COMMENTS

Split, Double Down, or Hit Me: An Analysis of the 1993 and 1997 Class III Michigan Gaming Compacts

President Ulysses Grant’s Peace Policy proposed to Congress in 1870 expressed the desire for Native Americans to hold “self-sustaining avocations, and . . . be visited by the law-abiding white man with the same impunity that he now visits the civilized white settlements.” After one hundred twenty-nine years, Native Americans hold self-sustaining avocations working in tribal casinos and the white man visits the tribal casinos on the reservations as he visits other settlements.

I. INTRODUCTION

Since the United States was established, the federal government has moved from a position of acknowledging American Indian tribal sovereignty to forcibly assimilating American Indians, to encouraging tribal self-government. Although the federal government’s current position encourages self-government, a tribe’s ability to govern itself is often dependent upon the whim of the federal government or the United States Supreme Court.

Acting under the ambit of tribal self-government, tribes began operating casinos as a means of surviving the onset of financial crises. Consistent with one commentator’s opinion that “the only thing

1. FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 135 (1990).

2. In the 1970s and 1980s, budget cuts in appropriations that benefited Native Americans escalated financial crises on many reservations. ENCYCLOPEDIA OF AMERICAN INDIAN CIVIL RIGHTS 144 (James S. Olson et al. eds., 1997). Currently, “Indian per capita income is about 40% of the national average, the Indian poverty rate is almost four times the national average, [and] the incidence of Indian homes lacking complete plumbing is over 14 times the national average . . . .” Stephen Cornell et al., American Indian Gaming Policy and Its Socio-Economic Effects: A Report to the National Gaming Impact Study Commission (visited Feb. 1, 1999) <http://www.indiangaming.org/execsrum.html>. Moreover, the life expectancy of a Native American is 47 years, but the life expectancy of other Americans is 78 years. National Indian Gaming Association, Where Indian Gaming Proceeds Go (visited Feb. 1, 1999) <http://www.indiangaming.org/proceeds.html>.
that the non-Indians hate more than Indians on the government dole is Indians making an honest living," 3 state governments have fought hard to prevent tribal casino success.

This is evident in Michigan, where tribal gaming has been the topic of debate. This debate has expanded from whether tribes have the authority to engage in gaming, to the question of whether Detroit should allow persons other than tribes to operate casinos. 4 The benefits that casino revenues have conferred on tribal life are not debatable. Revenues from gaming support health clinics, college education, retirement benefits, classrooms, and housing. 5 In 1985, prior to the advent of Indian gaming, the tribal unemployment rate in Michigan was sixty-five percent; in 1994, the tribal unemployment rate had dropped to five percent. 6

To alleviate the conflicts between the tribes and the states over gaming issues, Congress passed the Indian Gaming Regulatory Act (IGRA). 7 Under this act, discord between the tribes and the states revolves around what IGRA classifies as Class III gaming, which requires a compact executed between the tribe and the state. Pursuant to IGRA, many tribes began entering compacts with states. 8 After

Because gaming provides tribal nations "with the first real means of maintaining an autonomous existence since the great buffalo roamed," many refer to Indian gaming as the "New Buffalo." Jason D. Kolkema, Comment, Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites, 73 U. DET. MERCY L. REV. 361 (1996).


5. ARLENE HIRSCHFELDER & MARTHA KREPE DE MONTANO, THE NATIVE AMERICAN ALMANAC 224-25 (1993). Tribes are not "rolling in dough" as result of tribal gaming. National Indian Gaming Association, supra note 2. IGRA requires that net revenues be used only to fund tribal government, to provide for the general welfare of the Indian tribe and its members, to promote tribal economic development, to donate to charitable organizations, or to help fund operations of local government agencies. 25 U.S.C. § 2710(b)(1) (1994).


7. For a full discussion of IGRA, see infra Part III.

8. As of November 24, 1998, 157 tribes in 24 states engaged in 196 compacts. Bureau of Indian Affairs, Office of the Commissioner, Tribal-State Compact List (visited Jan. 1, 1999) <http://www.doi.gov/ bia/foia/compact.htm#m>. The states that have entered compacts are Arizona, California, Colorado, Connecticut, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Washington, and Wisconsin. Id. As compacts are approved or amended, notice is published in the Federal Register. See, e.g., Notice of
much litigation and negotiation, Michigan engaged in Class III compacts in 1993 with seven tribes,\footnote{Amendments to Approved Tribal-State Compact, 64 Fed. Reg. 14,746 (1999).} and then again in 1997 with four other tribes.\footnote{The seven tribes that entered compacts with Michigan in 1993 are the Bay Mills Indian Community, the Keweenaw Bay Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Saginaw Chippewa Indians of Michigan, and the Sault Ste. Marie Tribe of Chippewa Indians. For the 1993 Compacts, see Fraser, Trebilcock, Davis & Foster, Gaming Compacts (visited Feb. 1, 1999) <http://www.casinolaw.com/jurisdictions/michigan/compacts/>.}

This Comment argues that the 1993 and 1997 Compacts diminish tribal sovereignty by allowing the state to tax gaming and by subjecting the casinos to state laws. To understand the significance of the Compacts, a brief history of tribal sovereignty, contained in Part II, and an explanation of IGRA, in Part III, are necessary. After giving an overview of state and federal taxation of Native American tribes in Part IV, the litigation prior to the compacts will be discussed in Part V. This Comment then presents the 1993 and 1997 compacts and a comparison and analysis of the two in Part VI.

II. TRIBAL SOVEREIGNTY

The exact status of Native American tribal sovereignty is rather nebulous and the focus of much discussion. The following statement of Justice Miller, made over one hundred years ago, is still apropos:

The relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character . . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.\footnote{United States v. Kagama, 118 U.S. 375, 381-382 (1886).}

The varying approaches taken by the United States government toward Native Americans has contributed to the confusion. The federal government’s method evolved from the pre-nineteenth century notion of Native American segregation to the late nineteenth century
notion of assimilating Native Americans into "the American way."  
Although the United States government, from its inception, has continuously encroached upon tribal sovereignty, 13 the recent trend favors tribal self-determination. 14

Prior to the "discovery" of America, Native American tribes were independent sovereign nations, exercising all advantages of self-determination and autonomy. 15 When the European colonists arrived, they interacted with Native American tribes as fellow sovereign nations. 16 With the birth of the United States, our founding fathers continued to interact with Native Americans in the manner instituted by the European nations. The framers of the Constitution viewed tribes as sovereign nations, and George Washington engaged in a series of treaties with tribes in the same manner that he did with other foreign nations. 17

This approach would change. Tribal sovereignty would be divested through treaties, judicial opinions, and acts of Congress. Through treaties, tribes agreed to submit to the protection of the United States, 18 and became dependent nations. 19 Thus, Native Americans entered agreements prohibiting their exercise of sovereign power when it conflicted with the sovereign power of the United States. 20 The Supreme Court's first declaration of the status of Native

13. See id. at 288.
16. See id.
18. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 5 (1994). In a letter about Native Americans, Thomas Jefferson wrote that "[w]e presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them." Id. at 6. The text of the Treaty of Holston, between the federal government and the Cherokees, acknowledged the Cherokees' right of self-government and their status as a nation, but recognized the protection of the United States. Choctaw Nation v. Oklahoma, 397 U.S. 620, 623 (1970).
19. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 40 (1982 ed.). Native Americans entered treaties regulating their protection and creating exclusive trade relations, making them both politically and economically dependent. See id. at 41.
Americans is found in *Worcester v. Georgia.* Chief Justice Marshall postulated that the "several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive," creating the axiom that Native American reservations are separate dependent nations not subject to state regulations. Nevertheless, in *Johnson v. M'Intosh,* Chief Justice Marshall stated that "[e]ven if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state. The same treaties and negotiations, . . . show their dependent condition."

At the end of the nineteenth century, the federal government shifted toward ending tribal sovereignty. In 1871, Congress terminated making treaties with tribes. Sixteen years later, Congress passed the Indian General Allotment Act, known as the Dawes Act, which instituted a policy of assimilation. In the following years, the federal government began to partition tribal lands and to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large."

During the twentieth century, the federal government has equivocated in its policy toward tribes. In 1933, "the federal government abandoned its effort to assimilate Indians for a policy that emphasized tribal sovereignty and self-determination." The next year, Congress attempted to restore tribal self-government by enacting the

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M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).


22. *Id.* at 557.


24. 21 U.S. (8 Wheat.) 543 (1823).


No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.


30. **Kenneth R. Phlip, Indian Self-Rule 16 (1986).**
Indian Reorganization Act.\textsuperscript{31} Moving to the other end of the spectrum, Congress, during the 1950s and 1960s, terminated federal recognition of more than one hundred tribes.\textsuperscript{32} Congress also passed Public Act 280, which granted states some civil and criminal jurisdiction over tribes.\textsuperscript{33} In the 1970s and 1980s, the Supreme Court followed the inclination against tribal self-government by introducing a “trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.”\textsuperscript{34} Congress, on the other hand, passed the Indian Financing Act of 1974\textsuperscript{35} and the Indian Self-Determination and Education Assistance Act\textsuperscript{36} in its effort toward tribal self-government.\textsuperscript{37}

Presidents Kennedy, Lyndon Johnson, and Nixon generally followed the principles behind the Indian Reorganization Act, attempting to strengthen tribal sovereignty.\textsuperscript{38} President Reagan attempted to encourage tribal economic self-sufficiency by reducing subsidies.\textsuperscript{39} Currently, it is widely accepted that Native American sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.”\textsuperscript{40}

III. THE INDIAN GAMING REGULATORY ACT

Native Americans engaged in games of chance long before Co-

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This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians.

\textit{Id.} at 152.


36. \textit{Id.} § 450.


38. PHILP, \textit{supra} note 30, at 22.


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lumbus discovered America.  Nevertheless, the first commercial Na
tive American bingo operation was opened in New York in 1975. Other tribes soon followed suit, and a flood of litigation between
states trying to exercise authority over the tribes and tribes trying to maintain sovereignty ensued.

The first notable case in the battle between the states and the
tribes was *Cabazon Band of Mission Indians v. California*. The Caba-
zon Band opened a club where draw poker and other card games
were played, and California and Riverside County sought to force the
Cabazon Band to comply with state law and county ordinances regu-
lating gaming. The Supreme Court noted that "state laws may be
applied to tribal Indians on their reservations if Congress has ex-
pressly so provided." According to the Court, the central issue was
"whether state authority is pre-empted by the operation of federal
law; and State jurisdiction is pre-empted . . . if it interferes or is in-
compatible with federal and tribal interests reflected in federal law,
unless the state interests at stake are sufficient to justify the assertion
of state authority." In this case, the federal government's interest in
Indian sovereignty, self-sufficiency, and economic development, the
Court held, outweighed the state interest in preventing organized
crime.

Soon after this decision, the states asked for, and Congress
granted, the Indian Gaming Regulatory Act. The Act's intent was to
"promote tribal economic development, tribal self-sufficiency, and
strong tribal government." Although the stated purpose appears to
favor Native American gaming, "tribes did not lobby Congress for the
passage of gaming legislation. In fact, although the tribes did not
have a unified view on IGRA, most of the tribes officially opposed the
legislation." In protesting the passage of IGRA, tribes argued that it

41. N. Bruce Dutu, *Crow Dog and Oliphant Fistfight at the Tribal Casino: Political
Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 186 (1997). See also Eric
an exhaustive history of Native American gaming).
42. Kevin J Worthen & Wayne R. Farnsworth, *Who Will Control the Future of In-
407, 434.
44. Id. at 204.
45. Id. at 207.
46. Id. at 216 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324,
333 (1983)).
47. Id. at 216, 221.
49. Id. § 2701(4).
50. Alex Talchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's
violated their sovereign authority to "conduct affairs on their lands as permitted by treaties and the Indian Self-Determination Act."\textsuperscript{51} Tribes are extremely troubled that the Act applies state law to determine if a tribal gaming enterprise is legal, and tribal ability to conduct Class III gaming is dependent upon entering compacts with state governments.\textsuperscript{52} Presently, IGRA extends the power to regulate gaming on Native American lands to the states, even though the power to regulate Native American lands and tribes is constitutionally reserved for Congress.\textsuperscript{53}

IGRA affords tribes the exclusive right to regulate gaming activity on their lands "if the gaming activity is not specifically prohibited by Federal law and is conducted within a State that does not, as a matter of criminal law and public policy, prohibit such gaming activity."\textsuperscript{54} Three classes of gaming are allowed under IGRA. Class I gaming falls exclusively within the jurisdiction of tribes\textsuperscript{55} and includes those games that are social and those that are part of tribal ceremonies.\textsuperscript{56} Class II gaming encompasses bingo and card games that are not prohibited by state law.\textsuperscript{57} For Michigan tribal casinos, games played before May 1, 1988 are included as Class II under IGRA as long as the nature of the games has not changed since then.\textsuperscript{58} Class II gaming is within tribal jurisdiction,\textsuperscript{59} but such gaming must be legal under state law and regulated by specific tribal statutes.\textsuperscript{60}

\footnotesize{(footnotes omitted).}

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\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{54} 25 U.S.C. § 2701(5) (1994).
\item \textsuperscript{55} \textit{Id.} § 2710(1).
\item \textsuperscript{56} \textit{Id.} § 2703.
\item \textsuperscript{57} \textit{Id.} Class II games do not include "(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." \textit{Id.} § 2703(7) (B).
\item \textsuperscript{58} This exception also applies to tribal casinos in North Dakota, South Dakota, and Washington. \textit{Id.} § 2703(7) (C).
\item \textsuperscript{59} \textit{Id.} § 2710(a) (2).
\item \textsuperscript{60} \textit{Id.} § 2710(b) (1). The Chairman of the National Indian Gaming Commission must approve the ordinances if the tribe has the sole proprietary interest, but casinos opened before September 1, 1986 are exempt if: 1) the tribe owns at least a 60% interest; 2) if net revenues are used only to fund tribal government, to provide for the general welfare of the Indian tribe and its members, to promote tribal economic development, to donate to charitable organizations, or to help fund operations of local government agencies; 3) tribes provide annual audits; 4) if contracts over $25,000 are subject to audits; 5) if construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety; and 6) if key employees are subject to background investigations and oversight, including licen-
Class III gaming includes all other games not included under Classes I or II. To engage in Class III gaming, a tribe must meet the Class II requirements for gaming by adopting approved laws regulating the gaming, the particular Class III gaming must be legal under state law, and the tribe and the state must enter a compact allowing the particular form of gaming.\footnote{Once a tribe requests a compact with a state, the state has a duty to negotiate the compact in good faith.\footnote{Despite the Congressional mandate requiring states to negotiate in good faith for compacts with the tribes, neither the tribes nor Congress have a method of enforcing this requirement. In \textit{Seminole Tribe v. Florida},\footnote{the Seminole Tribe sued Florida and its governor, Lawton Chiles, alleging that they "refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact," thereby violating the 'requirement of good faith negotiation'" required by IGRA.\footnote{The Supreme Court noted that in passing IGRA, Congress, using the Indian Commerce Clause, attempted to abrogate the states' Eleventh Amendment sovereign immunity.\footnote{The Court, however, determined that Congress did not have such authority, and affirmed the dismissal of the suit, leaving the Seminole Tribe without a remedy.\footnote{IV. TAXATION

During colonization, because tribes and their members were considered sovereign, they were not subject to state or federal taxation.\footnote{As the definition of tribal sovereignty has changed, so has the assumption that Native Americans are exempt from taxation.\footnote{sure, appropriate standards for hiring, and notification to the Commission of background checks. \textit{Id.} § 2710(b).}}}}}}
A. Federal Taxation

Tribes are considered states with regard to taxation;[69] thus, Native Americans pay federal income tax regardless of whether they live or work on reservations.[70] In addition, the per capita payments to tribe members from Class II gaming are also subject to federal taxation.[71] Currently, gaming revenues are not subject to federal taxation,[72] and a recent federal budget proposal seeking to impose taxation on gaming revenues failed.[73] However, a number of members of Congress are beginning to realize the potential jackpot of taxing gaming.[74]

B. State Taxation

From the widely recognized tenet that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states,"[75] comes the premise that Native Americans and tribes are exempt from most state taxation.[76] Tribes were once able to declare that pursuant to the Indian Reorganization Act of 1934, they were federal instrumentalities and, hence, the intergovernmental immunity doctrine barred state taxation of Native Americans or their property.[77] Nonetheless, "[t]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."[78] If Congress does not either relinquish jurisdiction or pass legislation permitting it, a state possesses neither the authority to tax reservations nor Native Americans living on them.[79]

When a state seeks to tax activities occurring on reservations, the Supreme Court determines if taxation is permissible by comparing the parties’ interests.[80] Arizona, in McClanahan v. Arizona State Tax

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73. Worthen & Farnsworth, supra note 42, at 434.
74. See id.
80. AMERICAN INDIAN LAW DESKBOOK 305-06 (Nicholas J. Spaeth et al. eds., 1993). The Court conducts "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in
Commission, assessed income taxes on a Native American living and working on a reservation. The Supreme Court held this tax invalid. Under some circumstances, however, the Court has allowed states to tax Native Americans. For example, a state may tax Native Americans who lived outside of the reservation and who worked on the reservation. Although states may not impose a motor fuel tax on fuel sold by a tribe's retail stores, they may tax reservation cigarette sales to persons who are not members of the tribe. State and local governments may impose an ad valorem property tax on land at one time held in trust but repurchased by tribes or tribe members. Because lands held in trust are tax free, "if an Indian nation built a casino on land that had been placed in trust, the state or local units of government would not receive property tax revenue from the casino." 

In Mescalero Apache Tribe v. Jones, New Mexico attempted to tax the gross receipts of a ski resort operated by the Mescalero Apache Tribe located not on the Tribe's reservation, but on land leased from the federal government under the Indian Reorganization Act. The Supreme Court noted that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Section 465 of the Indian Reorganiza-

the specific context, the exercise of state authority would violate federal law and be preempted." Id. The inquiry considers the state's legitimate regulatory interest in the activity taxed, whether an "unusually large state tax has imposed a substantial burden" on a tribe, the federal policy supporting tribal development and self-sufficiency, whether the tax imposes direct economic burdens on a tribe, and whether the tax interferes with the federal statutory scheme. Id.

82. See id. at 165.
83. See id. at 173.
85. Id.
88. Luna, supra note 70, at 459.
90. Id. at 146.
91. Id. at 148-49. The Court recognized that absent specific federal statutes to the contrary, Native Americans are exempt from state taxation on activities occur-
tion Act provides that land or rights falling within the Act's realm "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." The Tribe argued that because the land itself was exempt from taxation, the income derived from the land was also exempt. The Court disagreed, stating that tax exemptions are not created by implication, and if Congress wanted the income to be exempt, "it should say so." New Mexico also sought to impose a use tax on the materials used to construct ski lifts. The Court reasoned that because the permanent improvements to the land would be immune from ad valorem property tax, the same immunity exempted the improvements from the use tax.

Although IGRA specifically allows a state to impose fines to defray the costs of regulating Class III gaming, it also provides that:

[N]othing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

V. ACTS LEADING TO THE MICHIGAN COMPACTS

The Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Keweenaw Bay Indian Community, Hannahville Indian Community, Bay Mills Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians have operated Class III gaming in Michigan for several years. When
Congress enacted IGRA, the tribes began negotiating with Michigan to effect a compact. After negotiating from August 1989 to May 1990, the negotiations came to an impasse with Michigan declaring that the tribes could not maintain slot machines or video games of chance because such games were illegal under Michigan law, and therefore not subject to negotiation.

In July 1990, the tribes filed suit, arguing that the state did not negotiate in good faith. The tribes sought a declaratory judgment that video games of chance and slot machines were legal, and under the authority of IGRA, they sought an order for the state to negotiate a compact. As Florida would argue in *Seminole Tribe v. Florida*, the State of Michigan claimed that it was immune under the Eleventh Amendment. The tribes argued that Michigan could not assert sovereign immunity when it engaged in transactions with tribes under federal legislation. Also, the tribes argued that IGRA abrogated the states’ sovereign immunity. Like the *Seminole Tribe* Court would hold four years later, the district court found that IGRA attempted to abrogate the states’ immunity; however, Congress did not have the power to do so. Thus, the district court dismissed the case on state

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99. *Sault Ste. Marie Tribe I*, 800 F. Supp. at 1486. The tribes contacted then-Governor Blanchard within thirty days after IGRA was passed to begin negotiations for a compact. *Id.*


104. The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

105. *Sault Ste. Marie Tribe I*, 800 F. Supp. at 1486. The tribes argued that the Eleventh Amendment did not bar this litigation. *Id.* at 1487. They asserted that as states “subject themselves to suit when Congress regulates under the Interstate Commerce Clause, so too have they relinquished their immunity when Congress legislates pursuant to the Indian Commerce Clause.” *Id.* at 1488. The tribes also argued that the states were acting as “delegates of the federal government,” therefore, they did not have sovereign immunity as states. *Id.* at 1488 n.1. Further, the tribes contended that Congress had abrogated the states’ sovereign immunity under the Interstate Commerce Clause. *See id.* at 1490.

106. *See id.* at 1488. The tribes argued that the Indian Commerce Clause gives Congress the power to abrogate state immunity, just as the Interstate Commerce Clause gives Congress such power. *See id.* at 1489.

107. *See id.* at 1490. The district court refused to analogize Congress’ power to abrogate sovereign immunity under the Interstate Commerce Clause and a power to abrogate immunity under the Indian Commerce Clause. *See id.* at 1490.
sovereign immunity grounds. The Sixth Circuit dismissed for lack of jurisdiction, and the tribes amended their complaint to add Michigan governor John Engler as a defendant.

The tribes and Governor Engler entered a Consent Judgment conditioned on the parties entering a Class III gaming compact. The Saginaw Chippewa Indian Tribe of Michigan intervened in the suit, and the seven tribes agreed to "make semi-annual payments to the Michigan Strategic Fund of the State of Michigan in an amount equal to eight percent of the net winnings at each casino derived from all Class III electronic games of chance, as those games are defined in each Class III compact." The obligation to make the payments continue as long as a compact exists or while "the tribes collectively enjoy the exclusive right to operate electronic games of chance." Under the consent judgment, the tribes are also required to "make semi-annual payments to any local units of state government in the immediate vicinity of each tribal casino in the aggregate amount equal to two percent of the net win at each casino derived from all Class III electronic games of chance." The tribes have the authority to determine which local government entities receive the payment. However, each local government entity that would receive ad valorem property taxes if the casino site were subject to taxation must receive at least the amount that it would receive under the ad valorem tax.

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108. See id.
109. Sault Ste. Marie Tribe II, 5 F.3d 147, 148. The court noted that there was not a final decision on the merits; therefore, whether IGRA abrogated state immunity was not within the court's jurisdiction. Id.
111. Id. "Net winnings" is defined as "the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at said machines." Id.
112. Id. The Consent Judgment also states:

The operation of electronic games of chance by persons or entities other than the tribal parties to this Stipulation shall not violate the tribes' exclusive right to operate said machines so long as said machines: a) reward a player only with the right to replay the device at no additional cost; b) do not permit the accumulation of more than fifteen (15) free replays at any one time; c) allow the accumulated free replays to be discharged only by activating the device for one additional play for each accumulated free replay; and d) make no permanent record, directly or indirectly, of the free replays awarded.

Id.
113. Id.
114. Id.
VI. THE 1993 AND 1997 COMPACTS

A. The 1993 Compacts

The 1993 compacts provide regulations governing Class III gaming. They allow the tribal casinos to operate craps and related dice games, wheel games, roulette, banking card games, non-banking card games played by tribes before May 1, 1988, electronic games, and Keno.115 To operate additional games, the tribes are required to send a written request to the governor, who would determine if the proposed games were permitted in Michigan and whether the "Compact is adequate to fulfill the policies and purposes set forth in IGRA with respect to such additional games."116 The compacts provide that tribal law regulates the number, location, or limitations of games, and that state law does not apply to Class III games operated pursuant to the compacts. They do, however, provide for supplemental regulations of gaming.117 The compacts also note that if a compact provision is more restrictive than a similar provision of tribal law, then the compact controls.118 The tribes promised to provide employee benefits as required by Michigan law and to purchase gaming equipment that meets either Nevada or New Jersey standards.119 Michigan requires the tribes to adopt state law relating to the sale and regulation of alcoholic beverages.120 Moreover, the compacts re-

115. The Compact provides that it applies to Class II games if those "games are expanded beyond their 'nature and scope' as it existed before May 1, 1988." 1993 Bay Mills Indian Community Gaming Compact § 3.

The compacts entered in 1993 are identical. See 1993 Keweenaw Bay Indian Community Gaming Compact; 1993 Lac Vieux Desert Band of Lake Superior Chippewa Indians Gaming Compact; 1993 Saginaw Chippewa Indians of Michigan Gaming Compact; 1993 Sault Ste. Marie Tribe of Chippewa Indians Gaming Compact. For simplicity's sake, then, only the 1993 Bay Mills Indian Community Gaming Compact will be cited.

116. 1993 Bay Mills Indian Community Gaming Compact § 3.

117. Id. § 4. Section 4, Regulation of Class III Gaming, provides in part:

(A) The Tribe has enacted a comprehensive gaming regulatory ordinance governing all aspects of the Tribe's gaming enterprise. This Section 4 is intended to supplement, rather than conflict with the provisions of the Tribe's ordinance. To the extent any regulatory requirement of this Compact is more stringent or restrictive than a parallel provision of the Tribe's ordinance as now or hereafter amended, this Compact shall control.

The remainder of the section provides extensive Class III game regulations governing tribal employees, accounting procedures, age requirements, the location of the games, game rules, information requested by the state, enforcement, and secrecy. Id.

118. Id.

119. Id. § 5.

120. Id. § 10. The Compact provides for the adoption of state laws regarding sale to a minor, sale to a visibly intoxicated individual, sale of adulterated or mis-
quire each tribe to pay the state twenty-five thousand dollars at the beginning of the fiscal year for costs associated with its compact. If the state does not incur twenty-five thousand dollars in expenses, the difference must be returned to the tribe.\textsuperscript{121}

B. The 1997 Compacts

On January 29, 1997, the Little Traverse Bay Bands of Odawa Indians entered a compact with the State of Michigan.\textsuperscript{122} The 1997 compact allows tribal casinos to operate craps and related dice games, wheel games, roulette, banking card games,\textsuperscript{123} non-banking card games played by tribes before May 1, 1988, electronic games, Keno, any other Class III game contained in Michigan Compiled Laws Annotated section 432.201,\textsuperscript{124} bowling card games, and card games held at senior citizen homes.\textsuperscript{125}

Many of the provisions contained in the 1997 compacts correspond to the 1993 compacts. For example, under the 1997 compacts, to operate additional games, the tribes must send a written request to

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\begin{itemize}
\item \textsuperscript{121} Id.
\item \textsuperscript{122} 1997 Little Traverse Bay Bands of Odawa Indians Gaming Compact.
\item \textsuperscript{123} The Compact states that it applies to Class II games if those “games are expanded beyond their ‘nature and scope’ as it existed before May 1, 1988.” Id. § 3.
\item Like the 1993 compacts, the 1997 compacts are identical. See 1997 Little River Band of Ottawa Indians Gaming Compact; 1997 Little Traverse Bay Bands of Odawa Indians Gaming Compact; 1997 Notawaseppi Huron Band of Potawatomi Indians Gaming Compact; 1997 Pokagon Band of Potawatomi Indians Gaming Compact. For simplicity’s sake, then, only the 1997 Little Traverse Bay Bands of Odawa Indians Gaming Compact will be cited.
\item \textsuperscript{124} Michigan law allows the following games:
\item Any game played with cards, dice, equipment or a machine, including any mechanical, electromechanical or electronic device which shall include computers and cashless wagering systems, for money, credit, or any representative of value, including, but not limited to, faro, monte, roulette, keno, bingo, fan tan, twenty one, blackjack, seven and a half, klondike, craps, poker, chuck a luck, Chinese chuck a luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game, or any other game or device approved by the board, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player.
\item \textsuperscript{125} 1997 Little Traverse Bay Bands of Odawa Indians Gaming Compact § 3. Michigan law allows for the playing of card games at senior residences, which do not serve alcohol, if the games are played between nine a.m. and midnight, the bets are limited to 25 cents, and the pot does not exceed five dollars. MICH. COMP. LAWS ANN. § 750.303a (West Supp. 1998). Bowling card games are defined as “a card game held in conjunction with a bowling game, the results of which depend on the outcome of the bowling game.” Id. § 750.310a.
\end{itemize}
\end{footnotesize}
the governor, who will determine if the proposed games are permitted in Michigan and whether the "[c]ompact is adequate to fulfill the policies and purposes set forth in IGRA with respect to such additional games."\textsuperscript{126} Again, the 1997 compacts provide that tribal law regulates the number, location, or limitations of games, that state law does not apply to Class III games operated pursuant to the compacts, and impose supplemental gaming regulations. The 1997 compacts control when compact provisions are more restrictive than tribal law.\textsuperscript{127} In the 1997 compacts, the tribes agreed to provide employee benefits as required by Michigan law and to purchase gaming equipment that meets either Nevada or New Jersey standards.\textsuperscript{128} Michigan requires the tribes to adopt state laws relating to the sale and regulation of alcoholic beverages.\textsuperscript{129}

Some compact provisions, however, did change from the 1993 agreements. In the 1997 compacts, for example, each tribe agreed to pay the state fifty thousand dollars a year to reimburse the state for expenses incurred in performing the compact.\textsuperscript{130} In addition, the obligation to make payments to the state is included in the 1997 compacts. The compacts provide that the eight percent obligation remains in effect as long as there is no change in state law that permits the operation of electronic games of chance or casino games by any other person, excluding those in Detroit and those operated by other tribes.\textsuperscript{131} The tribes are still required to make semi-annual payments of two percent of net winnings to local governments, although they no longer have the authority to determine to what local government the payments are made.\textsuperscript{132} The compacts provide for the creation of a Local Revenue Sharing Board created by the local governments to make that decision.\textsuperscript{133}

\textsuperscript{126} 1997 Little Traverse Bay Bands of Odawa Indians Gaming Compact § 3.
\textsuperscript{127} Id. § 4.
\textsuperscript{128} Id. §§ 5, 6.
\textsuperscript{129} Id. § 5. The compacts provide for the adoption of state laws regarding sale to a minor, sale to a visibly intoxicated individual, sale of adulterated or misbranded liquor, hours of operation, and similar provisions. Id. § 6.
\textsuperscript{130} Id. § 4.
\textsuperscript{131} Id. § 17.
\textsuperscript{132} Id. § 18.
\textsuperscript{133} The state's intent in negotiating for the two percent was to provide financial resources to the entities which incur increased expenses as a result of the Class III gaming. Id. Each local government appoints a representative to represent that entity on the board. The board consists of a representative from the county in which the facility is located; a representative from the village, city, or township in which the facility is located; and a representative from a third local unit determined by the representatives from the county and the village, city, or township. Id.
C. Compact Away What Little Rights They Have

Gaming compacts may initially appear to be a contract between two sovereigns, but consistent with the history of transactions between states and Indian tribes, the evolution of the compacts demonstrates that they too are eating away at tribal sovereignty. This is indicated by the 1997 compacts, which obligate tribes to pay eight percent of winnings to the state and two percent to a local government. Previously, the 1993 Consent Judgment directed for eight percent of net winnings to be paid as long as the tribes maintained the exclusive right to operate electronic games of chance. Section seventeen of the 1997 Little Traverse Bay Bands of Odawa Indians Gaming Compact, entitled “Tribal Payments to State for Economic Benefits of Exclusivity,” provides:

The State and the Tribe have determined that it is in the interests of the people of the State and the members of the Tribe to maximize the economic benefits of Class III gaming for the Tribe and to minimize the effects of Class III gaming by providing a mechanism to reduce the proliferation of Class III gaming enterprises in the State in exchange for the Tribe providing important revenue to the State. This section essentially masks a tax in the language of “interests of the people.”

On November 5, 1996, Michigan voters approved Proposal E, allowing gaming in Detroit by non-tribal casinos, and on December 5, 1996, the Michigan Gaming Control and Revenue Act became law. Several Michigan tribes informed the state that they would no longer pay the eight percent obligation because “their exclusive rights to operate casino games had been terminated.” Governor Engler filed a motion to compel compliance with the consent judgment. Whether the tribes had to continue to pay the obligation turned on the meaning of “exclusive right to operate.” The Lac Vieux argued that “when Proposal E was signed into law the Tribes lost their exclusive right and therefore no longer needed to make payments to

134. This was placed in the Consent Judgment rather than the 1993 compacts because IGRA prohibits the imposition of a tax on gaming revenues. David D. Waddell et al., Indian Gaming in Michigan, in THE STATE OF MICHIGAN GAMING LAW LEGAL RESOURCE BOOK 14-3 (1998).
138. Id.
139. Id. at 372.
the State.\textsuperscript{140} The Sixth Circuit held that until the Michigan Gaming Control Board grants a casino license to a non-tribal group, the tribes have an exclusive right to operate.\textsuperscript{141}

Thus, Michigan, in effect, negotiated to impose a tax in exchange for allowing the tribes to engage in Class III gaming and for disallowing other commercial casinos in Michigan. As long as the 1997 compact tribes pay the fee, they enjoy the benefits of exclusivity until the state decides to change the law permitting the operation of casinos. As demonstrated by the 1993 Consent Judgment, the exclusivity language does not preclude the state from allowing other non-tribal casinos.\textsuperscript{142} To operate a casino, the tribes entering the 1993 compacts are required to pay the obligation as long as they have the exclusive right to operate casinos. The tribes are bound to pay the fee or tax, but the state is not bound to maintain exclusivity. If the state were to allow non-tribal casinos, the state also could tax those casinos. Thus, the eight percent taken from the tribal casinos is merely a substitute for the revenues that are lost because of IGRA’s prohibition of state taxation of casino revenues.

IGRA specifically prohibits the imposition of taxes and fees. It provides that except for amounts necessary to regulate gaming:

\begin{quote}
[N]othing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations... based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.\textsuperscript{143}
\end{quote}

The tribes agreed to pay two percent of net winnings to local governments to defer additional costs. More importantly, the tribes agreed to pay Michigan a pre-determined amount, depending upon the year they entered into the compact,\textsuperscript{144} to “reimburse the State for
the actual costs the State incurs in carrying out any functions authorized by the terms of th[e] Compact.\textsuperscript{145} Therefore, because the compacts provide for a specific maximum on defraying costs of regulating, the eight percent obligation is clearly a tax or fee.

Not only does the eight percent violate IGRA, but it violates federal law prohibiting the imposition of state taxes on Native American tribes. If Congress neither relinquishes jurisdiction nor passes legislation permitting it, a state does not possess the authority to tax reservations and Native Americans living on reservations.\textsuperscript{146} Congress has not done so, but instead has specifically passed legislation prohibiting this kind of taxation.

The Consent Judgment in which the obligation was included was a result of litigation in which federal courts held that the judiciary did not have jurisdiction over Michigan, even though IGRA provided for such jurisdiction.\textsuperscript{147} The 1997 compacts were completed after Seminole Tribe v. Florida,\textsuperscript{148} where the Supreme Court held that tribes cannot sue states or governors under IGRA for not acting in "good faith."\textsuperscript{149} Therefore, even though the tribes did in fact consent to the eight percent obligation, had the state not negotiated in "good faith," the tribes would not have had a remedy or any recourse.

Under the 1993 Consent Judgment, the tribes are required to pay two percent of net winnings to local governments of their choice. Yet, the Consent Judgment requires that "each local unit of government shall receive no less than an amount equivalent to its share of ad valorem property taxes that would otherwise be attributed to the Class III gaming facility if that site were subject to such taxation."\textsuperscript{150} This language demonstrates that the fee is not only for reimbursement of costs, as allowed by IGRA, but also to impose a property tax on the tribal land, which is not allowed by IGRA. Furthermore, under the 1997 compacts, the state has transferred the oversight of the two percent of net winnings given to the local governments from the tribes to a local board.\textsuperscript{151} Previously, under the Consent Judgment, the tribes were to determine which local governments would receive the reimbursement.\textsuperscript{152} The change illustrates the movement from

\textsuperscript{145} See 1997 Little Traverse Bay Bands of Odawa Indians Gaming Compact § 4(M) (5); 1998 Bay Mills Indian Community Gaming Compact § 4(K) (5).

\textsuperscript{146} Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). See also \textit{supra} Part IV.B.

\textsuperscript{147} See \textit{supra} Part V.

\textsuperscript{148} 517 U.S. 44 (1996).

\textsuperscript{149} Id. at 75-76.


\textsuperscript{151} 1997 Little Traverse Bay Band of Odawa Indians Gaming Compact § 18.

tribal regulation to state regulation.

The compacts indicate that tribal law will regulate the number, location, or limitations of the games, but under the authority of the compacts, the state has imposed additional regulations.153 The compacts also provide that if state law and tribal law conflict, state law supersedes.154 In addition, the compacts required that employee benefits should conform to Michigan law.155 The purchasing of gaming equipment must comply with either Nevada or New Jersey law.156 Thus, although the compacts purport to allow tribal law to control, state law, in effect, regulates the activities of the tribal land.

Moreover, for the tribes to engage in gaming that is not listed in their compacts, they are required to send a written request to the governor of the state.157 It is the governor alone who determines if the games are permissible and whether “the Compact is adequate to fulfill the policies and purposes set forth in IGRA with respect to such additional games.”158 Therefore, tribes have been forced to contract away their authority over the determination of the propriety of games and the propriety of what occurs on tribal land.

VII. CONCLUSION

The federal government has long attempted to divest tribes of sovereignty while claiming to be encouraging self-government. While the federal government has slowly whittled away tribal sovereignty, with few exceptions, the federal government has maintained that activities on tribal land are not subordinate to state governmental regulations.

In passing IGRA, the government argued that its purpose was to promote tribal self-government. IGRA provided a statutory scheme requiring tribes to enter compacts with state governments to engage in gaming on tribal lands. By doing so, tribes are forced to negotiate with another sovereign entity to engage in an activity that occurs solely on tribal land. In contrast, Michigan would hardly negotiate with Ohio regarding activities occurring in Michigan — doing so would diminish Michigan’s sovereign authority.

153. 1993 Bay Mills Indian Community Gaming Compact § 3; 1997 Little Traverse Bay Band of Odawa Indians Gaming Compact § 3.
154. Id.
157. 1993 Bay Mills Indian Community Gaming Compact § 3; 1997 Little Traverse Bay Bands of Odawa Indian Gaming Compact § 3.
158. Id.
Although not intentionally, IGRA further divests tribes of authority because the federal judiciary has held that tribes may not sue states or governors in federal court for failing to negotiate in good faith. IGRA prescribes particular rules which tribes must follow to engage in tribal gaming; however, if states will not negotiate compacts, the tribes have no recourse. Thus, in negotiating the compacts, the tribes are at the mercy of the states.

The Michigan 1993 and 1997 compacts demonstrate the inequity in tribe-state negotiating. The compacts allow Michigan to impose an eight percent of net wins obligation on the tribes even though taxes and fees are specifically prohibited by IGRA. Although IGRA does afford the state the ability to seek reimbursement for costs associated with the compacts, Michigan and the tribes contracted for an amount specifically for reimbursement of costs up to either twenty-five thousand or fifty thousand dollars, depending on the compact. The compacts also provide for the payment of two percent of net winnings to local governments for reimbursement of costs incurred from tribal gaming. When local governments are reimbursed under the two percent obligation, the eight percent is pure surplus, and amounts to either a tax or a fee. Although the eight percent obligation must be paid while the tribes have exclusive rights to gaming, this requirement does not bind the state to provide the tribes with the exclusive right. The state may allow gaming at any time and not suffer any repercussions. As long as the state grants the tribes the exclusive right, the fee is required.

The tribes' sovereign authority is also diminished by the provisions that require state law to apply if the state law is more stringent, that require employee benefits be given in accordance with Michigan law, and that require that the gaming devices comply with Nevada or New Jersey law. Further, because the tribes must request permission from the state to institute additional games, the state's authority is increased at the expense of tribal authority.

The 1993 and 1997 compacts illustrate the uneven distribution of sovereignty between the states and the tribes. The tribes had little leverage in the negotiations, because IGRA does not provide them relief. They were forced to contract away their sovereignty. After being forced into dire financial straits by the government, contracting for taxes and contracting away sovereignty is a small price to pay for the "New Buffalo."

L. RENÉE LIEUX

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