described in Chapter 3, the Schattschneider-like efforts of non-Indian gaming interests and state officials to limit the court-determined rights of tribes to operate gambling ventures led them directly to Congress. While the legislation that resulted has been, at best, a mixed blessing for the tribes, it was fortunate for the tribes that the leading congressional actors - Udall, Inouye, McCain - were pro-Indian. Nevertheless, as the debates and reports indicate, the issue was clearly on the congressional agenda because of the rulings of federal courts over a period of four years.

The findings of this dissertation regarding the passage of IGRA expands the literature of agenda setting. While Henschen and Sidlow (1989) made a contribution to the field much beyond Kingdon, they did not go far enough in their own research. Finally, the actions of tribes, states, and non-Indian gaming interests in moving from the courts to the

legislature expand Schattschneider's (1960) ground-breaking work on the "scope of conflict" over political and economic issues.

All five of these areas are worthy of additional research. They not only illuminate the study of Indian politics and policy, but also expand the knowledge base of Political Science regarding the entire American political system.

A Final Word on the Status of American Indian Tribes in the American Political System at the End of the Twentieth Century

The status of tribes combines sovereignty and interest group activity in ways unique in the American political system. The self-governing powers of tribes rests on aboriginal sovereignty and national policy. While their status remains "dependent" and tribes no longer are dealt with through the treaty process, they have an evolving place in the American system of federalism. As has been noted, American federalism itself is a dynamic process. As tribes gain governing experience and Congress delegates them governing authority, tribal governments assume a status above local government and increasingly on a level resembling that of states. Administratively and statutorily, for example, tribes have been granted the right to be treated as states in some areas of environmental protection (Gover and Cooney 1996, 36).

As has been shown, states and tribes have contending views of the extent of sovereignty each may exercise. This is classic intergovernmental competition and conflict. Gaming is a striking example of the dynamic nature of federalism, as tribal, state, and federal governments each exercise some amount of sovereignty over gaming in Indian Country. The authority exercised by tribal governments is the result of tribal sovereignty. In passing the Indian Gaming Regulatory Act, Congress recognized a state interest in Indian gambling activities, limiting tribal sovereignty and exercising its broad plenary powers in Indian affairs. The irony of IGRA is that eight years after its passage, the law is disliked by state governors as much as it is by tribal leaders. (See Chapter 3 for an example of the views on IGRA held by some governors.)

The Seminole decision was an explicit recognition of the federalism question involved in IGRA; the Court diminished congressional power to abrogate the states' 11th Amendment sovereign immunity. This has broad implications for the federal-state balance of power, including the more than sixty year trend of expanding the power of the national government at the expense of state governments. This trend can been seen in recent laws passed by Congress and sometimes echoed by President Clinton. Seminole is one a series of Supreme Court decisions that have in some ways

limited Congressional power under the Commerce Clause. More of these decisions are expected in the 1996-97 term.

With renewed partisan political emphasis on the Tenth Amendment and the Court's concern about congressional authority under the broad commerce clause, federalism is in the process of being redefined. Tribes are clearly affected by this process. They are turning to the courts and legislatures to achieve legal and political recognition of their sovereign status. In so doing, they are behaving as other sovereigns in the federal system. While some of this is not new (Viola , Norgren 1996) the degree of sophistication and resources brought to bear in the process is historically new. Native American Rights Fund Executive Director John E. Echohawk noted in 1990, "What's happening is that tribal governments are becoming a permanent part of the fabric of American federalism....You have a federal government, state government and tribal government - three sovereigns in one country" (Moore 1990).

In the battle over Indian gaming, tribes have also rediscovered and redefined the other aspect of their status, that of interest groups. Their goals in behaving as interest groups include influencing other levels of government. Two major aspects of this activity, however, make Indian tribes as interest groups unique. First, as has been detailed, tribal governments and enterprises can become directly involved in electoral politics. Second, the goals

of tribal governments resemble those of other groups only superficially. While attempting to get a larger piece of the federal pie like other interest groups, tribal governments' pleas are based on their status and relationship with the federal government. Treaty obligations and the trust relationship mean tribes have a base from which to approach Congress that states do not have.

How tribes utilize their status varies widely from tribe-to-tribe and state-to-state. As demonstrated in the Oklahoma and New Mexico chapters, historical, political, and cultural factors impose limits or pose political opportunities for tribes. Individual and cooperative political leadership among the tribes may also be important. While there are examples of effective tribal leaders among Oklahoma tribes, rarely do they form a united front, even on Indian gaming. This is partly the result of the tribal and historical differences described in Chapter 6. On the other hand, similar factors have had the opposite effect in the tribes' fight for Indian gaming in New Mexico.

However, the differences among the tribes in the two states do not indicate a difference in political status within the political system. All tribes have the same status and exercise it to the degree resources, leadership, and political environment make action possible. Finally, while there is a firmly established tribal-federal

relationship, tribes and states have no formal relationship. It must be constantly established and re-established, making effective use of tribal political status increasingly imperative.

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APPENDIX

Interviews

William Carmack, Professor Emeritus of Communications, University of Oklahoma; former Administrative Assistant, U.S. Senator Fred R. Harris; former Assistant Commisioner of Indian Affairs; former Director, National Council on Indian Opportunity
Norman, OK: November 18, 1991 and February 24, 1992

LaDonna Harris, President, Americans for Indian Opportunity
Santa Ana Pueblo, NM: August 25, 1994

Fred R. Harris, University of New Mexico Political Science Professor; former U.S. Senator from Oklahoma
Albuquerque, NM: August 22, 1994

Ray Powell, Chairman, New Mexico Democratic Party
by telephone, Albuquerque, NM: August 22, 1994

Susan Williams (Sisseton-Whapaton), attorney, Gover, Stetson, & Williams, Albuquerque, NM
Albuquerque, NM: August 25, 1994

Frank Chavis (Sandia Pueblo), Co-Chairman, New Mexico Indian Gaming Commission
Albuquerque, NM: August 23, 1994
by telephone, Albuquerque, NM: March 17, 1995
Santa Fe, New Mexico: March 17, 1995

Gary Pitchylnn (Choctaw), attorney, Pitchylnn, Odom, Morse & Ritter of Norman, OK
Oklahoma City, OK: February 9, 1995
Norman, Ok: March 27, 1995
Norman, by telephone, July 20, 1995
Norman, by telephone, March 28, 1996

Enoch Kelly Haney (Seminole), Oklahoma State Senator
Oklahama City, OK: February 28, 1995

Joe S. Sando (Jemez Pueblo), Indian Pueblo Cultural Center Archives, Albuquerque, NM
Albuquerque, NM: March 13, 1995

Bruce King, former Governor of New Mexico
Santa Fe, NM: March 14, 1995

Rosalyn North, Secretary, New Mexico Senate Select Committee on Gaming
Santa Fe, NM: March 14, 1995

Phillip Lujan (Kiowa-Taos), Professor of Communications, University of Oklahoma; Tribal Court Judge for Norman, OK: April 7, 1995

Rennard Strickland (Cherokee-Osage), Dean, Oklahoma City Universtiy College of Law
Norman, Ok: April 13, 1995

Kirke Kickingbird (Kiowa), Professor of Law and Director Native American Legal Resource Center, Oklahoma City University College of Law; Counsel to Oklahoma Governor Keating for Indian Affairs
Oklahoma City, OK: April 18, 1995

Bill Anoatubby (Chickasaw), Governor, Chickasaw Nation
Oklahoma City, OK: April 21, 1995
Ada,OK: July 3, 1995
Norman, OK: October 23, 1995

Lawrence S. Snake (Delaware), President, Delaware Nation of Western Oklahoma, Anadarko, OK
Norman, OK by telephone: July 19, 1995

Julie Rorie, Staff Attorney, Administrative Office, Oklahoma Supreme Court
Norman, OK by telephone: July 25, 1995

Minnis, Michael, attorney, Minnis & Associates, Okalahoma City; attorney for Citizen Band Potawatomi Tribe
Norman, OK by telephone: July 27, 1995

David McCullough, attorney, Minnis & Associates, Oklahoma City; attorney for Citizen Band Potawatomi Tribe
Norman, OK by telephome: July 31, 1995

Jess Green (Chickasaw/Choctaw), attorney, Ada, OK. Attorney for Oklhaoma Indian Gaming Association and tribes
Norman, OK by telephone: August 1, 1995
Ada, OK: August 4, 1995
Norman, OK by telephone: October 11, 1995

Robert R. Stephens (Chickasaw), Purcell, OK. Former Chairman and Vice Chairman, Oklahoma Indian Gaming Association; former Gaming Commissioner, Chickasaw Nation.
Norman, OK by telephone: August 5, 1995

Curtis Wilson, Muscogee Area B.I.A., Contract Office
Norman, OK by telephone: September 13, 1995

James C. Cissell, Clerk of Courts, Hamilton County, Cincinnati Ohio; United States Attorney, Southern District of Ohio, 1977-1981
Norman, OK by telephone: September 27, 1995

Web Huntly (Chickasaw), Manager, Chickasaw Gaming Center, Thackerville, OK
Norman, OK by telephone: October 20, 1995

Barbara Warner (Ponca), Director, Oklahoma Indian Affairs Commission
Norman, OK by telephone: October 20, 1995

Ken Bellmard, Ponca City, Oklahoma, attorney for the Miami, Tonkawa, Modoc, and Otoe/Missouria Tribes
Norman, OK by telephone: October 20, 1995

Tracy Burris (Chickasaw/Choctaw), Chairman, Oklahoma Indian Gaming Association; Chickasaw Gaming Commissioner
Norman, OK by telephone: October 23, 1995
Norman, OK by telephone: March 28, 1996

G. William Rice (Cherokee-Pawnee), Cushing, OK; Attorney General, Sac & Fox Nation; Professor of Law, University of Tulsa Law School
Norman, OK by telephone: October 27, 1995

Richard W. Hughes, Santa Fe, NM; attorney for Santa Ana and San Felipe Pueblos
Norman, OK by telephone: October 27, 1995
Norman, OK by telephone: December 15, 1995
Santa Fe, NM: January 18, 1996
Norman, OK by telephone: July 25, 1996

Charles McLoughlin, Assistant United States Attorney, Eastern District of Oklahoma, Tulsa
Norman, OK by telephone: November 13, 1995

Verna Williams-Teller (Isleata Pueblo), former Governor Isleta Pueblo; Public Gaming Research Institute, Albuquerque, NM
Isleta Pueblo, NM: January 15, 1996

Ray Jojola (Isleta Pueblo), Isleta Pueblo Tribal Councilman
Isleta Pueblo, NM: January 15, 1996

Stanley Lucero (Laguna Pueblo), Lt. Governor Laguna Pueblo
Santa Fe, NM: Janaury 16, 1996

Teresa Salazar, Legislative Analyst, New Mexico State Representative Linda Lovejoy (Navajo)
Santa Fe, NM: January 17, 1996

Leonard Tsosie (Navajo), New Mexico State Senator
Santa Fe, NM: January 17, 1996
Santa Fe, NM: February 3, 1996

Rick Vigel (Tesueque Pueblo), Governor Tesueque Pueblo
Santa Fe, NM: January 17, 1996

Rex Hackler, Hackler, Rivera, Inc., Bernalillo, NM
Santa Fe, NM: January 18, 1996
Santa Fe, NM by telephone: January 20, 1996
Santa Fe, NM: February 2, 1996
Norman, OK by telephone: March 15, 1996

Anne Marie Beverly, Casino Host, Santa Ana Star Casino, Santa Ana Pueblo, NM
Santa Fe, NM: January 18, 1996

Jake Viarrial (Pojoaque Pueblo), Governor Pojoaque Pueblo
Pojoaque Pueblo, NM: January 19, 1996

John Pinto (Navajo), New Mexico State Senator
Santa Fe, NM: January 19, 1996

Regis Pecos (Cochiti Pueblo), Executive Director New Mexico Office of Indian Affairs, Santa Fe, NM
Santa Fe, NM: January 19, 1996

Ron Shutiva (Acoma Pueblo), Governor Acoma Pueblo
Santa Fe, NM: February 2, 1996

Vince Lujan (Taos Pueblo), Taos Pueblo Councilmemeber
Santa Fe, NM: February 2, 1996

Tom Teegarden, Director, Taos Pueblo Office of Community and Economic Development, Taos Pueblo, NM
Santa Fe, NM: February 2, 1996

Odis Echols, President, Echols Enterprises, Albuquerque, NM; Registered Lobbyist for Pueblo of Sandia and the New Mexico Indian Gaming Association
Santa Fe, NM: February 2, 1996

Kevin Gover, (Pawnee) attorney, Gover, Stetson & Williams, Albuquerque, NM; attorney for Pojoaque Pueblo
Santa Fe and Tesuque Pueblo, NM: February 3, 1996

Lisa Gover (Pawnee) attorney, Albuquerque; staff, New Mexico Indian Gaming Association
Santa Fe and Tesuque Pueblo, NM: February 3, 1996
Tulsa, OK: June 5, 1996
Norman, OK by telephone: July 13, 1996

Thorpe, Grace (Sac and Fox), President, No Nuclear Waste on Indian Lands (NECONA); Member, Sac and Fox NAtion Health Commission
Guthrie, OK: February 19, 1996

Ronald P. Lopez, Public Affairs Officer, United States Attorney's Office, Albuquerque, NM
Norman, OK by telephone: March 14, 1996

Herbert A. Becker, Director, Office of Tribal Justice, U.S. Department of Justice, Washington, D.C.
Norman, OK by telephone: March 15, 1996

Phillip Hogen (Oglala Lakota), Commissioner, National Indian Gaming Commission; former United States Attorney for South Dakota
Norman, OK by telephone: May 6, 1996