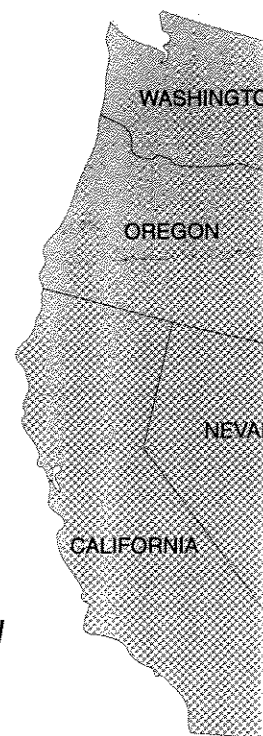


## Native American Casinos

# Compacting What?

By Robert R. Russell



*A review of the challenges facing the  
Native American Class III Gaming Compacting Process*

### **PART 1: Current Compacting Guidelines**

**C**ompacting? Class III? Sovereignty? The Native American community in the United States creatively and successfully began using gaming as an economic tool for independence from federal government assistance in the 1980s and 1990s. However, not all Native American tribes have been as fortunate as others. In this article, we will highlight the evolution of the Class III (Las Vegas-style gaming) compacting process and cite obstacles that are currently affecting the opening and expanding of Vegas-style Native American government-run casinos.

#### **Establishing the Procedure**

The tribal-state compacting process, in which an interested Indian tribe negotiates with a state for the opportunity to open a Class III gaming facility, is initiated by the tribe. Pursuant to federal law, the state is obligated to "negotiate with the Indian tribe in good faith to enter into such a compact." On the whole, despite some recurrent obstacles, this has been a successful process. Indeed, since the inception of the Indian Gaming

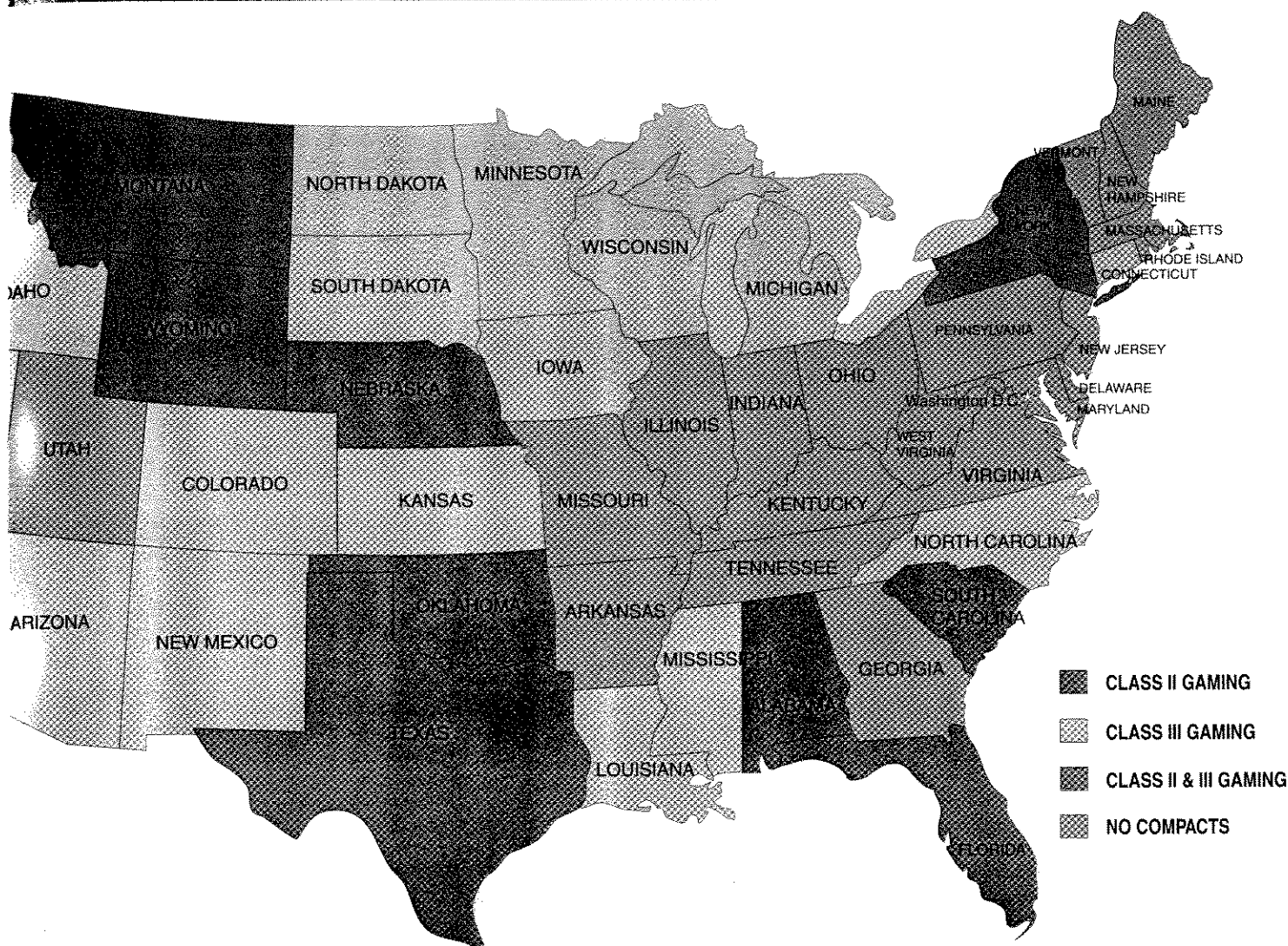
Regulatory Act in 1988, over 200 tribal-state compacts have been successfully negotiated.

Tribal casinos can be found in 30 of the 50 states. Twenty-Three states have tribal casinos that operate Class III gaming facilities, which can include slot machines, video and electronic games of chance, house-banked card games, craps, roulette and pari-mutuel wagering.

The 1999 National Gambling Impact Study Commission Report indicates that in 1987, prior to the enactment of IGRA, Native American gambling revenues were \$212 million. The National Indian Gaming Commission reported on July 11, 2002 that Native American gambling revenues had grown to \$12.7 billion for 2001. This dramatic increase in revenue can be largely attributed to IGRA and the ability of tribes to offer the popular Class III Las Vegas-style games.

In July 2002, research introduced at the Washington Indian Gaming Association trade expo revealed that Washington's billion-dollar Indian casino industry is the best engine for economic development that the state's tribes have ever had. The research fur-

*Next Issue: Part 2 will examine how the games themselves can be stumbling blocks to compacting, and what to look for in the future.*



ther indicated that the Washington tribes are using the gambling revenue to support their own governments, employ thousands of workers and set up a variety of social programs for tribal children and elders.

Some Indian tribes interested in opening Class III gaming facilities are finding out that the compacting process does not always run so smoothly.

Federal law provides that if a state fails to negotiate in good faith, the tribe may initiate an action against the state in U.S. District Court. However, in 1996, this avenue of recourse was cut off by the United States Supreme Court in the case of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In *Seminole*, the Court explicitly held that a state may assert an Eleventh Amendment immunity defense to avoid a lawsuit brought by an Indian tribe alleging that the state did not negotiate in good faith. (The Eleventh Amendment provides the states immunity from suit in the federal courts.) Accordingly, if a state were to claim immunity under the Eleventh Amendment, it would effectively

## Tribal-State Compact Process: *How Did It Start?*

Native American gaming began in the United States in the early 1980s in the form of high-stakes bingo games conducted on Indian lands. Through the decade, the gaming options offered by various tribes continued to evolve into what closely resembled Las Vegas-style gambling. As a result, governmental officials throughout the country sought to enjoin these activities in Federal Court. The tribes countered by asserting their status as sovereign nations and claiming that they were not subject to state regulation.

In 1987, the United States Supreme Court settled the nationwide debate with its opinion in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the Court expressly upheld the tribes' right to conduct gaming on their reservations.

In response to the *Cabazon* decision, members of Congress enacted the Indian Gaming Regulatory Act of 1988 (IGRA) to provide a regulatory framework for Native American gaming operations and to provide guidance to the states as to their role in the gaming process. In addition, the newly enacted law created a federal regulatory agency,

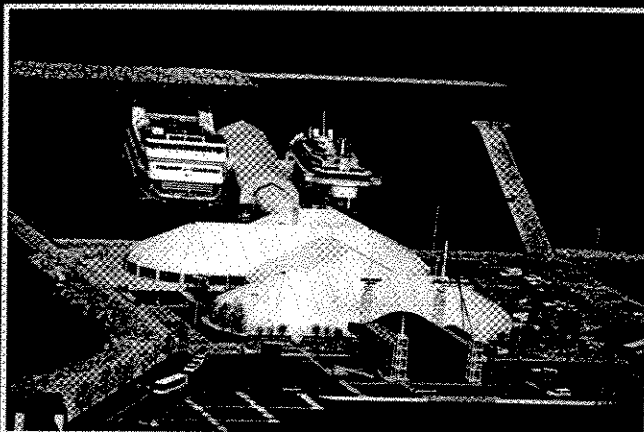
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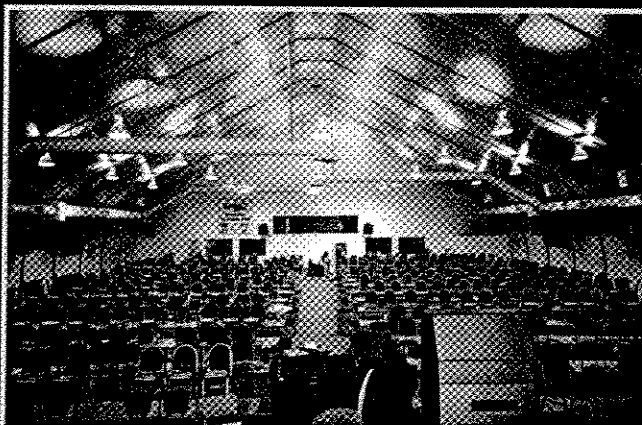
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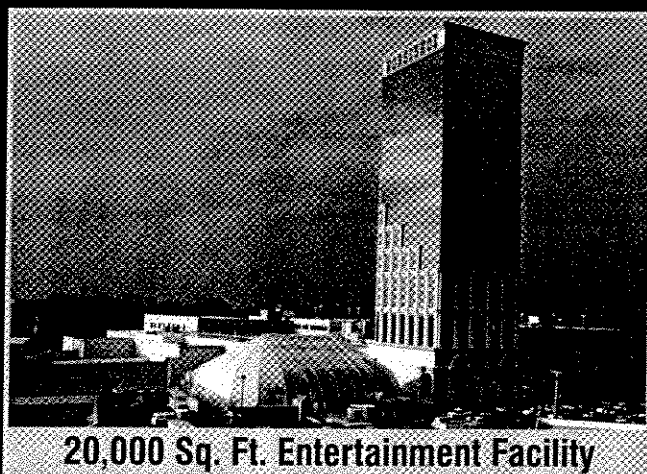
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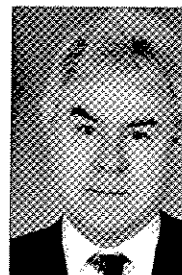


stalemate the compacting process as tribe would have no avenue of recourse if a state refused to negotiate a compact in good faith.

In April 1999, former Secretary of the Interior Bruce Babbitt used his authority under IGRA to create an alternative compacting procedure for situations in which an Indian tribe and a state failed to negotiate a compact, and

*"The Native American Class II gaming industry is much like a gently sloping bell curve."*

— David Whittlesey



where the tribal suit against the state in federal court to resolve the dispute is dismissed due to the state's assertion of immunity under the Eleventh Amendment. However, on the day that these rules were published, they were met with a lawsuit filed by the states of Florida and Alabama. It is the states' position that the Secretary of the Interior does not have the authority to broaden the scope of gaming allowed in individual states, and that due to the Secretary's relationship with the tribes as the trustee of Indians lands, any proposed rules will be biased in their favor. Although this litigation began in 1999, no resolution has been reached and the proposed rules for an alternative compacting procedure have not been implemented. Accordingly, many tribes which desire to open a Class III gaming facility are currently left with no alternatives since their respective states have refused to negotiate and the court system no longer provides recourse.

#### **Current Obstacles in the Compacting Process**

Experts that monitor and research the Native American gaming industry are optimistic that the impasse in the Class III compact debate will eventually solve itself through compromise by the states and tribes involved. Dennis Whittlesey, a national expert in Native American gaming law with the Washington D.C. law firm of Jackson & Kelley, states that "the Native American Class III gaming industry is much like a gently sloping bell curve." He notes that the industry is still in the



growth stage, and that it has yet to reach its apex. Whittlesey predicts that the Class III compacting process will continue to play a large role in the growth of the Native American gaming industry as a whole. In fact, he points out that the compacting process will affect each of the three main factors that he identifies as crucial to industry growth: new Class III compacts; the expanded scope of Class III gaming options in re-negotiated compacts; and newly acknowledged or restored tribes.

Katherine A. Spilde, Ph.D., senior research associate at the John F. Kennedy School of Government at Harvard University, points to two primary obstacles affecting the Class III tribal-state compacting process: 1) the scope of gaming options tribes should be permitted to offer; and 2) the level of assessment that tribes should be required to pay states to defray the costs of regulating Class III gaming activities. Both areas have entertained a host of lawsuits and enforcement actions by the BIA and the NIGC, and will continue to be dominant issues on the topic of the Class III compacting process. ■

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the National Indian Gaming Commission (NIGC), to oversee and regulate the gaming activities on tribal lands. In addition to the NIGC, the Federal Government also relies on the Interior Department, Bureau of Indian Affairs (BIA), Justice Department, FBI, IRS, Secret Service and the Treasury Department's Financial Crimes Enforcement Network to enforce laws relating to Indian gaming. Further, provisions for state regulation of tribal gaming are included in many tribal-state compacts. It should also be noted that tribes themselves spend over \$150 million per year on self-regulation of their gaming activities.

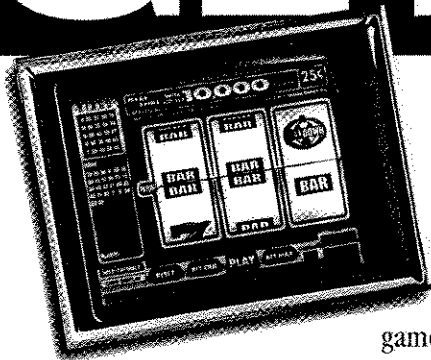
IGRA also created three classes of gaming categories and established separate rules for the regulation of each class. Class I gaming includes social gaming played for minimal prizes or gaming that is played in connection with tribal ceremonies or celebrations. Class II gaming includes bingo, pull-tabs, lotto, instant bingo games and certain electronic and card games where a house is not involved. This Class also includes card games that are not prohibited by the laws of the state and are played at any location in the state. In most states, baccarat and blackjack are deemed not to be Class II gaming. Class I is regulated exclusively by the tribe. Class II gaming is primarily regulated by the tribe with some involvement by the NIGC.

Class III gaming is defined as all forms of gaming that are not Class I or Class II. This includes all casino-style games, including any electronic games of chance such as slot machines and video poker. Class III gaming is typically referred to as Las Vegas-style gaming where a house is involved.

Under IGRA, the conduct of Class III gaming activities is lawful on tribal lands only if such activities:

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

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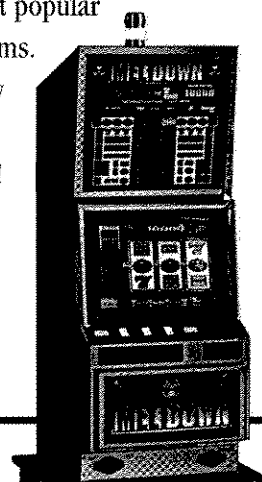


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### **PART 2: Class III Games: The Draw and The Drawback**

**T**he scope of the gaming options in a Class III casino is the main draw for Native American tribes in establishing new casinos; these are the games that bring in the revenues.

However, the gaming options that tribes will be permitted to offer continues to be a major stumbling block to the establishment of new Indian casinos in the states of Florida, Alabama, Oklahoma, Nebraska, Rhode Island, Michigan and Texas.

IGRA states that Class III gaming activities are lawful in a state that "permits such gaming for any purpose."

In Florida, Alabama, Oklahoma, Nebraska and Texas, state officials contend that Class III gaming is not authorized in their respective states in any form. Accordingly, these states refuse to enter into Class III compacts. Kate Spilde, senior research associate at the John F. Kennedy School of Government at Harvard University, says that "these tribes are currently without recourse due to the pending litigation concerning the Department of the Interior's alternative compacting procedures and the Eleventh Amendment immunity defense that states are permitted to raise."

The scope of gaming to be permitted also becomes an issue in states where

tribes have Class III gaming compacts, but the type of games offered is restricted to less than full Las Vegas-style gaming. In Washington, for example, the original Class III compacts limited tribes to offering "electronic tribal lottery terminals," which are not as financially lucrative as Las Vegas-style slot machines. However, at least one recently enacted Washington compact has expanded the scope of Class III gaming options to include a wider variety of games. This is viewed as a positive precedent by other tribes in the state who desire an expansion in their Class III compacts.

In the state of Texas, however, the scope of the gaming permitted under Class III compacts seems to be going in the other direction. At midnight on July 22, 2002, the Alabama-Coushatta tribe was forced to close the doors to its casino following U.S. District Court Judge John Hannah Jr.'s ruling in June 2002, that the casino is illegal due to the Native American Restoration Act of 1987. Under this act, the tribe agreed that it would not sponsor any gambling activities that were otherwise illegal in the state of Texas in exchange for federal recognition. The Alabama-Coushatta tribe filed an emergency motion for stay with the 5th Circuit Court of Appeals while it petitions its case, but the 5th Circuit recently denied the motion.

***'The level of assessment paid by the tribes to the states in order to defray the costs of regulating the Class III gaming will continue to be a "hot button" issue in both the initial formation and the re-negotiation of the tribal-state gaming compacts.'***

It is the Alabama-Coushatta tribe's position that they are a sovereign nation, which allows them to conduct any gaming that is legal in the state of Texas. The tribe points to Texas' loosely-written lottery statute as evidence that it is allowed to open a casino.

Following the closing of the Alabama-Coushatta's casino, the National Indian Gaming Association (NIGA) issued the following statement in support of the tribe's right to offer casino-style gambling:

"The National Indian Gaming Association emphatically opposes the

unlawful closure of the Alabama Coushatta's entertainment center by the state of Texas. First and foremost, as sovereign Indian nations, tribes have the right to pursue economic self-sufficiency through tribal government gaming. For the Attorney General to come in and force the closure of the only viable form of economic development Texas tribes have seen in hundreds of years is an affront to the Indian Gaming Regulatory Act and the federal-tribal relationship that was established in the Constitution of the United States of America... The actions by the state of Texas are truly disheartening. Consistent with our mission, NIGA is proud to stand with the tribe in support of its goal to attain economic self-sufficiency, and provide jobs and basic governmental services to its people."

One of the reasons that the scope of gaming allowed by the compact is such a major issue is that the penalty for violating such a provision can be very serious. The NIGC has the regulatory authority under IGRA to monitor tribes which do not have a Class III tribal-state compacts to make sure that they are not attempting to operate these games by blurring the lines between what is considered a Class II or a Class III game.

In August 2002, the NIGC levied a fine in excess of \$8 million against the Seminole Nation of Oklahoma for the illegal use of Class III gaming devices in the tribe's four casinos. In addition to the fine, the NIGC has also ordered the Seminoles to "cease and desist from *all* gaming activity in all four of its gaming facilities."

#### Level of Assessment Paid by Tribes

Both David Whittlesey, a national expert in Native American gaming law with the Washington law firm of Jackson & Kelly, and Spilde agree that the level of assessment paid by the tribes to the states in order to defray the costs of regulating the Class III gaming will continue to be a "hot button" issue in both the initial formation and the re-negotiation of the tribal-state gaming compacts. While states seem to view this assessment as a reasonable charge necessary to support its gaming regulation. Many tribes point to language in IGRA preventing the assessment of a tax on the tribes gaming revenues.

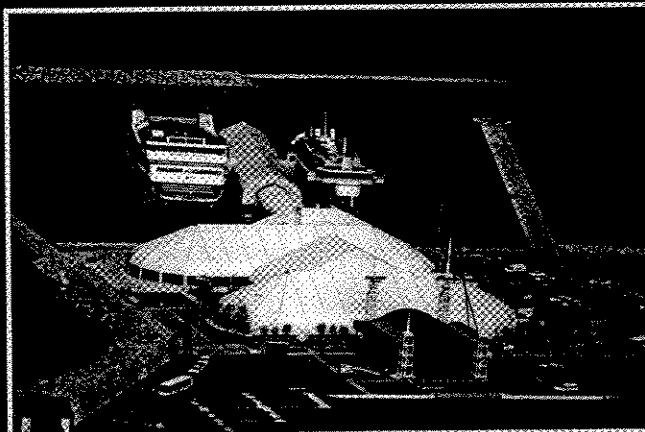
Except for the "assessment" by the state of an amount necessary to defray the costs of regulation, IGRA specifically prohibits the state or any of its political subdivisions from imposing any tax, fee or charge upon an Indian tribe to engage in Class III gaming activities. Furthermore, any "assessment" agreed to by the parties must be reasonable. According to Spilde, the BIA and NIGC have been reluctant to approve any



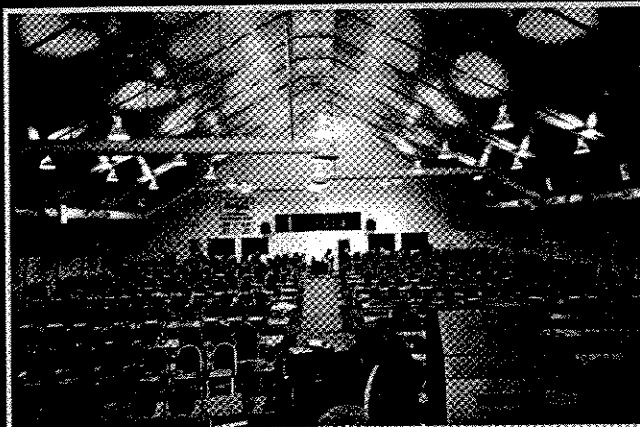
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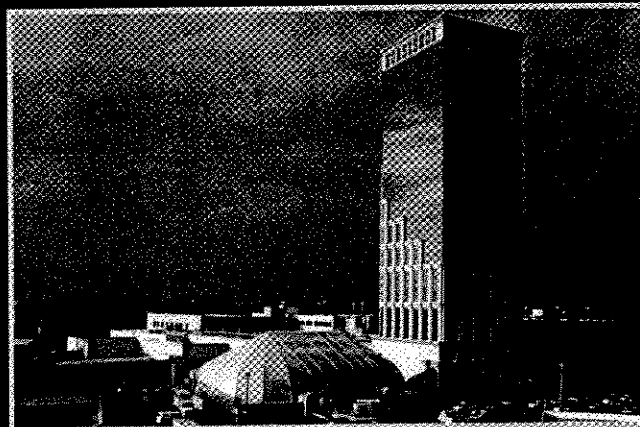
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tribal-state gaming compact which includes a state assessment or revenue-sharing provision of more than 6 percent - 8 percent of the Class III facility's revenue. It is also common in states where an assessment is set at 8 percent that the compact include an exclusivity clause to operate electronic gaming devices.

The level of state assessment is currently frustrating the compacting process in the states of California, Arizona, New Mexico, Wisconsin and New York. However, there is reason for hope. In many instances, tribes and state governments have found a solution to the level of state assessment in the form of public concessions made by the tribes as means of payment of the state's assessment. For an example of how this process works, Whittlesey points to an Oregon tribe which agreed with the state that 6 percent of its gross revenue would go to local charities, schools, libraries and the Oregon Historical Society. With this type of arrangement, neither side views the assessment as a tax. Rather, both sides receive a benefit from the transaction. As Whittlesey notes, "In order for concessions to be successful, there must be a 'quid pro quo.'"

In 1997, the state of New Mexico negotiated compacts that imposed a 16-

percent fee on tribal gaming revenue. However, the Bureau of Indian Affairs declared that this fee was too high and subsequently refused to approve the compacts. In 2001, a compromise was reached between the state of New Mexico and 11 of the state's 13 tribes. This new agreement contained a lower revenue sharing fee in the area of 3 percent-8 percent. However, the level of "assessment" paid to the state will continue to be a major issue in New Mexico as at least one of the remaining tribes has recently filed suit against the federal government, contenting that the current fee assessment is still too high.


#### What Does the Future Hold?

Although the compacting process has been largely successful over the past 14 years, resulting in the approval of over 200 Class III gaming compacts, it is becoming clear that there are many tribes trapped by the very system that was designed to assist them. As for these tribes that have reached a stalemate in the Class III compact negotiation process, Whittlesey identifies that they have three options: 1) wait for the governor to decide to negotiate; 2) open a Class II gaming operation; or 3) open a Class III casino without a compact. However, as

the \$8 million fine issued to the Seminole Nation of Oklahoma for operating Class III games without a valid compact illustrates, choosing the third option could be a very costly proposition.

In light of the current state of Native American affairs, what must a tribe do to better position itself to successfully negotiate a Class III tribal-state compact? Whittlesey believes "the tribes must focus on developing a good working relationship with the local governments. If a tribe can enlist the local government as an ally, it will have a much easier time getting the necessary approvals from the state and federal governments."

Native American governments should be proud of their use of gaming revenue for the purposes of economic independence, cultural enhancement, language preservation, health and educational services. As the Native American gaming industry continues to expand, economic opportunities will have a positive impact on Native American tribes. The benefits will also be felt by local host communities, suppliers and persons employed by these properties. Therefore, it is in the interest of the industry at large that the legal and policy issues facing the compacting process be worked out.



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