Op-Ed/Editorials – What IGRA Left Out

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The federal Indian Gaming Regulatory Act, which everyone involved in tribal gaming calls "IGRA," has turned into one of the most unusual laws ever enacted. The U.S. Supreme Court has ruled it unconstitutional. It leaves many important questions unanswered.

Still, it has worked remarkably well, mainly because everyone is ignoring its intent, and sometimes, its actual terms.

The statute was hurriedly enacted by Congress after the unexpected decision of the Supreme Court in 1987 in the case California v. Cabazon Band of Mission Indians. The tribe was operating commercial high-stakes bingo, even though California law allowed only charities to run low-stakes games. The Court held that California tribes could offer any form of gambling permitted in the state and could regulate themselves.

Bingo was the major form of gambling being operated on reservations at the time. Lawmakers were told by people like me that there were a lot of other forms of gambling available, including charity casino nights. But they ignored us and decided to write a statute that focuses on bingo.

Almost all tribes were living in abject poverty. So it was expected that outsiders would put up the money to build bingo halls and train tribal members to take over. That is why IGRA supposedly limits management contractors to only five years and not more than 30% of gaming revenue. It is also why IGRA exempted Indian gaming from the restrictions that then existed on television commercials.

That’s also why the new federal agency created by IGRA, the National Indian Gaming Commission ("NIGC"), is mainly concerned with Class II gaming.

The best example of the obsession with bingo is shown in IGRA’s division of gaming. Class I is low-stakes traditional and amateur games. Class II is bingo, including electronic aids and paper pull-tabs, and non-banking card games, like poker. Class III is simply "all forms of gaming that are not class I gaming or class II gaming."

You would think that a statute about gambling would devote at least as much space discussing casinos, slot machines, lotteries, parimutuel betting or sports wagering as bingo.

Most of the legal battles have been over the differences between Class II and III. If a state permits anyone to operate a Class II or III form of gambling, tribes have the right to offer the same. But for Class III, tribes must first enter into a formal compact with the state.

The other big legal question has been whether tribes can buy land in or near cities. IGRA says that a tribe with a reservation must get the approval of the Governor. Landless tribes need only the O.K. of the Secretary of Interior.

The stated purpose of IGRA was to make tribes financially and politically strong. As we all know, it has succeeded beyond anyone’s wildest dreams.

But it is interesting to see what IGRA left out.

1) WHO DECIDES? The decision whether a form of gambling is Class II or Class III is often the difference between legal and illegal. If linked gaming devices are declared to be slot machines, they are Class III and cannot be operated without a tribal/state compact. If they are ruled to be Class II bingo electronic aides, tribes can plug them in and immediately take in millions of dollars.

Courts always have the power to decide questions of law and fact like this. But does the NIGC? The federal Department of Justice ("DOJ")? What happens if the NIGC says a game is Class II and the DOJ says it is Class III, as actually happened? It makes sense for the NIGC to make regulations and determine whether a game is Class II or II, which it has done. But there is nothing in the IGRA that expressly gives the Commission this power.

2) REVENUE SHARING. Governors have discovered Indian gaming can be a goldmine. . .for the state. Today, tribes that don't agree to share their gaming profits don't get casinos. But IGRA does not authorize revenue sharing. In fact, IGRA requires a court to "consider any demand by the State for direct taxation of the Indian tribe. . .as evidence that the State has not negotiated in good faith."

Of course, there is no law preventing the state from accepting a "gift" from a tribe. IGRA requires the Secretary of Interior to approve tribal/state compacts. There is nothing in this statute permitting the Secretary to create her own standards for revenue sharing, but she has. Governors have discovered that if they give the tribe a unique economic benefit, meaning a monopoly, the Secretary will approve compacts giving the state a big slice of the action, up to 25%.

3) OFF-RESERVATION CASINOS. When a tribe wants to build in a better location, IGRA requires the Secretary to determine if it is in the best interest of the tribe and is not detrimental to the surrounding community. Nothing more. But the Secretary has again created her own standards. It is now clear, for example, that the further the land is from the tribe=s present location, the less chance there is that it will ever be approved for gaming.

4) IMPOSING STATE AND LOCAL STANDARDS ON TRIBES. Tribes are sovereigns over their own land and are not subject to state or local regulations. But as a practical matter, a tribe will never get new land or a compact unless it agrees to the community's standards for such issues as environmental impact and building and traffic safety. In fact, governors and the Secretary want to see a Memo of Understanding ("MOU") between a tribe and local government covering how the casino will handle water, sewage, police and fire protection, etc.

None of this is necessarily a bad thing. In fact, tribes, states and local communities have gained much by going beyond IGRA.

But then again they had to. If Congress had done a better job writing IGRA, all we would see would be a few high-stakes bingo halls.