



# *South Dakota Legislative Research Council*

## *Issue Memorandum 94-42*

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### **THE IMPACT OF THE INDIAN GAMING REGULATORY ACT ON STATE-TRIBAL RELATIONS: ISSUES FOR THE NINETIES**

#### *Introduction*

The advent of large-scale, widespread casino gaming on American Indian reservations in response to the Indian Gaming Regulatory Act of 1988 has exhibited the most profound and far-reaching impact on the lives of Native American peoples since the civil rights movement of the Sixties. The economic dimensions of the gaming revolution are dramatic and have been well documented despite the lack of reliable financial information from the Indian casinos themselves. Indian gaming has provided substantial employment opportunities on rural reservations where unemployment has been endemic and pervasive for decades. Even more than casino profits, full-time, productive employment has spurred reservation economies, boosted self esteem, lessened the problems of alcoholism, poverty, and crime, and provided hope for a better future. The economies of the states hosting Indian gaming have also benefitted from this unexpected economic expansion on the reservations with increased employment opportunities for non-Indians, construction activity, and tourism.

But although the benefits of Indian gaming have been undeniable, irreversible, and desirable, it has also given rise to a host of problems, stresses, and issues that constitute

a challenging agenda for the tribes, the states, and the federal government. Until recently, these questions have not received much national publicity, but that situation is currently changing with several network news programs, most recently CBS's *Sixty Minutes*, airing "video-magazine" reports on Indian gaming. State and federal lawmakers have already been aware of, and have been attempting to deal with these challenges for some time. The 1994 National Conference of State Legislatures Convention in New Orleans presented a series of sessions on Indian gaming and related concerns, and the NCSL magazine, *State Legislatures*, featured an interesting article on the subject in its June 1994 edition, entitled "*The Fat New Buffalo*." Although the primary responsibility for responding to the evolving issues in Indian gaming falls on the Congress and the state governors, state legislators and tribal officials have recognized the importance of the policies being debated and are attempting to impact the decision-making process.

#### *Background*

Although this memorandum will focus on the current issues affecting the future of Indian gaming in South Dakota, the development of Indian gaming in this state must be briefly reviewed. Prior to the implementation of video lottery and

Deadwood gaming, the presence of gaming on South Dakota's reservations was minimal. Although bingo and other charitable events were not unknown, the state constitution and statutes, coupled with the isolated location of most of the state's reservations, combined to limit the economic possibilities of charitable tribal gambling facilities. But in 1986 and 1988, Article III, section 25 of the state constitution was twice amended to permit lotteries and Deadwood limited gaming. The Legislature implemented a state lottery, authorized limited gaming in Deadwood, and subsequently went on to broaden the definition of lottery by permitting video games of chance. Concurrently, the Congress passed the Indian Gaming Regulatory Act (IGRA) of 1988 which extended to the tribal governments of each state the right to conduct whatever types of gaming anyone else in the state was permitted to conduct. Since Utah is the only state in the nation with federally-recognized Indian tribes that permits absolutely no gambling of any kind, the IGRA put the Native American peoples in the gaming business almost overnight and practically nationwide.

South Dakota has nine reservations, and all expressed interest in the new opportunity presented by the confluence of the IGRA and Deadwood gaming. The Sisseton, Flandreau, and Yankton tribes quickly negotiated gaming compacts with the state, obtained financing, and built and began to operate the first generation of Indian casinos in South Dakota. These casinos tended to be well situated near both sizeable South Dakota communities and near the borders of Minnesota, Iowa, and Nebraska. Due to favorable demographics and the advantage of being first in the field, the Dakota Sioux Casino near Watertown, the Royal River

Casino at Flandreau, and the Fort Randall Casino near Wagner have been successful and profitable. The second generation, Golden Buffalo Casino in Lower Brule and Lode Star Casino in Fort Thompson, followed a few months later. Located on remote reservations in the center of the state away from major cities, both casinos have experienced some success in drawing tourists from Interstate 90 and by catering to local residents. A third generation of tribal casinos has recently opened on Standing Rock near Mobridge and on Rosebud near Valentine, Nebraska. Although both are new, the initial public response has been encouraging. Plans for a fourth generation on the Pine Ridge and Cheyenne River reservations have been long delayed by difficult compact negotiations, tribal politics, and litigation. Tribal officials hope that these problems have now been resolved and that they will soon be able to inaugurate new casinos near Oelrichs and Whitlock's Crossing.

### *The Issues*

When the Pine Ridge and Cheyenne River casinos are completed, each of South Dakota's nine reservations will be actively engaged in the Indian gaming industry. The tribes are looking to a viable gambling industry as the foundation for further economic development, to reduce unemployment, and to provide reliable revenue for social programs. In order to provide the best environment for the healthy development of a tribal gaming industry, the tribes, the state, the Congress, the National Indian Gaming Commission, and the affected local communities must address a host of issues that currently impinge on state-tribal relations. These issues range from tribal sovereignty to public opposition

to Indian gaming. These issues are difficult and interconnected, and the resolution of the most significant of them may depend primarily on congressional action.

### ***Sovereignty***

State-tribal negotiations on gaming compacts have often reopened the unhealed wound of tribal sovereignty. In the Indian Gaming Regulatory Act of 1988, the Congress gave the states an expanded role to play in regulating certain aspects of tribal affairs. Since the tribes maintain that the United States Constitution makes them coequal with the states and subordinate only to the federal government, many tribal leaders view this expanding state authority over tribal affairs with alarm. Several Wisconsin tribes have sued the United States, challenging the authority of Congress to constitutionally give the states any degree of authority over Indian gaming. The states, on the other hand, feel that the Congress did not give them adequate authority to responsibly regulate the expanding Indian gaming activity and are vigorously lobbying Congress for amendments to the IGRA. The tribes are even more vigorously opposing such amendments. The shadows cast by the fundamental questions of state-tribal sovereignty represent a continual cloud over all peripheral Indian gaming issues.

### ***Duro Doctrine***

One aspect of tribal sovereignty is indicated by the debate over the *Duro doctrine*, which derives from a U.S. Supreme Court case concerning tribal jurisdiction over non-member Indians while they are on the reservation. The state has taken the position that non-member Indians, like non-Indians, should be under state jurisdiction while they are visiting tribal casinos. While the tribes

admit that few non-member Indians are likely to commit crimes in their casinos, they fear that the state's position constitutes the thin edge of the wedge on other jurisdictional questions.

### ***Off Reservation Sitings***

The request of the tribes to locate casinos on Indian land outside the borders of the reservations has been very contentious in South Dakota. The IGRA permits states to sanction off-reservation casino sites, but does not require it. Several tribes with geographically or demographically remote reservations have requested off-reservation casino sites: Cheyenne River in Fort Pierre and Pluma, Rosebud in Murdo and Winner, Lower Brule in Oacoma, and Crow Creek in Chamberlain. The tribes maintain that such sites would result in considerably more non-Indian employment and economic development as well as higher casino profits; but the state has resisted all attempts to expand Indian gaming beyond the reservation boundaries.

### ***Public Opposition***

Many state residents are philosophically opposed to all forms of gaming. They do not want any gambling, including tribal gambling, near their community or even in the state. Opponents to tribal gaming strongly object to the use of taxpayer monies to build tax-exempt Indian casinos to generate tax-exempt gaming revenues. They are also concerned that the state has little real ability to regulate Indian gaming operations. The tribes maintain that Indian gaming provides many benefits for the non-Indian community, including non-Indian employment and economic development, and that the state has been too responsive to public opposition to Indian gaming. The fate of video lottery in November could further

exacerbate this issue.

### ***Casino Management***

Some of the public concern about Indian gaming arises from the fact that federal law does not require the tribes to open their books to public inspection. Some tribes have brought in non-Indian financing and management which is often criticized by disaffected tribal members. Others have criticized the tribal leaders who have chosen to manage their casinos themselves. The large contracts and fees granted to management companies are sometimes viewed with suspicion. South Dakota has not been immune from this type of concern about how well and wisely Indian casinos are being run. So far, however, the worst abuses have been centered in the highly-profitable Indian casinos on the East and West Coasts.

### ***Utilization of Casino Profits***

Another contentious aspect of Indian gaming is the distribution and utilization of profits. The Flandreau tribe defended a long and vitriolic legal challenge concerning whether the tribe could distribute profits to reservation residents without giving the same amounts to nonresident tribal members. Many tribal governments have been accused of funding poorly-advised economic development projects with casino profits. Tribal leaders defend their economic policies as prudent and appropriate.

### ***Land Acquisition***

Some local governments and residents fear that as South Dakota tribes accumulate gaming profits, they will emulate the Pequot and other wealthy tribes who are using their surplus capital to purchase land. This has not yet happened in South Dakota, but local governments and taxpayers fear any

depletion of the local property tax base. Land purchased by Indian tribes becomes tax exempt through the imposition of a federal patent.

### ***Good Faith Negotiations***

Several tribes have repeatedly charged that the state has not negotiated with them in good faith as the IGRA requires. The state has chosen the use of an early compact negotiated with the Flandreau tribe as a starting point for all other negotiations and to insist on concessions for any significant alterations. The state feels that this is the only way to treat all nine tribes fairly. The tribes take the position that there is no reason to impose an artificial equality on the tribes and that the state should recognize that the compacts should be tailored to the individual needs of the various reservations.

### ***Expansion***

Most of the tribes, whether their gaming industries are well established or just getting started, feel that the state should be encouraging the expansion of tribal gaming to its natural limits. Several Indian casinos, notably Ft. Randall and Royal River, are experiencing very high rates of play on their machines and feel that they should be given a higher machine allotment. Others have requested higher bet limits or permission to institute other games such as keno or roulette. The state has negotiated provisions in some compacts permitting more machines if justified by usage, but has generally taken a go-slow attitude to expansion. With private, state, local, and tribal gaming literally exploding nationwide, the entire gaming industry is wondering where and when the saturation point will be reached. Recently the Bureau of Indian Affairs stopped making economic development loans to tribes to finance gaming due to

concerns that the industry may be overextended longterm.

### ***Litigation***

Due to the many new legal disputes that have evolved from Indian gaming, coupled with the dormant issues that have been reawakened, state-tribal litigation, already flourishing, has recently accelerated to record levels. Although the American legal system has served the tribes and states well as a means of achieving a final resolution of disputes, an atmosphere of continual litigation is not the best setting for resolving more numerous concerns by negotiation, agreement, or arbitration. Everyone resents the continual time, trouble, delay, and expense of litigation.

### ***Tribal Politics***

Gaming has also increased the pressures on tribal politics. Tribal officials are subject to relentless criticism from tribal members dissatisfied with the way the casinos are managed, the profits invested, the employment policies enforced, and the gaming regulated. Important concerns have been expressed, especially on Pine Ridge and Lower Brule, regarding the appropriateness of casinos on reservations where alcoholism has been a serious and persistent problem. The compact negotiated by the Pine Ridge Tribal Council was referred to a vote by tribal members who were dissatisfied about provisions impinging on tribal sovereignty. Such political dissention can only distract tribal leaders from the other pressing and important challenges they face in governing their tribes.

### ***Interracial Relationships***

Although many non-Indians are employed in Indian gaming and although Indian casinos

are drawing non-Indians to the reservations in impressive numbers, there is evidence that tribal gaming has caused stress in some aspects of the state's interracial relationship. Several tribal leaders have accused the state of "economic racism" and of attempting to hinder Indian gaming at every turn. They perceive state efforts to convince Congress to revise the Indian Gaming Regulatory Act as "reneging" on the deal. Some local residents have expressed resentment at the tribes' new enterprise which they feel benefits from unfair tax breaks and is not paying its way in the local community. Indian leaders nationwide have become very defensive about Indian gaming and have resisted good faith congressional efforts to institute useful reforms. Intensive litigation, negotiation, and controversy have created an atmosphere in which it is increasingly difficult to step back and look at the big picture.

### ***Conclusion***

The immediate focus for the resolution of many of the issues commented on in this memorandum is S2230, the Indian Gaming Regulatory Act Amendment Act of 1994, introduced by Senator Daniel Inouye (D-Hawaii). Although the bill enjoys the support of the Clinton Administration, the legislation has encountered intense opposition in Congress. Tim Wapato, Executive Director of the National Indian Gaming Association, has stated that the bill cannot be rehabilitated. Most tribal leaders are intensely suspicious of Congress' intentions. Meanwhile, the private gaming industry, especially Las Vegas and Atlantic City, oppose the bill as not going nearly far enough to regulate Indian casinos which may already be cutting into their business. The states are left in the middle; they generally

support reform in concept but are frequently dissatisfied with individual provisions of the Inouye bill.

Clearly, many issues exist in Indian gaming which urgently need to be addressed. Just as clearly, Congress is best equipped to address and resolve many of these pressing issues;

but there are many areas that are the legitimate domain of state-tribal relations, and neither the tribes nor the state should allow congressional inactivity to distract them from their mutual responsibilities.

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**This issue memorandum was written by Reuben D. Bezpaletz, Chief of Research Analysis and Legal Services for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.**

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