

Case 3: The Political Frame “Setting the Rules for Native Gaming”¹

By

Shalin Hai-Jew

*** Notes to the Instructor:** The political frame takes a macro view and is more strategic and policy-oriented. This focuses on the future of Indian gaming both in the US and globally.

Abstract: The political frame uses a legal, policy and procedure focus to approach the regulation of Indian gaming. With relevant external laws and internal tribal ones, this political frame asks readers to consider important tribal leadership structures and policies to support effective Indian gaming.

The policy frame explores the principles supporting Native American gaming. It also provides an overview of the Indian Gaming Rights Act (IGRA) of 1988. This section includes an overview of the three classes of gambling. The growing political power of Native Americans is addressed near the conclusion.

The policy frame generally suggests that “costs” for some will be “benefits” for others, and all concepts are contestable. The ideas of “fairness,” “sovereignty,” “ethics” and “legality” all may be different based on different perspectives and the interests of various stakeholders.

The tribe has decided to go forward with some more due diligence. This involves examining the laws and policies affecting Native gaming. Also, the tribe itself has asked that some initial tribal policies be put into place for the running of the tribal casino. They want some initial proposals for tribal policies. The policies may touch on a range of issues: state-level compact stances, employment, human resources policies, expenditures, guidelines for the spending of net gains funds, leadership, decision-making, dispute resolution, and others. However, these policies cannot contradict federal and state laws in general.

The following information provides a brief overview of federal laws. State laws and tribal gaming compacts differ from state-to-state. Tribes that have casinos also have different policies and approaches. This section then offers a high-level federal view.

Principled Argument

Native American Sovereignty. The general principles for Indian gaming have been delineated through court arguments and established court precedence. The principle of pre-constitutional and extra-constitutional sovereignty provides a basis for Indian gaming. “Tribes’ ability to govern their members and territories stems from their inherent powers as pre-constitutional sovereign nations. As the original inhabitants of

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North America, indigenous peoples governed themselves without external influence. The federal government's establishment of a legal relationship with the tribes meant that they continued to exercise extra-constitutional authority over their members. This authority translated into the right of self-governance. Under the doctrine of reserved rights, tribes maintain rights they have not specifically ceded to the federal government through treaty or agreement. Because it implies such broad powers, 'the right of self-government may be (tribes') most valuable reserved right'" (Light and Rand, 2005, p. 19).

Yet, even the concept of sovereignty has not been without conflict and difficulty. Challenges to this legal concept and practice have occurred through mass media, the court systems and even the legislature at the federal level. "The federal legal doctrine of tribal sovereignty, or what most frequently is erroneously referred to in federal law and jurisprudence as well as the legal literature as simply 'tribal sovereignty,' incongruously refers to both the legal status of tribes as pre-constitutional and extra-constitutional nations and the body of federal Indian law that defines and limits that political status. This problematic conflation of tribal sovereignty with the federal law that diminishes it is confusing to most people, including policy-makers, and frustrating to Indian law scholars. The federal definition of tribal sovereignty, as it is applied in U.S. laws, court decisions, and regulations, grows out of, diminishes, occasionally crushes, and sometimes supports tribes' inherent self-determination—but does not equate with it" (Light and Rand, 2005, pp. 18 - 19).

The research literature and the historical precedence would suggest that this concept and practice may face challenges in the future.

Indian Gaming Regulatory Act (IGRA)

The Indian Gaming Regulatory Act (IGRA). In 1988, the Supreme Court passed the Indian Gaming Regulatory Act (IGRA, or Public Law 100-497) in response to a court case *California v. Cabazon and Morongo Bands of Mission Indians*. This ruling was widely seen then as the preemption of state law by the federal government's interest in tribal self-sufficiency and economic development. In other words, instead of letting state governments decide whether or not to allow tribes to engage in tribal gaming, they would decide to allow it assuming certain preconditions were met and the state laws have no standing laws against Class III gaming on the books.

Others viewed this law differently—as a restriction on Native American sovereignty and decision-making. Early in its inception and for years afterwards, there were criticisms of the IGRA taking away Native American sovereignty because of its oversight of Indian gaming.

The implications of the IGRA may be seen by some as a restriction on Native American rights. "First, to the extent the IGRA seeks to give a gaming right to all tribes without considering the external impediments to gaming profits many tribes face, it does not distribute the benefits of the gaming right equally. Second, to the extent the IGRA does not recognize either the heterogeneity of tribal cultures or the cultural choices gaming entails, it cannot distribute the benefits of gaming effectively. Gaming, with its concomitant postmodern consumerism, forces tribes that seek to engage in it to assess the commensurability of wealth, cultural identity, and sovereignty. In doing so, gaming complicates the distinction between the material and nonmaterial.

“Finally, for tribes that choose to game under the IGRA, the choice may entail significant political constraints. By allocating some control of gaming rights to the states, the IGRA necessarily redistributes sovereignty. And by subjecting tribal gaming to federal regulation and oversight, the IGRA asks tribes to sacrifice some presumed sovereignty in exchange for a new federal right to exercise sovereignty. The federal entitlement of Native Americans to game on tribal lands does not implicate economic development policy and wealth distribution alone. By redistributing culture and sovereignty, the IGRA fuels the tribes’ long battle for cultural survival and political autonomy” (Mezey, Feb. 1996, p. 713).

The federal government also works with tribes for federal recognition. With the success of tribal gaming, many more tribes have applied for federal recognition. “In Connecticut and elsewhere, tribes seeking federal recognition continue to generate considerable interest from casino investors. There are approximately 291 ‘would-be tribes’ seeking federal recognition, some of them bankrolled by wealthy outsiders” (Light and Rand, 2005, p. 61).

The authors show well the many legal expenses for tribal petition and recognition. “The increased costs of pursuing federal recognition—in hiring what has been labeled a ‘tribe’ of paid consultants and experts including historians, genealogists, treaty experts, lobbyists, and lawyers—have led Blumenthal and other state leaders to argue that ‘money is driving the federal tribal recognition process.’ Blumenthal asserted that the BIA is riddled with conflicts of interest, as senior officials who also are tribal members either have prior relationships with casino interests or intend to become gambling consultants upon leaving the private sector” (Light and Rand, 2005, p. 62).

“Benign Prohibition” Role of the Feds

The US government had been taking a softening stance towards gambling by “benign prohibition,” in the viewpoint of one researcher. Frey sees the decriminalizing of gambling with a policy of non-enforcement: “The rapid expansion of legal gambling, particularly the casino variety; the increased visibility of opposition groups, such as the Christian Coalition; the federal government’s high priority on drug control and the control of money laundering; the mushrooming use of the Internet for a variety of services including placing wagers; local and state governments’ interest in generating additional sources of tax revenue; and the growing concern that gambling might have a negative impact on the social and economic infrastructure of communities, states, and regions have forced the federal government to take a closer look at what it needs to do to regulate gambling” (Frey, Mar. 1998, p. 140).

Potential Biases of Law re: Indian Gaming

Former lawyer, anthropologist and academic Eve Darian-Smith writes a cautionary work about the potential biases in law in the context of Indian gaming. “It is also necessary in order for us to appreciate the interrelationship of social, political, and economic organization and structural systems that perpetuate stereotypes and discriminatory practices. These benefits have ramifications for everyone living and working in the United States regardless of ethnic background or color of skin. We all

have a responsibility and duty to understand ongoing cultural, political, and economic discriminations, despite the relatively small population of Native Americans in this country, which according to the latest census statistics is about 2.4 million, less than 1 percent of the total U.S. population” (Darian-Smith, 2004, p. 5).

A complex layer of regulations affects Native gaming—from the federal, state, and tribal levels. Different classes of gambling are allowed by different states.

Different Classes of Gambling

Class I “Traditional”	Class II “Bingo”	Class III “Casino-Style”
Includes social games played for low-value prizes and traditional forms of tribal gaming associated with native American ceremonies	Includes bingo and other games similar to bingo, such as lotto, pull-tabs, and punch boards, if played in the same location as bingo, and non-banked card games	Includes all games not within either Class 1 or Class II, such as slot machines, banked card games, and casino games
Within exclusive tribal jurisdiction	Within tribal jurisdiction with NIGC oversight	Within the jurisdiction of both the tribe and the state, allocated according to compact, with NIGC oversight
Not subject to IGRA’s requirements	Subject to IGRA’s requirements	Subject to IGRA’s requirements
		Requires a tribal-state compact

Source: Indian Gaming Regulatory Act, 25 U.S.C., 2701-21 (2001).
(Light and Rand, 2005, p. 45)

Note: The National Indian Gaming Commission (NIGC) is a regulatory agency.

Tribal leaders often decide not only how Indian gaming sites are run but also the ways that resources are used for the betterment of the tribe. Those who have studied such economic development issues say that there are “no uncomplicated solutions” (Cornell and Kalt, *Reloading the dice: Improving the chances for economic development on American Indian reservations*, n.d., p. 43).

Native American tribes need political stability from the outer environment and internally in order to maximize what they may achieve financially and socially with Indian gaming. Tribes have struggled to be less vulnerable to the vagaries of Congressional funding (Sanchez, Jan. 1996, p. 1). With a turn towards self-sufficiency, they may be more vulnerable to the vagaries of the market.

Internally, reservations need to have politically insulated governance that will not fall into nepotism or fiscal mismanagement. “Thus, enterprises without politically insulated corporate governance cannot generate ongoing profits for reinvesting in the community or for sustaining employment growth” (Jorgensen and Taylor, n.d., p. 1).

Necessary Elements for Effective Native Leadership

Unique Challenges of Native Leadership. Native tribal leaders face a unique set of challenges in leading such business endeavors. “First, they must operate between the institutions of Indian culture and those of the larger society, balancing competing values while being constrained by differing norms. Second, tribal governments contend with staggering social conditions the likes of which are found in few other places in America. These two additional burdens make the exercise of tribal self-government a particularly delicate and urgent task. The recent past has seen a relative flowering of tribal governmental success in what has become known as the Self-Determination Era of Indian policy. However, Indian self-determination is a departure from the past” (Cornell, Kalt, Krepps, and Taylor, July 31, 1998, p. 3).

Native Americans and their leaders need to build appropriate governance. “For sovereignty to have practical effects in Indian Country, tribes have to develop effective governing institutions of their own. Harvard Project research indicates such institutions will have to provide the following:

- Stable institutions and policies.
- Fair and effective dispute resolution.
- Separation of politics from business management.
- A competent bureaucracy.
- Cultural ‘match.’” (Cornell and Kalt, n.d., *Sovereignty and nation-building: The development challenge in Indian country today*, p. 12)

Some academic research shows the negative effects of federal and state government regulation (on loss limits, on boarding times for riverboats, on gaming fees) on gaming profits. Floor space deregulation has a salutary effect on wins (Thalheimer and Ali, 2003, pp. 907 and 909).

Another factor for success involves that of political adaptability within a tribe (Galbraith and Stiles, Aug. 2003, pp. 93 – 111). This may involve parlaying gaming profits into useful infrastructure and economic initiatives. This involves moving from aid capital to venture capital. Will Indian gaming casinos lead to greater participation in the private sector? Will these yield long-term economic benefits? (Galbraith and Stiles, Aug. 2003, p. 94).

The literature on casino management deal with a range of complex issues from the need to manage employees with varying skill levels to deciding whether to unionize gaming (Waddoups, 2002, pp. 7 – 21) to creating excitement among customers. Tribal leaders need to create market opportunities. They need to gain access to more financial capital. They need to properly use their internal assets—natural resources, human capital, and institutions of governance. They also need to use their culture to promote sustainable and stable development (Cornell and Kalt, *Reloading the dice: Improving the chances for economic development on American Indian reservations*, n.d., pp. 7 - 9). Indeed, various observers suggest that there are now different leadership expectations of tribal leaders, who are not disseminating federal resources now as much as leading change and self-sufficiency.

Cornell and Kalt suggest that tribes need more structures for formalized decision-making (such as judicial boards, tribal ethics boards or outside adjudication), so a tribe’s success is not reliant on specific individuals in leadership positions. There need to be systems for recording ownership and ways to enforce the ownership of property. Casinos need regulatory systems and oversights (Cornell and Kalt, *Reloading the dice: Improving*

the chances for economic development on American Indian reservations, n.d., pp. 18 - 19). There need to be checks and balances of power (p. 23). There must be a separation of electoral politics from the day-to-day management of business enterprises. In addition, any solutions need to fit the tribal culture (p. 25).

Access to Greater Political Power. With greater access to economic clout, Native Americans have found that they also have come into their own politically and are courted by politicians at the national, state and local levels (Darian-Smith, 2004, p. 96). Their new moneys have enhanced their self-esteem and wherewithal to shape some of their collective destiny.

One tribe has chartered its own city. "Quil Ceda is located on the (Tulalip) reservation and is the first federally chartered municipality since the District of Columbia. The tribes issued tax-exempt bonds pursuant to the Indian Tribal Government Tax Status Act of 1982 to finance projects developing the infrastructure around Quil Ceda." R.L. Skeen sees many benefits "such as fending off attempts to annex Indian lands, creating investment incentives for outside business to enter Quil Ceda without binding the entire tribe, and keeping the remainder of the reservation rural" (Skeen, 2006, p. 30).

Working with the system. Various documents show how Native American leaders have been working within the various governance organizations, legislative committees and with the federal and state legislatures to avoid shoddy policy-making on various issues related to Native gaming. They have taken clear stances on potential Internet gaming, "legislative carveouts" for other gaming industries, and regulatory issues.

Indeed, any number of Native American interests stands an improved chance of gaining voice in the US political system because of the enablement from the funds from tribal gaming. Where tribal gaming goes in the future will depend on the public and legislative debates on this contentious issue. It will also depend on how Native American leaders run these casinos and their diversifying businesses.

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