FENCING THE BUFFALO: OFF-RESERVATION GAMING AND POSSIBLE AMENDMENTS TO SECTION 20 OF THE INDIAN GAMING REGULATORY ACT

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"Gaming is for many isolated, neglected and destitute Native Americans the modern version of the myth of survival, called by some the *White Buffalo.*"[1]

Tribal gaming has frequently been compared to the buffalo as it has successfully fed, clothed, and sheltered numerous tribal communities, and generally improved the quality of life on many reservations.[2] Tribal gaming has changed the lives of countless Native Americans by giving tribes a real opportunity to be economically independent.[3] Twenty-five years after the passage of Public Law 280 (P.L. 280),[4] the United States Supreme Court recognized in *California v. Cabazon Band of Mission Indians*, that Native Americans possessed the authority to conduct gaming within their reservation free of state intrusion.[5] In response, Congress quickly reacted by attaching regulations to the now inevitable tribal gaming craze.[6]

In 1988, Congress' response to the *Cabazon* decision was the enactment of the Indian Gaming Regulatory Act (IGRA) which provided for tribal gaming

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[1] Hon. Pierre L. Van Rysselberghe, *People of the White Buffalo Gambling Is the Modern Version of the Myth of Survival for Many Native Americans*, OR. ST. B. BULL., December 1995, at 41.

[2] Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 56 (1995).

[3] *Id*.

[4] P.L. 280 was passed by Congress in 1953 and "required some states, and allowed all others, to impose their criminal laws on reservations and to open their civil courts to suits by and against Indians." Carole Goldberg, *In Theory, in Practice: Judging State Jurisdiction in Indian Country*, 81 U. COLO. L. REV. 1027, 1032 (2010). This law was significant because states with P.L. 280 power attempted to apply their own gaming laws on tribal lands. Melissa S. Taylor, *Categorical vs. Game-Specific: Adopting the Categorical Approach to Interpreting "Permits Such Gaming,"* 43 TULSA L. REV. 89, 91 (2007).

[5] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

[6] Courtney J. A. DaCosta, *When "Turnabout" is Not "Fair Play": Tribal Immunity Under the Indian Gaming Regulatory Act*, 97 GEO. L.J. 515, 521 (2009) ("The next year, in response to "intense lobbying" by states and other coalitions, Congress enacted IGRA to overrule *Cabazon I* legislatively and to grant states limited regulatory authority over Indian gaming.").

operations within the boundaries of the tribes' reservations.[7] IGRA's purpose was to codify a tribe's right to conduct gaming for tribal economic development.[8] In addition, Congress wanted to attach statutory regulations to ensure that operators and players conducted fair gaming in a manner which protected tribes from becoming vulnerable to organized crime or other corruptions, and to ensure that the tribal communities would be the primary beneficiaries of the gaming on their reservations.[9] Critics of IGRA claimed that the regulations restricted the tribes' ability to provide for their communities' needs.[10] Supporters of tribal gaming accused IGRA of crippling the "new buffalo."[11]

Despite the critics' initial beliefs, twenty-five years after IGRA's enactment, tribal gaming is still a large metaphorical "buffalo." It is a multi-billion dollar industry with steady growth each year.[12] Tribes that once depended on welfare now have portfolios worth millions of dollars.[13] However, the one major limitation IGRA poses on tribal gaming is its restriction on a casino's location.[14] Gaming cannot "be conducted on lands acquired by the Secretary[15] in trust for the benefit of an Indian tribe after October 17, 1988" unless the land falls under one of the two categories of exceptions laid out in Section 20 of IGRA.[16] These two categories permit tribal gaming outside of a reservation's boundaries, a practice commonly known as off-reservation gaming or the more derogatory term of "reservation shopping."[17]

Off-reservation gaming is an expansion of the gaming buffalo's range far beyond the borders of the tribal lands.[18] Native American tribes are buying land and requesting the Department of the Interior (DOI) to take the land into trust for gaming and then appealing to their state's governor for requisite per-

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[7] Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (1988).

[8] Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 421 (2009).

[9] 25 U.S.C. § 2702(2) (1988).

[10] 25 U.S.C. 2710(d)(3)(A) (1988) (For example, IGRA demands tribes negotiate with the state to operate certain games); *see also* Wolf, *supra* note 2, at 53 (there is a circuit split on whether states have to negotiate in good faith).

[11] Wolf, *supra* note 2, at 53.

[12] *2003-2012 Gross Gaming Revenue Trends*, NAT'L INDIAN GAMING COMM'N, http://www.nigc.gov/Portals/0/NIGC%20Uploads/media/teleconference/2012%20Gross%20Gaming%20Revenue%20Trends.pdf (last visited Jan. 1, 2014) (In 2012, tribal casinos earned $27.9 billion in gross gaming revenue).

[13] Norimitsu Onishi, *Lucrative Gambling Pits Tribe Against Tribe*, N.Y. TIMES, Aug. 5, 2012, at A13, *available at* 2012 WLNR 16460958.

[14] 25 U.S.C. § 2719 (1988).

[15] "Secretary" is defined as the Secretary of the Interior under 25 U.S.C. § 2703(10) (1992).

[16] *Id.*; UNITED STATES DEP'T OF THE INTERIOR MEMORANDUM ON THE DECISIONS ON INDIAN GAMING APPLICATIONS (June 18, 2010), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc009878.pdf [hereinafter 2010 MEMORANDUM].

[17] Justin Neel Baucom, *Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have We Forgotten the Foundational Principles of Tribal Sovereignty*, 30 AM. INDIAN L. REV. 423, 423-424 (2006) ("One of the main concerns of states opposing Indian gaming is what some term 'reservation shopping' - where out-of-state tribes seek to prove rights to ancestral lands in federal court for the purpose of building large casinos in more heavily populated areas.").

[18] *Id.*

mission to operate gaming on the purchased land.[19] Theoretically, a tribe could build and operate a casino on the other side of the country from where its reservation is located. Instead of being limited to the reservation's borders, a tribe can effectively "shop" for a more beneficial site for a casino, such as a major highway exit or within a city's limits.

Until recently, off-reservation gaming was a rare occurrence.[20] Following his recent decision to allow two off-reservation casinos, California Governor Jerry Brown commented that he did not believe applications to build off-reservation casinos would become commonplace.[21] Though only five tribes have received approval for off-reservation gaming sites in IGRA's first twenty-three years, the Obama Administration has since adopted a more supportive policy towards the idea.[22] In 2011, the DOI rescinded a 2008 Guidance Memorandum[23] from the Bush Administration that only permitted for gaming sites within a "commuting distance" from the reservation.[24] In a few years, the number of approvals could grow exponentially.

Off-reservation gaming has become a source of conflict among Native American tribes.[25] Tribes that maintain facilities within their reservations struggle to compete with tribes that have applied for more convenient locations under the Section 20 exceptions.[26] These exceptions have been the focus of several congressional hearings and proposed legislation since IGRA's enactment 25 years ago.[27] Many tribes have gone on record relaying their concerns regarding off-reservation gaming and how a few tribes' efforts could harm the image of tribal gaming for all Native American communities.[28] Deron Mar-

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[19] 25 U.S.C. § 2719(b)(1)(A) (1988); *see also* 25 C.F.R. 151.11 (1995).

[20] Rob Hotakainen, *Tribes Push to Open Off-reservation Casinos — and Face Stiff Resistance*, McClatchy Wash. Bureau, July 5, 2012, *available at* 2012 WLNR 14206480 ("The 1988 law passed by Congress has always allowed off-reservation casinos. But they're extremely rare, with only a handful approved by the federal government.").

[21] *When Casinos Go Far-Afield; State Needs Consistent Policy for Such Projects*, Orange Cnty. Reg., Nov. 15, 2012, at Local, *available at* 2012 WLNR 25585791.

[22] James M. Odato, *Indian Casino Plans for Catskills Gets Federal Boost*, Times Union, June 15, 2011, *available at* 2011 WLNR 11912171.

[23] United States Dep't of the Interior, Memorandum on the Guidance on Taking Off-reservation Land Into Trust for Gaming Purposes (Jan. 3, 2008) *available at* http://www.indianz.com/docs/bia/artman010308.pdf [hereinafter 2008 Memorandum].

[24] United States Dep't of the Interior, Memorandum on the Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes (Jun. 13, 2011) *available at* http://www.nativeamericanlawfocus.com/files/Uploads/Documents/Tribal%20Blog%20pdfs/June%2013%20Memo%206.22.11%20post.pdf [hereinafter 2011 Memorandum].

[25] Onishi, *supra* note 13. ("But plans for the two casinos are drawing fierce opposition and last-minute lobbying in the state capital from an unexpected source: nearby tribes with casinos that they say will be hurt by the newcomers.").

[26] *Id.* (statement of Brenda Adams) ("We played by the rules. We had to stay on our historical lands. . .. We'd like to have a casino in downtown San Francisco, but that's not our territory.").

[27] *See* S. 477, 113th Cong. (2013); *see also* S. 771, 112th Cong. (2011); *Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, 109th Cong. (2005), *available at* 2005 WL 3023993.

[28] *See Off-Reservation Indian Gaming: Hearing Before the Committee on House Resources*, 109th Cong. (2005) (statement of Rep. Richard W. Pombo) *available at* 2005 WLNR 18164891 ("This great increase in new proposals has led to new problems for tribal gaming

quez, chairman of the San Manuel Band of Mission Indians, stated in a 2005 hearing before the House Committee on Resources:

> With advice from other tribes, San Manuel believes that further legislation addressing reservation shopping should . . . amend the two-part determination to require the secretary to make an affirmative finding that a proposed off-reservation acquisition would not have a detrimental impact on nearby tribes . . . require that the lands proposed for acquisition under the two-part determination be within petitioning tribes' ancestral land . . . for gaming purposes, require state legislators, not governors alone, to concur with acquisitions under the two-part determination . . . [and] prohibit crossing state lines into areas where the tribe has no existing land . . .[29]

In the same hearing, Cheryle Kennedy from the Confederated Tribes of the Grand Ronde Community of Oregon believed the following requirements concerning off-reservation gaming should be added to IGRA:

> (1) the Secretary determines that the lands are in the state where the tribe resides or had its primary jurisdiction; (2) the Secretary determines that the tribe has ancestral or historic ties to the lands; and (3) the Secretary consults with and obtains the concurrence of other tribes that have an ancestral or historic tie to the lands.[30]

This note looks into and discusses the common themes shared by Marquez and Kennedy, in particular the consultation requirement, the ancestral land requirement, and the concurrence requirement. First, this note will discuss the history of IGRA with a specific focus on its off-reservation gaming components.

Second, this note will discuss the consultation requirement and what it has to do with the Secretary's requirement to merely "consult" with nearby tribes and non-native communities over taking lands into trust. Several tribes have argued this law should demand a greater level of finding as to how an off-reservation casino affects nearby tribes. On the other hand, elevating the level beyond "consulting" with tribes could harm a tribe's ability to break into the gaming market and, ultimately, hinder its capacity to provide for its members.

Third, this note will discuss how tribes and scholars alike have supported the ancestral land requirement as a way to permit tribes to seek gaming outside of their reservations but still limit gaming operations to those lands to which a tribe has a connection. Allowing tribes to move beyond ancestral lands has caused conflict between tribes. It increases competition by allowing tribes to propose casinos on land to which they lack any connection, and may, in fact, be the ancestral land of a different tribe. Additionally, overly permissive land acquisition policies create more than just tribe-on-tribe conflicts. They create conflicts between Native and non-Native American gaming operations, which

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.. . . It has increased conflict between Indian tribes. It has led to frustration in local communities who feel powerless to affect whether or not a casino is located in their community. And it has severely damaged the public image of Indian gaming, causing the public focus to shift away from the good things gaming has done for tribal self-governance and self-sufficiency, and instead focus on the perceived negatives of tribal gaming.").

[29] *Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, *supra* note 27 (statement of Deron Marquez, Tribal Chairman, San Manuel Band of Mission Indians of California).

[30] *Id.* (statement of Cheryle A. Kennedy, Tribal Council Chairwoman, Confederated Tribes of the Grand Ronde Community of Oregon).

in turn causes more public criticism against the practice of off-reservation gaming and tribal gaming overall.

Finally, this note will discuss the concurrence requirement which focuses on the parties that must assent to a tribe's land acquisition before the tribe may formally operate gaming facilities. Tribal sovereignty is a unique concept because a tribe has power over its reservation, but its sovereignty only extends as far as the federal government allows.[31] IGRA is a complex federal regulation affecting tribal communities because it thrusts states into the federal/tribal relationship. Currently under IGRA, only the governor of the state involved has to agree with the Secretary's decision to take land into trust for gaming. Some tribes are pushing for state legislatures, rather than the governor, to make the decision of whether to permit an off-reservation facility. Though some urge the decision to the local community rather than the state legislature, most tribes do not want a local community to have veto power over their casino claiming that to allow such is another unfair blockage in the procedural process.

Section 20 of IGRA has been the subject of multiple proposed legislative amendments and much debate.[32] Any amendments will significantly alter the tribal gaming industry and surrounding communities. Congress needs to take into consideration these four factors and amend Section 20 so that it can maintain IGRA's policies while at the same time mitigate tribal conflicts, conflicts with non-Native Americans, and maintain a good image for Indian gaming.

I. History of the Indian Gaming Regulation Act

Tribal gaming's past is riddled with legal conflicts between the federal government, state governments, and the tribes.[33] The courts have regularly found that tribes are a distinct governing body separate from the United States and state governments.[34] Tribes have characteristics of sovereignty over their members and territory, but are "dependent on, and subordinate to, only the Federal Government, not the States."[35] However, states are not entirely powerless over the affairs of a reservation. State laws may apply to Native Americans on their reservations should Congress expressly consent to it.[36]

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[31] United States v. Kagama, 118 U.S. 375, 383-84 (1886) ("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. They owe no allegiance to the states, and receive from them no protection.").

[32] *See* S. 477, 113th Cong. (2013); *see also* S. 771, 112th Cong. (2011).

[33] *See generally* Carole E. Goldberg, et al., American Indian Law: Native Nations and the Federal System (6th ed. 2010).

[34] Cherokee Nation v. Georgia., 30 U.S. 1, 1-2 (1831) ("The Cherokees are a state. They have been uniformly treated as a state since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political, character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.").

[35] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980)).

[36] *Id.*

P.L. 280, passed in 1953 and codified as 18 U.S.C. §1162, permits states to have limited jurisdiction on reservations when the matters are criminal in nature.[37] Prior to Public Law 280, states lacked the ability to prosecute Native Americans for crimes committed within the borders of the reservation.[38] Even the jurisdiction of federal district courts over reservations was limited to just ten specific crimes.[39] House Reports explained that leaving the tribal government primarily responsible for law enforcement was in some cases insufficient.[40] Congress remedied the problem by delegating criminal jurisdiction to states that demonstrated a desire to take on the duty.[41] Though there is not much legislative history on P.L. 280, Congress expressed its concern over enclaves of lawlessness and inadequate tribal law enforcement.[42]

Twenty-five years after the passing of P.L. 280, the Supreme Court opened the floodgates for tribal gaming with its interpretation of the law in *California v. Cabazon Band of Mission Indians*. In *Cabazon*, two federally recognized tribes, the Cabazon and Morongo Bands of Mission Indians, were located on reservations in Riverside County, California.[43] Each band possessed an ordinance approved by the Secretary to conduct bingo games within their reservations.[44] The Cabazon Band also operated a card club where draw poker and other card games were played.[45] At that time, the state of California did not prohibit all forms of gaming, as it operated a lottery and encouraged its citizens to participate in "state-run gambling."[46] In addition to permitting a state lottery, California allowed charitable organizations to conduct, under strict circumstances, bingo games.[47] These restrictions required bingo games to be staffed and operated by members of the charitable organization.[48] They also precluded members operating the games from receiving pay for their services, and mandated the games' profits be kept in special accounts specific to charitable purposes.[49] Additionally, the prizes could not exceed $250 per game.[50] In *Cabazon*, California state authorities asserted jurisdiction, pursuant to P.L. 280, to shut down the tribal gaming because a violation of gaming laws was consid-

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[37] 18 U.S.C. §1162 (1953) (providing that Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin have criminal jurisdiction upon enactment; the other states may exercise the option).

[38] Worcester v. Georgia., 31 U.S. 515, 534 (1832) (the United States Supreme Court found the Cherokee Nation within Georgia is not under the state's territorial jurisdiction as it has been recognized by the laws and treaties of the United States as subject to the control and dominion of the Cherokee Nation of Indians).

[39] 18 U.S.C. §1153 (1948).

[40] Bryan v. Itasca, 426 U.S. 373, 380 (1976) (citing H.R. Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953)).

[41] *Id.*

[42] *Id.* at 379.

[43] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 204 (1987).

[44] *Id.* at 204-05.

[45] *Id.* at 205.

[46] *Id.* at 210.

[47] *Id.*

[48] *Id.* at 205.

[49] *Id.*

[50] *Id.*

ered a criminal offense. Based on this analysis, California argued the tribe's for-profit bingo and draw poker were expressly prohibited under state law.[51]

The U.S. Supreme Court found in favor of the Cabazon and Morongo Bands by distinguishing a limitation to P.L. 280 that the Court had already addressed in a prior case.[52] In its earlier holding in *Bryan v. Itasca County, Minnesota,* the Supreme Court interpreted P.L. 280 as granting jurisdiction to the states for the purposes of adjudicating private civil matters between Native Americans, but withheld the power of civil regulatory authority over Tribal actions, i.e. states did not have the power to tax the tribes.[53] The Supreme Court's rationale was that bestowing such authority to the states "would result in the destruction of tribal institutions and values" which is something the act was not intended to cause.[54] Therefore, the Court found a state's authority to enforce a law turned on whether or not the law was criminal or civil in nature.[55] In *Cabazon*, the California authorities viewed the gambling violation as criminal in nature, the Supreme Court interpreted the violation as primarily civil.[56] The Court reasoned a state's laws fall under P.L. 280's grant of criminal jurisdiction only if the intent of the laws is to prohibit specific conduct.[57] However, since gambling in California was allowed and subject to regulation, P.L. 280 did not grant the state the authority to enforce the restrictions of its gaming law because "it must be classified as civil/regulatory" and not criminal.[58] Just because a regulatory law may be enforceable as both criminal and civil does not bring the law under P.L. 280's umbrella.[59] *Cabazon* opened up the option of tribal gaming beyond what was imagined in 1987.

Congress enacted IGRA a year after the publication of *Cabazon*. IGRA was meant to not only regulate gaming on Indian lands, but also to restrict the land on which tribes can conduct their gaming operations.[60] As expressed in the Act, the general purpose of IGRA included the protection of both the Native Americans and the non-Natives entering the reservations to gamble.[61] IGRA's regulatory provisions were meant to "shield [tribes] from organized crime and other corrupting influences" and to guarantee that tribes would be the primary beneficiaries of the operation.[62] Additionally, the regulations were meant to ensure that gaming is "conducted fairly and honestly" by both the player and

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[51] *Id.* at 205-06.

[52] *Id.* at 208-09.

[53] Bryan v. Itasca, 426 U.S. 373, 373 (1976) (*Bryan* involved a native residing on a reservation who brought action against the county and state for attempting to levy personal property tax on his mobile home).

[54] *Cabazon*, 480 U.S. at 208.

[55] *Id.*

[56] *Id.* at 209 ("If the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation.").

[57] *Id.*

[58] *Id.*

[59] *Id.* at 211.

[60] Redding Rancheria v. Salazar, 881 F. Supp. 2d 1104, 1109 (N.D. Cal. 2012).

[61] 25 U.S.C. §2702(2) (1988).

[62] *Id.*

the casino.[63] IGRA divided gaming on reservations into three classes, each class giving the state varied regulatory authority over the gaming operation.[64]

Gaming has proved to be a financial success for tribes. As of 2009, 237 Native American tribes in twenty-eight states have used gaming to rebuild their communities by creating new jobs and funding their governments and public services.[65] In 2009, tribal gaming's gross revenue was approximately $26.4 billion.[66] Given the economic downturn in 2008,[67] these numbers are impressive. In 2009 there was only a $300 million drop from the $26.7 billion the National Indian Gaming Commission (NIGC) projected in 2008.[68] Since then, tribal gaming has gained any footing it lost, reporting revenues totaling $27.4 billion in 2011.[69]

II. The Location Requirement and IGRA's Exceptions

IGRA also addresses where a tribe may conduct gaming.[70] According to Section 20, there is a general prohibition, with explicit exceptions, stating that gaming "shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988."[71] The exceptions to this

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[63] *Id.*

[64] 25 U.S.C. §2703 (1992). Class I gaming is the least stringent of the categories. Gaming certified under Class I is under the exclusive control of the tribe and is not subject to any other provisions of IGRA. 25 U.S.C. §2710(a)(1) (1988). Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming . . . in connection with, tribal ceremonies or celebrations." 25 U.S.C. §2703(6) (1992). Class II gaming gives the state some, albeit minimal, control over the form of gaming on the reservation. Class II gaming includes bingo where the game is played for prizes with cards bearing numbers or some other labels. 25 U.S.C. §2703(7)(A) (1992). This classification also permits card games specifically authorized by state law or those not expressly prohibited by the state. *Id.* The classification of Class II gaming does not include any banking card games, "electronic or electromechanical facsimile or slot machines of any kind." 25 U.S.C. §2703(7)(B) (1992). Banking card games include baccarat, chemin de fer, and blackjack. *Id.* According to IGRA, a Native American tribe can engage in Class II gaming on their reservation if the gaming "is located within a State that permits such gaming for any purpose by any person, organization or entity" or if the tribe adopts an ordinance approved by the Chairman. 25 U.S.C. §2710(b) (1988). Therefore, if any form of gaming classified under Class II is permitted within a state, the state cannot prohibit the tribe from engaging in those specific forms of gaming within the reservation. Class III is the final classification and it includes all forms of games that are not defined under Class I or II. 25 U.S.C. §2703(8) (1992). Class III games are only lawful on Native American reservations if they are permitted by an ordinance or resolution that is adopted by the tribe, meet the requirements of Class II gaming, and are approved by the Chairman." 25 U.S.C. §2710(d) (1988). "Chairman" is defined as Chairman of the National Indian Gaming Commission. 25 U.S.C. §2703(2) (1992).

[65] 2009 *Economic Impact Report*, Nat'l Indian Gaming Ass'n, at 2, *available at* indiangaming.org/info/NIGA_2009_Economic_Impact_Report.pdf.

[66] *Id.*

[67] Nick Mathiason, *Three Weeks that Changed the World*, The Guardian (Dec. 27, 2008), http://www.theguardian.com/business/2008/dec/28/markets-credit-crunch-banking-2008.

[68] *NIGC Tribal Gaming Revenues from 2005-09*, Nat'l Indian Gaming Ass'n, *available at* http://www.nigc.gov/LinkClick.aspx?fileticket=1k4B6r6dr-U%3D&tabid=67.

[69] *Id.*

[70] 25 U.S.C. §2719(a) (1998).

[71] *Id.*

broad restriction are categorized as either "equal footing" exceptions or the "off-reservation" exceptions.[72]

A. *Equal Footing Exceptions*

The prohibition of gaming on land acquired after 1988 poses a major problem for several tribes due to the federal government's previous assimilationist policy toward Native Americans.[73] Between 1954 and 1962, Congress passed fourteen termination acts resulting in 110 bands and tribes losing their federal recognition.[74] The loss of federal recognition for these tribes eventually led to their dissolution.[75] Ultimately, the government reinstated most of the terminated communities.[76] However, the damaging effects could not be undone. Though the government reinstated many tribes in the 1970's and 1980's, "[s]everal native bands and tribes and over one million acres of land remain unrestored" as of this writing.[77] Tribes that were not recognized or did not have a designated reservation prior to October 7, 1988, were prohibited from participating in gaming because they had no land on which to operate.[78]

The equal footing exceptions treat after-acquired land as if it was land in trust pre-IGRA.[79] Parcels qualify if they are "within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988."[80] Lands in trust as part of a land settlement claim, and lands as part of the tribe's initial reservation also qualify under the "equal footing" exceptions.[81] Finally, tribes can apply for an exception if the land in trust is part of the restoration of lands for a tribe that has had its federal recognition restored.[82]

To counteract the government's previous policy of assimilation, the criteria for the "restored lands" exception is codified under 25 C.F.R. §§292.7-292.12. This exception included criteria to meet 25 U.S.C. §2719(b)(1)(B)(iii).[83] Congress provided such mechanisms "to ensur[e] that tribes lacking reservations when IGRA was enacted [were] not disadvantaged relative to more established ones."[84]

The Redding Rancheria is one of the tribes that attempted to commence gambling on "restored lands" pursuant to one of the equal footing exceptions.[85] In 1922, the federal government established a 30 acre reservation for Redding

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[72] 2011 MEMORANDUM, *supra* note 24.

[73] Judith V. Royster Rory, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 659 n.19 (1989).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] 2010 MEMORANDUM, *supra* note 16.

[80] 25 U.S.C. §2719(a)(1) (1998).

[81] 25 U.S.C. §§2719(b)(1)(B)(i)-(ii) (1998).

[82] 25 U.S.C. §2719(b)(1)(B)(iii) (1998).

[83] 25 C.F.R. §292.7 (2008).

[84] Redding Rancheria v. Salazar, 881 F. Supp. 2d 1104, 1109-10 (N.D. Cal. 2012) (quoting Roseville v. Norton, 348 F.3d 1020, 1022 (D.C. Cir. 2003)).

[85] *Id.*

Rancheria.[86] In 1965, the tribe's recognition was withdrawn and the reservation was terminated.[87] In 1984, almost twenty years later, the tribe's federal recognition was reinstated.[88] By 1992, the Redding Rancheria had taken back 8.5 of the original 30 acres.[89] The tribe owned and operated a casino on the 8.5 acre reservation but sought to expand its gaming operation by constructing a second casino on part of an undeveloped 230 acre land parcel that had been purchased by the tribe in 2004 and 2010.[90]

The tribe's proposal for a new casino became the subject at issue in *Redding Rancheria v. Salazar*. In *Redding*, there was no dispute as to whether the tribe was restored, the dispute concerned whether the purchased lands were "restored."[91] The newly acquired property was located several miles outside the reservation.[92] The tribe requested that the DOI determine whether the parcels had eligibility for gaming.[93] The DOI informed the tribe that, according to 25 C.F.R. §§292.7-292.12, the parcels were not eligible.[94] The tribe filed suit to set aside the decision rendered by the DOI.[95]

The Court concluded the DOI can only classify the land as "restored" as long as it satisfies §292.12.[96] According to the CFR, the tribe must demonstrate: (1) a modern connection, (2) a historic connection, and (3) a temporal connection.[97] The court found that the tribe sufficiently demonstrated the modern and historical connection requirements but failed the temporal connection test.[98] Section 292.12(c) states that to satisfy the temporal connection requirement a tribe has to show either that (1) "the land is included in the tribe's first request for newly acquired lands" since the tribe's restoration, or (2) "the tribe submitted an application to take the land into trust twenty-five years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands."[99] The court determined that the tribe could not show either element.[100]

B. Two-Part Determination

The second exception is commonly referred to as the "off-reservation" exception or the two-part determination. According to 25 U.S.C. §2719(b), the gaming prohibition does not apply when the Secretary decides a gaming operation on after-acquired lands "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding commu-

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[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 1110.
[92] *Id.* at 1108.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 1110.
[96] *Id.* at 1111.
[97] 25 C.F.R. §§292.12(a)-(c) (2008).
[98] Redding Rancheria v. Salazar, 881 F. Supp. 2d 1104, 1111 (N.D. Cal. 2012).
[99] 25 C.F.R. §292.12(c) (2008).
[100] *Redding*, 881 F. Supp. 2d at 1111.

nity."[101] In addition to the Secretary's decision to take the land into trust for gaming, the governor of the state also has to concur with the land's use.[102] The two-part determination exception has caused the most controversy as it allows a tribe to conduct gaming on land "in the best interest of the tribe" even if it is outside the tribe's reservation or historical territories.[103]

III. Proposed Amendments to Section 20 of IGRA

A. The Consultation Requirement

San Manuel Band Chairman Marquez has contended that future legislation should require the Secretary to do more than merely consult with neighboring tribes when determining whether to take land into trust for gaming.[104] As Section 20 currently stands, the Secretary can determine that gaming activity may occur on newly acquired lands "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes."[105] In Marquez's and many other tribal leaders' view, limiting the Secretary's power to make a decision by requiring a greater level of investigation could avoid off-reservation casinos encroaching on an on-reservation casino's market. This would also help lessen the conflict between tribes because land would not be taken into trust for gaming if another tribe's business was threatened by its proximity. In contrast, creating this provision could hinder tribes that have not yet begun their gaming operations from ever having the chance to enter the market. This issue is sensitive because of its potential to pit tribes against each other.[106]

Gaming has turned into a very lucrative business for the Native American tribes. As stated in IGRA's policy, Congress enacted IGRA to "ensure that the Indian tribe is the primary beneficiary of the gaming operation."[107] Tribal gaming has brought several tribes immense wealth. Tribes whose people once depended on welfare now consist of some of the wealthiest people in America.[108] The Jackson Rancheria of Miwuk Indians once gathered firewood to supplement their welfare funding.[109] Now, Goldman Sachs manages the tribe's nine-figure portfolio.[110] Another example is the United Auburn tribe

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[101] 25 U.S.C. §2719(b)(1)(A) (1988).
[102] *Id.*
[103] Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 Va. J. Soc. Pol'y & L. 396, 466 (2006). For example, in 2004 a newspaper article described how at least five Oklahoma tribes were attempting to seek out of state land for gaming because the Indian gaming competition in the state was so fierce. *See* Tony Thornton, *State Tribes Make Play to Get Casinos Elsewhere Oklahoma Indians are Frustrated by Small Markets and the Inability to Operate Las Vegas-style Games*, Oklahoman, Aug. 16, 2004, at News, *available at* 2004 WLNR 21114502.
[104] *Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, *supra* note 27.
[105] 25 U.S.C. § 2719(b)(1)(A) (1988).
[106] Onishi, *supra* note 13.
[107] 25 U.S.C. § 2702(2) (1988).
[108] Onishi, *supra* note 13.
[109] *Id.*
[110] *Id.*

which operates a casino a short drive from Sacramento.[111] The tribal council successfully provides housing for its members, builds water and sewer systems, and funds the healthcare and dental needs of all its members.[112] Children in the tribe are also encouraged with monetary rewards to succeed in school.[113] The Jackson Rancheria and the United Auburn are just two examples of how gaming has vastly improved the tribes' welfare.

Due to the potential wealth that tribal gaming can bring to a tribe, a major issue taking root is intertribal conflict from competing gaming operations. Tribes that have maintained their on-reservation casinos fear that other tribes are unfairly advantaging themselves in the gaming market. Because they have built casinos on their reservations despite the inconvenience of their locations to major thruways or cities, tribes maintaining on-reservation casinos resent tribes trying to build off-reservation gaming operations. The Picayune Rancheria of the Chukchansi Indians is heavily opposed to the North Fork Rancheria of Mono Indians' efforts to build a casino along a highway.[114] The Picayune Indians say the Bureau of Indian Affairs' decision to take the additional property into trust when the North Fork Indians already have existing tribal land is "primarily because it would be more commercially profitable" for the tribe.[115] The Picayune are against off-reservation gaming, stating it is "unjust and unfair to tribes . . . who played by the rules."[116]

Several tribes also feel the consultation requirement is misleading. During congressional testimony, James Ransom, the Chief of the Saint Regis Mohawk Tribe, commented that a major problem behind off-reservation gaming is the failure of tribes to consult with the tribes that might be potentially impacted.[117] One such example is in the Bureau of Indian Affairs' environmental impact statement regarding the Jemenez Pueblo application for a casino along the New Mexico and Texas border.[118] The Fort Sill Apache Tribe filed comments with the Bureau claiming that the Bureau's findings were inadequate because they didn't consider Fort Sill's own casino plans on trust land ten miles away.[119] The "consult" requirement in Section 20 has proven vague from a tribe's perspective because there is no established standard to review for an application.[120] Realistically, Chief Ransom's suggestion that the tribes accept responsibility, be respectful to each other, and facilitate discussions on the issue is not likely to happen.[121] While the tribes together may be a stronger force,

111 *Id.*
112 *Id.*
113 *Id.*
114 Brian Wilkinson, *North Fork Tribe Gets Land Approval for Casino*, SIERRA STAR, Dec. 6, 2012, *available at* 2012 WLNR 26262944.
115 *Id.*
116 *Id.*
117 *Indian Gambling Regulation: Hearing Before the Committee on Senate Indian Affairs*, 109th Cong. (2005) (statement of James W. Ransom, Chief, St. Regis Band of Mohawk Indians), *available at* 2005 WLNR 10228673.
118 Rene Romo, *Change Boosts Jemez Casino*, ALBUQUERQUE J., June 26, 2011, *available at* 2011 WLNR 12715684.
119 *Id.*
120 *Indian Gambling Regulation: Hearing Before the Committee on Senate Indian Affairs*, *supra* note 117.
121 *Id.*

their personal loyalties remain with the members of their individual tribes.[122] The tribal gaming industry has become competitive. For the foreseeable future, it is likely that for every application for an off-reservation casino there will also be action from another tribe trying to quash it.

For depressed tribes seeking to acquire lands near their existing reservations, the prospect of narrowing the Secretary's ability to make determinations over newly acquired lands is a major concern. Though gaming has provided some tribes with ample profits to support their communities, there are still several tribes that need assistance to survive.[123] "Of the 550 federally recognized tribes, only ninety-one of them operate high-stakes gaming facilities."[124] Tribes that have kept their gaming within their reservation now feel that they are disadvantaged by the policy shift regarding reservation shopping.[125] The tribal council secretary for the Enterprise Rancheria of the Maidu Indians stated in an interview how "[i]t's really sad right now in Indian country with the divide between the haves and have-nots."[126] The Enterprise Tribe struggles to support itself with half of its members living in FEMA trailers leftover from the Hurricane Katrina disaster.[127] They are seeking to build a casino on a site with more "economic potential" 35 miles south of their reservation and are confronted with opposition from two other tribes that have casinos in that area.[128] Enterprise's secretary says the tribe is trying "to get on equal footing" with other tribes, which have enjoyed a great deal of success with gaming.[129]

The effects of amending Section 20 to require more than mere consultation would likely be comparable to the recent situation in Wisconsin. In March of 2013, Wisconsin Governor Scott Walker stated that any of the 11 tribes residing in Wisconsin have the power to veto an off-reservation proposal.[130] Under this policy, there has to be a consensus between the tribes, meaning that each tribe has to approve the application, before the governor will concur with the Secretary's decision to take land into trust.[131] The Menominee tribe spoke out against the governor's new position saying the stance heavily benefits the Forest County Potawatomi, a tribe that owns a bingo casino in Milwaukee that had net revenue of $368 million in its most recent fiscal year.[132] The Menominee followed up this criticism, stating that the power to veto a project is "a two-way street."[133] The Wisconsin tribes will continue to reject any off-reservation proposals put forth by any other tribe. Governor Walker's policy

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[122] Onishi, *supra* note 13.

[123] Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 736 (1996).

[124] *Id.*

[125] Onishi, *supra* note 13.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] Cary Spivak, *Tribes Can Veto Casino Plans: Walker Says There Must be Consensus Before Off-Reservation Proposals OK'd*, MILWAUKEE J. SENTINEL, Mar. 1, 2013, at D1, *available at* 2013 WLNR 5124507.

[131] *Id.*

[132] *Id.*

[133] *Id.*

may keep the off-reservation applications in check, but it has stunted growth of tribal gaming while at the same time increasing tensions between the state's tribes.

Neither side, on the issue of whether to add an "affirmative finding" requirement to Section 20, is necessarily wrong. Gaming has provided a great deal of revenue for many tribes. Being able to successfully subsist without any aid from the federal government is a great incentive to enter the gaming market and to keep competition to a minimum. Allowing another operation within a casino's vicinity could drastically affect revenue that supports the tribe. An off-reservation casino in a location that is easier to access could cause significant losses to another tribe. The tribes are simply looking out for their own members' interests, whether those interests are to find new revenue streams or preserve their current business.

B. The Ancestral Lands Requirement

Efforts to amend IGRA to add an ancestral land requirement to "off-reservation" determinations is another issue that has instigated a great deal of conflict between tribes.[134] Critics of off-reservation gaming claim that tribes are able to acquire land to which they have no ancestral ties or, even worse, land to which a different tribe has an ancestral connection.[135] In addition, limiting the available land a tribe may acquire for gaming to that which the tribe can show an ancestral connection to is not only important to inhibit further tribal conflicts, but also to maintain the delicate balance between Native American gaming operations and non-Native operations. Such a limitation would prevent a windfall to the tribes at the expense of non-Native operators and the states.

A tribal land application in Barstow, California exemplifies the ancestral land controversy.[136] The Los Coyotes Band and Big Lagoon of Humboldt County had arranged with former California Governor Arnold Schwarzenegger to build separate casinos off a major freeway exit in Barstow in exchange for sharing the revenue gained from their slot machines.[137] Barstow is a halfway point on Interstate-15 between Los Angeles and Las Vegas. As a major hub for travelers, a casino would bring in a great deal of revenue, which is why the tribes were interested in the site even though it was not remotely close to their own reservations.[138] The Los Coyotes' casino would be approximately 115 miles away from their tribe's reservation and the Big Lagoon's casino would be 700 miles away.[139] San Manuel Band Chairman Marquez has strongly spoken out against the Los Coyotes and Big Lagoon casino proposals because the

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[134] Jim Miller, *San Diego Tribe is Still Trying for Barstow Casino*, THE PRESS-ENTER., Aug. 2, 2011, *available at* 2011 WLNR 15266778.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] James P. Sweeney, *Off-Site Casinos Appearing Unlikely: New Policy Set Up by Interior Official*, SAN DIEGO UNION-TRIBUNE, January 8, 2008, at B1, *available at* 2008 WLNR 527383.

intended sites for the casinos are within San Manuel's own ancestral lands.[140] San Manuel has maintained that it is not opposed to a tribe going outside its reservation's borders for gaming, but it opposes the Los Coyotes project purely because the tribe has no ancestral ties whatsoever to the Barstow area.[141]

To support their argument, the San Manuel tribe claims they would not oppose the Chemehuevi's land application for a Barstow casino project because the Chemehuevi have ties to the land in Barstow.[142] The Chemehuevi's proposed project, however, was not a part of the tribal negotiations with Governor Schwarzenegger.[143] Permitting Los Coyotes and Big Lagoon to construct a gaming facility there gives them the ability to gain revenue on land that is valuable to another tribe that actually has ties to the area.

The threat of an imbalance between Native and non-Native gaming operations could be avoided with the ancestral lands requirement as well. New Mexico Senator Mary Jo Papen recognized the benefits gaming has brought to the tribes of her state, but notes that the Jemenez Pueblo application for gaming land has caused a great deal of controversy. The Jemenez Pueblo is a tribe that is planning a casino project next to a major highway in a town called Anthony.[144] The town is approximately 300 miles from their reservation.[145] According to Papen, this intended tribal casino site is only a few miles from a non-Native racetrack.[146] In New Mexico, racetracks are permitted to have slot machines in their facilities but no table games.[147] The Jemenez Pueblo casino will be able to have both slot machines and table games, potentially drawing a great deal of business away from its non-Native competitor.[148] The tribe also pays much less to the state than the non-Native casino pays in taxes. The racetrack has to pay 26 percent of its slot machines' net revenue, while the Jemenez Pueblo has to pay a mere eight percent.[149]

Given the disparity of what types of games the tribe may offer to the public and the tax arrangement with the state, the non-Native casino and, ultimately, the state suffer significant harm. The non-Native operator loses patrons to the tribal casino, not only because of the tribal casino's proximity to the non-Native operation, but also because of the variety of gaming the tribe can offer since it is untethered to state regulations. The state's net tax base, subsequently, diminishes.

Consequently, provisions requiring a tribe to demonstrate an ancestral connection to newly acquired lands have not met much dispute. Both Marquez

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[140] *Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, *supra* note 27.

[141] Miller, *supra* note 134.

[142] *Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, *supra* note 27.

[143] *Id.*

[144] Romo, *supra* note 118.

[145] *Id.*

[146] *Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, *supra* note 28 (statement of Sen. Mary Kay Papen, New Mexico).

[147] *Id.* (these facilities have commonly been referred to as "racinos").

[148] *Id.*

[149] *Id.*

and Kennedy support the requirement.[150] Scholars have also supported the requirement as a compromise between the tribes and the states. Rand suggested that maintaining tribal gaming within ancestral lands could preserve opportunities and encourage the tribes and states to engage in cooperative policymaking.[151]

C. The Concurrence Requirement

Lastly, there has been a debate over who within a state government should have the authority to concur or disagree with the Secretary's determination to take land into trust for gaming. IGRA permits tribes to operate gaming on newly acquired lands once the Secretary takes the land into trust for gaming, "but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination."[152]

The relationship between tribes and the United States is unique because a tribe is a sovereign nation independent of the federal government only so much as Congress permits.[153] IGRA, on the other hand, adds a new consideration into

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[150] *See Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, *supra* note 27; *see also Off-Reservation Indian Gaming: Hearing Before the Committee on House Resources, supra* note 28.

[151] Rand & Light, *supra* note 103, at 469.

[152] 25 U.S.C. §2719(b)(1)(A) (1988).

[153] The Native Americans' relationship with the federal government is unique. When one thinks of the word "sovereignty" it hints at the power to independently manage a body of people. Tribes have their own sovereignty separate from United States citizens, but the strength and extent of that sovereignty depends on what the federal government is willing to grant it. The result of this pseudo-sovereignty is a variety of case law from the Supreme Court of the United States that gives certain powers, but not other essentials for having independence within their reservations' borders. For example, *Worcester v. Georgia* is a case that overturned the state's assertion of power within the Cherokee reservation. Worcester v. Georgia, 31 U.S. 515 (1832). Around 1830, the legislature extended its laws on the reservation despite federal treaties with the tribe stating otherwise. *Id.* at 521-28. Chief Justice Marshall held that Georgia's power was invalid because the Cherokee Nation, "is a distinct community occupying its own territory." *Id.* at 561. *Williams v. Lee* was a twentieth-century reaffirmation of *Worcester*. A non-Native who owned a shop on a reservation filed suit against a Native American couple for the collection on goods sold to them on credit. Williams v. Lee, 358 U.S. 217 (1959). The appeal came from the Arizona Supreme Court after its decision that the state's courts could exercise civil jurisdiction over reservations because the federal government didn't expressly forbid it. *Id.* at 218. The Supreme Court disagreed and held that a state court had no jurisdiction over a lawsuit brought by a non-Native against a Native American for a debt contracted on tribal land. *Id.* Justice Black wrote in his opinion, "the cases in [the Supreme Court] have consistently guarded the authority of Indian governments over reservations." *Id.* at 223. Though the above cases demonstrate the federal government's deference to the tribes, there are also a series of cases reflecting that tribal sovereignty is not absolute. The most prominent decision comes from *Oliphant v. Squamish Indian Tribe*. Though prior decisions permitted the tribes jurisdictional power over their reservations, *Oliphant* held that the tribes have no criminal jurisdiction to try and punish non-Natives within their reservation borders. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Squamish's treaty stated that the tribe recognized their dependence on the federal government, and the Court interpreted this provision along with the *Worcester* opinion to hold that the tribal nations were in such a situation that made them "necessarily dependent. . .for their protection from lawless and injurious intrusions on their country." *Id.*, at 207 (quoting Worcester, 31 U.S. at 555). Thus, the Court has given the Native Americans a half-sovereignty for although they are in part treated as nations separate

this dynamic by empowering the state governor to choose whether or not to permit a tribal casino within the state's borders. Chairman Marquez takes the position state legislators should make the determination over the governor.[154] His proposal has been the subject of debate when considering amendments to Section 20. In addition to possibly adding the veto power to state legislatures, there's a question of whether to give the surrounding community of a new casino site a voice as to whether an application should be approved.[155] Several tribes are heavily against having a local referendum in response to a tribal casino's proposal.[156] Marquez fears a local referendum would dramatically alter federal Indian policy and create "unprecedented intrusion" into the United States' relationship with the tribes.[157] Kennedy did not see local input as an intrusion, but agreed that local governments should not have the power to veto a tribal development.[158] Allowing another veto power to an off-reservation casino would create a significant burden by adding another step to the process.[159] Tribes have argued that the local community is already considered by the Secretary when deciding to take the land into trust.[160] However, considering many tribes have complained about the adequacy of the "consulting" requirement, where their interests are affected by the proposed gaming operations, this may not be a strong argument to pose.

In contrast, Senator Papen has supported the idea of requiring a local referendum.[161] Such an action would "[allow] citizens most impacted by off-reservation casinos to have a voice."[162]

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from the United States, Congress has the power to diminish that power. *See* Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010). Tribal sovereignty is a complex body that hurts and helps Americans and Native Americans alike. As Florey poses to his audience, this means that a patron who is injured while on a reservation cannot file suit against the tribe because of sovereign immunity, and a non-Native can repeatedly commit crimes on tribal land because tribes have no criminal jurisdiction over non-Natives within their borders. Katherine J. Florey , *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 595-96 (2010). The issues that have arisen over tribal gaming are yet another demonstration of these sovereign complexities on and off the reservation. IGRA was considered "an example of 'cooperative federalism' " because it tried to balance the conflicting interests of the federal and state governments and the Native American tribes by granting each body participation in regulatory instrument. Brooke Delores Swier, *Gaming Goldmines Grow Green: Limited Gaming, Good Faith Negotiations, and the Economic Impact of the Indian Gaming Regulatory Act in South Dakota*, 54 S.D. L. REV. 493, 498 (2009) (quoting Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)).

[154] *Off-Reservation Indian Gaming: Hearing Before the House Committee on Resources*, *supra* note 29 (statement of Deron Marquez, Tribal Chairman, San Manuel Band of Mission Indians of California).

[155] *Id.*

[156] *Id.*

[157] *Id*.

[158] *Off- Reservation Indian Gaming: Hearing Before the House of Representatives Resources Committee*, *supra* note 27 (statement of Cheryle A. Kennedy, Tribal Council Chairwoman, Confederated Tribes of the Grand Ronde Community of Oregon).

[159] *Id.*

[160] *See* 25 U.S.C. §2719 (1988).

[161] *Off- Reservation Indian Gaming: Hearing Before the House of Representatives Resources Committee*, *supra* note 27 (statement of Sen. Mary Kay Papen, New Mexico).

[162] *Id.*

Many cities have made the effort to help tribes with their off reservation requests. Lansing, Michigan recently transferred the first of several parcels of land to the Sault Ste. Marie Tribe of Chippewa Indians.[163] The property is located in downtown Lansing, and the city hopes the casino will mean "job growth and 'incalculable' economic benefits for the region."[164] With the possibility of 700 construction jobs and 1,500 permanent jobs, there is little doubt why the city is willing to give the tribe conveniently located property.[165]

Barstow, California is another city that is welcoming the possibility of off-reservation gaming facilities. As previously mentioned, the Los Coyotes Band of Cahuilla Indians has been working with officials toward the construction of a casino off a major exit on Interstate-15.[166] The city has also fallen victim to the economic downturn, suffering a 15.7% unemployment rate.[167] The casino will bring 1,000 construction jobs and 820 permanent jobs.[168]

Beyond the prospects for jobs and revitalization, tribes will also heavily compensate communities in exchange for their off-reservation operations. The North Fork tribe would like to build a casino on Highway 99 just north of Madera, California.[169] The tribe has agreed to provide the county and city of Madera, as well as the local water district, an annual payment of $5 million to finance schools, roads, parks, public safety, economic development, and local charities.[170] The North Fork also agreed to pay the Picayune Rancheria of the Chukchansi Indians to mitigate the loss to their competing on-reservation casino. The Chukchansi will receive $760,000 monthly until the North Fork casino opens and then 2.5% of the net wins on slots till 2020.[171] Beyond even these payments, the North Fork tribe has also agreed to provide funding to non-gaming tribes within the state.[172]

IV. CONCLUSION

The resulting effects of the *Cabazon* decision gave tribes the power to hold for-profit gambling on their reservations. Congress then enacted IGRA to regulate the industry. In 1994, public policy analyst Sidney Wolf wrongly blamed IGRA for killing the gaming buffalo.[173] Today, tribal gaming is a huge industry having earned over $27 billion in the 2011 and 2012 fiscal years.[174] It has been astoundingly beneficial to tribes that have participated in gaming operations. The ability to operate these facilities on reservations has allowed

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163 Kristen M. Daum, *City Transfers Land to Tribe for Lansing Casino Project*, LANSING STATE J., Nov. 2, 2012, at Business, *available at* 2012 WLNR 23288913.
164 *Id.*
165 *Id.*
166 Sam Pearson, *Northern California Off-reservation Casino Could be Model for Barstow*, DESERT DISPATCH, July 26, 2012, *available at* 2012 WLNR 15696922.
167 *Id.*
168 *Id.*
169 Wilkinson, *supra* note 114.
170 *Id.*
171 *Id.*
172 *Id.*
173 Wolf, *supra* note 2.
174 *2003-2012 Gross Gaming Revenue Trends*, *supra* note 12.

many tribes and bands to amass wealth to support their members with homes and healthcare, redevelop reservations through construction of water and sewage systems, and encourage young members to succeed in school.[175] IGRA simply confined tribal gaming to prevent unfettered abuse of a system meant to primarily benefit tribal members.

The "off-reservation" exception or two-part determination exception has created a great deal of conflict, not only between Native and non-Native gaming operations, but also between the tribes themselves. Lands that a tribe had no prior ties to are now available for gaming, so long as the Secretary and the governor of the state both agree to allow gaming on the site. Allowing tribes to construct casinos in conveniently located, high-traffic areas has and will harm competing tribal casinos that had maintained their facilities on their own reservations' land. In recent years, tribal representatives have approached Congress, lobbying for amendments to Section 20 to better harness opportunities for off-reservation gaming. Though tribes have expressed several different ways to amend IGRA with regard to the two-part determination, the general themes behind their concerns are very similar.

Section 20 of IGRA needs to undergo several revisions. While tribal opinions vary as to the extent Section 20 should limit off-reservation gaming, the two-part determination needs to be redrafted to reflect the concerns mentioned in this article. With the Obama Administration's rescission of the Bush Guidance Memo, the federal government's policy toward off-reservation gaming has become more lax. Although current California Governor Jerry Brown did not believe his recent decision to allow two off-reservation casino sites would create a trend, it was that decision that established a new environment and perspective toward tribes applying for an off-reservation site.

The "consult" requirement should be cause for greater investigation into the effects of proposed off-reservation casinos on local communities and tribes. The fact that more than one tribe has accused the Bureau of Indian Affairs of not considering a competing tribe's interest in an off-reservation casino proposal should be a major concern. Allowing a foreign tribe access to another tribe's gaming market has the potential of diminished revenues and will permanently affect intertribal relations.

Many tribes have also supported limiting a tribe's ability to extend off-reservation gaming to lands to which it has an ancestral connection. Such a requirement would not only prevent a tribe from overextending beyond land they have a right to occupy, but it would also prevent them from invading another tribe's ancestral territory. Additionally, an ancestral land requirement would better balance the competing interests of Native and non-Native gaming operations.

Lastly, there is a question as to who in the state government should wield the power to decide off-reservation applications. Several tribes want state legislators to make this decision rather than the governor. On the surface, this amendment is logical. Legislators are representatives of the different regions of the state. Legislators theoretically would be aware of their different regions' concerns better than a single governor who represents the entire state. How-

[175] Onishi, *supra* note 13.

ever, giving state legislators the power to veto could create a new, large hurdle for an off-reservation casino to pass. Tribes may want state legislators' input, but not another veto vote.

In contrast, tribes are hesitant to include local referendums in the decision-making process. Tribes generally feel that giving veto power to a local community stacks another blockage into a stream already full of several potential vetoes. Still, community input should be an important consideration in approving and off-reservation casino project. Though tribes already have extensive procedural hurdles to gain approval for an off-reservation facility, the fact remains that the local community is the body of people who will be most affected by a casino's presence, both negatively and positively. For instance, tribal casinos provide new jobs and have the potential to spur growth and spending in the local economy. Finding a way to better include local community concerns into the off-reservation approval process is critical to effective development of Indian gaming and the communities it affects.

Tribal gaming is very much like the buffalo several authors have compared it to. Properly managed and developed, gaming can be a sustainable resource for the tribes like the buffalo. However, just like the buffalo was overhunted, so too could be the same fate for tribal gaming without some regulation and control. Despite Sidney Wolf's criticism that IGRA is killing the new buffalo, in fact, it is doing the opposite. IGRA has prevented tribes from overstepping beyond their reservation and tribal lands. Instead of killing the buffalo, IGRA is keeping tribes from overhunting it.