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SPECIAL FEATURES

REPORT OF THE NATIONAL GAMBLING IMPACT STUDY COMMISSION

*Jackie Barone**

The National Gambling Impact Study Commission (NGISC) was established by Congress in 1996 to conduct a comprehensive legal and factual study of the social and economic implications of gambling in the United States. With a budget of \$5 million, the committee's two-year investigation included hearings, site visits, original research, surveys of existing literature, and solicitation and receipt of input from a broad range of individuals and organizations. Kay C. James, former Secretary of Health and Human Services for Virginia and past senior vice president of a Washington based family policy organization, chaired the Commission. The group was also comprised of: William Bible, member of the Nevada Ethics Commission; James Dobson, Ph.D., founder and president of Focus on the Family, a nonprofit organization; J. Terrence Lanni, Chairman of the Board and Executive Officer of MGM Grand, Inc.; Richard Leone, president of a nonprofit public policy research institution; Robert Loescher, corporate CEO and Assemblyman of the Central Council of the Tlingit/Haida Indians of Alaska; Leo McCarthy, former Lieutenant Governor of California; Paul Moore, M.D.; and John Wilhelm, General President of the Hotel Employees and Restaurant Employees International Union. The Commission's examination of gambling in the United States culminated in the its report, which was released June 18, 1999.

The charge of the Commission's enabling legislation¹ explicitly requires the Commission to study the impact of gambling on Native American tribal governments. In order to fulfill this requirement, the Commission established a Subcommittee on Indian Gambling which presided over seven formal hearings and received testimony from tribal leaders representing over 50 tribes from throughout the country, and visited the Gila River Indian Community to view tribal housing, agricultural enterprises, tribal government facilities, and one of two tribal casinos. In addition, the full Commission heard testimony from tribal representatives, officials of the National Indian Gaming Commission, the Bureau of Indian Affairs, and representatives of state and

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1. See National Gambling Impact Study Commission Act, Pub. L. No. 104-169, 110 Stat. 1482 (1996); see also NATIONAL GAMBLING IMPACT STUDY COMM'N, REPORT OF THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 6-7 (1999) [hereinafter REPORT]. The Act provides: "[I]t shall be the duty of the Commission to conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States on . . . (A) Native American tribal governments" National Gambling Impact Study Commission Act § 2(5), 110 Stat. at 1482.

local governments. It also visited Connecticut's Foxwoods casino, the largest Indian gaming facility in the United States.

An entire chapter of the Commission's report is devoted to Native American Tribal Gambling. According to Robert Loescher, the only Native American on the Commission, the chapter on Indian gaming is a "snapshot"² of the status of Indian gaming in America today. Indian casino gambling is just shy of a decade old, tracing its beginning back to the U.S. Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*.³ There, the U.S. Supreme Court held that the state of California had no authority to apply its regulatory statutes to gambling activities conducted in Indian country.⁴ The Indian Gaming Regulatory Act (IGRA)⁵ quickly followed, providing a statutory basis for the regulation of tribal gaming, including a requirement that revenues from such gaming be used for the social and economic benefit of tribal members. Loescher states that "the benefits of Indian gaming are just a tiny down payment on the deficit of stupendous social and economic needs facing the vast majority of Native American citizens."⁶ The findings of the subcommittee support that statement quite well.

The report points out that despite the large scale of many tribal gaming operations and their importance as a source of funding for tribal governments, only a minority of tribes operate gambling facilities on their reservations. In fact the Chairman of the National Indian Gaming Association reported in 1995, in hearings concerning the Gambling Impact Study Commission Act, that approximately 130 tribes operated class III enterprises.⁷ That is about one fifth of the total number of tribes in the United States. But for those tribes who participate in commercial gambling operations and do so successfully, the benefits are many. The intent and requirement of IGRA is that revenues from tribal gambling operations be used to promote the economic development and economic welfare of the tribes.⁸ Tribes operating gambling facilities have provided employment to their members and others, resulting in drops in the unemployment rate in their communities. Gambling revenues are also used to support tribal governmental services such as tribal

2. Statement of Robert W. Loescher of the National Gambling Impact Study Commission (June 7, 1999) [hereinafter Statement of Loescher].

3. 430 U.S. 202 (1987). The Court concluded that tribes could operate tribes could operate games that were legal in the state on their reservations and that the authority to regulate them lay with the tribe, and not the state.

4. *Id.*

5. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (1994)).

6. See Statement of Loescher, *supra* note 2.

7. See *The Gambling Impact Study Commission Act: Hearing on S. 704 Before the Senate Comm. on Governmental Affairs*, 104th Cong. D1298-02 (1995) (testimony of Robert Goodman, available in 1995 WL 647890, at *2).

8. *Id.* at D1300.

courts, utilities, law enforcement and social welfare programs. It is noted that gambling revenues are also being used to fund tribal language, history and cultural programs, things that have suffered from significant neglect and underfunding by the federal government. In fact, the report states that there "was no evidence presented to the commission suggesting any viable approach to economic development across the broad spectrum of Indian country, in the absence of gambling."⁹

At the conclusion of its investigation as it pertained to tribal gaming, the Commission set forth fifteen recommendations. These recommendations do not by any means suggest broad, sweeping changes in the regulation and operation of tribal gaming enterprises. In fact, some seem to be obvious repetitions of requirements already in place. However, those most simple suggestions could be construed in a variety of ways. This is where potential danger to tribal gaming lies. Some of the more troubling or suspicious recommendations are discussed below.

Recommendations of the Commission

(1) Ensure adequate funding for the National Indian Gaming Commission (NIGC) for proper regulatory oversight to ensure integrity and fiscal accountability.

(2) Clear definition of IGRA's classes of gambling so that there is no confusion as to what forms of gambling fall into which class. Class III gambling activities should not include any form of gambling that is not available to other persons, entities, or organizations in a state. In other words, Indian gambling should not be inconsistent with a state's overall policy on gambling.

(3) Tribal governments should work with labor organizations and the states to ensure an enforceable right to organize and bargain collectively. Congress should enact legislation establishing such worker's rights only if there is not substantial voluntary progress toward this goal over a reasonable period of time.

(4) Tribal governments, states, and labor organizations should work together to provide tribal casino employees equivalent or superior protections that are applicable to comparable state and federal employment laws.

(5) The National Indian Gaming Commission (NIGC) should annually publish aggregated financial data from tribal casinos in the same manner as data mandatory collected from commercial casinos as in Nevada and New Jersey. Independent auditors should review and comment on each tribal gambling operation's compliance with the Minimum Internal Control Standards promulgated by the NIGC.

9. See REPORT, *supra* note 1, at 6-7.

(6) Enrolled tribal members should have access to the annual, certified and independently audited financial statements and compliance reviews of the Internal Control Standards on written request.

(7) Tribal and state sovereignty should be recognized, protected, and preserved.

(8) All relevant governmental gambling regulatory agencies should take the rapid growth of commercial gambling, state lotteries, charitable gambling and Indian gambling into account as they formulate policies, laws, and regulations pertaining to legalized gambling in their jurisdictions. They should also recognize the long overdue economic development Indian gambling can generate.

(9) The federal government should fully and consistently enforce all provisions of IGRA, which may preclude inconsistent results in litigation concerning uncompacted gambling.

(10) Tribes, states and local governments should continue to work together to resolve issues of mutual concern rather than relying on the federal government to solve such problems.

(11) All parties should recognize the mutual benefits that may flow from Indian gambling. Tribes should enter into reciprocal agreements with state and local governments to mitigate the negative effects of the activities that may occur in other communities and balance the rights of all governments involved.

(12) The federal government should leave issues related to gambling to negotiation between the states and tribes.

(13) Congress should specify a constitutionally sound means of resolving disputes between states and tribes regarding class III gambling. All parties to class III negotiations should be subject to an independent, impartial decision maker who is empowered to approve compacts in the event that a state refuses to enter into a class III compact, but only if the decision maker does not permit any class III games that are not available to others in the state and only if an effective regulatory structure is created.

(14) Congress should adopt no law altering the right of tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of class II bingo games as defined under IGRA.

(15) Tribal governments should be encouraged to use some of the net revenues derived from gambling as seed money to further diversify tribal economies and to reduce their dependence on gambling.

Response to the Commission's Recommendations

Clear Definition of Classes

This recommendation, on first look, appears to be a description of the law as it currently stands. After all, aren't the classes as set out by IGRA pretty

well defined? And when it comes right down to it, it seems that the more clear Congress tries to be, the more confused we become! It appears that the true focus of this recommendation is the problems some states have had in interpreting their own laws on gaming. If a state has no completely prohibitive policy against class III gaming, federal courts have held that the state may not prohibit such gambling on reservations.¹⁰ Commissioner Loescher stressed his disagreement with this recommendation, stating that it suggests limitation of tribal gaming rights under existing law.¹¹ In construing state laws on gaming, it appears that the courts have taken the same tack as they do with Congress: if the legislature had intended to prohibit a particular type of behavior, they would have done so explicitly. This recommendation could easily be construed as an attempt to make an end run around existing state law, limiting the ability of tribes to offer certain types of gaming in their casinos where state law does not explicitly do so.

Employee Rights

Recommendations three and four are a reaction to some negative testimony that was received by the subcommittee. A former employee of Foxwoods testified that despite his loyalty and quality work, he was "severely injured, harassed, stripped of my position, my rights, my job and my health benefits by the abusive upper management" for which the Mashentucket Pequots are responsible.¹² The Commission also heard testimony urging it to recommend basic worker protections that are commensurate with current federal protections.¹³ On the relationship between Indian sovereignty and workers' rights, Connecticut Senator Edith Prague stated, "Along with sovereignty, there is a responsibility to maintain a basic respect for human rights . . . there is no balance at Foxwoods because of how the Mashentucket Pequots have chosen to use their sovereign rights."¹⁴ On the converse side, the Commission also noted that some tribes have in fact entered into labor agreements covering tribal gambling employees. The Menominee Tribe of Wisconsin has engineered an agreement which would cover its proposed off-reservation casino. The agreement affirms the tribe's sovereignty while ensuring the rights of tribal gambling employees to organize, join unions, and bargain collectively.¹⁵

Without more, it is difficult to know where the majority of tribes stand on the issue of "employee rights." Testimony from one facility's former

10. *See id.* at 6-10.

11. Statement of Loescher, *supra* note 2.

12. *See* REPORT, *supra* note 1, at 6-19 (quoting the testimony of Fred Sinclair, former employee of Foxwoods, Mar. 17, 1998).

13. *Id.* at 6-18.

14. *Id.*

15. *See id.* at 6-19.

employees indicates only that there is a problem at that particular casino. Other testimony demonstrates that tribal casinos offer lucrative employment to tribal members and non-Indians alike. The fact that federal employment laws do not generally apply to the tribes¹⁶ does not mean that tribal employers run roughshod over the rights of their employees. We must not forget that each tribe is a sovereign entity, and it is impossible and unwise to make broad, sweeping generalizations in reference to the treatment of employees at tribal casinos as a whole. Emphasis in this area should be on voluntary agreements and progress, and away from the threat of legislative mandates.

Tribal Sovereignty and Recognition of Successful Economic Development

Recommendations seven and eight must be read together. Governmental gambling regulatory agencies cannot take Indian gaming into account in the formation of policy and law without considering tribal sovereignty. It must be first in our minds that "[t]he sovereignty retained by tribes includes the 'power of regulating their internal and social relations.'"¹⁷ This power has been held by the Supreme Court to include the right to conduct gaming enterprises on reservation lands.¹⁸ Therefore, regulatory agencies, especially those at the state level, must tread very carefully in their attempts to control tribal gaming. Absent a heavy hand from regulatory agencies thus far, most tribes seem to have done well in following the already strict rules set out for them in IGRA. We should concentrate on the good that tribal gaming has brought to Indian country instead of wasting time conjuring up ways to make it more difficult.

Mutual Benefits — Tribal Gaming's Impact on Local Economies

The ideas behind recommendations ten, eleven, and twelve center around mutual agreements and cooperation. The Commission looked to the impact that tribal gambling has on local economies through taxes, revenue sharing, and employment of non-Indians. For example, the Mashantucket Pequot Tribal Nation and Mohegan Nation are forecasting a contribution of \$294 million to the State of Connecticut in the 1999 fiscal year.¹⁹ Other tribes who operate high stakes gambling facilities by compact pay a percentage of their profits to their states. The concerns of local government personnel are also noted, including those over increased traffic, deteriorating highway

16. For a survey of laws and their applicability to tribes, see William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995).

17. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

18. *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987).

19. 1999-2001 BIENNium: GOVERNOR'S BUDGET SUMMARY, CONNECTICUT, JOHN G. ROWLAND, GOVERNOR A-3, A-7, A-12 (1999).

infrastructure, and higher law enforcement and emergency services costs. The report points out, however, that many tribal and local governments are engaged in cooperative relationships to address such problems and concerns. This "play nice with others" directive is already occurring. To suggest otherwise indicates a bit of ignorance on the part of the various commission members.

Compacting Requirements

Recommendation thirteen addresses an issue which has and will continue to be a topic of debate. That is the requirement wherein tribes wishing to operate class III gaming facilities must come to an agreement with their respective state. Under IGRA, class III gaming is lawful on Indian lands only if it is:

- (1) authorized by an ordinance adopted by the governing body of the tribe and approved by the chairman of the National Indian Gaming Commission;
- (2) located in a state that permits such gambling for any purpose by any person, organization, or entity, and;
- (3) conducted in conformance with a tribal-state compact that is in effect.²⁰

The report notes that if a state has no completely prohibitive policy against class III operations, the state may not prohibit gambling on reservations.²¹ This has been the cause of great friction among tribes who wish to establish class III operations and the states in which they reside. States generally criticize IGRA's requirement that they negotiate compacts concerning class III gaming "in good faith." They argue that IGRA fails to impose the same requirement on the negotiating tribes.²² Testimony by state officials before the Commission suggested that this unilateral good faith requirement reduces the possibility of reaching a mutually agreeable result. The recommendation here does little more than point out that there is a problem. It is unclear whether the injection of an impartial decision maker will improve the situation. It will be interesting to see whether any action is taken pursuant to this particular suggestion.

Conclusion

Considering the varied backgrounds of the Commission members and the fact that they came to an agreement as to their recommendations, it is not surprising that hotly debated issues such as scope of gaming and compacting procedures were not addressed in the chapter on Native American tribal

20. 25 U.S.C. § 2710 (1994). Class III gambling includes those games found in the typical Las Vegas style casino, including slot machines, craps, roulette, and card games against the house.

21. See REPORT, *supra* note 1, at 6-10.

22. *Id.* at 6-11.

gambling. The statements of the Commissioners speak volumes regarding gambling overall, and some speak directly to Indian gambling. For instance, William Bible, former Chairman of Nevada's Gaming Control Board stresses that authorization, taxation and regulation of gambling is primarily a state matter. However, he states that there is a clear federal responsibility in tribal gambling and seems to feel that more oversight is necessary.²³ Leo McCarthy, former Lieutenant Governor of California, points to gambling's redeeming qualities including its contribution toward a better quality of life for impoverished Native Americans. He also points out that the overwhelming number of adults who gamble do so without harming themselves or others.²⁴ James Dobson, founder and president of Focus on Family, accuses gambling of being "a destroyer that ruins lives and wrecks families."²⁵ Richard Leone would likely agree with that view, stating that "the American people are the net losers in a society of pervasive gambling."²⁶

Commissioner Robert Loescher's personal statement highlights some of the problem areas as he views them. He states that Indian gaming furthers self determination through tribal ownership and control of its gaming operations.²⁷ In addition, he points to the fact that impacts on surrounding communities is generally positive, and voices disappointment that the Commission declined to include in the tribal gaming chapter clear and objective descriptions of the structure, operation and implementation of the regulation of Indian gaming.²⁸ He points out that Indian gaming is increasingly well regulated by a cooperative of the tribal and state governments involved, as well as the federal government.²⁹

It is extremely important for us to remember that for many tribes, economic development opportunities are few. Gambling offered a panacea to many poor and struggling Indian tribes. Recall that the "trust relationship" means that the protection of tribal members and the promotion of their economic and social well being is the responsibility of the federal government — should we find staggeringly high rates of poverty and unemployment among Native Americans, to whom do we look? This is not to say that the federal government is to blame for the poverty and other social ills that plague many Native communities today. Indeed, the great majority of other

23. Statement of William A. Bible, National Gambling Impact Study Commission, in REPORT, *supra* note 1.

24. Personal Statement of Leo T. McCarthy, National Gambling Impact Study Commission, in REPORT, *supra* note 1.

25. Summary Statement by Commissioner James C. Dobson, PhD., National Gambling Impact Study Commission, in REPORT, *supra* note 1.

26. Personal Statement of Richard C. Leone, National Gambling Impact Study Commission (June 7, 1999), in REPORT, *supra* note 1.

27. See Statement of Loescher, *supra* note 2.

28. *Id.*

29. *Id.*

communities are equally infected. However, it is difficult to overcome the argument that the federal government, if it hasn't completely fallen down on the job, has certainly stumbled in its duty to ensure the economic and social well being of those to whom it has this trust responsibility.

Congress continues in its efforts to stimulate economic growth in Indian country. With the advent of tribal gambling, many tribes have been given the opportunity to address economic and social problems with little assistance from the federal government. Tribal casinos provide jobs for tribal members — good jobs. Jobs that generally pay more than minimum wage — and who can survive on minimum wage? Further, casino operations put money back into the tribal organization to fund social welfare programs, court systems, and law enforcement. According to the Commission's report, such programs "have historically suffered from significant neglect and underfunding by the federal government."³⁰ Those tribal governments who have used their gambling revenues to address neglected issues should be commended, not vilified for the method with which they amassed the funds to do so.

On reading the full report, one forgets that millions of Americans participate in gambling activities at various levels without detriment to their health or financial well being. What the chapter on Native American tribal gambling does well is to remind us that tribal gaming has played a very positive role in Indian country, with little or no truly negative impact on surrounding communities. IGRA gives tribes the upper hand in negotiation of compacts and in the actual operation of their gaming facilities, perhaps in recognition of their inherent sovereignty. Any hint from the outside that the tribes have abused this authority must, at this point, go unsubstantiated. Gaming has been used by Indian tribes as a means to better the lives of their members. That statement is capable of strong and voluminous support. Robert Loescher states that "[i]n pursuing gaming, tribal leaders have done the best that they could do with very limited resources and opportunities, and at this point in history I believe they should be commended for what they have accomplished."³¹ Well said, Mr. Loescher.

30. See *Report*, *supra* note 1, at 6-7.

31. Statement of Loescher, *supra* note 2.

