

SOVEREIGNTY AND ECONOMY: TRIBAL-STATE CONFLICT IN TIME OF RECESSION

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Government does not exist in an economic vacuum. Just as laws and regulations can promote or constrain economic activity, so too the economy may have reciprocal impacts on government. Government is not free. Funding is required for health, education and other programs that may be provided. At any level—tribal, state or federal—governments are constrained by their ability to raise revenues.

The link between economics and politics is of special importance for Native American tribes. Tribal sovereignty depends on strong tribal government, which is impossible without economic development. Indeed, Congress explicitly recognized this when it adopted the Indian Gaming Regulatory Act of 1988 (IGRA). The stated purpose of the Act was for Indian gaming to provide “a means of promoting tribal economic development, self-sufficiency and strong tribal government,” and “to protect such gaming as a means of generating tribal revenue.” 27 U.S.C. § 2702(1)(3).

The recession of the last two years has had a profound impact on all governments, but tribal governments in particular. Significantly, this is the first major recession since IGRA was adopted and thus, for most tribes,

the first time that tribal gaming revenues have declined. Because tribes depend on gaming revenues more so than any other governments, it is tribal governments that suffer the most in the downturn.

Ironically, even as tribal revenues decline, many states are targeting tribes to make up for the loss of state tax revenues through direct taxation (e.g., on sale of tobacco) and revenue sharing (on gaming). Some states are still trying to limit Indian gaming, while others seek to regulate it and share in the revenues.

This article will highlight the latest developments in tribal-state relations across a number of areas, including how tribes and states are responding to the economic downturn, and likely areas of tribal-state dispute, negotiation and potential cooperation in the coming years.

Impact of the Economy on Tribes

The economic downturn has depressed consumer discretionary spending across the board, and this impact has been particularly severe on the entertainment and hospitality industry in general and gaming—including Indian gaming—in particular. Because Indian gaming has only been around since the 1990s, this is the first time most tribal

casinos have experienced any drop in revenues. As a result, tribes have been forced to put a greater emphasis on containing (and cutting) costs to preserve profitability, and many expansion projects have been delayed or canceled entirely.

In addition, because tribal gaming has been impacted so dramatically, and disproportionately, gaming tribes increasingly are exploring other opportunities for economic development. Even before the downturn, many tribes sought to diversify beyond gaming. However, while the recession has highlighted the importance of diversification, the unavailability of credit has stymied many non-gaming projects.

Alternative energy projects are a case in point. Prior to the credit crisis, many tribes were ideally situated to take advantage of the growth in demand for “green” energy, particularly wind and solar power. While some tribes have successfully partnered with investors to install turbines and solar panels, many other such projects have stalled because investment capital has disappeared. The recession has also made alternative energy projects less attractive from a tax perspective: widespread declines in corporate profits have eliminated the tax incentives that had previously encouraged development of these projects.

Another obstacle for tribal development of alternative energy is the lack of infrastructure to move energy from the reservations where it is created to the population centers of the country where it is needed—and

the recession has largely halted private investment to expand such regional and national energy networks. The federal government, however, is entering the picture. By professing support for a national energy grid, the Obama administration has given tribes hope that the necessary upgrades may begin even before economic recovery brings private investors back to the fold. Federal investment (see, for example, the Energy Security Bill) is aimed at promoting alternative energies and creating the infrastructure necessary to efficiently deliver power from the source to consumers. If these efforts are successful, the combination of abundant “green” energy available on reservations and a growing market for wind and solar power may lead to significant economic opportunities for tribes. Still, the economy will continue to play an important role, either positive or negative, on tribal energy development.

Increased Potential for Tribal-State Disputes from Off-Reservation Activity

The need to diversify their business means that tribes increasingly may involve themselves in other types of economic activity besides gaming. Some of these options involve off-reservation economic activities which the state may have the power, and certainly the desire, to regulate.

For example, in California a dispute developed between a tribal-run staffing services firm and state authorities over whether the tribal business was required to comply with the state’s workers’

compensation insurance regulations. California law requires that all employers provide workers’ compensation insurance for their employees, either by obtaining such insurance from a state-licensed provider or meeting the state’s guidelines for self-insurance. Mainstay Business Solutions, a tribal entity of the Blue Lake Rancheria, offered both permanent and temporary employees to California businesses at reduced cost by providing alternative insurance benefits as authorized under tribal ordinance, but not under California law, to the employees.

The state shut down several businesses staffed by Mainstay employees, asserting that, because the tribe’s workers’ insurance plan was not state regulated, the businesses did not have acceptable workers’ compensation coverage for their employees. Mainstay contended that the state was unlawfully trying to assert jurisdiction by forcing the company to buy workers’ compensation coverage for its employees and argued that it had sovereign immunity, even for tribal business enterprises conducted off the reservation. After more than a year of legal and political fighting, the tribe ultimately agreed to waive its claim of sovereign immunity, to self-insure its employees in accordance with state regulations, and to submit to state oversight of its program.

As the depressed economy encourages tribes to pursue off-reservation economic activity, there are likely to be more of these types of disputes.

State Response to Decreased Revenue: Tobacco Taxation

As other revenues decline, many states are exploring ways for raising revenue from tribes, including through taxation of tribal sales of tobacco.

Florida, for example, recently enacted legislation that ended the state's longstanding state tax exemption for cigarettes sold on tribal lands. Under the new law, tribal members may still purchase tobacco without paying state taxes, but non-Indians are subject to the state's recently increased fee of \$1.34 per pack. The law also allows the state to enter into agreements with tribes, similar to gaming compacts, to share the resulting tax revenues. Though no such agreements have yet been negotiated, the prospect of the taxes producing extra revenues for tribes has encouraged tribal acceptance of the new law: the Seminole Tribe has already announced that it has begun charging the tax to non-tribal members.

In New York, the battle over state efforts to tax tobacco sales on tribal lands has been much more contentious. While New York's tobacco sales tax has long applied to sales to non-tribal members, the law has generally not been enforced on the state's reservations. Particularly given that cigarettes purchased in New York carry a state tax of \$2.75 per pack (and an additional \$1.50 per pack in New York City), this policy has spurred business for tobacco sales on Indian lands, resulting in the sale of an estimated 28 million cartons of untaxed cigarettes per year. In response to the state's deepening budget deficit,

state and local law enforcement authorities have recently begun acting to begin collection of taxes for sales to non-Indians on tribal land.

Because New York's previous attempts to enforce state tax laws on reservations were met by strong (and sometimes violent) opposition, New York's governor is moving forward with caution. In September 2009, Governor David Paterson sent a letter to three United States Attorneys in New York requesting a "threat assessment" to determine the "likelihood of violence and civil unrest" if the state began enforcing the collection of state taxes on cigarette sales on tribal lands. In response to the state's moves, tribal leaders have warned of "the historic consequences of what happens when the state tries to violate our treaty rights" and predicted that a "strong reaction to further affronts on tribal sovereignty is inevitable."

In the meantime, the City of New York has filed a federal lawsuit seeking to prevent tobacco shops on reservations from selling untaxed cigarettes to non-tribal members. The city alleges that such sales lead to smugglers illegally reselling the cigarettes, resulting in loss of tax revenue and increased smoking, particularly by minors. While the suit is still pending, a preliminary injunction was issued preventing the defendant shops from selling untaxed cigarettes to non-tribal members.

The battle over taxation of reservation tobacco sales in New York and elsewhere has prompted Congress to take up the issue. The Prevent All Cigarette Trafficking (PACT) Act,

proposed by legislators from New York and Wisconsin, would prohibit the United States Postal Service from delivering cigarettes and certain other tobacco products. The bill, if enacted, is expected to effectively put many Indian-owned smoke shops out of business because these enterprises rely heavily on mail order sales.

State Response to Decreased Revenue: Gaming Revenue Sharing

Faced with budget shortfalls, many state officials see tribal gaming—and specifically, revenue sharing—as a way to help pay for education, health care and other programs without raising taxes. Florida provides an interesting example. Despite being the first state to allow tribal gaming (nearly a decade before the passage of IGRA), Florida had historically placed limitations on gambling, and tribal Class III gaming was limited to slot machines. In fact, Governor Charlie Crist's successful 2006 campaign included a pledge to oppose the "expansion of gambling" in Florida. Due to a severe economic slump caused primarily by a downturn in the state's housing market, however, Florida faced a budget crisis that threatened lawmakers with billions of dollars in cuts to state programs.

To avoid cutting programs, the governor negotiated with the Seminole Tribe to permit increased gambling in exchange for state-tribal revenue sharing on gaming profits. In 2007, the governor and the tribe reached an agreement to allow the Seminoles the exclusive right to expand offerings in their seven casinos in Florida to include table

games such as blackjack, roulette, and craps in exchange for tribal agreements to contribute \$150 million per year towards state education programs and create 40,000 new jobs. Florida's legislature, however—which was left out of the negotiation process and unsatisfied with the terms of the agreement—filed a lawsuit challenging the governor's authority to enter into the compact unilaterally. A Florida Supreme Court ruling in 2008 that the compact was invalid, followed by the tribe's refusal to cease the new gaming activity in its casinos, has led to a standoff between the governor, the legislature, and the tribe regarding issues of state authority and sovereignty. After receiving legislative input, Governor Crist signed a new compact with the Seminoles in August 2009 that provided for increasing payments by the tribe to the state over a 20-year period. The fate of the agreement, however, is still unclear as the compact has not yet been ratified and still faces considerable opposition from lawmakers.

Massachusetts has also witnessed a dramatic change in the attitude of state officials toward tribal gaming. Previously, the state had been lukewarm to expanding gambling within its borders, having rejected a plan to license resort-style casinos in 2008. However, the need to cut billions from its budget, and studies showing that Massachusetts residents spend nearly \$1 billion annually at casinos in nearby Connecticut, have persuaded the state's leading politicians to embrace tribal gaming as a means of generating new revenues. Massachusetts's

governor, senate president, and house speaker have all announced their support for a bill allowing for expanded gaming in the state, including slot machines at the state's racetracks and casino resorts on tribal lands. Both the Mohegan Tribe, which operates the massive Mohegan Sun resort in Connecticut, and the Mashpee Wampanoag Tribe, which only received formal federal recognition in 2007, have acquired land for potential casino projects and announced plans to move forward once state approval is granted.

In California, on the other hand—which faces its own severe budget crisis—the state opposes the proposed expansion of gaming to urban areas. The urban gaming issue has been recently put in the spotlight by a proposal to build a mega-resort casino at Point Molate in the city of Richmond, near the heart of the San Francisco Bay Area. The Guidiville Band of Pomo Indians, a terminated-and-later-restored tribe, has asked that the Secretary of the Interior take land in trust for the gaming project. In October 2009, Governor Schwarzenegger lodged his opposition to the casino and the associated land-in-trust application, arguing the project violates the intent of the 2000 voter-approved state law (Proposition 1A) that authorized tribal gaming. Schwarzenegger contends that Proposition 1A was not intended to open the door to urban gaming, but to limit gaming to a tribe's existing reservation lands, most of which are in non-urban areas. The land-in-trust application remains pending with the Secretary of the Interior; if approved, the

governor will be required to negotiate a compact with the Guidiville Band, notwithstanding his opposition to urban gaming.

Role and Strategy of the Tribal Attorney in Tribal-State Disputes

Tribal attorneys may play the role of educator, facilitator, communicator, or advocate—and sometimes all roles at the same time—in tribal-state disputes. Which of these roles gets emphasized in a particular matter depends on the sophistication of the parties, the nature of the substantive dispute, and the contentiousness of the issue.

In building a strategy for negotiation with the state, it is important to understand the tribe's and state's respective interests and goals in a particular matter. Does the matter strike at the heart of the tribe's sovereignty? Is there an economic or business reason to negotiate an agreement with the state? Is there an important principle or precedent at stake?

The most important documents in any tribal-state dispute are the agreements or compacts, if any, between the tribe and state on a particular issue. That is because state law generally cannot apply to tribes or their land absent the tribe's agreement. Other important documents include the state law or regulation (proposed and/or existing) at issue; the tribe's own governing documents, including any applicable laws; tribal resolutions or ordinances on the subject; pertinent court decisions or precedents; and any federal laws that may apply.

As a threshold matter in any tribal-state dispute, it is important to emphasize that tribes, like states, are sovereign governments. Therefore, any discussion between the state and tribe should be done on a government-to-government basis, with respect for the tribe's sovereign status. While a tribe may be willing to cooperate and compromise on given issues—or even agree to state regulation in certain areas—the state should recognize it generally cannot regulate tribes or reservation conduct without the tribe's consent.

Furthermore, there are many contexts in which state regulation is simply unnecessary. As sovereign nations, tribes have the power to regulate activity on their own land, and tribes do so. In addition, federal law and regulations often apply on Indian land. Given the existence of tribal and federal law, there is often no need for additional state regulation. In these instances, state regulation would be cumulative and burdensome at best—and worse, an affront to tribal sovereignty.

Once the ground rules are established—that tribes are sovereign and state law generally should not apply—there may be a basis for compromise on the applicability of state law or regulation. What strategy to then employ will depend on the particular matter and parties involved.

Challenges for the Tribal Attorney and State Representatives

One of the greatest challenges in this area is that the law is unsettled and still in development. This is as much an opportunity (e.g., for creative legal argument) as a challenge. Tribes and their attorneys play a significant role in the development of the law. As sovereigns, tribes can make their own law and negotiate agreements with states for the application of state regulations. Tribal attorneys play an important role in the process as advocates and facilitators. Because the law is still developing and in a state of flux on many issues, it is critical to anticipate the precedential value—good or bad—of any dispute.

A mistake that states and their representatives often make in dealing with tribes is to assume that every tribe has the same interest on a particular issue. Tribes are sovereign not just vis-à-vis the state, but also relative to each other. In addition, in the gaming context, tribes are competitors in many instances. While one set of rules may benefit larger tribes, a different set of rules may benefit smaller tribes.

Negotiation in a setting of mutual respect can be very effective at resolving tribal-state controversies. It is critical the state and its representatives understand, and genuinely respect, tribal sovereignty. While most communications can be effectively handled through

attorneys, face-to-face meetings between top government officials from state and tribe can be extremely helpful. This is an important way the state can show respect for the tribe as a sovereign government.

Conclusion

The economic crisis has spawned several new areas of potential dispute between tribes and states. On the tribal side, the need to diversify their business means that tribes increasingly may involve themselves in other types of economic activity besides gaming, including more activities off the reservation. On the state side, the need to raise revenues to meet budget shortfalls has resulted in a renewed focus on applying and collecting taxes from tribes; and in some states, Indian gaming, and state revenue sharing, is expanding out of perceived economic necessity. Furthermore, given the trend of recent court decisions to circumscribe tribal authority, states are increasingly emboldened in their attempts to regulate and tax in Indian country.

In light of these economic and legal developments, the potential for tribal-state conflicts is on the rise. The future should hold many more opportunities for tribes and states to negotiate and cooperate on matters of mutual interest, and also many fundamental disputes—on issues of principle that strike at the heart of tribal sovereignty—that can only be resolved through the courts.

