

INDIAN GAMING:
THE MONTANA STALEMATE

by
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Rebecca Shirley Wingo

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ABSTRACT

In 1988, a series of lawsuits between the tribes and the states culminated in the passage of the Indian Gaming Regulatory Act (IGRA) in Congress. The law divides gambling into three classes: Class I games consist of traditional Indian games. Class II consists of games such as bingo and card games not played against the house. Class III games are the typical Vegas-style games, including slots, roulette, craps, and blackjack. Only Class III gaming requires that the tribes to enter into a compact with the state. Indian gaming in Montana is currently at a stalemate. The state is unwilling to allow tribes to expand their casinos to include Class III, Vegas-style gaming which would provide funding for basic tribal programs as well as supplement existing programs. According IGRA, tribes must either make a compact with the state or be content with Class II games only. IGRA states that should the state fail to negotiate their Class III compacts in good faith, the tribes have the right to sue the state. The state, however, is able to assert their Eleventh Amendment right of sovereign immunity and stop the lawsuit. The controversy over Indian gaming and the law has played out in the court system, the media, and state courts. Through interviews with tribal councilmen and attorneys across the reservations in Montana, I have concluded that Montana has not negotiated in good faith and has ignored tribal sovereign rights. As sovereign nations, the tribes should not have to negotiate with the state. Montana Indian reservations should join forces to bring a case before the state and federal government and sue for fairer Class III gaming compacts for each reservation.

INTRODUCTION

Indian gaming in Montana is currently in a deadlock between the tribes and the state. The tribes would like more regulatory control over gaming on their reservations. The state would also like more regulatory control over gaming on Indian reservations. These are two inherently conflicting desires as state interests do not typically reflect the best interests of Indian people. The current situation between tribes and the State of Montana is a result of a federal law called the Indian Gaming Regulatory Act (IGRA) passed in 1988.

In 1987, the Supreme Court arrived at a decision in the *Cabazon Band of Mission Indians v. California* that was of great importance to tribes: they ruled that California could not regulate gaming in Indian Country. This was a huge victory for the tribes and recognized tribes' sovereign right of regulatory powers on their own reservations. The tribal victory was short-lived, however, and in 1988, Congress used its plenary power to override the Supreme Court decision and pass IGRA. This act divided gaming into three classes. Class I gaming consists of traditional, social games played for minimal value. Class II games include bingo, and other games similar to bingo. Class III games are the typical Vegas-style games, including slots, roulette, craps, blackjack, and poker. Furthermore, IGRA mandated that the tribes negotiate a compact with the state if they wanted Class III gaming. The law included a good faith provision intended to protect tribes from states negotiating unfairly. The provision asserts that, should the state not negotiate their Class III tribal-state compacts within good faith, the tribes can then sue the state.

IGRA has been tested extensively in the court system on everything from who in the state gets to negotiate the compacts with the tribes (the state legislature or the governor), to pushing the limits of Class II games, to the good faith provision. The good faith provision is possibly the most detrimental to tribes, though certainly that was not the original objective of Congress. After being tested in the courts, culminating in the Supreme Court case of the *Seminole Tribe of Florida v. Florida* in 1996, it turns out that Congress did not have the right under IGRA to abrogate the states' Eleventh Amendment right to sovereign immunity. To put this plainly, tribes are not longer protected by the good faith provision because the states do not have to allow the lawsuit if they failed to negotiate fairly.

The current situation in Montana is that the state is not negotiating their compacts with the tribes within good faith. Because of the *Seminole* decision, tribes have no legal recourse to enforce the provisions in IGRA and the state has no obligation to uphold the law's provisions. Montana allows Class II gaming, and anyone with a liquor license can also have two Class III games: video keno and video poker. Reservations, if they have a Class III compact with the state, can also have video keno and video poker. Montana does not support expanded gaming while the tribes, as sovereign nations, feel they should not have to subject themselves to the regulatory powers of the state when it comes to Class III gaming as it is a violation of their sovereignty.

The opposition to Indian gaming in Montana comes from multiple sources. The governor is the one who negotiates all the compacts, but the compacts must also be approved by the state legislature so the resistance to expanded gaming comes not only

from the governor, but also the legislators. The state legislature often caves to outside lobbying, most notably from the Montana Tavern Association. The Tavern Association, since it can have the same Class III games as the tribal casinos, want to keep its corner on the market and do not want expanded Indian gaming because it would take away some of its client-base, not to mention its revenue.

Tribes can use casino profits to create a more stable economy on reservations and fund essential tribal programs, from education language programs to supplementing Indian Health Service programs. It is unfair for the state to blatantly negotiate compacts unfairly and limit the economic growth on Indian reservations in Montana when a lot of good programs can be funded through tribal casino revenue.

This study does not assert that all tribes should have Class III gaming. Instead, this study contends that a mandatory tribal-state compact for Class III gaming is a violation of tribal sovereign rights. As far as whether or not a tribe should have Class III gaming on their reservation, it is an internal decision to be made at the discretion of each of the tribes. My argument is also that there are many beneficial aspects to tribal gaming, from providing employment to funding tribal programs for both the tribes and the states to consider when negotiating Class III compacts. Compact negotiation should not be one-sided. In order for this to happen in Montana, the state will have to expand gaming on Indian reservations. If the state will not, it is up to the tribes to take their case to the Department of the Interior and demand better compacts.

HISTORY OF TRIBAL GAMES

Pre-contact Native American cultures all incorporated some form of gambling, though the game variations depended on the tribe and region. Extensive documentation of many traditional games was completed in 1907 by Stewart Culin, called Games of the North American Indians.¹ Culin's work is an excellent primary source that goes into some depth about the reason these games were played, which was often religious or spiritual in nature.² Native American tribes have a vast history of gambling as a traditional pastime, as do Euro-Americans. One of the differences between the two groups, however, is that while mainstream, Euro-American gambling has been allowed to evolve beyond sticks and bones into a multi-billion dollar industry, the evolution of Native American gambling has been limited and regulated by the federal government and the states, most notably through the Indian Gaming Regulatory Act (IGRA) of 1988.

In 1893, a chance meeting between Frank Hamilton Cushing and Stewart Culin at the Columbian Expedition in Chicago led to an extraordinary research project of traditional Native American games.³ Culin's previous work was documenting Old World, traditional games, particularly in the Orient. His booth at the 1893 Expedition drew Cushing's interest. Cushing's previous work with some Southwest tribes, mainly the Zuni, caused him to immediately recognize the similarities between traditional Native games and Old World games. Culin and Cushing were the first researchers to document in depth traditional Indian games and vaguely acknowledge the religious and sacred

¹ Stewart Culin, *Games of the North American Indians*, (Lincoln: University of Nebraska, 1992).

² Kathryn Gabriel, *Gambler Way: Indian Gaming in Mythology, History, and Archaeology in North American*, (Colorado: Johnson Printing, 1996), 6.

³ Gabriel, 6.

aspects of those games. Cushing died in 1900, seven years short of the publishing of Culin's 846 page study.⁴

Culin, whose work deals solely with tribes in the lower 48 states, divides Native games into two categories: games of chance and games of dexterity. To break it down further,

“The games of chance fall into two categories: 1, games in which implements of the nature of dice are thrown at random to determine a number or numbers, and the sum of the counts is kept by means of sticks, pebbles, etc., or upon an abacus, or counting board, or circuit; 2, games in which one or more of the players guess in which of two or more places an odd or particularly marked lot is concealed, success or failure resulting in the gain or loss of counters.”⁵

Games of dexterity would include games such as archery, where arrows or darts are thrown at a mark;⁶ snow-snake, where darts or javelins are either slid across the ice or thrown in the air to see whose will go the farthest;⁷ hoop and pole, where a spear is thrown or an arrow either shot or thrown at a moving hoop;⁸ ring and pin, where a ring is attached to a dart or pin by a cord and must be captured on the dart or pin;⁹ as well as various other ball games. Many of these games are widespread across the tribes within the United States, while others are limited to regions. For example, the snow-snake game is played only by Northern tribes who have enough snow to play the game.

The following is a chart of all the games played a century ago by the tribes in Montana as documented by Stewart Culin.

⁴ Gabriel, 6.

⁵ Culin, 31.

⁶ Culin, 383.

⁷ Culin, 399.

⁸ Culin, 420.

⁹ Culin, 527.

Tabular Index to Tribes and Games*

Tribes	Games of Chance					Games of Dexterity				Minor Amusements												
	Dice Games	Guessing Games				Archery	Snow-snake	Hoop and Pole	Ring and Pin	Ball Games					Tipcat	Shuffleboard	Swing	Tops	Bull-roarer	Buzz	Popgun	
		Stick Games	Hand Game	Four-stick	Hidden Ball					Racket	Shinny	Double Ball	Hand-and-foot	Tossed Ball								
Assiniboine	X	X	X			X	X	X	X	X	X			X	X							
Blackfeet	X		X					X										X				
Chippewa	X	X			X		X	X	X	X	X	X						X				
Cree	X	X	X		X		X		X			X						X				
Crow	X		X			X	X	X			X		X					X			X	
Teton Dakota	X	X				X	X	X	X		X				X	X	X	X	X	X	X	X
Sisseton Dakota	X																					
Wahpeton Dakota	X	X				X	X	X	X		X				X	X	X	X	X	X	X	X
Yanktonais Dakota	X									X												
Gros Ventre	X		X			X	X	X	X		X		X					X			X	
Kutenai			X																			
Northern Cheyenne	X		X			X	X	X	X	X	X	X	X					X				
Pend d'Oreilles		X						X				X										
Salish								X														

*This table is created from the original table in Culin's Games of the North American Indians and is edited to display only current federally recognized Montana tribes. The four bands of Dakota listed are current residents of the Fort Peck Indian Community. All spellings of tribal names are taken directly from Culin's book.

Montana currently has ten federally recognized tribes:¹⁰ the Blackfeet on Blackfeet Reservation, Chippewa and Cree on Rocky Boy Reservation, Confederated Salish¹¹ and Kootenai Tribes of Flathead Indian Reservation, Crow of the Crow Reservation, Assiniboine and Gros Ventre of the Fort Belknap Indian Community, Assiniboine and Dakota Sioux of the Fort Peck Indian Community, and Northern Cheyenne on Northern Cheyenne Reservation.

As evidenced by the chart, there are many commonalities between the games played by each tribe in Montana. For example, within the games of chance, with the exception of the Salish, each tribe played a version of a dice game. Also extremely popular among the Montana tribes was the hand game. In his documentation, Culin found that many of these games, however, were not played by everyone but were rather divided along gender lines. For example, the Blackfeet men's hand game was documented by Maximilian, Prince of Weid at Fort Mackenzie, MT. According to Weid, this was a man's game in which the men sit in a circle with objects of value in the middle of the circle. They play for the prizes in the middle. One man takes some pebbles in his hand and moves them back and forth in time with his song. The others try to guess how many pebbles he is holding. "In this manner considerable sums are lost and won."¹²

Another example of a gendered game is the Blackfeet version a dice game. Culin notes that it is a woman's game made with four straight buffalo ribs for dice. Women play either one-on-one or in teams where each individual team member challenges the

¹⁰ The State of Montana is also the home of the Little Shell Cree, but since this paper will discuss gaming in a legal context, only those tribes legally recognized by the federal government will be discussed.

¹¹ The Confederated Salish Tribe refers to both the Salish and the Upper Pend d'Oreilles Tribe.

¹² Culin, 269.

player sitting opposite them. After the dice are thrown, the opposing person must give one stick for every point on the dice. The purpose is to get as many sticks as possible. Culin notes that the women do not sing during their game as the men do in the hand games.¹³ He documents neither women playing hand games among the Blackfeet, nor any men playing the dice game. He also notes the regional similarity in the Blackfeet dice game, which is nearly identical to the game played by the Gros Ventre.

Some of the games, while they had a similar objective, varied from tribe to tribe. The Northern and Southern Cheyenne for example played a dice game slightly different from that of the Blackfeet women. Instead of bone, the women used five plum stones carved on one side for dice. The stones were placed in a shallow bowl or basket, thrown in the air, and caught in the basket again. The carvings on the stones determine the count of the throw. The objective of the game, just like the Blackfeet, is to get as many sticks from your opponent as possible. Some throws give you sticks, while others take them away. When one player (if playing individually) or the entire team (if playing multi-player) has all the sticks, then the game is called.¹⁴ These are just a few examples of separate men's and women's games, but there were a few games that were played by both men and women. For example, the Cree played a hand game in which there was "no limit as to numbers or sex of players."¹⁵

As mentioned previously, Culin and Cushing were only beginning to realize the religious and sacred significance of some of the gambling taking place within Native communities. Their work is surprisingly devoid the prejudices of the times. To place

¹³ Culin, 56-57.

¹⁴ Culin, 58-59.

¹⁵ Culin, 270.

their work in the context of Indian policy, for instance, they began their study only three years after the ban on Native religions by way of the Ghost Dance and the massacre at Wounded Knee in 1890. It is not surprising, therefore, that their work merely brushes over the religious explanation of some of the games. To Culin and Cushing's credit, however, they do make note of any seasonal/ceremonial occurrences of the games. For example, working off of Cushing's research within Zuni culture, Culin writes, "In general, games appear to be played ceremonially, as pleasing to the gods, with the object of securing fertility, causing rain, giving and prolonging life, expelling demons, or curing sickness."¹⁶ Culin goes on to say, however, "as opposed to this view, it should be said that I have no direct evidence of the employment of games in divination by the Indians apart from that afforded by Mr. Cushing's assertion in regard to the Zuni sholiwe. This game is ceremonially played to-day to secure rain."¹⁷

This is where Kathryn Gabriel, author of Gambler Way: Indian Gaming in Mythology, History and Archeology in North America, expands upon Culin's work, creating a fuller picture of traditional gambling. Indeed Gabriel asserts that "an important and overlooked aspect of traditional Indian gaming is that gambling has nearly always been a sacred activity, inextricably bound together with myth, legend, and ritual."¹⁸ Native American gambling, according to legend and myth, has origins in the divine. These stories tell how gambling came about as well as the symbolism of the games and rules of play.

¹⁶ Culin, 34.

¹⁷ Culin, 35.

¹⁸ Gabriel, 17.

Gabriel writes about two kinds of gambler myths, the first of which centers around gambling. The myth most commonly follows a format in which there is “an ominous gambler whose gaming challenges are irresistible to the people.”¹⁹ The people lose everything, including their families and friends. Then, as soon as the people cannot take it anymore, a hero figure enters who can defeat the gambler with “superior skill, cunning, or magic.”²⁰ In the end, the gambler tries to renege on his bet, but the hero will not let him. The gambler gets a taste of his own medicine and the people are restored to freedom.

The second type of gambler myth Gabriel writes about is when gambling occurs in the story as a footnote instead of the central theme. In these myths the characters engage in a contest or game. Gabriel writes, “no one game is unique to myths told by any particular cultural or regional group. The myths are possibly told to establish the sacred context of the games and gaming equipment, to deliver playing instructions, or to teach a moral message.”²¹ What is clear about gambling in Native American cultures is that each game has a time and place. Some games are seasonal and compliment the seasonal ceremonies, some are purely religious in nature, while others are used for healing.

Non-Indian cultures’ gambling history is as deeply rooted in religion as is Native gambling. No one knows the origin of gambling. As David G. Schwartz writes in his book Roll the Bones: the History of Gambling, “No one can say exactly who invented prayer, music, farming, medicine, or money. The same must be said for gambling: It is

¹⁹ Gabriel, 17.

²⁰ Gabriel, 18.

²¹ Gabriel, 19

simply older than history.”²² The first gamblers were not simply playing games. Much like Native American cultures, their first games were religious in nature, not recreational. Looking back at the ancient cultures of the Greeks and Etruscans, they practiced haruspicy, a religious ceremony in which a beast was slaughtered and its entrails read for divination. Even tarot-card reading, a modern-day divination practice, was “ironically, once a gambling game.”²³

The oldest form of gambling, odds and evens, was so successful that its basic function is still being used today as dice. The game is simple: a priest or shaman grabs a handful of small objects such as nuts or stones and then dumps them out. If the number of objects is even, then the answer is yes. If the number of objects is odd, then the answer is no. In some cultures, the results may be reversed, but the basic idea is the same. This practice is called cleromancy.²⁴ The religious practice of cleromancy later evolved into dice. Most commonly used for a die was a specific bone called the hucklebone, or astragalus. This bone “had four unsymmetrical large sides – concave, convex, broad, and narrow (it was impossible for the bone to come to rest on either of its two rounded ends). Each side stood for a different outcome.”²⁵ Dice continued to evolve. The oldest six-sided dice dates back to 3000 BC and was discovered in the Mesopotamian region in present-day Iraq.²⁶

It was not uncommon for non-Indian cultures to link gambling with their gods either. In ancient Egypt, Thoth was credited with the invention of gambling. Thoth was

²² David G Schwartz, *Roll the Bones: The History of Gambling*, (New York: Gotham Books, 2006), 5.

²³ Schwartz, 6.

²⁴ Schwartz, 6.

²⁵ Schwartz, 7.

²⁶ Schwartz, 8.

the Egyptian god “charged with enforcing *maat*, or divine order, an arbitrator whose counsel was especially treasured, and a judge of the dead. Gambling in the land of Nile was thus linked to secret knowledge.”²⁷ In one myth, Thoth succeeds in beating the moon and calls in a favor for a friend. He adds five days to the year giving the Egyptians a 365-day solar year instead of their 360-day lunar year.²⁸ Similar incorporation of gambling into stories spans across India, China, and back across Europe and is supported by the physical evidence of gambling artifacts.

It is not until 1000 BC, however, that cards begin to circulate throughout the Old World. Culin, in later writings, hypothesizes that cards originated from Korean divination arrows used in the 6th century. However, no one really knows the true origins of cards. Cards begin to present themselves in a form recognizable to modern eyes around 1500 BC.²⁹

Gambling continued to evolve in North America through the introduction of Euro-American traditions. Gambling in the United States has had its ups and downs as attitudes towards it have changed over the centuries. Gambling was more a part of the culture of the Wild West than it was part of the Eastern culture of America. The West was unsettled and isolated. The mobility of a deck of cards or pair of dice ensured gambling a prime spot in adult pastimes. Unregulated casinos were soon created to meet client demand. As a result of its popularity with the unsavory Western characters,

²⁷ Schwartz, 10.

²⁸ Schwartz, 11.

²⁹ Schwartz, 41.

gambling's reputation was inextricably tied to the "wild" reputation of the Wild West.³⁰ By 1909, only 60 years after the Gold Rush that brought the vast majority of settlers to the West, the last state, Nevada, outlawed casino gambling. Twenty-two years later, Nevada would once again legalize gambling and quickly create a multi-billion dollar gambling industry.

There are many similarities between the traditional games from the Old World and the traditional games of the American Indians, ranging from the religious aspects to materials used in play. The evolution of gaming within these communities, however, highlights the differences between the two. Culture is not static, and therefore activities, such as gambling, that take place within any given culture do not remain static either. Euro-American gambling has been allowed to adapt and change with the times to create successful gaming operations. Native American gambling, on the other hand, has been severely limited and subjected to an external regulatory power: the states. In theory, states are supposed to have equal legal footing with tribes since each is sovereign under the eyes of the federal government and certainly states are not supposed to have a say in the internal affairs of the tribes. Despite tribes' sovereignty, the Indian Gaming Regulatory Act of 1988 placed them under the regulatory control of the states.

Mainstream American society decided that the gaming industry, especially in locations like Las Vegas and Atlantic City, is one way for members of that culture to earn money through their traditional pastime of gambling. Why do Euro-Americans still limit the same opportunity for Indians? Many Americans tend to view Native cultures as

³⁰ John M. Findlay, *People of Chance: Gambling in American Society from Jamestown to Las Vegas*, (New York: Oxford University Press, 1986), 4-10.

static, as if they expect them to still live in teepees. These same individuals have no problem with Native Americans continuing with the traditional hand games and stick games, more than likely because those are the games they expect to see Indians play. State legislatures, governors, and Tavern Associations among others do not like, and continually tried to prevent, Indians from breaking out of their perceived static cultural mold. In the case of gaming, this is accomplished through the IGRA. The act permits tribes to continue their traditional games with no regulation but prevents tribes from evolving their gambling culture in the same way Euro-Americans already have by requiring state approval and compacts for Vegas-style gambling on Indian reservations. The remainder of this study will discuss this act and its impact on Native American tribes.

TRIBAL SOVEREIGNTY: A BRIEF HISTORY

Sovereignty, in its purest form, has a very clear definition: Sovereignty is the right to govern and exercise civil and criminal power over oneself and one's people. In relation to tribal issues, however, sovereignty is polluted with United States politics and agendas. Tribes are currently referred to as quasi-sovereign nations, which explains why much of their function today is dictated or regulated by either the Federal government or the States. This is, of course, where things get tricky because the Federal government and the states frequently compete over issues of sovereignty, leaving tribes at the mercy of shifting statutory and case law.

In the history of United States tribal affairs, sovereignty in its purest form is something always out of reach. At contact, tribes were regarded as sovereign nations. The colonists made treaties with various tribes, recognizing Indians' inherent sovereign right to govern themselves by engaging in a treaty-making process. When the settlers rebelled against the British and formed their own country, the United States leaders continued to make treaties with tribes until 1871. The American political agenda, however, was polluted with ideas of "manifest destiny" and many in the United States believed they had the right to control Native lands, especially Native resources, partly because they didn't really believe that those lands and resources belonged to the Natives. According to the U.S. Constitution, the power to negotiate treaties rests solely with the executive branch. In 1871, Congress used what is now called plenary power to rewrite the clause in the Constitution in regards to the executive treaty-making power. In doing so, Congress officially ended the treaty-making processes with tribes. Congress continues

to assert its plenary power (which has no basis in the Constitution) to this day. The power is most commonly used in Indian Country to override a Supreme Court decision, as is the case in the passage of the Indian Gaming Regulatory Act of 1988.

To demonstrate the early Americans' notion of Manifest Destiny, look at one of the cases in the Marshall Trilogy. In the case of *Worcester v. Georgia (1832)*, the issue up for review was whether or not the State of Georgia had the right to enforce state laws on tribal lands. The Supreme Court ruled that Georgia had no jurisdiction to make laws or enforce laws on tribal lands and therefore, had to leave the Cherokee alone. Most unfortunately for the Cherokee, gold was discovered in their territory. At this point in time, the checks-and-balances government that we take for granted today was not a well-functioning machine. In fact, the three branches of government were all relatively new and extremely distrustful of each other. The Supreme Court was only recently established at this time by the 1789 Judiciary Act, only 43 years prior of *Worcester v. Georgia*. As evidence of the unsettled nature of the three branches of government, Congress and the President ignored the Supreme Court and assisted the state in the removal of the Cherokee to Oklahoma. President Andrew Jackson was rumored to have said, "Justice Marshall has made his decision. Now let him enforce it." Georgia got the gold and the land, as was their God-given right under Manifest Destiny. In the end, whether in the east or out west, it was gold and the potential for land and resources that drove tens of thousands of settlers into Indian Country, with no regard for tribal rights. It is at this point in history that the sovereign rights of tribes began to seem more like a nuisance than a legal or even a moral reality. After the Gold Rush in the 1850s, land

became as valuable a resource as gold. It was the Dawes (General Allotment) Act of 1887 that caused a 67% “surplus” land loss for Indian people, regardless of previous treaty rights.

Nevertheless, no matter which treaty it was, or which tribe the treaty was made with, the federal government did, and still does, have a moral and legal obligation to uphold the rights of the tribes. What began as a general recognition of the United States’ responsibility to protect tribal boundaries has evolved, through court decisions and law starting with the General Allotment Act, to an increasingly elaborately defined and self-imposed fiduciary duty. Complicating matters are the competing claims to sovereignty mentioned previously.

There are three sovereigns within the United States: the federal government, the states, and the tribes. The tribes and the states have similar semi-sovereign statuses. The states, while maintaining a large part of their sovereignty, did enter into statehood under the approval of the federal government and therefore must comply with the laws and regulations of the federal government. The tribes, in large part due to the treaties, have entered into what Supreme Court Chief Justice John Marshall coined as domestic-dependency. Marshall’s dicta in the *Cherokee v. Georgia* (1831) states,

“Though the Indians are acknowledged to have an unquestionable and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps be denominated domestic dependent nations.”¹

¹ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

As a result of this hierarchical structure that places the federal government as the supreme sovereign, state and tribal rights often conflict because states want more control over reservations incorporated within their state boundaries. There is an equally problematic conflict between the states and the federal government over who has more power in Indian Country.

During these conflicts, the federal government must step in and answer the sovereignty question at hand. The federal government can do this in a variety of ways, including executive orders, judicial decisions, or legislation. Historically, when the federal government has had a vested interest in the state's side of the dispute, then it has sided with the state regardless of its fiduciary duty to tribes. The Indian Gaming Regulatory Act of 1988 is an example of this, but this law will be addressed in more detail in the following chapters. On the opposing side, when a state's interests in a tribal issue caused it to overstep its bounds as a subordinate sovereign, then the federal government tends to side with the tribes. It is less that the federal government has acted on its obligation to protect the rights of the tribes, but more that it has moved to protect its own powers as the superior sovereign.

Steven Andrew Light and Kathryn R.L. Rand, authors of Indian Gaming and Tribal Sovereignty: The Casino Compromise, sum up the notion of tribal sovereignty best and explain why there is so much tension between the federal government's perception of tribal sovereignty and the tribes' position on their own right of self-determination:

“As it is commonly understood, sovereignty is a nation's independent and supreme authority to govern its citizens and interact with other nations. Sovereignty connotes political legitimacy and autonomy rooted in self-governance, the freedom and independence of a nation to determine its

future. Sovereignty can be both absolute and nonabsolute, reflecting the divergence between political theory and the coexistence of nations in the real world. Absolute in its extent and character, the supreme and inherent nature of sovereignty cannot be denied. Yet in practice, the *scope* of sovereign authority may be limited by mutual concession or by political or legal imposition.”²

Light and Rand go on to identify two competing conceptions of tribal sovereignty: “the federal definition which is grounded in federal Indian law, and indigenous perspectives, which deny the extent of federal authority and are rooted in tribes’ inherent right of self-determination.”³ Over the course of American history, the federal government has exerted its authority over Indian peoples and Indian lands as part of its colonial and imperial agenda. Tribes dispute that agenda based on the fact that their self-governance pre-dates formation of the United States. With the exception of the Spanish, the European powers that preceded the formation of the United States each engaged with American indigenous groups via treaties, which are instruments of international relations; that is, tribes were perceived as sovereigns. The United States acknowledges this sovereign status in general, but denies tribes the right to self-determination whenever it infringes on upon the federal government’s “rights.”

For instance, Public Law 83-280 (known commonly as PL 280), passed in 1953, remains one of the most controversial laws affecting Indian Country. PL 280 was passed during the Termination Era when Congress was trying to rid itself of the financial burden of as many tribes as it could by unilaterally “terminating” its relationship with individual tribes. Termination policy and PL 280 go hand-in-hand when considering Congress’

² Steven Andrew Light and Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise*, (Lawrence: University Press of Kansas), 5.

³ Light and Rand, 5.

view point on the financial aspect of the government's fiduciary duty at the time. Under termination policy, over one hundred tribes lost their federal recognition, meaning that they no longer had funding or any of the services promised to them in treaties, such as health care and schooling. In addition to the loss of funding and services, the tribes also lost their reservations, and as a result, their jurisdiction over their own people. Individual tribal members were no longer considered dual citizens of their tribe and the United States, thus ending any remnants of tribal sovereignty as far as the federal government was concerned.

PL 280 is a bit more complex, but rested on the same premise: Congress wanted to be relieved of its responsibilities to the tribes. It passed an unfunded mandate in five states (California, Oregon, Minnesota, Nebraska, and Wisconsin) that transferred "broad criminal jurisdiction and a limited grant of civil jurisdiction"⁴ from the federal government to the states. This mandate did not require consultation with the Indian nations it affected, nor did it require approval from the five initially affected states. Congress successfully rid itself of its trust responsibility at the expense of the tribes because it no longer considered funding the tribes to be a viable investment, thus denying the tribes their inherent right to self-determination.

In 1968, under President Lyndon B. Johnson, there was an incredible turn of events following the Indian Civil Rights Act and, in 1970, the election of President Richard Nixon. The Indian Self-Determination and Education Assistance Act in 1975 officially ended the policy of termination and amended PL 280. PL 280's amendments

⁴ Kathryn R.L. Rand and Steven Andrew Light, *Indian Gaming Law and Policy* (Durham: Carolina Academic Press, 2006), 21.

allowed states to retrocede their jurisdictional control back to the federal government as well as giving tribes the ability to opt for PL 280/state criminal jurisdiction or not. This was a huge victory for tribal sovereignty in general. Any tribe entered into PL 280 prior to 1968, however, did not have the right to deselect state jurisdiction in favor of federal jurisdiction, so the tribes in the first five states (later six when Alaska adopted statehood) are still under state criminal jurisdiction.

In the years following Johnson's and Nixon's repudiations of termination policy, Congress worked hard to encourage tribal economic development and self-sufficiency. Education bills were passed, increasing many tribes' legal abilities and management skills. States began to fear tribes because they were no longer able to exploit them with impunity as Native communities gained experience with the legal system.

During this same time period, there was a boom in gaming operations, especially on Indian reservations. At this time, gambling as we think of it today was a relatively new phenomenon. Las Vegas did not become the gambling hub of America until after gambling was re-legalized in the Nevada in 1931. By the 1950s, Las Vegas was turning into the massive attraction it is today. Within that time frame, states began to see the potential of gaming tax revenues and profits. Tribes with gaming operations were not under state control because of their inherent sovereignty. States desired as they often had in the past, to have regulatory power in Indian Country.

In the meantime, some tribal communities were making incredible profits off of high-stakes bingo operations, especially in Florida and California. For a brief period in the 1970s, Florida became the hotspot for tribal sovereignty debate in relation to

gambling, beginning with the 1979 5th Circuit Court case, *Seminole of Florida v. Butterworth*.

The Seminole had contracted with a private company to build a high-stakes bingo palace within driving distance of both Ft. Lauderdale and Miami, prime real estate for a profitable casino. According to Light and Rand, “[a]lthough Florida law permitted charitable bingo, it set several restrictions on the games, including a \$100 ceiling on jackpots, and violations were punished through criminal penalties.”⁵ Florida had previously passed a statute extending state criminal and limited civil jurisdiction over its reservations under PL 280. The Seminole Tribe argued that since they were a sovereign nation and since Florida allowed other organizations within the state to operate bingo halls, it was legal for the tribe to run a high-stakes bingo hall and the state could not regulate gaming on their reservation. The court decided that since Florida allowed bingo to be played within the state, then their attempt to stop the Seminole from running a high-stakes bingo operation was an attempt to make the Seminole comply with state regulations. PL 280 and Florida’s statute only referred to criminal/prohibitory actions. Again, according to Rand and Light, “[b]ecause Florida generally allowed bingo subject to restrictions, the game did not violate the state’s public policy and thus did not fall within Public Law 280’s ambit of allowable state jurisdiction.”⁶ In the eyes of the federal government, Florida was overstepping its jurisdictional boundaries and getting involved in federal jurisdictional responsibilities. The court had no option but to decide on the side of the tribes in order to protect the federal government’s jurisdictional boundaries.

⁵ Rand and Light, 21.

⁶ Rand and Light, 22.

The 5th Circuit court's decision in *Seminole* did not end the debate over regulation of gaming in Indian Country, however. The State of California pursued a similar case before their 9th Circuit Court of Appeals in *Barona Group of Captain Grande Mission Band of Indians v. Duffy* (1982).⁷ At the time, California allowed bingo within the state for charitable purposes, in much the same manner as Florida. The Barona Group had hired a private contractor to set up a high-stakes bingo hall on their reservation. "Local law enforcement, asserting that the state restrictions applied on the tribe's reservation, threatened to shut down the bingo operation and arrest its patrons."⁸ California had an advantage in their case that Florida did not have: because California was one of the original PL 280 states, they already had Congress' mandate to exercise criminal and limited civil jurisdiction over tribes. Florida, on the other hand, only had a state statute granting them similar powers under PL 280. The 9th Circuit Court, however, based its decision on the *Seminole* ruling, holding that PL 280 was only applicable under criminal/prohibitory acts, not regulatory ones.

These two cases were not the only cases defining PL 280 as a prohibitory/criminal law, not a regulatory one. In Wisconsin, the Oneida Tribe of Indians also won its court case against the state for their high-stakes bingo halls. The success of gaming tribes in the legal system spurred more tribes around the country to open their own gaming operations, much to the dismay of the states. Rand and Light explain:

"Indian gaming facilities at the time, operated by more than 80 tribes across the country, primarily consisted of bingo and a few card rooms offering poker and blackjack, but even without slot machines or other

⁷ *Barona Group of Captain Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (1982).

⁸ Rand and Light, 23.

lucrative casino-style games, the tribal gaming industry grew rapidly in the 1980s, grossing over \$110 million in 1988.”⁹

With the success and rise of Indian gaming, California waited for a more appropriate time to take their next case before the Supreme Court. It was not until the Cabazon and Morongo Band of Mission Indians opened “bingo halls and a card club on their reservations in Riverside County, near Palm Springs and within driving distance of Los Angeles”¹⁰ that California decided enough was enough. The subsequent lawsuit ended up before the Supreme Court in 1987 with *California v. Cabazon Band of Mission Indians*.¹¹ California argued their case a little differently this time. For one thing, the state not only had PL 280 at their back, but it also had a state penal code on gaming profits that it extended over Indian reservations. According to the Court in *Cabazon*:

“Cal. Penal Code Ann. § 326.5...does not entirely prohibit the playing of bingo, but permits it when the games are operated and staffed by members of designated charitable organizations, who may not be paid for their services. Profits must be kept in separate accounts and used only for charitable purposes; prizes may not exceed \$250 per game.”¹²

California argued that since the Indian casinos were not complying with their statute (i.e. not operating solely for charitable purposes, exceeding the prize cap, and paying their employees) they were in violation of state law. Therefore, the state argued that California law enforcement had a right to shut down the tribes’ gaming operations. California also argued that under the Organized Crime Control Act of 1970 (OCCA) they could intervene in a gaming operation they thought was being influenced by organized crime. The questions before the Court, therefore, were as follows: Can the state of California

⁹ Rand and Light, 23.

¹⁰ Rand and Light, 24.

¹¹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

¹² 480 U.S. at 205 (1987).

extend its penal code on gaming profits over tribal gaming operations? Can California use PL 280 to control gaming on tribal lands? Does OCCA authorize California to extend its jurisdiction over tribal gaming?¹³

The Supreme Court decided to uphold other court decisions in previous cases, such as the *Seminole* case, on PL 280 and rule against their argument under OCCA. According to the court, “Although state laws may be applied to tribal Indians on their reservation if Congress has expressly consented, Congress has not done so here either by Pub. L. 280 or by the Organized Crime Control Act of 1970 (OCCA).”¹⁴ As far as OCCA goes, the law applies to violations of gaming laws on the state and local level as punishable by federal law enforcement. The Court concluded that states are not granted any authority over gaming in Indian Country.

As far as PL 280 is concerned, the court chose to uphold other court decisions in previous cases on the criminal/prohibitory nature of the law. According to the Court,

“When a state seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the state law is criminal in nature, and thus fully applicable to the reservation, or civil in nature and applicable only as it may be relevant to private civil litigation in state court.”¹⁵

California did not prohibit gaming at the time of the court case. In fact, California encouraged gaming at the time through its state lottery. It was ruled that the Cabazon Band of Mission Indians was not in violation of any criminal laws and therefore any attempt by the state to apply its laws in Indian Country was invalid. Furthermore, the Cabazon and Morongo Indians had no exploitable resources, and therefore the federal

¹³ 480 U.S. 202 (1987).

¹⁴ 480 U.S. 202 (1987).

¹⁵ 480 U.S. 202 (1987).

government was in agreement that gaming was an acceptable form of economic development.¹⁶ The California penal code was also found to be prohibitory, and therefore could not be relied upon by the state as granting jurisdictional authority on the reservation.

Furthermore, the federal agenda in Indian Country at this time was encouraging of tribal economic development. In *Cabazon*, the Court points out that

“the federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development, are important, and federal agencies, acting under federal laws, have sought to implement them by promoting and overseeing tribal bingo and gambling enterprises.”¹⁷

In other words, the court would have been in violation of federal Indian policy were it to rule in favor of the states. The end result of this Supreme Court case was a huge victory for the tribes and cause for fear and concern on the part of the states for their own gaming profits and jurisdictional boundaries.

It is important to point out in this case what was meant previously by competing claims to sovereignty between the states and the federal government. While the Supreme Court decision in *California v. Cabazon Band of Mission Indians* does discuss the federal Indian policy of the time in encouraging tribes to develop casinos to boost their economy, the end decision had less to do with what was best for the tribes, and more to do with where the federal jurisdictional lines end and state jurisdiction begins. Read again the following passage: “Although state laws may be applied to tribal Indians on their reservation if Congress has expressly consented, Congress has not done so here either by

¹⁶ 480 U.S. at 210-211 (1987).

¹⁷ 480 U.S. at 203 (1987).

Pub. L. 280 or by the Organized Crime Control Act of 1970 (OCCA).”¹⁸ Congressional support for PL 280 was never about what was best for the tribes or individual Indians. It was about an attempt to cede federal jurisdictional authority over tribes to the states.

Federal Indian policy has been described as being schizophrenic.¹⁹ Upon first interpretation, I believed this to mean that the mood of the federal government determined whether they sided with the tribes or the states. Upon further deliberation, I realized that it was less a swing towards the tribes during certain time periods (that is not to say that federal policy did not shift between favoring the tribes and not favoring the tribes over long periods of time), but the decisions usually boiled down to whether or not the states were overstepping their jurisdictional boundaries and treading on federal toes. The *Cabazon* decision is a prime example of this.

The states were not satisfied with the Supreme Court decision in the *Cabazon* case. Over the next year, Congress prepared new legislation that would ultimately place tribal gaming under state gubernatorial control. The Indian Gaming Regulatory Act of 1988 filled in the jurisdictional gaps created by PL 280 and regulatory action on tribal lands in relation to gaming. The act has had an enormous impact on Indian gaming operations and was a major blow to tribal sovereignty in the wake of significant court victories. The only way Congress could override the Supreme Court decision in *Cabazon* was to use its plenary power to create legislation that virtually makes the legal struggles of the 1970s and early ‘80s moot.

¹⁸ 480 U.S. 202 (1987).

¹⁹ Used by Justice Clarence Thomas in *United States v. Lara*, 514 U.S. 193 (2004) and also by Robert Williams Jr. in his book [Like a Loaded Weapon](#).

LEGISLATIVE HISTORY OF IGRA

Hearings on Indian Gaming began in 1984, approximately three years before the final decision in *California v. Cabazon Band of Mission Indians* (1987). In 1986, a version of the current Indian Gaming Regulatory Act (1988) was proposed in Congress, but not passed. Only after the victory of tribal sovereignty in the *Cabazon* case did Congress pass an act to regulate Indian gaming and give States more authority through Class III gaming Tribal-State compacts. Congress cited many reasons for passing the legislation, but in the end it was more of a blow to tribal sovereignty than anything else, despite the best intentions of those working hard to create a compromise between tribes and states.

In 1983, Arizona Representatives Morris Udall and John McCain introduced a bill to the House of Representatives, H.R. 4566 with the intention of better regulating gaming in Indian Country. Udall “emphasized that the intent of the legislation was to neither support nor oppose gaming and noted that the federal courts had determined that Indian tribes had the right ‘under certain circumstances’ to conduct gaming.”¹ Within the next year, Representative Shumway (CA) attempted to prohibit gaming in states that either made it illegal or in violation of their public policy. California’s actions at this early date set the background for their future legal actions in court, culminating in the *California v. Cabazon Band of Mission Indians* Supreme Court case in 1987. After many hearings on Indian gaming, the conflict between tribal and state rights was made evident. State mostly argued against Indian gaming based on issues surrounding organized crime, the

¹ W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics*, (Norman: University of Oklahoma Press, 2001),54-55.

loss of state revenue, and the belief that the federal government and tribes could not regulate gaming effectively enough to please the states. Unfortunately for tribes, the states had the most sway in Congress and it was not long before much of the regulatory control over gaming was handed over to the states.

On October 17, 1988, the Indian Gaming Regulatory Act (IGRA) was signed into law by President Ronald Reagan. This act is of instrumental importance to Indian gaming today. With its roots in the 1986 bill, the act divided gaming into three categories. Class I gaming currently includes all social and traditional games and falls under the sole regulatory power of the tribes. Class II gaming currently includes bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, other games similar to bingo, and card games explicitly allowed by the state or not explicitly prohibited by the state. Class II excludes “any banking card games, including baccarat, chemin de fer, or blackjack.”² Class III gaming is currently defined as “all forms of gaming that are not class I or class II gaming.”³ Basically, Class III gaming is the type of gaming most people think of when they think of Las Vegas or Atlantic City.

IGRA called for the formation of the National Indian Gaming Commission (NIGC) to act as a regulatory agency. In the 1986 proposal, the NIGC was charged with regulating Class II and Class III gaming. Congress later realized that a small group of people (originally eight, later three) could not possibly have enough resources or time to work effectively for each of the fifty states in regulation. Presently, the NIGC currently only has to monitor Class II gaming and inspect all gaming facilities. The Commission is

² Indian Gaming Regulatory Act, 25 U.S.C. § 2703 (1988).

³ 25 U.S.C. § 2703.

required to have at least 2 members who are fully enrolled Indian tribal members. They also cannot have any more than two people of the same political party.⁴ This measure was taken to prevent racial or political discrimination within such an important commission to Indian gaming.

The most telling differences between the 1986 version of the Indian Gaming Regulatory Act and the 1988 version is the way in which the latter deals with the issue of Class III gaming. Currently, Class I gaming is regulated solely by the tribes. Class II gaming, as long as the State allows it within their borders and the tribe complies with State laws, is allowable in Indian Country without state regulation. Class III gaming, however, must be negotiated in a compact between the state and the tribe. If the negotiations are not done in “good faith,” then the tribe can sue the state in accordance with IGRA. Class III gaming is then subject to state regulation as well as existing federal law. More will be discussed about these tribal-state Class III compacts and “good faith” later on in this chapter.

In the 1986 version of the bill, however, a moratorium was proposed on Class III gaming for four years, until the General Accounting Office (GAO) could conduct a two-year study on the issue and Congress could decide whether or not to enact new legislation regarding Class III gaming. To place this bill in historical context, a hearing on the bill was held after the *Seminole* and *Barona Group* decisions, both cases involving high-stakes bingo halls which fall under the current category of Class II gaming. There was no official Supreme Court ruling on Class III tribal gaming at this time, so there was almost no legal precedent for Congress to follow. The States argued for complete state

⁴ 25 U.S.C. § 2704.

regulation of all Class III gaming within their boundaries. The tribes of course argued that since they are sovereign nations, they should not have to comply with state regulations. At this point in history, the House of Representatives was breaking ground in tribal gaming law, or at least they would have been had they passed the 1986 bill.

The Class III gaming moratorium itself was an enormous compromise between the Representatives supporting state rights and the Representatives supporting tribal sovereignty. Representative Bill Richardson (NM), who argued in favor of states rights, said that while he was “proud” to have been a part of such a “successful” compromise, his personal preference “would place all class III operations or high-stakes gambling under State control, with bingo supervised by the Federal Commission.”⁵ Richardson went on to cite three main state concerns in regards to Indian gaming: crime control, fair and honest gaming for the general public, and compliance of Indian gaming with state laws. One of the biggest state fears was over crime control, especially organized crime infiltration into Indian casinos, a fear which would manifest itself in the *California v. Cabazon* case about a year later when California tried to argue for state regulation of Indian casinos under the Organized Crime Control Act (OCCA).⁶ Tellingly, Tony Coelho, a Representative from California, stated,

“There is no doubt that something needs to be done to regulate gaming activities that take place on Indian lands. To allow unrestricted Indian gambling to continue would be an injustice to the tribes, to the States, and to the citizens of this Nation. We have to balance competing rights,

⁵ Bill Richardson. Representative Richardson speaking in support of H.R. 1920. 99th Cong., 2d sess. *Cong. Rec.*, 21 April 1986, vol. 132, pt. 50.

⁶ It should be noted that in the hearings following the *Cabazon* decision, it is pointed out by Senator Inouye (HI) that “in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity.” 99th Cong., 2d sess. *Cong. Rec.*, 21 April 1986, vol. 132, pt. 50.

duties, and responsibilities, and come up with a fair solution which protects everyone.”⁷

Rep. Coelho supported the bill, but was actually the one who came up with the idea for the moratorium to give Congress more time to figure out what to do about Class III gaming. As is evident from these two representatives, states wanted more regulatory control, but were forced into a compromise by tribal rights supporters until the GAO study could be completed.

It is not surprising that tribal sovereignty was at the center of tribal arguments against the both the 1986 and 1988 bill. The notion of engaging tribes in a government-to-government relationship was not lost on the House of Representatives, however. Included in the “Findings of Congress” section of the 1986 legislation was a statement declaring that “a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”⁸ Many members of Congress even encouraged tribal gaming if it helped promote the tribes economically. Rep. Morris Udall (AZ) rose in defense of Indian gaming arguing that gaming operations on reservations had become an enormous part of the tribal economy, in some cases reducing unemployment from fifty down to ten percent. The profits on those reservations went toward their healthcare, scholarships and road-work in an effort to improve the infrastructure on the reservations. Udall went on to say,

“We should not be surprised that they have done so. Federal programs to aid Indian tribes and people have never been adequate to meet the need. With the severe budget cuts of the last 5 years and with the further threat

⁷ Tony Coelho. Coelho speaking on a tribal-state compromise. 99th Cong., 2d. sess. *Cong. Rec.*, 21 April 1986, vol. 132, pt. 50.

⁸ U.S. Congress. *Indian Gaming Regulatory Act*. 99th Cong., 2d sess. *Cong. Rec.*, 21 April 1986, vol. 132, pt. 50, Sec. 2. (a-5). The wording of this section did not change in the 1988 legislation.

of Gramm-Rudman cuts, the economic and social life on Indian reservations have been devastated. Just as there are many States turning to lotteries and other gaming activity to fill the gap left by Federal cutbacks, so too are the Indian tribes.”⁹

Essentially, Udall’s message was that the states should not be hypocritical in their views on gaming, especially in the face of Federal Indian policies designed to promote economic development, an essential aspect of the Self-Determination policy adopted by the government in 1968 with the election of President Nixon.

Equally important was Representative John McCain’s speech in “reluctant” support of the 1986 bill. McCain spoke directly about the *Seminole* case and the court’s decision to uphold the government-to-government relationship between the Native tribes of this country and the federal government. This inherently excludes state regulation of gaming on tribal lands. He went on to say that he did not personally believe gaming to be the ideal solution to tribal economic struggles, but that in some cases, it is the only resource for tribes to turn to. To further his point about the government’s fiduciary duty, McCain stated,

“The protection of all citizens participating in Indian games is a federal responsibility, that must not be pawned off to the States. Traditionally, States, and Indian tribes have been adversaries, as our committee hearings clearly demonstrated. State witnesses wanted State jurisdiction, regulation, enforcement, and taxation. However, no state witness testified that the state had a responsibility to Indian tribes for their health, welfare, or economic development.”¹⁰

McCain’s dig at the states stems from a deep understanding of the federal government’s duty to the tribes and, coming from Arizona (a state with one of the largest Indian

⁹ Morris Udall. Representative Udall rose in support of H.R. 1920. 99th Cong., 2d sess. *Cong. Rec.*, 21 April 1986, vol. 132, pt. 50.

¹⁰ John McCain. Representative McCain spoke on the importance of the federal government’s fiduciary duty. 99th Cong., 2d sess. *Cong. Rec.*, 21 April 1986, vol. 132, pt. 50.

populations) an equally deep knowledge of the state-tribal adversarial relationship. The states bear no such responsibility for tribal welfare, so the end result is that their decisions are heavily influenced by their own interests, disregarding tribal needs and interests. The 1986 bill did not pass. The decision on Class III gaming had to wait until the *Cabazon* Supreme Court decision.

One year later, McCain became a Senator for Arizona and shortly thereafter joined the Senate Indian Affairs Committee. McCain was one of the drafters of the Indian Gaming Regulatory Act that passed in 1988, S. 555. In the couple years since the 1986 hearing in the House, the Supreme Court issued an official ruling on Class III gaming in the *Cabazon* case. The *Cabazon* case was over whether or not the Cabazon and Morongo Bands of Mission Indians could have casino resorts with card games and pari-mutuels, which typically today would be classified as Class III gaming. The ruling was in favor of the tribes and decided that as long as the State in which the tribe's reservation resided allowed that type of gaming generally, then the tribes too could conduct the same type of gambling on their reservations.

In the wake of *Cabazon*, IGRA was finalized with a new section requiring tribal-state compacts. There was no moratorium as was proposed in the beginning of 1986; there was no suspension of any new Class III gaming operations until such a time when Congress could review a GAO study on the matter and decide on the appropriate legislation. Instead, there was an immediate decision on Class III gaming, only arrived at after extensive debate, which weighed far more heavily toward states rights than tribal

sovereignty, more than likely due to the fact that the states were unhappy with the *Cabazon* Supreme Court decision.

As it stands, the compacts are only necessary if a tribe intends to have Class III gaming operations. In such a case, the tribe must make a formal request to their state who then must engage in negotiations with the tribe to try to broker a deal on whether or not the tribe can have Class III gaming. IGRA, recognizing that the states can be bullying when it comes to tribal affairs, dictates that the states must conduct the negotiations in “good faith.” If they do not negotiate in “good faith,” then the tribes have the right to sue the states.¹¹ In theory, this gives the tribes some clout in the negotiations because a lawsuit is a timely, costly affair and no state would want to be accused of not acting in “good faith” towards tribes. In reality, this is an enormous blow to tribal sovereignty, as it requires the tribes to comply with state laws and regulations.

The tribal-state compacts were designed for an ideal world. Tellingly, Senator Inouye (HI), who co-sponsored the bill with Senator Daniel Evans (WA), said that, “This is not the best of all possible worlds but the committee believes that tribes and States can sit down at the negotiating table as equal sovereigns, each with contributions to offer and receive.”¹² He went on to say that there would be no transfer of jurisdiction unless the tribe expressly consented to it through one of these compacts. He also made it clear that this legislation was not intended to set the precedence for transfers of state jurisdiction on more matters than just gaming. This compact works in the ideal world, but we do not

¹¹ 25 U.S.C. § 2710 (d)(3)(A)

¹² Daniel Inouye. Senator Inouye was one of the original drafters of the legislation and rose in support of S. 555. 100th Cong., 2d sess. *Cong. Rec.*, 15 September 1988, vol. 134, pt. 127.

live there. Instead, we live in a world where states do not necessarily consider tribes to be “equal sovereigns.”

Time and time again, jurisdiction and regulation has been taken away from tribes. Take for example the *Oliphant v. Suquamish Indian Tribes* (1978) Supreme Court decision.¹³ Mark Oliphant argued that since he was a non-Indian resident on the Suquamish Indian reservation, the tribe had no criminal jurisdiction over him, even though he knowingly and voluntarily entered their reservation and committed a crime on their land. The Supreme Court upheld Oliphant’s argument, leaving non-Indians free to commit crimes on reservations with virtual impunity. States are allowed to punish Indian people who leave the reservation and commit crimes within state borders, yet non-Indian state residents who commit crimes on Indian reservations cannot be prosecuted by the tribal police, who are readily available to enforce the law. Instead, these non-Indian crimes must be prosecuted by federal law enforcement. To further compound the issues, in the 1990 case of *Duro v. Reina*,¹⁴ the Supreme Court decided that tribal law enforcement could not prosecute non-member Indian residents either, creating an even larger jurisdictional gap in Indian Country. A piece of legislation commonly referred to as the “Duro-fix” passed through Congress in 1992, overriding the Supreme Court decision and restoring jurisdiction for non-members back to the tribe. Congress’ plenary power to restore tribal jurisdiction was later upheld in the 2004 *United States v. Lara* case. The *Oliphant* case, however, still stands.

¹³ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹⁴ *Duro v. Reina*, 495 U.S. 676 (1990).

I would argue that it is not possible for states and tribes to sit down as “equal sovereigns,” as Sen. Inouye hoped, when the Federal Courts have proven that even they do not regard tribes as equal sovereigns with the states. Inouye’s hope is clouded by changing political agendas and leaders. It was Congress that passed and implemented PL 280 in 1953 indicating that they, too, place tribes on unequal footing with the states. It is ironic that, knowing this, members of the 1988 Congress were still optimistic enough to think that states could negotiate fair compacts with the tribes.

I truly do believe, however, that there were people in Congress who really did have the best interest of tribes at heart. Unfortunately, the *Cabazon* decision seemed to frighten reluctant Congressmen over the edge, state-side. To further compound the issue, federal agencies rejected responsibility for tribal gaming issues. When it was suggested in the hearings that that it should be a federal agency regulating Class II and Class III gaming in Indian Country, federal officials opposed the idea. As Inouye (HI), stated,

“Recognizing that the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests, some have suggested the creation of a Federal regulatory agency to regulate class II and class III gaming activities on Indian lands. Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in State agencies, and thus that there was no need to duplicate those mechanisms on a Federal level.”¹⁵

It would seem that the federal agencies were shirking on their responsibility to the tribes and pawning off regulation to the states, knowing full well, as Inouye said, that giving the state jurisdiction over tribal activities has traditionally never worked out for the benefit of the tribes.

¹⁵ Inouye, 100th Cong., 2d sess. *Cong. Rec.*, 15 September 1988, vol. 134, pt. 127.

Inouye and several of the drafters including Senator Tom Daschle (SD) understood that the final compromise was not the best for the tribes. Daschle was a member of the Select Committee on Indian Affairs and was actually one of the original co-sponsors of the S. 555 bill, yet he cast his vote in opposition to the bill once the final draft had been made. Daschle said,

“My reason for opposing the bill is that those Indian tribes from South Dakota whom I represent have informed me that the bill is unacceptable. The tribes strongly object to any form of direct or indirect State jurisdiction over tribal matters. They believe the provisions calling for a tribal-State compact are in derogation of the status of Indian tribes as domestic sovereign nations. The direct or indirect application of State law in Indian country, they believe, is a dangerous and unwarranted precedent for further inroads upon tribal sovereignty. They further believe that opponents to Indian self-determination and strong tribal government will use this unwarranted precedent as a justification for State taxation, zoning, water regulation and further jurisdiction over tribal economic activities.”¹⁶

Representing his constituents, Daschle rejected the bill he helped draft because the end product was not a piece of legislation that would greatly benefit the tribes.

The tribes themselves were more aware than anybody of the potential repercussions of increased state regulation in Indian Country. Senator Daniel Evans (WA), one of the co-sponsors of IGRA, recognized that many tribes opposed IGRA because of the possibility of expanding state regulatory power onto reservations for Class III gaming operations. In his defense of the legislation he said,

“I wish to make it very clear that the committee has only provided for a mechanism to permit the transfer of limited State jurisdiction over Indian lands where an Indian tribe requests such a transfer as part of a tribal-State

¹⁶ Tom Daschle. Senator Daschle did not support the end product of the bill, S. 555. 100th Cong., 2d sess. *Cong. Rec.*, 15 September 1988, vol. 134, pt. 127.

gaming compact for class III gaming. We intend that the two sovereigns...will sit down together in negotiations on equal terms...”¹⁷

Once again, Congress is defending their decision based on some presumed equality at the negotiation table. While this works in an ideal world, it is proven that in many cases tribes are not treated as though they are on equal footing with the states. The only protection for tribal governments is the concept of “good faith” under which all negotiations must take place.

After the bill was passed in the Senate, it went to the House and was pushed through without a review. The President signed the bill into law on October 17, 1988, overriding the Supreme Court decision in the *Cabazon* case that allowed tribes to run whatever type of gaming they wanted as long as it was allowed in the state borders generally, free of state regulation. Congress used its plenary power to create new law that would deal a solid blow to tribal sovereignty and Indian gaming. As Stewart L. Udall, Former Secretary of the Interior, stated in 1990,

“We all know that Congress has plenary [power], and ultimately if the Indians lose their sovereignty, it will happen, in my opinion, not through another termination. Instead, it will occur by a Congressional salami process of cutting off little pieces here and there, until some day it will all be gone.”¹⁸

In the aftermath of the passage of IGRA, the legislation came under hot debate.

There were many Senators who defended their position in the face of non-supporters.

One of those Senators was Harry Reid (NV), and judging by his State of residence, it is not surprising that he defended the legislation that gave states more regulatory control

¹⁷ Daniel Evans. Senator Evans rose in support and defense of his co-sponsored bill, S. 555. 100th Cong., 2d sess. *Cong. Rec.*, 15 September 1988, vol. 134, pt. 127.

¹⁸ Stewart L. Udall, in *Indian Gaming and the Law*, ed. William R. Eadington (Reno: Institute for the Study of Gambling and Commercial Gaming, 1998), 23.

over tribal gaming. Reid criticized many of the people who attacked the legislation by claiming that they must not have read the bill well, as Congress' intentions were not to take power away from the tribes, but to reach a compromise. He stated, "...what is important to understand is that unless everyone works well together to make this fragile compromise work, this compromise could collapse, and very quickly we could find ourselves back where we started [in 1988]."¹⁹ Reid continued with a warning to the tribes:

"I advise those interested in Indian gaming to do what is necessary to avoid reopening this fight. The Indian gaming laws are like any other law, they are living documents, and therefore undoubtedly have to be modified on occasion; thus, they are subject to change."²⁰

The compact compromise was indeed a fragile thing at this time, but Senator Reid's warning to dissenters was telling of a state that had vested interests in keeping Class III gaming under the regulatory control of the state. Las Vegas was far too much of a money-maker for Nevada to readily give the tribes in the state the same opportunity without the state benefiting also.

In a speech at the North American Conference on the Status of Indian Gaming in March, 1989 Stewart Udall gave the following advice in support of tribal gaming:

"You need strong friends in high places. History shows a few of them can go a long way. So the opportunities are there and I believe the Indians have the leadership now to seize these opportunities and deal with them in a sensitive way... Let us see if the states will deal fairly with these compacts."²¹

¹⁹ Harry Reid, "U.S. Senator: State of Nevada," in *Indian Gaming and the Law*, ed. William R. Eadington (Reno: Institute for the Study of Gambling and Commercial Gaming, 1998), 20.

²⁰ Reid, 20.

²¹ Udall, 28.

He also agrees with Reid on the fact that IGRA is an evolving law. He recommends the tribes to work with the law. When the law stops working with the tribes, that is when the tribes can go to Congress and ask for it to be amended. Because Udall's speech was made approximately one year after the passage of IGRA, it is a good testament to the sentiments at the time. It appeared that most people at the time recommended the tribes adapt to the law. They differed, however, on how the tribes should react if the law stops working for them. Supporters of state rights believed the tribes should not fight back, as is evident in Reid's speech. Supporters of tribal rights, as Udall suggests, argued that the tribes should fight for change in Congress.

It is evident that there are nearly as many interpretations of IGRA as there are people who have read the bill. In the years following IGRA, there have been many discussions, debates, and cases that have sought to define the loose terms surrounding tribal-state compacts. These will be discussed in the next chapter, but it is important to understand that no one was happy with compromise. Even the states, which benefitted most from the bill, still wanted even more regulatory control. The tribes, however, lost a little more of their inherent sovereignty in the process. "Sovereignty questions are difficult and they are clearly controversial. What is clear, though, is that the vast majority of tribes do not want any state regulation whatsoever. They should not be required to come under state regulation."²² While tribes should not have to face state regulation at any turn, they now must.

²² William N. Thompson, in *Indian Gaming and the Law*, ed. William R. Eadington (Reno: Institute for the Study of Gambling and Commercial Gaming, 1998), 52.

UNANTICIPATED BACKLASH AND LOOPHOLES IN IGRA

The Indian Gaming Regulatory Act (IGRA) of 1988, while extremely controversial upon its passage, became increasingly more controversial as the legislation was tested in the following years. The term “good faith” is poorly defined, as is the bill’s definition of the “State” with which the tribes must negotiate. These conflicts have played out in both the media and in courts across the country. What Indian gaming within the context of IGRA really boils down to is how well the state in question understands the sovereign status of Indian tribes and how willing they are to undertake fair negotiations.

Brian Greene, author of “The Reservation Gambling Fury: Modern Indian Uprising or Unfair Restraint on Tribal Sovereignty,” identified several initial repercussions of IGRA that played out in the courts.¹ The first aspect of IGRA to be challenged by the tribes was the civil/regulatory powers of the states, which do not extend over Indian Country, versus their criminal/prohibitory powers. According to IGRA, tribes could have Class II and Class III gaming as long as, in the case of Class III games, the state and tribe negotiate a compact. In 1990, the Mashantucket Pequot Tribe of Connecticut wanted to open Class III, Vegas-style gaming on their reservation since the state already allowed “Vegas Nights” for other organizations as fundraisers. The state refused to negotiate a compact because they insisted that the only Vegas-style gaming allowed in the state were these one-night gambling fundraisers and unless the tribe was

¹ Brian Greene, “The Reservation Gambling Fury: Modern Indian Uprising or Unfair Restraint on Tribal Sovereignty?” *BYU Journal of Public Law* 10, no. 1 (1996): 93. *Bibliography of Native North Americans*, EBSCOhost (accessed March 23, 2009).

prepared to follow state regulations, they could not have Class III gaming. What the Pequot Tribe wanted was freedom to have “casino-nights” every night without state regulation. The Pequot Tribe brought a suit before the court in accordance with IGRA on the basis that the state was not negotiating “within good faith.”² The court decided in favor of the Pequot Tribe because the state “by allowing certain non-profit entities to engage in ‘Las Vegas Nights,’ even though subject to tight regulations, Connecticut's approach to gambling in general was civil-regulatory rather than criminal-prohibitory.”³ The first of many IGRA tests had begun and fallen to the favor of the tribes.

The second wave according to Greene came with the *Lac du Flambeau Indians of Lake Superior Chippewa v. Wisconsin* case in 1991.⁴ The Lac du Flambeau Indians wanted to negotiate with the state to open a casino on their reservation. The state refused on the grounds that since they did not allow any Class III gaming in the state, except lotteries and pari-mutuels, then the tribes could not have a casino that exceeded the state’s parameters on Class III games. “The Flambeau Tribe, following the Cabazon rationale, argued that in determining whether a state's criminal laws would apply to reservation gaming, the court must analyze the state's policy toward gaming in general.”⁵ Since Wisconsin allowed lotteries, it was not that they prohibited Class III games, but rather that they regulated them. The state, therefore, was required to enter into negotiations with the tribe and come to some agreement on Class III games. These two

² *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (1990).

³ *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (1990).

⁴ *Lac du Flambeau Indians of Lake Superior Chippewa v. Wisconsin*, 770 F. Supp. 480 (1991).

⁵ Greene, 93.

victories for tribes, as noted by Greene, were essential in the testing of IGRA's boundaries when it comes to state regulatory power.

The second aspect of IGRA to be tested was the definition of what constitutes a Class II game. The National Indian Gaming Commission (NIGC), which was formed under IGRA, has the power to oversee and define Class II games. The wording of IGRA on Class II games is ambiguous when it comes to bingo. The law states, "The term 'class II gaming' means the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)..."⁶ According to Greene, the wording "other technologic aids" has been interpreted a number of different ways. In an attempt to maximize their gaming, a number of tribes interpreted this definition to include "video machines that play like slot machines, which are class III games, but which could arguably be defended as class II 'technological aids' to bingo."⁷ The NIGC decided that these video machines are Class III machines and cannot be used without a compact. Other tribes, such as the Oneida of Wisconsin, pushed the boundaries of IGRA's definition of Class II games as "lotto."⁸ The tribe argued that colloquially, the term "lotto" is short for lottery and therefore, the tribe could run bingo-style lottery games. The court decided in favor of the state and made the Oneida turn off their machines. It seems that when the tribes try to push the boundaries of the definitions set forth by IGRA, the law is fairly rigid.

The third aspect of IGRA that was initially tested by the tribes Greene points out was the Grandfather Clause written in to allow any tribes that had Class III games before

⁶ Indian Gaming Regulatory Act, 25 U.S.C. § 2703 (7)(A)(i) (1988).

⁷ Greene, 93.

⁸ 25 U.S.C. § 2703, (7)(A)(i)(III).

May 1, 1988 to keep their games as long as they didn't expand their casino. This is only applicable in certain, identified states.⁹ Sometime after the passage of IGRA, the Sisseton-Wahpeton Sioux of South Dakota expanded their casino to include blackjack. Their casino was opened on April 15, 1988, just before the IGRA cut-off. According to the courts, this expansion was not allowable without a compact because it exceeded the scope of what was allowed by the Grandfather Clause.¹⁰ Once again, the tribes' attempt to test the boundaries of IGRA failed. The only successes they had thus far were to force the states to negotiate fairly, but even that was soon to change.

The drafters of the IGRA created an unanticipated loophole in their stipulation that "the State shall negotiate with the Indian tribe in good faith to enter into such a compact."¹¹ In the event that a state fails to negotiate within these standards, according to IGRA the tribe then can sue the state. The moral ideal of negotiating "within good faith" is honorable, but unlikely given the long history of adversarial relations between states and tribes. IGRA is, however, very clear on the protocols that must be followed if a tribe wants to sue their state; and the way the court decision should fall is also fairly clear:

"The court then determines whether the state negotiated in good faith, considering the state's public interest as well as concerns about public safety, criminality, financial integrity, and adverse economic impacts on existing gaming. Any of these considerations might indicate that despite the failure to negotiate or to reach a compact, the state nevertheless fulfilled its good-faith duty."¹²

⁹ 25 U.S.C. § 2703, (C) - (F)

¹⁰ Greene, 93.

¹¹ 25 U.S.C. § 2710 (d)(3)(A).

¹² Kathryn R.L. Rand and Steven Andrew Light, *Indian Gaming Law and Policy* (Durham: Carolina Academic Press, 2006), 57.

If the court decides that the state did attempt within the best of their ability to negotiate a compact, then the courts will decide in favor of the state. If the court finds that the state did not negotiate fairly with the tribes, then the court issues a 60-day notice for both parties to agree on a compact. If, after that 60-day window, the state and tribe cannot agree on a compact, a court mediator orders both parties to submit a final compact proposal. The mediator then decides on a compact that best complies with IGRA and state laws and sends it to the state for approval. In the event that the state does not approve, the Secretary of the Interior will work with the tribes to create a compact that complies with IGRA and state law. The compact is automatically approved by the Secretary, who then has the authority to sue the state if they fail to comply with the mandated compact.¹³ It is clear that the legislators in Congress created an elaborate system within the compromise itself to ensure that tribal rights would not be completely disregarded by the states. It is also evident, however, that their main purpose was for the states to be the front line in negotiations.

The entire negotiation process created by Congress, including all of its seemingly preventative measures to ensure fairness on the part of the State, is a violation of the tribe's right to regulate activity on its own reservation. It is a breach of sovereignty to ask one sovereign to submit to the regulatory control of another. Beyond the initial breach of tribal sovereignty in forcing Class III gaming compact negotiations with the state, it is a further intrusion for the court mediator, in the event that the state and tribe cannot come to an agreement, to submit the compact to the state for approval. Why should the state get the final say in the matter? Why not submit the compact to the tribe

¹³ 25 U.S.C. § 2710 (d)(7)(B).

to make sure it is acceptable for their gaming needs? The compact negotiation protocol is hypocritical given the “Findings of Congress” at the beginning of the act, wherein “a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”¹⁴ It also stands in opposition to the final “Finding” that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not...prohibit such gaming activity.”¹⁵

In reality, however, much of the negotiation protocol is not even applicable because the states are protected by the Eleventh Amendment. In 1795, the Eleventh Amendment was passed in regards to judicial limits. The amendment simply states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹⁶ Essentially, what this means is that the sovereign entities within the United States, and including the United States, have sovereign immunity. Sovereign immunity protects states, tribes, and the federal government from lawsuit unless they waive their immunity. It was designed so that citizens could not sue their state without the state’s consent. It also prevents the sovereign entities from suing each other without consenting to the lawsuit. The states and tribes cannot sue the United States unless the United States waives its immunity. It

¹⁴ 25 U.S.C. § 2701 (4).

¹⁵ 25 U.S.C. § 2701 (5).

¹⁶ Steve Mount, “The U.S. Constitution: Amendment 11,” USConstitution.net. <http://www.usconstitution.net/const.html#Am11>.

also means that the tribe cannot sue its state unless the state waives their Eleventh Amendment rights and allows the lawsuit, thus the loophole in IGRA is created.

The drafters of IGRA did try to diffuse this conflict. Congress claimed in their drafting that they had the power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment rights. There was no legal precedent to dictate that this was inaccurate. Congress' power was tested in court by the states. The first state to claim sovereign immunity was Alabama in 1991.¹⁷ The Poarch Band of Creek Indians attempted to sue Alabama by acting as a representative of the United States, since states are not immune from suit by the federal government. The courts decided in favor of Alabama on the basis that tribes do not qualify as representatives of the United States.¹⁸

According to Greene, the next logical step for tribes was to argue that because every state adopted the U.S. Constitution, including the Indian Commerce Clause, then they have accepted any legislation enacted under the Indian Commerce Clause. Since IGRA was enacted under the Indian Commerce Clause, then Congress has the power to abrogate the states' Eleventh Amendment right because IGRA clearly dictates that tribes have the right to sue their states. This case was argued by the Sault Ste. Marie Tribe of Chippewa Indians in Michigan.¹⁹ The courts disagreed claiming that,

“ ‘if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.’”²⁰

¹⁷ *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (1991).

¹⁸ Greene, 93.

¹⁹ *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (1992).

²⁰ Greene, 93.

Once again, the court upheld state rights and has continued to assert that Congress cannot abrogate states' Eleventh Amendment rights under the Indian Commerce Clause. The only way for Congress to have done this in 1988 was to enact the law under the Interstate Commerce Clause. As Greene states,

“Under the Interstate Commerce Clause, Congress has the power to regulate all commerce or activity that affects more than one state. Because the power to regulate interstate commerce is broadly interpreted, and gambling on Indian reservations depends upon goods and visitors from outside the state, Indian gaming falls within the scope of interstate commerce and is thus subject to Congressional control.”²¹

Congress could amend the law and enact it under the Interstate Commerce Clause, but this is not something that Congress is planning to do, according to a member of Montana Senator Max Baucus' Finance Committee.²²

There are several states that have taken advantage of this Eleventh Amendment loophole. Outraged, tribes brought law suits that culminated in the Supreme Court case *Seminole Tribe of Florida v. Florida* (1996). In 1996, the Seminole of Florida sued both the state and the then-Governor Lawton Chiles for refusing to comply with IGRA and negotiate Class III gaming compacts with the tribes at all, let alone in good faith. To understand the decisions of the court, one must go further back in Supreme Court history. In a 1908 Supreme Court case, *Ex parte Young*,²³ the court decided that “state sovereign immunity does not extend to state officials acting unconstitutionally or contrary to federal law, so that they may be sued despite the state's immunity from suit.”²⁴ This is called the

²¹ Greene, 93.

²² Staff Member on Max Baucus' Finance Committee. Interview by author. Phone recording. Washington D.C./Bozeman, MT, 27 February 2009. Transcript attached.

²³ *Ex parte Young* 209 U.S. 123 (1908).

²⁴ Steven Andrew Light and Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise*, (Lawrence: University Press of Kansas), 48.

Ex parte Young Exception and is important in the *Seminole* case because the Seminole claimed that they were able to sue Florida's governor because he violated IGRA, a federal law, in refusing to negotiate with the tribes. In the *Seminole* case, the Supreme Court had to decide if Congress had the authority in IGRA to override state sovereign immunity if compacts were not negotiated fairly, and if the tribe also had the right under *Ex parte Young* to sue Governor Chiles. In a nutshell, the Supreme Court decided that Congress did not have the power to mandate that the states give up their sovereign immunity and accept the lawsuits from tribes if their compacts were not negotiated in good faith. Secondly, the Supreme Court decided that the *Ex parte Young* Exception did not apply in this case because "IGRA's cause of action against the state is narrower than the general remedy allowed under the *Ex parte Young* doctrine."²⁵ The Seminole as well as the rest of the tribes facing adversarial states were out of luck.

The end result of the *Seminole* case was that all tribal attempts to protect tribal sovereignty and rights through IGRA's compact process were null and void. Tribes cannot sue the states when the states refuse to negotiate in good faith, leaving them with few options but to comply with the states' wishes in Class III gaming compact negotiations; or forego Class III gaming altogether. Without the threat of lawsuit after the *Seminole* case, there were no incentives for states to act fairly. There was also nothing to prevent states from insisting on taxation of Indian gaming revenues. Some states that have taken advantage of what is called "revenue sharing" are Wisconsin, New Mexico, New York, and California.²⁶ IGRA was a controversial decision to begin with

²⁵ Light and Rand, 49.

²⁶ Light and Rand, 70.

because it allowed state interests to override tribal sovereignty in the area of gaming. But IGRA's repercussions were far worse than the actual law because the tribes were not even protected by the law as was intended.

There is currently hope for the tribes, however, because they can now go to the Department of Interior directly to force compacts with the states. This option is only available to tribes if the tribes have already tried to sue the state and the state has asserted its sovereign immunity. The tribes then must submit a proposal for Class III gaming to the Secretary of the Interior, who then gives a copy to the state. The state has 60 days to make recommendations and comment on the proposal and submit a counter proposal. If the state fails to submit a proposal, the Secretary then makes a determination on whether the tribe can have Class III gaming based on state public policy and law. If the state does submit a compact proposal, then the Secretary must invite a mediator to create a compromise between the tribes and the state. The Secretary has final approval on the compact.²⁷ This process, however, takes time and money, and has not been utilized by many tribes as of yet, and certainly has not been utilized by any tribe in Montana.

Beyond the objectionable outcome of the court cases surrounding the "good faith" provision, another unforeseen backlash to IGRA is the question of "Who is the State?"²⁸ In the definitions section of IGRA, everything is defined from "Indian Lands" to "Indian Tribes," to the three types of gaming.²⁹ Never once does IGRA define who in the state gets to negotiate compacts aside from mentioning that the governor of the state in

²⁷ Rand and Light, 100-101.

²⁸ Original speech by Frank Chavez, the 1996 co-Chairman for the New Mexico Indian Gaming Association.

²⁹ 25 U.S.C. § 2703.

question must concur with the Secretary of the Interior on the suitability of acquiring off-reservation trust land for the purpose of gaming.³⁰ “As a matter of state law, in most states the governor negotiates a compact that the legislature ratifies.”³¹ Montana falls within this majority. Some states, however, have argued that the power to negotiate compacts should lie with the legislature. “State courts have been asked to answer important questions related to the separation of powers and other dimensions of state constitutional law.”³² No situation expresses the confusion and seriousness surrounding this question of who has the authority to negotiate compacts as the New Mexico elections of 1994.

New Mexico is home to numerous tribes including the Sandia Pueblo and the Mescalero Apache. These two tribes, after the passage of IGRA, sought to negotiate compacts with the state for Class III gaming. Then Governor, Bruce King, was opposed to tribal gaming and refused to negotiate with the tribes in regards to expanding their casino operations. While King had received support from tribes in previous elections, they decided to use their gaming revenue to back one of his opponents in the Democratic primaries, Casey Luna, who was more willing to expand tribal gaming. Luna lost in the primaries by three percent of the vote. Meanwhile, Gary Johnson narrowly won the Republican primaries. Johnson “would be the dark horse on whom the tribes would next put their gambling-generated money.”³³

³⁰ 25 U.S.C. § 2719 (b)(1)(A).

³¹ Rand and Light, 123.

³² Rand and Light, 123.

³³ W. Dale Mason, “Tribes and States: A New Era in Intergovernmental Affairs,” in *The Tribes and the States: Geographies of Intergovernmental Interaction*, ed. Brad A. Bays and Erin Hogan Fouberg (Lanham: Rowman & Littlefield Publishers, Inc., 2002), 91.

The tribes promised to back Johnson and in return he promised to sign Class III gaming compacts with the tribes upon his election. Both parties were true to their word, and after funneling over a quarter of a million dollars into Johnson's campaign, the tribes and Johnson were victorious. Johnson signed compacts with thirteen tribes by the spring.³⁴ Over the next year, tribes were forced to maintain a constant presence in the New Mexico state capitol to combat anti-gaming lobbyist who attempted time and again to "undercut the tribes' gaming position."³⁵ Eventually, the New Mexico Supreme Court would be instrumental in undoing what the tribes had worked so hard for.

In 1995, the state sued Governor Johnson.³⁶ The court ruled that Johnson did not have the power to negotiate compacts with tribes and was acting outside of the confines of his office. Negotiating compacts, according to the state, was a duty of the legislature and not the governor. In addition to signing essentially illegal compacts, the state also argued that the governor expanded gambling to include games that were considered illegal by New Mexico state law and was in violation of New Mexico public policy.³⁷ Four months later in a separate case, the New Mexico Supreme Court ruled that since New Mexico had such a strong policy against gaming, it was, for the most part, considered a criminal act.³⁸ A year after that, in 1996, the New Mexico Supreme Court decided in another case that the tribal casinos "were operating illegally and without

³⁴ Mason "Tribes and States," 91-92.

³⁵ Mason "Tribes and States," 92.

³⁶ *New Mexico ex rel. Clark v. Johnson* (1995), 120 N.M. 562, 904 P.2d 11.

³⁷ Mason "Tribes and States," 93.

³⁸ Mason "Tribes and States," 93.

compacts. The court's ruling meant that the tribes once again were faced with having to become involved in the legislative process."³⁹

The situation in New Mexico for the most part has been resolved, but it left many questions about the separation of powers within each state and questioned Congress' decision in IGRA to leave the negotiations open to state interpretation. In 1997, the New Mexico legislature decided that it would legalize some forms of gambling and give the power of compact negotiation over to the governor.⁴⁰

Ultimately, Indian gaming in the wake of IGRA left more questions and disputes than it solved. Currently, the problems surrounding the provision that tribes could sue their state if the state failed to negotiate in "good faith" are unresolved within the law itself, but tribes are making progress via direct communication with the Department of the Interior. In the wake of the *Seminole* decision, Daniel Inouye, Democratic Senator from Hawaii and one of the drafters of IGRA, expressed that if Congress had known that the states who had originally supported IGRA would then turn around and assert their sovereign immunity in the face of the provisioned lawsuit, then they would not have proposed and passed IGRA in the first place.⁴¹ The backlash created by IGRA began after its passage in 1988, but is far from over even two decades later. The ramifications of IGRA vary from state to state. Montana tribes are no exception to the hardships faced in tribal-state compact negotiation, and fall victim to the loopholes created in IGRA's wake.

³⁹ Mason "Tribes and States," 93.

⁴⁰ Mason "Tribes and States," 93

⁴¹ Rand and Light, 97.

SUPPORT FOR AND OPPOSITION TO GAMBLING

As discussed in the introduction, my argument does not assert that tribal gaming and Indian casinos are the best, most effective ways of achieving economic development on reservations. Instead, what my contention is that the decision to build and operate casinos in Indian Country is at the discretion of the tribe and that the type of gaming conducted on a reservation should also be at the discretion of the tribe without state regulation. In mandating that tribes negotiate with the state for Class III gaming, tribal sovereignty is compromised and the state gains more control in Indian Country. Indian gaming is an extremely controversial issue between the tribes and the states and even within tribes themselves. On all sides, there are groups that support tribal gaming as economic development just as there are many groups that oppose it. But still, all over the country there are groups that strongly support Indian gaming while there are others who may support gaming, but do not support tribal casinos. There are other groups that are completely opposed to gambling for either moral or religious reasons. The prevalence of these groups varies from state to state. In this chapter, I will discuss these groups in detail, as well as groups in Montana in particular who are in opposition to tribal gaming; and I will explore some of the reasons tribal casinos are important to tribes.

As suggested above, the tribes themselves are in some cases divided on the issue of tribal gaming. According to Deborah Welch, author of Contemporary Native American Issues: Economic Issues and Development, some Indian tribes “reject casino

operations as being contrary to traditional tribal teachings.”¹ In particular, the Navajo and the Hopi have been opposed to gaming. The Navajo have only recently internally agreed to build a casino on the Tohajillee Reservation near Albuquerque in the hopes that “gaming may help raise the living standard of a people whose unemployment rate is 44 percent and whose per capita income is just over \$6,000.”² Their reasoning is that since non-Indians and Indians are going to gamble somewhere, it might as well be with their tribe where the profits can truly do some good.³ So far, the Hopi have held true to their values and have refused to build a casino despite encouragement from state legislators and the passage of a proposal that would give the Navajo and Hopi both the right to have slot-machines and build casinos.⁴ “Caleb Johnson explained Hopi opposition in terms the non-Indian world might better understand: ‘Gaming is making money off other people’s bad habits, and the Hopi way says we should not use other people’s bad habits to benefit.’”⁵ There are entire tribes like the Hopi and Navajo who reject gambling as detrimental to their culture, while other tribes must face internal dispute between pockets of supporters and pockets of opponents. Either way, the decision of whether or not to have gaming remains a sovereign tribal right. Where tribal sovereignty is infringed upon is on the types of gaming allowed: Class II or Class III.

It is the contention of many tribes that casinos do not have to be detrimental to tribal culture. Profits can be used for the advantage of traditional culture as tribes are

¹ Deborah Welch, *Contemporary Native American Issues: Economic Issues and Development*, (New York: Chelsea House Publishers, 2006), 87.

² Steven Andrew Light and Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise*, (Lawrence: University Press of Kansas, 2005), 10.

³ Light and Rand, 10.

⁴ Light and Rand, 10.

⁵ Welch, 87.

able to further preserve their culture through gaming profits. “A hefty portion of gambling revenues has been devoted to ensuring that traditional cultures are protected, not just as colorful relics from the past, but as viable societies that will continue in the future.”⁶ This cultural issue is where the internal disputes play out in tribes. Some people do not want their traditional way of life changed by the presence of a casino, while others view it as an opportunity to help fund cultural preservation projects. The Mashantucket Pequots recently used \$193 million to build a museum and open a library while the Eastern Band of Cherokee used their profits to expand their museum.⁷ There are obviously two sides to the cultural preservation argument, both of which can be compelling, but in the end the decision is up to the tribe.

More opposition to Indian gaming comes from outside the tribal community through many religious groups. Some religious groups are morally opposed to gambling. Nothing better exemplifies the influence these groups can have than the conflict between the Match-e-be-nash-she-wish Band of Pottawatomis Indians (the Gun Lake Band) in Michigan and the state in 1999. Their proposed casino would “draw nearly three million visitors a year and create 4,301 jobs, including 1,554 in the casino itself and 2,747 in the surrounding community.”⁸ The boost the casino would give to the reservation and local county economies was obvious, but the surrounding non-Indian community fought hard to prevent the casino, and much of the action played out in the churches. Most tellingly, 73 percent of Conservative/Fundamentalist Christian groups discussed the casino with

⁶ Welch, 84.

⁷ Welch, 84-85.

⁸ James M. Penning and Andrew Storteboom, “God and Gaming: Community Conflict over a Proposed Indian Casino in West Michigan,” in *Religious Interests in Community Conflict: Beyond the Culture Wars*, ed. Paul A. Djupe and Laura R. Olson (Waco: Baylor University Press, 2007), 17.

their congregants. Sixty-eight percent of the Catholic Churches did the same, and well as 61 percent of the Christians Reformed Church and the Reformed Church in America. Other actions taken by the churches included casino-related discussions during sermons, and discussion groups before or after the church service. Outside church-related activities, these same people wrote letters to public officials, sent around petitions against the casino, worked with other organizations to stop the casino, attended meetings, wrote the local papers, and contributed money to causes opposed to the Indian casino.⁹ The religious outcry against the Indian casino was unanticipated and slowed down the process for getting the casino built as 15 percent of the Church Governing Boards passed an official resolution against the casino.¹⁰ As the conflict played out, casino advocates continued to argue the extent to which the Pottawatomie casino would impact the local economy for the better while those in opposition to the casino continued to argue against it on a moral and economic level, since the religious groups allied themselves with non-religious groups also opposed to the casino.¹¹ According to the Match-e-be-nash-she-wish Band of Pottawatomi Indians' tribal website, the band just signed a Class III gaming compact with the governor in 2007,¹² eight years after the conflict began. The compact did not end the conflict, however, and the remainder played out in the courts over the years. Now, in 2009, the casino is ready to be built.¹³ What this conflict between the church and the tribes represents is the impact interest groups can have on tribal gaming.

⁹ Penning and Storteboom, 37.

¹⁰ Penning and Storteboom, 39.

¹¹ Penning and Storteboom, 42.

¹² Match-E-Be-Nash-She-Wish Band of Pottawatomi, "News," Gun Lake Band of Pottawatomi. <http://www.mbpi.org/development/casino/news.asp>

¹³ Match-E-Be-Nash-She-Wish Band of Pottawatomi, "News," Gun Lake Band of Pottawatomi. <http://www.mbpi.org/development/casino/news.asp>.

While the tribes' sovereign status protects them from a lot of this opposition in that they only fall under state regulatory control in Class III gaming compacts, the groups can cause a long delay in the timeline of an Indian casino and cost the tribe a lot of money in the process through litigation and delays.

Non-Indian interest groups such as the religious groups discussed in the case of the Gun Lake Band of Pottawatomis Indians have a significant amount of influence over the state as well, especially in terms of the state legislature. Small, rural populations are mainly concerned with the impact of tribal casinos on their communities. For instance, people fear that the casinos that open restaurants on their premises will take business away from local restaurants. The larger the casino is and the more amenities it offers, the more competition there is against local businesses. These communities then complain to their local politicians who then must work for their constituents in the state legislature and block casinos however they can. The Montana Tavern Association sees itself as being in direct competition with the tribal casinos since most bars in Montana have some form of gaming or an adjacent casino. The Tavern Association has had a strong role in the decision-making and policies surrounding Montana tribal gaming. Their activities are discussed in more detail in the next chapter.

On the other hand, the current economic crisis and the potential for extra money from tribal casinos has not been lost on state legislators.

“As state budgetary shortfalls become more severe, legislators in several states have encouraged governors to pressure tribes to renegotiate existing tribal-state compacts and incorporate revenue-sharing agreements to ‘level

the playing field' and 'spread the wealth' with state and local governments."¹⁴

This has not yet occurred in Montana, but that is not to say that the state legislature has been particularly encouraging of tribal gaming. More will be discussed about Montana's state legislature's role in Indian gaming in the next chapter.

Norma Bixby, a former Northern Cheyenne State Representative from Lame Deer, offered some insight into Montana's opposition to Indian gaming. She argues that Montana is trying to save Indians from themselves when it comes to gambling.¹⁵ It is true that many states do argue against Indian gambling because of gambling addiction. The basic fact is, however, that the national incidence of lifelong pathological gambling is only 0.8 percent of the population. As a point of comparison, 13.8 percent of the population suffers from alcohol dependence, 6.2 percent from drug dependence, and 6.4 percent from major depression.¹⁶ In the big scheme of things, gambling addiction does not encompass a high percentage of the population. While the incidence of lifelong pathological gambling is low, tribes still put money into prevention programs. "In many areas, like Arizona, North Dakota and Connecticut, Indian Tribes are the primary funding source for such programs."¹⁷ In Arizona, for example, the tribes contributed \$760,000 to the Arizona Department of Gaming and "the Salt River and Tohono O'odham Tribes provide about 85 percent of the Arizona Council of Compulsive Gambling's annual

¹⁴ Rand and Light, 122.

¹⁵ Norma Bixby. Interview by author. Phone recording. Northern Cheyenne Indian Reservation/Bozeman, MT, 18 March 2009. Transcript attached.

¹⁶ National Indian Gaming Association, "Indian Gaming Facts," National Indian Gaming Association <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml>.

¹⁷ National Indian Gaming Association.

budget.”¹⁸ In Montana, the tribal casinos have not yet been successful enough to make donations at all, let alone of such magnitude.

Another reason many states do not pass policies in support of tribal gaming is because the tribal casinos are not taxable by the state government. It does not make sense to many legislators to allow for the expansion of Indian gaming when the state does not receive any monetary compensation. It makes more sense for states to expand their own gaming operations that directly benefit them as in a state lottery; or, to expand their state casino operations on lands that are subject to state taxation. In the wake of the *Seminole* decision, there has been nothing stopping states from making compacts with tribes wherever tribes are willing to provide for state compensation. In essence, tribes must make all of the concessions at the negotiation table and the states are the ones who emerge victorious. IGRA specifically says that any negotiations that require state taxation of Indian casino profits would not be considered “within good faith.”¹⁹ In essence, some states are now requiring monetary compensation very similar to a tax,²⁰ thus violating IGRA. The tribes have no recourse to sue the state after the *Seminole* decision.

Many states, like Montana, would also rather see development of natural resources than gaming to improve the economy on tribal reservations. To fulfill the original intentions of the architects of the Indian Gaming Regulatory Act, even if a state does not support gambling, they still must concede the benefit of tribal casinos in cases where no other form of economic development is available.

¹⁸ Light and Rand, 87.

¹⁹ 25 U.S.C. § 2710 (d)(7)(B)(iii)(II).

²⁰ Light and Rand, 70.

Likewise, many tribes believe that gaming will bring them a much needed economic boost, though certainly few tribes believe that gaming will make them millionaires over night. The fact is that only a small percentage of tribes controls most of the revenue produced by tribal gaming operations. In 1995, a survey by the General Accounting Office found that “eight tribal facilities generated 40 percent of Class III gaming revenue.”²¹ Since the time of the study, more tribal casinos have opened and in 2006, tribal gaming revenue exceeded \$25 billion,²² but the variance between tribes on how profitable their casinos are is still great. For example, on average in 2006, the Mashantucket Pequot Foxwoods casino, the largest casino in the world, had 50,000 visitors per day.²³ As a point of comparison, the daily visitors at Foxwoods are approximately the same as the entire population of Great Falls, MT. Montana just does not have the population size to support such large gaming operations.

Most tribes know that they will never rival Foxwoods in terms of gambling. According to a staff member on Max Baucus’ Finance Committee, “five percent of the Indian gaming operations in the United States [are] truly successful. The other 95 percent are not and it’s mainly because in places like Montana, you have gaming going on all over the place.”²⁴ What Montana tribes see in gambling, though, are employment opportunities, with unemployment on Montana reservations sometimes reaching as high

²¹ W. Dale Mason, “Tribes and States: A New Era in Intergovernmental Affairs,” in *The Tribes and the States: Geographies of Intergovernmental Interaction*, ed. Brad A. Bays and Erin Hogan Fouberg (Lanham: Rowman & Littlefield Publishers, Inc., 2002), 90.

²² National Indian Gaming Association.

²³ Welch, 81.

²⁴ Staff Member on Max Baucus’ Finance Committee. Interview by author. Phone recording. Washington D.C./Bozeman, MT, 27 February 2009. Transcript attached.

as 70 percent.²⁵ The growth of Indian casinos, even if they do not turn over an incredible profit, at minimum provide jobs where there were not any jobs previously, allowing people to stay on their reservation instead of moving away for employment opportunities.

“In 2000, the U.S. Census revealed that for the first time, the trend of people leaving their reservation had been reversed. With jobs now available, Native Americans could return to their homelands, to be part of their extended families and raise their children in an environment in which they can be taught what it means to be Indian – whether that is Cherokee, Dakota, Cheyenne, or any other people.”²⁶

Tribes who engage in gaming in these rural areas truly understand the benefit a few more jobs can bring. According to the National Indian Gaming Association (NIGA), Indian casinos provide a total of 670,000 jobs nationwide. It should not be assumed, however, that these jobs are all filled by Indian employees. In reality, 75 percent of these jobs are held by non-Indians, but this reality mainly holds true in urban areas. In rural areas such as South Dakota, North Dakota, and Montana where unemployment on Indian reservations is high, the tribal casinos provide employment mainly to their tribal members,²⁷ which directly impacts reservation employment rates and economies. In urban areas, the tribal casinos provide a boost for the non-Indian communities as well in terms of employment.

Casinos can also provide funding for underfunded programs on reservations.

What many state legislators, and sometimes even governors, do not understand is that the monetary gain from tribal casinos does not usually go into the pockets of individual tribal

²⁵ Bureau of Indian Affairs, “Calculation of Unemployment Rates for Montana Indian Reservations, Research & Analysis Bureau: Montana Department of Labor and Industry.
http://www.ourfactsyourfuture.org/admin/uploadedPublications/1935_IndianLaborMarket_wCSK.pdf.

²⁶ Welch, 84.

²⁷ National Indian Gaming Association.

members as it does in privately owned casinos around the state. The money goes directly back to the tribe for tribal programs if they turn a profit at all. The money, according to IGRA, must go to funding for the tribal government, to economic development plans for the tribe, local government agencies, charities, and the general welfare of the tribe and its members.²⁸ This means that the tribes can use their profits to supplement governmental programs that are on a tight budget such as the Indian Health Service or even for the improvement of the education system on the reservation. The common misconception is that all the money is paid out to individual tribal members in the form of per capita checks. The reality is that only one-quarter of the tribes with gaming operations distribute per capita checks, which are then subject to federal taxation. Per capita payments are not distributed without the express consent of the Secretary of the Interior.²⁹ Where profits go within the context of the provisions in IGRA is up to the individual tribes. Some viable and necessary options for the allocation of funds will be discussed in particular relation to Montana tribes in the next chapter.

While there may never be peace between the states and the tribes on the issue of Indian gaming, it is important that the tribes do not falter under the states' hardball politics. As discussed previously, though the *Seminole* decision was an enormous blow to tribal sovereignty and invalidated the good faith provision in IGRA, there are other ways for tribes to succeed in the courts, though they take considerable time and money. While the tribes should have never been subjected to state regulatory control of Class III gaming, the law is in place and until it is changed. There is little tribes can do but go

²⁸ 25 U.S.C. § 2710 (b)(2)(B).

²⁹ National Indian Gaming Association.

along with it. Tribes will continue to face opposition from religious groups, local businesses, and state legislators and each state is defined by its own unique struggles. While Montana tribes have not faced battles like tribes in New Mexico or Minnesota have, they too have their own unique situation.

STATE OPPOSITION TO GAMING IN MONTANA

Indian gaming in Montana, like Indian gaming in many other states, is a controversial issue but has its own characteristics that make it unique. There are currently ten federally recognized tribes in Montana. Every tribe has at least one casino, but not every tribe currently has a compact with Montana for Class III gaming. Gathering information from nearly every reservation, I have concluded that Montana has not negotiated their compacts in “good faith” yet no tribe has yet sued.¹ As discussed in the previous chapter, there are a lot of players in the gaming sphere, ranging from the state legislature to the Tavern Association to the governor. Each of these components creates different problems for tribes wanting to pursue Class III gaming.

The first person I wanted to interview for this study was U.S. Senator Max Baucus because he has been in the Senate since 1978 and witnessed the passage of the Indian Gaming Regulatory Act (IGRA) in 1988. Because his current position is so demanding, he was unavailable for an interview, but his office allowed me to interview one of the members of his Finance Committee who was knowledgeable about Indian Affairs.² Baucus’ Staff Member offered some insight into the way Max Baucus views gaming in Montana. His Staff Member reports that Baucus, “like a lot of the tribes, realize[s] that gaming is not that successful, not just in Montana, but in the United States. I think there’s a common misunderstanding that just because you’re an Indian tribe and

¹ There are rumblings that the Salish and Kootenai may pursue some form of lawsuit, but that information could not be confirmed. Kermit Horn of the Fort Belknap Indian Community has also asserted that the Fort Belknap tribes may sue, but thus far, nothing has been brought against Montana.

² Staff Member on Max Baucus’ Finance Committee. Interview by author. Phone recording. Washington D.C./Bozeman, MT, 27 February 2009. Transcript attached.

you have gaming, you're rich.”³ The Staff Member also went on to say that Baucus has no stance on the gaming law itself. As a law, it is something that he will uphold. Baucus does not think that gaming is the best route for tribal economic development and believes that tribes would be more productive if they were to develop their natural resources.⁴ This attitude is fairly typical of attitudes in the U.S. Congress.

Baucus' Staff Member felt that if there were to be any change in the law itself, it would take a considerable amount of education in Congress since many people do not truly understand Indian gaming, which tends to hold tribes back when it comes to policy making. The Staff Member asserted that there is considerable opposition to Indian gaming based on legislators' misunderstandings about tribal gaming and tribal sovereignty. The Staff Member states,

“I think there's a misunderstanding in parts of the country, particularly in the South, that I've encountered that they view legislation for Native Americans as being more race-based as opposed to political-based and I think it's a misunderstanding that they have. And, I don't think they fully appreciate what the government-to-government relationship is between tribes and the U.S. government, so I think it's an education thing for some of them, and I think that kind of colors the way legislation gets passed or doesn't get passed in Congress.”

Federal Indian policy has always been hotly debated among the branches of government, but to hear that many people in Congress do not even understand the government-to-government relationship held by the tribes is disheartening. The current climate in Congress, based on the information I received out of Max Baucus' office, is much the same as it was 20 years ago with the passage of IGRA: there are some who support tribal gaming and then there are many others who do not. If there were to be any changes made

³ Staff Member on Max Baucus' Finance Committee.

⁴ Staff Member on Max Baucus' Finance Committee.

to the current law, it would again result in a compromise that would be detrimental to Indian sovereignty, though perhaps it would clarify the problem created by the *Seminole* case.

The truly disheartening thing about learning that there are those in Congress with no understanding of tribal sovereignty is that it results in their dismissal of other important legislation in regards to tribes as well such as “health provisions, a lot of tax provisions, [and other] things that could help.”⁵ Baucus’ Staff Member asserts that most of misunderstanding of the federal-tribal relationship comes from the Republican Party. The Staff Member claims that gaming is something that a typical Republican, if he or she were to think about it, would approve of: “using your own resources to pull yourself up and make yourself...economically viable.”⁶ It is concerning that the fate of many Indian policies rests in the hands of people who do not recognize tribal sovereignty and are blinded by the faulty assumption that the federal-tribal relationship has its roots in race, and not in political negotiations among sovereigns.

While the U.S. Congress certainly seems to hinder Indian policy, even more detrimental are decisions made by state legislatures. This is so because state legislatures are much more localized and their decisions are in direct response to the legislator’s constituents, many of whom may live on or near a reservation. As previously discussed, tribes are only required to negotiate with the state when they want Class III gaming. Most states let the governor negotiate the compacts and require the legislature’s approval of the compacts. This is currently the method employed by Montana, but there is nothing

⁵ Staff Member on Max Baucus’ Finance Committee.

⁶ Staff Member on Max Baucus’ Finance Committee.

in the State Constitution that mandates this, so really the negotiations by the Governor can be rejected by the state legislature. So far, there have been no disputes in Montana between the Governor and the state legislature in the negotiation process for Class III gaming compacts.

In 2005 however, Norma Bixby, a former Representative from Lame Deer, MT on the Northern Cheyenne Indian Reservation, introduced a bill to clarify the language surrounding the negotiations. Her bill was not in support of expanded gaming, but rather was an attempt to give the governor more power in the negotiations than he currently has:

“It is the intent of the legislature to delegate to the governor authority to determine when entering into a compact to allow conditions of play that are different from those authorized by state law or regulation will further state and federal policy and to preserve the legislature's authority under Article III, section 9, of the Montana constitution to define the scope of gambling activities that are permitted in the state.”⁷

As far as the role of the legislature was concerned, the bill allowed for the legislature to approve a compact, but did not allow them to change the language of the compact in any way.

The bill would give the Governor Schweitzer the right to represent the state in compact negotiations, or delegate that right to whomever he deemed appropriate. It also allowed him to go beyond the current state policy on gaming and allowed him to negotiate different hours of operation, number of machines, and limitations on wagers and payouts.⁸ In reality, this is no different than what the current governor has done in compact negotiations, but it would legalize the process and would avoid any future

⁷ Montana Legislature. 2005. House Bill No. 132. N. Bixby and V. Small-Eastman. <http://data.opi.mt.gov/bills/2005/billhtml/HB0132.htm>.

⁸ Montana Legislature, H.B. 132.

conflicts over the matter. Eric Stearns, the Senior Legal Counsel for Governor Brian Schweitzer, stood up in support of Bixby's bill. He stated that "this bill 'codifies and clarifies' the current statute." Mr. Stearns gave special emphasis to the committee members "that Governor Schweitzer does not support increased gaming on or off the reservations."⁹ He was joined by several others, including the Assistant Attorney General, a representative from the Gaming Advisory Council, and various tribal members.

Some opponents to the bill argued that it allowed the governor to have too much power. Dallas Erickson from the Montana Family Coalition argued that it was a "power grab" by the governor. He also argued that gambling would increase child abuse as well as domestic violence.¹⁰ Others argued that the incidence of gambling addiction in Montana was in the top five in the country and that passing this legislation would worsen the addiction levels, calling gambling a "'predatory' enterprise."¹¹ Two people from "Don't Gamble with the Future," a grassroots organization against Class III gaming in Montana, argued that "if the state could 'allow level three gambling in one place it will be all over Montana.'"¹² Others argued that the bill was unconstitutional because of the separation of powers and that gaming was not a viable form of economic development.

Bixby's bill was not passed, but there are several key things to note about the arguments against the bill. First, the argument about the "power grab" by the governor and the issue of separation of powers is an honest concern of the state legislature. But the

⁹ Montana House of Representatives. 2005. Committee on Judiciary: Minutes. 59th Legislature – Regular Session. http://data.opi.mt.gov/bills/2005/MinutesPDF/House/050127JUH_Hm1.pdf, 6.

¹⁰ Montana House of Representatives, 8.

¹¹ Montana House of Representatives, 8.

¹² Montana House of Representatives, 8.

reality is that the governor already exercises the powers appropriated to him in the bill and was exercising them at the time of this bill as well. He currently negotiates all the compacts and runs them by the legislature before they go into effect. Tribal compacts already exceed the state maximum payout of \$800 for Class III machines by about \$1,200. There was nothing new in the bill. It just frightened the legislators.

Second, the argument by the representatives from “Don’t Gamble with the Future” is invalid since there is already Class III gaming in Montana off the reservations. Anyone with a liquor license is allowed to have video keno and video poker (Class III games) in their establishment. If this group were truly concerned about the “spread” of gaming, they would be better off focusing on the state public policy on gaming in general to argue against Class III gaming on tribal lands. Furthermore, the bill was not arguing for expanding Class III gaming. It was actually just clarifying who gets to negotiate with the tribes for Class III gaming. The fact of the matter is that organizations such as “Don’t Gamble with the Future” cannot do anything to stop tribes from having Class III gaming. It is tribes’ right under IGRA to have Class III gaming so long as they have entered into a compact with the state. If the state refuses to negotiate with the tribes, then the tribes can sue, eventually going through the Department of the Interior to finalize their compacts should the state refuse to waive its sovereign immunity. It is disingenuous of these organizations to focus on tribal gaming rather than trying to change the public policy of the state on gaming if they wish to prevent the spread of Class III gaming.

Third, as Bixby pointed out, the reason some of the legislators were up in arms about gambling addiction was because the bill on the docket immediately before hers was about the addictiveness of the lights on the gaming machines. She stated,

“And that’s another thing that failed my bill was just before I came in, they had another bill that happened to do with something about addiction... [They] said that gaming machines, or the lights on the gaming machines, the flashing...causes people to be addicted. And so that’s another reason I say that they’re trying to save us from ourselves, to keep us from getting addicted, I guess.”¹³

The organization of the day’s bills was just not in her favor.

In 2007, Joey Jayne, a Representative from Arlee, MT, introduced another Indian gaming bill into the House that was very similar to Bixby’s bill, but it also attempted to expand Class III gaming on the reservations. H.B. 146 once again attempted to clarify the language IGRA left open in regards to who gets to negotiate compacts. Jayne’s law would have given the same powers to the Governor as Bixby’s bill would have. Jayne’s bill would also have allowed for “authorized class III games” on Indian reservations for “play exclusively on Indian lands and for the exclusive economic benefit of Montana Indian tribes.”¹⁴ The Class III games her bill refers to are those currently authorized by the State of Montana for play on authorized “Casino Nights.”

Current “Casino Nights” in Montana are only permitted for non-profit organizations that intend to use their profits for “civic, charitable, or educational” purposes.¹⁵ The games authorized for these nights include roulette, craps, slot machines,

¹³ Norma Bixby. Interview by author. Phone recording. Northern Cheyenne Indian Reservation/Bozeman, MT, 18 March 2009. Transcript attached.

¹⁴ Montana Legislature. 2007. House Bill No. 146. J. Jayne. <http://data.opi.mt.gov/bills/2007/billpdf/HB0146.pdf>.

¹⁵ MT State Law 23-5-710. Requirements for conducting casino nights.

blackjack, and other games played against the house.¹⁶ The “Casino Nights” also authorize live keno and bingo, but the maximum payout for bingo or keno is \$100.¹⁷ The maximum payout for any other game is \$300.¹⁸ The current law in Montana in regards to Vegas-style Class III gaming featured at these “Casino Nights” is regulatory rather than prohibitory. As discussed previously, it was the Mashantucket Pequot Indians who argued a case very similar to this in court in 1990 and won.¹⁹ They now run Foxwoods Casino, the largest casino in the world. The state cannot enforce its regulatory laws on Indian reservations unless expressly given the right by Congress. Because the state allows Class III Vegas-style games, Montana’s tribes have a potential to win this dispute in court in the same manner as the Pequot Indians.

Representative Jayne’s bill would have expanded Class III gaming on reservations to incorporate the same types of games played on these “Casino Nights” and asked the legislature to interpret the law to the “maximum extent possible, as being consistent with 19 Article III, section 9, of the Montana constitution and state law regulating gambling.”²⁰ Jayne’s bill, which was requested by the State-Tribal Relations Committee, asked for looser restrictions on the Class III gaming allowed on the reservations to include Vegas-style gambling. This would have helped the tribes economically by allowing them to pull in more money from more tourists and local communities. Jayne’s

¹⁶ Montana Legislature, H.B. 146, 1.

¹⁷ Montana Code Annotated. 2007. 23-5-412. Card prices and prizes - exception.
<http://data.opi.mt.gov/bills/mca/23/5/23-5-412.htm>.

¹⁸ Montana Code Annotated. 2007. 23-5-312. Prizes not to exceed three hundred dollars.
<http://data.opi.mt.gov/bills/mca/23/5/23-5-312.htm>.

¹⁹ Brian Greene, “The Reservation Gambling Fury: Modern Indian Uprising or Unfair Restraint on Tribal Sovereignty?” *BYU Journal of Public Law* 10, no. 1 (1996): 93. *Bibliography of Native North Americans*, EBSCOhost (accessed March 23, 2009).

²⁰ Montana Legislature, H.B. 146, 1.

bill did not pass. Unfortunately, I was unable to speak with Jayne and the minutes from the hearing were unavailable. The purpose of Jayne's bill was to improve the economic conditions on tribal lands through gaming, a viable solution to many tribes who do not have other forms of economic development readily available to them. The problem lies in the attitudes toward tribes in the state legislature and among their constituencies.

The attitudes of the voters are reflected in the state legislature, which does not pass many bills involving Native Americans. Norma Bixby, the former State Representative from Lame Deer, has her own ideas on why the state does not pass legislation that would benefit the tribes economically. She said in a recent interview that,

“The legislature is so conservative anymore, you know? It's very difficult to get anything through there, especially if it has anything to do with reservations and Indians. They are getting better, but I think they're still, just looking at some of the Indian legislation, it's just so difficult – or anything for poor people. Corporations or energy companies, they [have] a free reign, but anybody else with real human needs it seems that this legislature does not like helping people out very much.”²¹

The current state legislature does not want to pass very many laws that would help Native Americans, but its make-up changes every two years. This is both good and bad. The good aspect is that Indians can really make an effort every two years to reelect someone who is voting in favor of Indian legislation. The bad aspect is that Native Americans only make up less than 7 percent of the population in Montana.²² It is therefore difficult for them to have a strong pull in the vote to add or remove legislators. As Kermit Horn, a Tribal Councilman from Fort Belknap Indian Community, said,

²¹ Bixby.

²² U.S. Census Bureau, “State and County QuickFacts: Montana,” U.S. Census Bureau. <http://quickfacts.census.gov/qfd/states/30000.html>.

“...the legislature...has a specific district they represent. The tribes here are only 7 percent of the state, so we’re up against the non-Indians who don’t want to see the tribes get the upper-hand on them so they’re not going to give us the ability to become financially secure like the other tribes who have the wide-open gaming compacts now. For instance, I believe it is in Minnesota that all the tribes there in Minnesota/Wisconsin are able to offer the gaming that enables them to become financially secure. It’s just the environment here in Montana. They don’t want the Indians to become successful.”²³

It is difficult for tribes to get a strong foothold in the legislature because of their population size in comparison to the rest of the state, which really makes it difficult to get the legislation they want passed through both the House and the Senate.

The economic discrimination faced by tribes in Montana extends to organizations and associations throughout the state. Former Senator and Chair of the Montana State-Tribal Relations Interim Committee Frank Smith believes that while all the tribes want Class III gaming, Montana “just has so many organizations in the state that don’t want to expand gaming of any type.”²⁴ This group includes the “Don’t Gamble With Our Future” group discussed earlier who lobbied against Bixby’s bill in 2005. This group is against all Class III gaming, tribal or non-tribal. Bixby feels that, because of these groups including the Montana Family Coalition, the state may be assuming a paternalistic attitude toward to tribes in regards to gaming: “I guess they just want to protect the tribes from themselves...because they think, it’s tribal people who go to the casinos and these poor people are on welfare and they’re using their welfare money to run the machines and do the gambling.”²⁵ Tellingly, both Smith and Bixby were former legislators and

²³ Kermit Horn. Interview by author. Phone recording. Fort Belknap Indian Reservation/Bozeman, MT, 25 March 2009. Transcript attached.

²⁴ Frank Smith. Interview by author. Phone recording. Fort Peck Indian Reservation/Bozeman, MT, 3 March 2009. Transcript attached.

²⁵ Bixby.

neither argues that the legislature is discriminatory as they received support from both tribal members and non-Indians in their terms.

What is more telling about Smith's and Bixby's interviews is that while they never argue that there is racism in the state legislature, they both point out that the Tavern Association is extremely influential in keeping Indian casinos from expanding, as do many other tribal members and attorneys. The Tavern Association, formerly the Montana Licensed Liquor Dealers Association,

“was incorporated October 14, 1937 by a statewide group of tavern owners. Membership, that year, was close to three hundred. The association was formed for the mutual protection and benefit of its membership. Its purpose: to provide a service of advice, direction and assistance to members; to aid members in the promotion of trade; to recommend regulation that would further their interests and to cooperate with the Montana Liquor Control Board by initiating or assisting in the control and regulation of the retail sale of alcoholic beverages.”²⁶

Today, the Association's purpose remains intact and it currently boast over 800 members. It continues to work to protect its members and their businesses. In many cases, this protection requires the Association to lobby against expanded Indian gaming.

Michael Manson, contracted attorney for the Northern Cheyenne tribe, when asked what sort of role the Tavern Association has in the prevention of expanded tribal gaming, replied,

“Oh, they've had a huge role. I don't think they had to work very hard with the Republican governors. I don't think it took much persuading with them. I never saw them really have any interest in tribal gaming or tribal progress anyway. I think that Governor Schweitzer actually does want the tribes to do better but it puts him in a difficult spot to have a very well heeled predecessor. I mean, one of the most powerful and effective lobbyists in Helena is the Tavern Owners Association... It's very difficult

²⁶ Montana Tavern Association, “Montana Tavern Association,” Montana Tavern Association. <http://www.montanatavernassociation.com/>.

for legislators to do anything that the tavern owners disagree with and they've got a very strong coalition on this."²⁷

According to Manson, the Tavern Association sees itself in direct competition with tribal casinos, when the reality is that the tribal casinos are, for the most part, far enough away from the urban centers that most people will not drive to a reservation to gamble instead of going for a night out in their own town and gambling at their local casino.²⁸ The truth is that most of the tribal casinos are dry so they're actually focusing on a different market. The tribal casinos are targeting travelers in Montana and are not actually pulling that much business away from the taverns.

There is no valid reason that the Tavern Association, despite its views on Indian gaming, should be able to influence the legislature on Indian gaming the way it does. Bixby stated that tribal casinos do not bring in even close to the amount of revenue that bars and casinos bring in across the state. She went on to complain that as the law currently exists, it should be Governor Schweitzer making decisions about Indian gaming, not the Tavern Association.²⁹ The legislators that are swayed by the lobbying of the Tavern Association do not understand that gambling is not a "get-rich-quick" scheme for tribes. The individual bar owners who have a few keno and video poker machines get to put the income from those machines directly in their pockets. As explained previously, the money generated by tribal casinos does not usually go into the pockets of individuals. Rather, it goes to benefit the entire tribe by funding everything from social programs to

²⁷ Manson, Michael. Interview by author. Phone recording. Northern Cheyenne Indian Reservation/Bozeman, MT, 27 March 2009. Transcript attached.

²⁸ Manson.

²⁹ Bixby.

education to healthcare.³⁰ It is crucially important for the legislators to understand that Native communities use the money generated by their casinos to help their own people. Those legislators who do not understand this ought to familiarize themselves with the Indian Gaming Regulatory Act which dictates that the money can only be used to “fund tribal governmental operations or programs; to provide for the general welfare of the Indian tribe and its members; [or] to promote tribal economic development...”³¹ The money can also be used to donate to charities or fund local government operations according to IGRA, but tribes in Montana are currently only making enough money to fund or supplement existing, underfunded tribal programs. These are the things that the legislators should be considering when they are making decisions about the expansion of Indian gaming. Instead, they are caving to the pressure that is put on them by the Tavern Association, with its faulty claims of tribal competition against local businesses.

No business quite exemplifies the power of the Tavern Association like Town Pump Inc. & Affiliates, a company out of Butte, MT, which includes Lucky Lil’s Casinos. According to Manta.com, this company’s estimated annual sales are \$60.6 million.³² This number would include the money made in the Town Pump convenience stores, gas sales, and the Lucky Lil’s Casinos. Frank Smith, the former chair of the State-Tribal Relations Interim Committee was extremely cryptic when talking about the pressure from the Tavern Association. He hesitated in speaking to me about it, but in the end, said, “Well, we’ve got one big corporation here in the State of Montana that

³⁰ Bixby.

³¹ 25 U.S.C. § 2710 (b)(2)(B).

³² Dun and Bradstreet, Inc., “Town Pump Inc & Affiliates (Lucky Lil’s),” Manta.com. http://www.manta.com/coms2/dnbcompany_cvnh7b.

[doesn't] want [anybody] else to have gaming except them."³³ When asked who it was, he merely stated, "I can't say, but they are in Butte."³⁴ By all accounts, this corporation Smith speaks of is Lucky Lil's. Virgil Henderson, compliance officer for the Chippewa Cree Tribe, agreed with Smith and said, "If you look at Lucky Lil's and the State of Montana, that's all it is, is Lucky Lil's. They control the game, to me."³⁵

Why, in a state that prides itself on individual independence, should the legislature be controlled by the well-funded lobbying of one or two special interest groups? It is enough of a compromise of tribal sovereignty to force the tribes to comply with the state in regards to gaming on their reservations. It makes it even worse when the state does not even control their own decisions and feel they must run their decisions through an outside association before passing any new laws when it comes to expansion of tribal casinos. The legislature hinders tribal gaming, and in doing so, also hinders the economic development of extremely poor Native communities that desperately need an economic boost.

Gaming is an issue in the Montana state legislature that does not fall along party lines, but rather spans them. Both Democrats and Republicans in the state tend to vote against Indian gaming, unlike in the U.S. Congress as Max Baucus' staff member explained. Bixby, in discussing the failed passage of her bill, pointed out that the Democrats were also voting against her bill, not just the Republicans from the rural reservation border towns. "The Democrats come from urban communities with lots of

³³ Smith.

³⁴ Smith.

³⁵ Virgil Henderson. Interview by author. Phone recording. Rocky Boy Indian Reservation/Bozeman, MT, 19 March 2009. Transcript attached.

casinos, so some of those Democrats did vote against the bill; [they] financially vote because of the Tavern Association in their particular districts.”³⁶ Bixby went on to say that “if a person could ever get anything past the Tavern Association, [there] might be a good chance for a bill like that. But I think the way it is right now, the climate isn’t good at all.”³⁷ Unfortunately, it would take a completely new legislature, free from the influence of the Tavern Association to expand gaming in a bill similar to the one Jayne introduced. Until Montanans begin deciding new laws based on the merits of what the bill can accomplish in Indian Country instead of the potential problems it might – or might not – create for the 800 members of the Tavern Association, tribal gaming will not succeed without taking measures on the federal level.

The Tavern Association has as much impact with the governor as it does with the legislature. Michael Manson, contract attorney for the Northern Cheyenne, has spent time personally speaking with Governor Schweitzer on the issue of tribal gaming in Montana, particularly with regard to the Northern Cheyenne tribe. According to Manson, the Governor believes that it is unfair to the taverns to expand Indian gaming.³⁸ If this is true, then it reveals a serious disconnect in the Governor’s understanding of the state’s powers under IGRA. What he should be considering is what tribes’ powers are as sovereign nations, and how he ought to proceed based on the fact that the tribes and the states must discuss gaming on the level of a government-to-government relationship, as is clearly dictated by IGRA. If the roles were reversed, Montana would not be long in suing

³⁶ Bixby.

³⁷ Bixby.

³⁸ Manson.

the tribes. It is interesting that the tribes have not yet made this political move. I suggest that it is only a matter of time before they do.

The governor has an even more involved role in the success or failure of gaming for Indian tribes than does the state legislature. The governor is the current state representative who negotiates all the compacts before he sends them to the legislature for approval. As discussed in previous chapters, these negotiations must take place in “good faith” and in compliance with IGRA’s provisions. Tribes in Montana, however, have made it clear that the governor’s negotiations have not been in “good faith” and, that in many instances, he has not respected the tribes’ sovereign, governmental status. While Schweitzer has not necessarily done everything the tribes have hoped for in regards to gaming, many tribal members still feel that he has been a friend to the tribes generally. It is his treatment of the tribes in regards to gaming that truly highlights the flaws in IGRA and its implementation in Montana especially.

Governor Schweitzer has negotiated Class III gaming compacts with every reservation in Montana, but currently only five of the seven reservations still have Class III gaming compacts with the state. The Confederated Salish and Kootenai Tribes on the Flathead Indian Reservation and the Blackfeet no longer have gaming compacts with the state. Instead, they have switched their focus to Class II games. Each tribe has had similar experiences in working with the governor. One of the first similarities is that the negotiations are not conducted by the governor himself, but rather by his negotiation

team. There are five or six members of this team, including the Assistant Attorney General, Sara Bond.³⁹

The state legislature allows the governor to conduct negotiations as he sees fit, and to appoint any necessary representatives to do so. He chooses to use a negotiating team instead of participating in the talks himself. This is understandable, as he is an extremely busy individual, especially while the legislature is in session. That being said, it is not well received by the tribal communities when the head of the government they are supposed to be negotiating with on a government-to-government basis does not show up to the negotiations, but the tribal presidents and chairmen do. This is viewed as another blow to the sovereignty of tribes as it appears that the Governor either does not understand the government-to-government relationship itself, or, what is worse, he understands but does not respect the relationship. Either way, the Governor's absence at the negotiation table is taken as an affront.

Furthermore, many tribes have also felt that the Governor has not been fair in the actual compacts they end up with. The current typical Class III gaming compact in Montana limits the number of Class III machines to a specific number, commonly 350. The maximum payout ranges from \$1,500 to \$2,000.⁴⁰ The maximum pot size for the state is \$800, so the tribes have at most a \$1,200 advantage over off-reservation casinos, an advantage which has so far not been enough to pull large numbers of patrons to their casino establishments. Additionally, the compacts establish maximum numbers of Class III machines in one location to anywhere between 250 and 300 machines, so most tribal

³⁹ Manson.

⁴⁰ For a complete listing and copies of all the tribal-state compacts, visit the Department of Justice's website at <http://www.doj.mt.gov/gaming/tribalgamingcompacts.asp>.

casinos offer a combination of Class II and Class III machines. Tribal leaders are not pleased with the limits on Class III gaming imposed by the state. Many tribes, especially the Salish and Kootenai feel that the market should demand both the number of Class III machines and the maximum payouts. The arbitrary limits were one of the reasons that these tribes did not renew their Class III gaming compacts and chose instead to develop their Class II market. As Lana Page, attorney for the Salish and Kootenai Tribes, stated, they wanted decreased limitations on their machines and payouts and to let the market bear what it would.

“As you can tell in the State of Montana, lottery is [an] unlimited amount; it can go up to any amount you can fathom I guess and it can get to that point. But we wanted, instead of being limited to a certain amount of \$1500 [...] for the maximum payout, we wanted to let that be unlimited, bear what the market could bear.”⁴¹

The Governor’s negotiation team refused to increase those amounts very much, which is one of the reasons the negotiations at Flathead fell apart. Kermit Horn from Fort Belknap Indian Reservation echoed Page’s sentiments and criticized the Governor’s role in limiting the tribes’ gaming operations. He stated,

“[...] the legislature here said that the off-reservation casinos can only pay out \$800, but the governor was able to allow us to pay up to \$2000. Why \$2000? Why not, if he was able to go from \$800 to \$200, why couldn’t he go from \$800 to \$800,000? He seemed to just pull a figure out of the air with no solid reason behind that \$2,000 payout. If he has the ability to go to \$2,000, why doesn’t her have the ability to go to \$100,000?”⁴²

Horn has a valid question. The Governor is able to increase the number of machines and the maximum payouts allowable to the tribes, and has done so to allow the tribes to have

⁴¹ Lana Page. Interview by author. Phone recording. Flathead Reservation/Bozeman, MT, 11 March 2009. Transcript attached.

⁴² Horn.

more machines and better payouts than the rest of the state, but as far as economic development and successful gaming operations is concerned, the increases allowed by the Governor are not enough, and they are arbitrary, to boot.

One of the main reasons that Schweitzer does not allow tribal gaming operations to grow very much is because he feels that there are better ways for tribes to develop their economies. The Governor would much rather see the tribes develop their natural resources than expand gaming. In 2006 Governor Schweitzer was quoted in saying, "I'm a friend of Indian Country, but I am not a friend of gaming. I do not support expanded gaming anyplace in Montana, and I will not support expanded gaming. I have stood in front of the Tribal Council and told them I do not support any expansion of gambling."⁴³ Many Native communities are hesitant in developing their natural resources because of the ill effects it has on the land, but the state wants to see the development of natural resources because it is something that the entire country, especially the state would profit from in the end because the tribes would have to contract out to some company like a mining company, which would then bring revenue to state businesses. The problem, however, is that the tribes have difficulty in finding funding for these programs. As Bixby put it, "They want us to find other sources of economic development but when you go to the legislature to try to get some assistance in economic development, you fight tooth and nail for that."⁴⁴ This desire on the part of the state to have tribes develop economically through the use of their natural resources is clouded by the difficulty the legislature gives tribes when they try to get funding for it, if they decide to develop those

⁴³ The Associated Press, "Tribes Decline Gaming Compact," *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

⁴⁴ Bixby.

resources at all. The fact is that gaming is another viable source of economic development, but Montana and its governor cave to the opinions and money of special interest groups that do not like gambling. IGRA forced tribes to submit to the limitations of their state, and in Montana, those limits are severe.

Tribal representatives echo each other in their assessment of the way Governor Schweitzer has negotiated compacts, many of them feeling that he has not negotiated in good faith and that Class III gaming in Indian Country has unfair limits placed upon it. Even Max Baucus' Staff Member noted the unfortunate consequence of IGRA's giving the states the upper hand in negotiations with tribes:

“So really, everything is geared towards the state; the state has the upper hand and if the tribes aren't willing to give up, or they don't want to give up as much as the state, or any state, asks for then they just have to be satisfied with Class II. And I think most states will want as much as they can get out of the negotiations and out of the proceeds that the tribes would generate from Class III gaming. And unfortunately, the way the Supreme Court case is ruled,⁴⁵ you can allege that the state was not negotiating in good faith all day long and it's not going to do you any good.”

Thus far, Montana has proceeded with its unfair negotiations with impunity.

No tribe has yet tried to sue the state and take their case to the federal government, though from the sound of it, it would have a good chance of success. Smith, who as Chair of the State-Tribal Relations Interim Committee, asserted that he was present in one negotiation where the Governor and his negotiation team basically “told the tribal leaders...this is what you're going to negotiate with. If you don't like it, you don't have to have it.”⁴⁶ This lack of flexibility on the part of the state and the Governor

⁴⁵ Max Baucus' Staff Member is referring here to the *Seminole* decision.

⁴⁶ Smith.

is not indicative of Montana's attempts to follow IGRA's provision and negotiate in good faith. Smith believes that "a perfect negotiation is when both people walk away and say they got took."⁴⁷ Negotiations are a give and take on both sides of the table but Montana demands more from the tribes than they are willing to give. Manson, who works mainly with the tribes in Oregon, was surprised to see how difficult the negotiations in Montana actually are and commented on the phone to me that the tribes in Montana have the worst compacts in the country.⁴⁸ The negotiations should be conducted on a leader-to-leader basis and should truly represent a compromise between the tribes and the states. Thus far, the Governor of Montana and the state legislature have not proven that they are capable of doing this.

Governor Schweitzer is not, however, an enemy to the tribes in Montana, nor has he been completely inflexible. Bixby said it best when she stated, "He's a friend of the Indians, but with limits. He still doesn't believe [...] that Indian tribes should be allowed to determine their own destiny."⁴⁹ Bixby went on to say, "[We're] sovereign nations, so he has his heart beating with the sound of the drum, but only as he perceives the drum should beat and not what the tribes feel is best for them and help them with their endeavors."⁵⁰ While she feels that Schweitzer is a good governor for the State of Montana, she also believes that he should be supportive of tribes, regardless of whether they choose to develop their natural resources or develop their casinos. The Salish and Kootenai Tribes agree that he has been a "friend to the Native Americans," but their

⁴⁷ Smith.

⁴⁸ Manson.

⁴⁹ Bixby.

⁵⁰ Bixby.

representatives also feel that the Governor needs to respect their sovereignty based on a tribal to state equality that they have not entirely felt thus far in relation to gaming.⁵¹ Respecting tribal sovereignty and supporting the tribes that desire to develop their gambling as a boost to their economies are common threads of concern throughout the reservations in Montana.

In extremely small ways, the Governor is slowly bending the laws in regards to gambling on the reservations. For example, on the Northern Cheyenne reservation, Manson has succeeded in the ongoing negotiations with the Governor in bending the state law on poker tournaments. The current law is that a particular establishment cannot have poker tournaments two consecutive weekends, but the traffic through tribal casinos is extremely seasonal. The Cheyenne wanted to be able to conduct tournaments on consecutive weekends during the high traffic season in their casino to maximize their profits. Once the Governor understood the intentions of the tribe, he was more flexible on the issue. The negotiations are ongoing, so this small concession may change in the finalization of the compact, but Manson feels confident that the Governor will bend the rules for the tribe.⁵² Also the negotiators were willing to slightly increase the number of machines allowed and the maximum payouts. Nevertheless, these are small issues in the larger scheme of things as the tribes would actually like to expand gaming. The concessions made by the state are minor appeasements.

At the same time the Governor remains inflexible on other small things such as increasing the value of the bills accepted in the machine bill feeds to amounts above \$20.

⁵¹ Page.

⁵² Manson.

The tribes want their patrons to be able to insert \$50 or \$100 bills into Class III machines, which is currently not allowed by the state.⁵³ The state refused to budge on this issue, presumably because the Governor's negotiators did not want people to gamble too much of their money, which defeats the purpose of a casino, and is reminiscent of Bixby's idea that the state just wants to protect Indians from themselves. In the Northern Cheyenne negotiations the Governor's team also refused to negotiate in regards to linking the Class III machines to allow for a progressive jackpot, which would essentially allow for larger payouts.⁵⁴ Since Class II gambling does not fall under the state regulation in Indian Country, the Class II machines can be linked for larger progressive jackpots. The tribes desired this larger payout option for their Class III machines as well, but the state was not willing to negotiate on that issue. The lower the payout, the less patronage the casino will receive from people outside the reservation, which limits the success of the tribal gaming operations. The lack of willingness to negotiate fairly with the tribes hinders the progress of tribal gaming operations and stunts the economic growth of the tribes.

Requiring the tribes to negotiate with the states in order to conduct Class III gaming on their reservation does not encourage tribal self-determination. Governor Schweitzer and the Montana state legislature should support tribal decisions no matter what they are in order to come into compliance with IGRA and, more importantly, to truly acknowledge the sovereignty inherent to Native American tribes. The governor supports tribal development of natural resources,⁵⁵ but the tribes want to expand their casinos to prosper economically. It is difficult for Schweitzer to authorize the expansion

⁵³ Manson.

⁵⁴ Manson.

⁵⁵ Manson.

of tribal gaming when he does not support gambling as a general rule. Politically, it would not be a wise career move for him. Ultimately however, the tribes should be able to decide these things for themselves without state regulation. The current law dictates that Class III gaming must be accompanied by a state-tribal compact, which is a fundamental violation of tribal self-determination and sovereignty. In addition to this blow to sovereignty, the tribes are at the whims of the state leaders. In Montana, it is unlikely that Governor Schweitzer will let gambling expand much beyond where it is right now. The result is that Montana places its interests over those of the tribes and fails to comply with the provisions in IGRA requiring the state to negotiate in good faith. Due to the *Seminole* decision, there are no repercussions for the state in doing so because they cannot be sued under the Eleventh Amendment.

NATIVE VIEWS ON GAMING IN MONTANA

There are seven reservations in Montana, five of which have Class III gaming compacts with the state, while the other two reservations have shifted their focus to further developing their Class II gaming operations. For the most part, all seven reservations face similar roadblocks to the expansion of their casinos into more profitable operations that would allow them to develop their economies as well as provide for the general welfare of their tribal members. They also share the same future to gambling in Montana.

Most of the successful Indian casinos in the United States have Class III, Vegas-style gaming which is currently not allowed on reservations by the State of Montana. Many tribal members acknowledge that the Class III games allowed in Montana are not going to make them rich, or even level the playing field between the poverty so prevalent on Montana reservations and the success of the individual casino owners across the state. But it does not stop them from trying to negotiate better compacts with the state whenever they believe it to be possible. It was previously established that the state legislature and the governor play a large role in the success and failure of tribal casinos. The most recent bill to go through the legislature in regards to gaming was an attempt in 2007 to expand gaming on Indian reservations to directly benefit the tribes economically. This bill was not passed, so the tribes who do currently have compacts with the state (all reservations except the Blackfeet Reservation and the Flathead Reservation) can only operate Class III machines such as video poker and keno.

The compacts the state makes with the tribes are fairly uniform. The CEO of Siyeh Corporation on the Blackfeet Reservation who runs the Glacier Peaks Casino, Dennis Fitzpatrick, said in a personal interview that the state compacts have two components. The first is the sort of provisions that a particular tribe will receive in their compacts for Class III games on their reservation ranging from number of machines to maximum payouts. The second component requires state regulatory jurisdiction over non-members conducting gaming on the reservation.¹ In essence, the tribes want complete regulatory control over everyone on the reservation who conducts gaming operations while the state insists on state regulation over non-Indians on the reservation. It boils down to whether the tribes are willing to accept the state's jurisdictional terms.

For example, the original 1998 compact that the Crow Tribe first signed with Montana says, "Because of the Reservation's present and historical demographics and so long as the Tribe does not allow the sale of alcoholic beverages within the Reservation, the State does not seek authority to authorize gaming operations owned by non-Indians on the Crow Reservation."² Essentially, the state wanted to maintain its jurisdiction over non-Indian Class III machine owners on the reservation. The current state law only allows individuals with a valid liquor license to have Class III games in their establishment. The wording of the compact leaves room for renegotiation if the Crow were to legalize alcohol on their reservation. Finding a tribe willing to allow non-Indians to run gaming operations on their reservation is extremely rare, but it did happen in

¹ Dennis Fitzpatrick. Interview by author. Phone recording. Siyeh Corporation/Bozeman, MT, 25 March 2009.

² Montana Department of Justice. State-Tribal Gaming Compacts: Crow Nation of the Crow Indian Reservation. Montana Department of Justice. <http://www.doj.mt.gov/gaming/tribalgamingcompacts/crowgamingcompact.pdf>, 2.

Montana with the Salish and Kootenai on Flathead Indian Reservation. Furthermore, the Crow compact speaks of the “present and historical demographics” on the reservation, which is mainly Indian with few non-Indian residents. Because the Crow outnumber their non-Indian counterparts, the state does not assert authority. The state does, however, word the provision in such a way that if the demographics were to change, then they would be able to renegotiate.

In 2007, the Fort Belknap Indian Community signed a similar compact into effect on their reservation. Their jurisdictional provisions are as follows:

“Because of the Reservation’s present and historical demographic and land ownership patterns, the State does not presently license and regulate any gaming operations owned by non-Indians and conducted on non-Indians lands within the Reservation boundaries. Should these conditions change providing the potential for non-Indian gaming on non-Indian owned fee lands, the compact shall lapse upon 60 days written notice by either party. The 60 days may be used by the parties to meet and confer regarding the potential amendment or renegotiation of the compact.”³

While the wording is very similar to the wording used in the Crow compact nine years prior, there are some serious changes. Montana now makes it clear that renegotiation of the compact will take place should non-Indians be allowed to run gaming operations on their fee lands, regardless of whether the reservation is wet or dry. It seems that Montana would like their non-Indian residents on tribal reservations to have the same benefits they would have off the reservation. This is a violation of tribal sovereignty, not to mention the potential it has to take away business from tribally operated casinos. It almost appears that the state, while they must allow the tribes to conduct Class III gaming

³ Montana Department of Justice. State-Tribal Gaming Compacts: Gros Ventre and Assiniboine Nations of the Fort Belknap Indian Reservation. Montana Department of Justice. <http://www.doj.mt.gov/gaming/tribalgamingcompacts/fortbelknapgamingcompact.pdf>, 3.

through a compact, want to ensure that should the tribe be successful, the state always will have a way to get a cut of the profits even if they have to violate tribal sovereignty in the process.

The Confederated Salish and Kootenai Tribes renegotiated a compact with the state in 2006 as their five year compact was set to expire. Their negotiations fell apart, however, over this same jurisdictional issue. The newspapers reported that Governor Schweitzer was “surprised” that the negotiations failed as he was “very optimistic as the start of the day.”⁴ Flathead was one of the few reservations in the entire country that, as a demonstration of their good will, allowed non-Indians to have Class III gaming operations.⁵ When the Salish and Kootenai refused the compact proposed by Montana in 2006, they effectively terminated the operations of their non-Indian counterparts as well. In areas of Flathead Reservation, the non-Indian community members had three times as many machines as did the tribe. Since the profits from the tribal machines were being used for education and social services, the Salish and Kootenai were finding it more difficult to compete and continue to fund their programs.⁶ Taking away Class III gaming was actually beneficial to the tribes because it decreased the saturation level of gaming on the reservation. Now all gaming profits on Flathead go directly to the tribes and their programs.

As well as benefiting monetarily from terminating Class III gaming on their reservation, the Salish and Kootenai Tribes also made a solid stance on the issue of tribal

⁴ The Associated Press, “Tribes Decline Gaming Compact,” *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

⁵ The Associated Press, “Mailing About Tribal Compact Under Dispute,” *Billings Gazette*, February 5, 2007, <http://billingsgazette.net/articles/2007/02/05/news/state/40-mailing.txt>.

⁶ James Steele, Jr., “The Importance of Class II Gaming,” *Indian Gaming* 17, no. 10 (2007): 16.

sovereignty and refused to allow gaming operations run by their non-Indian community members unless the non-Indian falls under tribal jurisdiction. According to Governor Schweitzer, the tribes turned down \$700,000 in the negotiations, approximately 70 percent of the total Class III gaming revenue on the reservation at the time. This number is derived from the 20 percent the state would give the tribes from the gaming revenues on the reservation and \$500,000 from gasoline taxes on Flathead.⁷ According to Lana Page, a staff attorney for the Salish and Kootenai Tribes, it boiled down to jurisdiction, not money. The tribes were asking that they be able to regulate the gaming operations within their own borders for both Indians and non-Indians, and the state refused. It is an extreme violation of sovereignty when the tribe cannot even regulate activities within its own borders. So while the Salish and Kootenai walked away from \$700,000, essentially they refused to put a price on their sovereignty.

That is not to say that the tribes who do have Class III compacts with the state have sold out. In fact, in each negotiation with the state, tribes are pushing the Governor and his negotiation team further in payouts and number of machines. These are small victories, but they are victories. Essentially, though, Montana tribes would like to have Class III, Vegas-style games, or at least the option to decide for themselves if their market could support Vegas-style games. The way the tribes look at it is that a more successful casino could help both their net revenue and employment.⁸ Kermit Horn from the Fort Belknap Indian Community stated,

⁷ The Associated Press, "Tribes Decline Gaming Compact."

⁸ Virgil Henderson. Interview by author. Phone recording. Rocky Boy Indian Reservation/Bozeman, MT, 19 March 2009. Transcript attached.

"...the reason I don't think Class III is a big draw is because here in Montana we have to negotiate a compact with the State of Montana and the Class III games that we are allowed to run are only video poker and video keno. Our payout is \$2000. It's not the Class III gaming that tribes such as the Mashantucket Pequots, you know, they have wide-open Las Vegas-style gaming. Ours is nowhere near that level."⁹

Horn believes that if the state would allow the Class III market to open up, the tribes would really be able to succeed and earn money for programs that they do not currently have, such as a retirement community for their elders or a dialysis center.¹⁰ The tribal representatives that I spoke with understand that even if they were to have Vegas-style games, they would not become instantly rich. Their communities are so impoverished that it would take a long time just to get their reservation community above the poverty line.

The Salish and Kootenai, as well as the Blackfeet, decided to terminate their compacts with Montana and shift their focus to Class II gaming which is regulated entirely by the tribes with oversight by the National Indian Gaming Commission (NIGC) as mandated by IGRA. Fitzpatrick believes that Class III games would bring a nice mix to the casino floor, but that not having the current Class III games allowed in Montana in Glacier Peaks Casino is not detrimental to their revenue. James Steele, Jr., current Tribal Chairman of the Confederated Salish and Kootenai Tribes, published an article recently on the potential of Class II games in Indian Country. Steele wrote:

"Indian gaming is a little different in Montana than in the rest of the country. Unlike Washington State or Florida, Montana's state law authorizes Class III games in any establishment with a liquor license. It seems like every restaurant and gas station in Montana offers the same

⁹ Kermit Horn. Interview by author. Phone recording. Fort Belknap Indian Reservation/Bozeman, MT, 25 March 2009. Transcript attached.

¹⁰ Horn.

keno and poker machines. Off reservations, the maximum payout is capped at \$800. As a result, tribes in Montana are unable to offer a Class III game that is different than the ma and pa restaurant or gas station.”¹¹

Steele’s contention is that tribes have a better chance of success by developing the Class II gaming market because it does not fall under the regulatory control of the state government. Fitzpatrick on Blackfeet Reservation adds that as tribes run into more trouble with the state in their negotiations, Class II will become a practical solution to the current stalemate.¹² The current state model for Class III gaming is so restrictive that the future of gaming in Montana’s political climate is found in Class II games.

Class II is a viable temporary solution to the Montana gaming stalemate because the tribes can regulate their Class II games to reflect the demand of the market. Tribes can also dictate their own payout limits and number of machines. There are no regulations from the NIGC that would disallow progressive jackpots (linking the machines to increase the payouts.) The increase in payouts is the attraction that will bring more people into the tribal casinos. As Manson discussed, people are not going to drive long distances to go to a tribal casino that has the exact same machines as their local pub when the difference in jackpots is only \$1,200. It is the allure of the larger jackpot that reels in gamblers and tourists alike. Class II gaming can provide this lure since the state cannot limit the payouts like they do for Class III machines on the reservation. Steele wrote that one of their progressive jackpots paid more than \$500,000 to one of their patrons. With the high payouts, Flathead’s Gray Wolf Peak Casino in 2007, the year following the failed Class III negotiations, still managed to hit the \$2

¹¹ Steele, 16.

¹² Fitzpatrick.

million mark it had set from the 2006 year.¹³ Class II gaming has proved to be equally as profitable and perhaps more enjoyable for the Salish and Kootenai since they no longer have to deal with the state. Only time will tell if Class II gaming in Montana can perhaps become even more profitable.

Tourism in Montana currently pulls from a different market than the typical Las Vegas or Atlantic City market, which directly affects the success of the Indian gaming operations. Max Baucus' Staff Member pointed out the flaws in Montana's tourism industry: "I don't think they go to Montana for gaming. If they want that, they go to Las Vegas or Atlantic City. So you have a lot of people who go to Montana to go to the parks: the national parks, state parks...and typically those types of people don't gamble."¹⁴ A survey published by the University of Montana on tourism in Indian Country in February 2009 supports this assertion. The survey revealed that more tourists are drawn to Indian Country in Montana for the museums than for the casinos.¹⁵ It seems that more people are attracted to reservations for the cultural aspects than gambling. Of the 218 people surveyed who visited a reservation, only 18 percent "indicated some level of agreement with wanting to gamble on a reservation, and 62 percent strongly disagreed with the idea."¹⁶

This survey, while a telling indication of what draws people to Indian Country in Montana, lacks depth and foresight. The survey indicated that a small percentage of people who visited a reservation agreed with gambling. The people surveyed belonged to

¹³ Steele, 16.

¹⁴ Staff Member on Max Baucus' Finance Committee.

¹⁵ Olp, Susan, "Message to Tribes: Museums Work," *Billings Gazette*, February 26, 2009. <http://www.billingsgazette.net/articles/2009/02/26/news/state/29-message.txt>.

¹⁶ Olp.

this group Max Baucus' Staff Member discussed who do not come to Montana to gamble in the first place. If there were fewer restrictions for Class III gaming on Indian reservations and tribes were allowed to have roulette tables, craps, and blackjack like Representative Jayne's legislation would have legalized, then a very different group of people would be frequenting Indian Country. Of the people surveyed, the most popular destination was Blackfeet Reservation because of its proximity to Glacier National Park. Seventy-four percent of the people surveyed went to this park. Second in popularity was the Crow Reservation, home to the Little Big Horn Battlefield.¹⁷ The destinations of the tourists are equally as telling as their survey results. If the Class III gaming was less restrictive for Indian tribes, the type of people traveling to reservations would change along with the law. This survey reflects the current attitude of visitors to Montana's Indian Country, but fails to recognize the potential impact the current gaming law has on the tourism industry.

Another group within the tourism industry is the international tourists who come to America specifically to visit Indian Country. "Of the top 13 activities of overseas travelers to Indian Country, a trip to the casino was rated No. 12, according to the International Trade Association."¹⁸ Certainly, Montana tribes do not have the sort of casino pull as would the Eastern Band of Cherokee with Harrah's Casino. International tourism is not a priority for Montana tribes. Most International tourists want to see a powwow or some sort of cultural event. The museums on many of Montana's reservations provide a pull for many of these visitors, as revealed by the University of

¹⁷ Oip.

¹⁸ Rave, Jodi, "Montana Tribes Mull Tourism Marketing Strategies," *Billings Gazette*, December 3, 2007, <http://billingsgazette.net/articles/2007/12/03/news/state/32-tourism.txt>.

Montana's survey. Tribes here do not want to market their culture by having weekly dances or shows for their visitors, but they do want people to walk away with a better understanding of their culture.¹⁹ If casinos and cultural education are some of the main attractions for people come to Indian Country, Montana tribes should find a way to balance both desires while preserving and protecting their cultural integrity. The casinos could be an even bigger pull for visitors if the state restrictions on Class III gaming were lifted.

Location is also an essential component to the success of the tribal casinos in Montana. Many of the reservations are out of the way and do not attract too many passersby, so seasonal traffic through Montana plays an important role. The weather in Montana does not allow for yearlong tourism according to Dennis Fitzpatrick of the Blackfeet Siyeh Corporation. Fort Belknap has a fairly successful casino because they can pull people in from Malta, Havre, and other surrounding communities, and they are also at the crossroads of Hwy 2 and Route 66 from Billings.²⁰ They are in direct competition with Rocky Boy Indian Reservation, and Rocky Boy is struggling to make ends meet,²¹ but it provides essential employment, so they are marketing as best they can.

Virgil Henderson of Rocky Boy commented,

“I thought that basically Hwy 2 coming through Havre, that's kind of a main highway and you think you'd get more tourists. In the summertime I guess we do fairly well. There's a lot of tourists that come through and stop and game. I think with a hotel we'd probably do better.”²²

¹⁹ Rave.

²⁰ Horn.

²¹ Frank Smith. Interview by author. Phone recording. Fort Peck Indian Reservation/Bozeman, MT, 3 March 2009. Transcript attached.

²² Henderson.

Location along these highways is essential to these communities, but since Fort Belknap and Rocky Boy share the same highway, it is a struggle because they have to pull from the same communities.

The Little Big Horn Casino on Crow Reservation is the closest Indian casino to Billings, MT. Just beyond Crow is the Northern Cheyenne Indian Reservation. The Cheyenne do not really have to compete with the Crow for the Billings gamblers though because they are able to attract people from Sheridan, WY.²³ In addition to the Sheridan community, the Cheyenne Reservation is a shortcut for truckers travelling east-west on Interstate 90. The Charging Horse Casino on the Northern Cheyenne Reservation has a nice, affordable restaurant that serves a lot of that trucking traffic.²⁴ Ashland and Colstrip, two smaller off-reservation communities within twenty miles of Lame Deer, also visit the Cheyenne casino. While their reservation is in a relatively remote area, there is still a lot of potential for success due to their location.

The Northern Cheyenne actually have plans to expand their casino operations and build a new casino 15 miles south of the reservation toward Sheridan, WY at the Tongue River Reservoir. The casino would have a restaurant and a deli, but there would be no entertainment venue, as it would not be an enormous building. There is a marina about a mile away in the state park, so there are currently no plans to build one at the casino, though it is not ruled out in the future.²⁵ It is possible to place off-reservation land into trust for the sole purpose of building a tribal casino, but it is difficult. The Secretary of

²³ Norma Bixby. Interview by author. Phone recording. Northern Cheyenne Indian Reservation/Bozeman, MT, 18 March 2009. Transcript attached.

²⁴ Bixby.

²⁵ Manson, Michael. Interview by author. Phone recording. Northern Cheyenne Indian Reservation/Bozeman, MT, 27 March 2009. Transcript attached.

the Interior must first determine that the land is suitable for gaming, meaning that it will help the tribe economically and would not be detrimental to the surrounding community. If the Secretary determines that the land is not suitable for a casino, there is nothing more the tribe can do. If the Secretary determines that the land can be placed into trust and used for gaming, then the final say is passed to the governor of the state who must concur in the determination within one year. If he/she does not concur with the Secretary's determination within the year, then the tribes would have to reapply.

Michael Manson, the contract attorney for the Northern Cheyenne was hired for the sole purpose for getting the land at the Tongue River Reservoir placed into trust for gaming purposes. The current situation for the Cheyenne is that the land in question at the Tongue River Reservoir has been determined to be suitable by the Secretary of the Interior as of 28 October 2008. In order to obtain the determination from the Secretary, Manson noted that the tribes had to jump through a lot of unnecessary hoops. In addition to completing studies that would prove that a casino in that location would be beneficial to the tribe and not detrimental to the surround community, the Northern Cheyenne also had to complete an Environment Assessment of the land. The assessment, according to Manson, was the most extensive assessment he had ever seen, and in his career, he has seen many Environmental Assessments.

“We had to go out there and look for some endangered or threatened plant! You've probably been out to that site. I mean, they've got one tree on that that's ten-feet tall and a bunch of cheatgrass and what-not. There's no endangered plant or whatever you're worried about to be seen. It's on a reservoir. It's the biggest coal mines in the country within a few miles. There's coal bed methane drilling to the north. I mean, the whole idea that there were environmental issues, especially since no environmental groups were bringing up any issues, right? The Fish and Wildlife Services wasn't

bringing up any issues. The only thing they brought up is, ‘Well, there’s going to be more traffic on the roads between the highway and the casino, so we think there will be some roadkill.’ OK, and that’s probably true and then bald eagles will go and probably feast on the roadkill.”²⁶

The Fish and Wildlife Services came to an agreement about the bald eagle issue deciding that casino security would pull any roadkill away from traffic as soon as it was spotted thus preventing as much damage to the eagle population as possible, but that was not Manson’s point. His point was that they had to complete such an extensive assessment despite the fact that no one was complaining about environmental issues, not even the park adjacent to the property, and yet it made no difference. They still had to spend a lot of time and money to complete the assessment with little rationale.

Manson was also vexed with the fact that the Secretary’s determination only lasts one year. If the governor of the state in question still has not concurred after a year, then the tribes can apply for a maximum of a six month extension. Manson argues that a year does not make much sense. Within five years, there can be significant change to a community that would require a new assessment of the development. After a year, there is not enough change in a region to support the time limit. Manson said,

“And when you’re doing all this work to say now this is only good for a year, year and a half, it’s blatantly unfair and in fact, something that they don’t do to anybody else. I mean, if you’re planning to build a mine somewhere, they don’t say, ‘Well, sorry. We’re going to say it’s OK for a year, but after that you’re going to have to re-do it, you know, get more approvals.’”²⁷

The Northern Cheyenne Tribe has until 28 October 2009 to get the governor to concur in the Secretary of the Interior’s determination before it expires. Governor Schweitzer has

²⁶ Manson.

²⁷ Manson.

been putting his decision off until after the current legislature session in Helena, though Manson would be surprised if the Governor did not concur. The casino is supposed to bring in \$1 million within the first year based on all the studies they have completed, as well as provide about 30 jobs for people on the reservation. Should Governor Schweitzer concur, the Tongue River Reservoir would be the fourth incident of off-reservation land being placed in trust for the sole purpose of gaming since the passage of IGRA.²⁸ The Northern Cheyenne are standing on the brink of economic independence, not to mention a historical land-to-trust transfer since it is so uncommon. The location of the proposed casino, 25 miles north of Sheridan, WY, promises to be fruitful for the tribe. It would be indicative of Montana's lack of good faith toward tribes if the Governor did not concur or let the Secretary's determination expire.

Besides the seasonal weather and the location of the casinos, some other roadblocks to Indian gaming from the tribal perspective include the state, the leadership, and the saturation point of gaming in Montana currently. Henderson looks to Montana's relationship with the tribes on the issue of sovereignty as a huge roadblock to tribal gaming.²⁹ Until the state starts to both acknowledge and respect that tribes need to be treated as equals in a government-to-government relationship, there will never be any progress at the negotiation table. Smith pointed out that one of the biggest problems is the varying interpretation of IGRA between the tribes, the Governor, and the state

²⁸ National Conference of State Legislatures, *States and Tribes: Building New Traditions, Indian Gaming in the States: Dispelling Myths and Highlighting Advantages*, (Denver: National Congress of State Legislatures, 2005), 8.

²⁹ Henderson.

legislature.³⁰ Because everyone has such different interpretations, it is virtually impossible to expand gaming in Montana; people cannot even decide on what the law means.

The ever-changing leadership is also a problem in both the state and the tribe. In the state, legislators are elected every two years, each with their own agendas. Governors are elected every four years. If there is a governor who has poor policies on Indian issues, then there are at least four years of poor decisions for Indian Country. Within the tribe, presidents are typically elected every four years as well. Bixby's complaint was that if the leadership changes every four years, then there is no continuity. "You get one tribal president who thinks [something is] a great idea and the next doesn't think it's a great idea. You never seem to get ahead because you're always waiting for someone to jump through a hoop to get something through."³¹ Consistency in policy and continuity of leadership are essential for tribal communities because it allows the tribes to look further ahead and plan long term goals, rather than having those long term goals change every four years.

The final roadblock that the tribal members or representatives pointed out in their interviews was that gambling has nearly reached its saturation point in the State of Montana. It is easy for state citizens to go to their nearest Town Pump or bar and put \$5 in the machines. It is not easy for them to drive an hour or more to go to their nearest tribal casino and put in \$5. The tribal casinos cannot offer any Class III incentives that the local bars cannot beyond the minimal payout increases the Governor has offered.

³⁰ Smith.

³¹ Bixby.

Fitzpatrick, who runs an entirely Class II gaming facility, does not see Class III gaming expanding much more based on the current state model. He believes that unless the attitude toward tribal gaming in Montana changes, then Class II is the future of Indian casinos.³² Max Baucus' Staff Member, in addition to several other tribal representatives, concurs. Jayne's bill was the best piece of legislation introduced thus far because it would have changed the course of Class III gaming in Montana on Indian reservations and allowed only tribes to have expanded Class III games. The attitude in the state is that this is not fair to the Tavern owners. Until that attitude changes, Class II is the future.

It is extremely important for Montana tribes to have successful economic development ventures, especially casinos. People question the practicality of casinos as viable solution for economically depressed reservations. Casinos are extremely important in the development of reservations because all of the money is required by federal law to go back to the tribe and fund needed tribal programs. No other tribal economic ventures can promise that the money is going where it's supposed to go. Per capita checks are not an acceptable use of casino revenues unless the tribe gets the express permission of the Secretary of the Interior. As discussed previously, the state legislators do not seem to realize that the money does not make individuals rich like it does in their local communities. Instead, the tribe decides where they best need the money to go and most tribes have plans for where they would like their casino revenue to go in the future.

A couple tribes in Montana are using the casino revenue to pay off their debts. Ever since Frank Smith took over Fort Peck Inquiry, he has made sure that all the money

³² Fitzpatrick.

goes where it is supposed to go. The Fort Peck Indian Community is now paying off as much as \$7,400 in debts every month. Before Smith began working for the tribe again, “they were going about \$30,000 a year in the hole.”³³ The tribe is currently still in \$40,000 worth of debt, but they are paying it off as quickly as possible thanks to the profits from the casino.³⁴ Fort Belknap is also using its revenue to pay off their debt to the Chickasaw Nation in Oklahoma. The Chickasaw loaned Fort Belknap the money to build and start their casino which opened last June. Fort Belknap has promised to pay back the loan within three years to avoid high interest rates.³⁵ It is an amazing turnaround in this country that tribes are now able to lend other tribes money when they need it. It is a step in the right direction toward self-determination and is often times made possible through casino revenue. There is still work to do before many of Montana’s tribal casinos start to turn a real profit and tribes begin to stand on their own feet. Paying off bad debts, loans, and not spending more than you make are all good steps towards an economically independent nation. Gaming on some Montana reservations is slowly tipping the scales in favor of the tribes, though there is still a lot of work to be done.

For other tribes where there is minimal debt to pay off, they can use their revenue to fund new programs or supplement existing ones. Horn, once Belknap finishes paying off their loan to the Chickasaw Nation, wants to build a nursing home/retirement community for the elders on their reservation. Currently, they have to send their elders off the reservation if they need long term care. Tribal elders serve a unique role in Indian

³³ Smith.

³⁴ Smith.

³⁵ Horn.

communities and sending them off the reservation for the last years of their life is not an viewed by tribes acceptable course of action. Horn feels that it is extremely important to keep those valuable people as close to the tribe as possible. He also wants a dialysis center on the reservation.³⁶ In doing so, the Indian Health Service can provide more care for their patients and keep them close to home, family and friends during any treatment. These idea Horn is planning for the future are often times things that non-Indians take for granted, but they are things that tribes lack. Gaming revenue can be an important contributing source for programs and facilities within Indian communities. He also hopes to get enough money to keep their youth center open daily and into the night in order to keep their children occupied and away from bad influences. They are planning to build a motel and truck stop across from the casino to hopefully attract more of the trucking traffic through their reservation.³⁷ Each tribe has their unique needs, so what programs they want to fund depend entirely on their community. The Northern Cheyenne, for example, is focusing on funding the casino on the Tongue River Reservoir trust land and are just waiting for Governor Schweitzer to concur with the Secretary of the Interior's determination.

There is so little economic development on Indian reservations that they must all go off-reservation to buy anything beyond what is provided in their grocery store and gas station which is one of the reasons the state is probably reluctant to let tribes expand their gaming operations. If tribes were to expand gaming and become more economically stable, then they could provide their own goods and services. Currently, in order to buy

³⁶ Horn.

³⁷ Horn.

clothes, appliances, or electronics, tribal members must go off the reservation. Tribes spend the majority of their money off tribal lands, contributing to the wealth of the state. Tribes ought to be spending their money in their own communities and keeping money on the reservations.

“Gaming revenues, especially from Class III gaming, frequently provide start-up capital for tribes to initiate other types of business on their reservations. By using gaming revenue as a catalyst to launch or invest in non-gaming businesses, many tribes have experienced the successful growth of diversified economies. Achieving this diversification could ensure future economic stability.”³⁸

It is important for tribes to be able to diversify and develop their economies so that tribal members do not have to travel long distances just to be able to go to a superstore. The Bureau of Business and Economic Research at the University of Montana did a study in 2003 on the “Monetary Contributions of Reservations to the State of Montana.” The total expenditure of all the tribes in the state was over one billion dollars.³⁹ It is important for the state to keep this revenue circulating within their taxable sphere. It would not benefit the state to let tribes develop economically through casino profits and keep their one billion dollars on the reservations.

Gaming in Montana does not currently allow tribes to develop economically through Class III games that would bring much needed revenue to the reservations. According to Bixby, the state does not understand what the economic benefits could be for the tribe if they had fewer restrictions and limitations on their Class III games.⁴⁰ Max Baucus’ Staff member even says that in Congress, there needs to be an enormous amount

³⁸ National Conference of State Legislatures.

³⁹ Bureau of Business and Economic Research, *Monetary Contributions of Reservations to the State of Montana*, (Missoula: The University of Montana, 2007), 4.

⁴⁰ Bixby.

of education because people just do not understand that individuals do not benefit from tribal casinos – tribal communities do. The majority of tribes in the country are not rich and many live below the poverty line. Casinos are one way to change this, and looking at other tribes around the country, it is an effective way. Montana needs to change its policy on tribal gaming to improve the economic situation of the communities living on reservations within the state.

CONCLUSION

The tribes and Montana are currently at an impasse when it comes to expanding Indian gaming. The state does not want any expansion of gaming, but it is the sovereign right of tribes to be self-sufficient and if the tribes deem that gaming is an avenue towards economic independence, then gaming should be at the sole discretion of the tribe. Unfortunately, tribes are required by federal law to negotiate with the state for Class III gaming. Montana will not expand that gaming to include Vegas-style slots, roulette, blackjack, craps, or any other games beyond video poker and keno. Governor Brian Schweitzer's actions in the negotiations have indicated that he is unwilling to negotiate with tribes on a leader-to-leader basis, thus acknowledging tribal sovereignty. His inflexibility is grounds for the tribes to sue, in particular the Confederated Salish and Kootenai who by all accounts, have experience extremely poor jurisdictional offers in negotiations partly due to the fact that they are a minority on their own reservation. The Indian Gaming Regulatory Act (IGRA) of 1988 created a loophole in the good faith provision that initially was designed to protect tribes. As it stands, should the tribes choose to sue the state, the state can assert their sovereign immunity, ending any legal action. The loophole could be fixed by Congress, but currently the legislators are not willing to amend the law and destroy the political edge states currently enjoy in negotiations. Tribes in Montana are currently stuck with what Montana offers for Class III gaming, or they must be willing to only have Class II games in the casinos.

My solution for Montana tribes is to have all the tribes form a coalition of sorts between to force the state into negotiating better compacts. Failing that, they ought to

sue or take their case to the Department of the Interior. There are several important protocols the tribes need to follow to make this coalition successful.

Within the first phases of the establishment of the coalition, each reservation needs to choose the most qualified candidates possible to be representatives in the gaming coalition. Each reservation needs to have the same number of representatives to even the playing field and to prevent any conflict between the tribes. It is extremely important to minimize conflict so the coalition can work as a unit as opposed to individual tribes. Presenting a unified front makes the coalition's stance against the state even stronger.

The meetings must take place in a neutral location also to prevent conflict. The tribes can either decide on a permanent location beforehand, or they can choose to alternate between reservations. Prior to the first meeting, the tribes need to look at the successes and failures of the previous negotiations with Montana as well as the successful negotiations within other states. The tribes need to bring with them to the meeting a list of expectations of the coalition, outlining what they are willing to concede to the state and what they are not. They also need to decide the minimum outcome they will accept from the negotiations with the state. By the second meeting, the tribes need to elect a chairperson, vice-chairperson, secretary, sergeant at arms and any other positions they deem necessary for their coalition.

Within a year, the coalition needs to engage in negotiations with the state outlining their demands for Class III gaming compacts on all seven reservations. The coalition ought to engage in negotiations under the assumption that the state will

negotiate within good faith. The tribes need to present the compact as a whole so that the state cannot make concessions for one tribe and not for another. It could be argued that such a coalition is a violation of each of the tribes' sovereignty. While each tribe represents a separate sovereign nation, Montana has shown that they would rather treat the tribes identically based on their penchant for using cookie-cutter compacts in negotiations. No one tribe has a distinct advantage over another because the compacts are much the same and have the same provisions, from the number of machines to maximum payouts. Therefore, since the state is going to treat each reservation's compact the same anyway, it would behoove the tribes to unite and present a stronger front to the states.

To strengthen its argument, the coalition should also present to the state their future plans for their casino revenue and how it would benefit both the tribes and the state. My suggestion includes placing a priority on education. One area of importance is K-12 programs so that more students will graduate and go to college. Tribes also need to either set up a scholarship fund for their youth or add more money to an existing one. Tribal Colleges are often underfunded so contributions to the local colleges are important as well. The money can be used to fund language preservation programs and outreach. The outreach could include teaching courses in K-12 institutions. The states would benefit from this plan because the tribes would begin turning out larger graduating classes who are better prepared to go to college and stay in college. Improving state educational statistics through a focus on Indian educational programs on the reservations should provide some incentive for Montana to negotiate fairer compacts.

As many tribes have expressed, their federal healthcare is underfunded. As Kermit Horn from Fort Belknap pointed out, they have no long-term care for their elders and currently have to send them off reservation.¹ Tribes need money to develop elderly care centers and casinos are one way of funding this. In addition to nursing homes, tribe can fund grants for the clinics to acquire better equipment and doctors, ranging from dialysis units to better neo-natal care and maternity wards. The possibilities for expansion and funding in healthcare are virtually endless. They can even fund Indian Health Service scholarships that would require that all graduates from the scholarship program give a minimum of five years of service at the IHS to payback their community for their funding. Showing the state that having casino revenue will contribute to the general welfare and health of the tribal community is another incentive for the state.

The tribes also need to demonstrate that they will work to protect their community from the ill-effects of the casino. Cultural preservation programs could be implemented to protect the tribal culture in the form of museums, language programs, and immersion schools. In addition, there should be incentives for teachers to return and teach on their reservation as many children learn better from their own people. Curriculum reflecting tribal views and beliefs should be incorporated into the school system. Of course, development of these programs requires funding, and the casino is one way to acquire the necessary funding.

Another potential ill-effect from the casino could be a rise in gambling problems in the tribal community. The tribal council, should they choose to expand their gaming, should also invest in programs such as Gamblers Anonymous and provide support for

¹ Horn.

their people before it becomes an enormous problem. Providing a support system would also show the state that the tribes are invested in welfare of their people foremost.

Montana may also be swayed to negotiate better compacts if they understood that the tribe could also develop their community by creating a startup fund for tribal entrepreneurs. In doing so, it would encourage tribal members to diversify their economy as well as providing employment. Funding is important for people to be able to bring their business ventures to fruition.

In addition to all these ideas, tribes who have the resources available could use casino revenue to develop their renewable resources, such as wind energy and geothermal energy, which is something that Montana politicians would appreciate. If the tribal gaming coalition can prove to the state that they are working on improving their reservation, the welfare of their people, their unemployment levels, their healthcare, and their economic stability, the state may be more inclined to agree to an expansion of gambling on Indian reservations. If that fails, the tribes need to sue the state.

Should the state fail to negotiate in good faith, the coalition of tribes needs to officially reject the state's offer so that when it sues Montana, the coalition can prove that, at the end of the negotiations, the tribes were not willing to accept a compact that was not negotiated in good faith. It is important that all tribes reject the Class III gaming compacts so there are no grounds for the state to claim that the tribes accepted their offer. Any lawsuit that the coalition brings against the state after that will take a lot of time. The tribes should immediately switch their casinos to only Class II machines so they can continue to make money while the case is being tried.

Since tribes have the right to sue the state under IGRA if the state fails to negotiate within good faith, suing Montana is the next step for the tribal coalition if the negotiations fail. Assuming that the state does not assert its sovereign immunity as is typical now for states to do after the *Seminole* decision, the trial will take a lot of money as well as time. Each tribe needs to contribute to their representation equally to diffuse any potential disagreements. While it is true that some tribes would be better able to afford the large expenses legal proceedings can entail, in order to keep the peace and to ensure that every tribe will be equally represented by the coalition, they must split the cost equally.

The lawsuit that the coalition could bring against the state would stand a good chance if the tribes here in Montana would argue something similar to the Mashantucket Pequot's argument in the 1990s. As discussed previously, because Montana allows Class III games such as craps, roulette, and blackjack during their non-profit "Casino Nights" but just regulate the payouts and games, they cannot enforce their regulations in Indian Country. This is the same situation in Connecticut at the time of the Mashantucket Pequot Indian Tribe's lawsuit. According to the precedence set by the courts, unless a state specifically prohibits certain games then the tribes should be able to use those games. Montana does not prohibit Class III games, rather they regulate them and state regulatory/civil jurisdiction does not extend over Indian Country.

If Montana does assert its Eleventh Amendment right, each member of the coalition should be willing to see the issue through to the end, even if they have to go to the Department of the Interior to force the state to negotiate. This will require more time

and money, but it is imperative that the tribes stay united so that a Class III gaming compact can be negotiated for all tribes in Montana.

After interviewing people from several different tribes, it is clear to me that Montana places their political agendas and the agendas of special interest groups like the Tavern Association above the interests of the tribes. The most obvious reason for doing so it because, politically, it makes the most sense for the state to protect their own interests. In reality, however, by ignoring tribal interests and needs, the state is also ignoring the sovereignty of tribal nations. In doing do, they are effectively demonstrating that they have no intention of negotiating Class III gaming compacts with the tribes in good faith. Because of the loophole in IGRA, it is most likely that Montana will assert its Eleventh Amendment right, which is why I contend that tribes must be willing to see the process through to the end, even if that means going through the Department of the Interior.

It is fortunate that the tribes have the Department of the Interior as an avenue for pursuing legal justice. What is also fortunate is that, assuming the tribes do not go to trial with the state, the tribal case before the Department of the Interior does not set a precedent in the same manner a court case would. So, if a tribe does not get what it needs through the Department of the Interior, at least they have not damaged future tribal attempts nationwide.

Tribes in Montana stand a good chance of winning a lawsuit against the state. Failing that, they have another alley to force the state to negotiate in good faith through the Department of the Interior. I will be interested to see where Indian gaming in

Montana goes in the future. I think tribes will rally soon to do something about the state's unfair negotiations. Montana should be wary.

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APPENDICES

APPENDIX A

INTERVIEW WITH MAX BAUCUS' STAFF MEMBER

This interview was with one a Staff Member on Max Baucus' Finance Committee. This interview was conducted on 27 February 2009 via telephone.

Staff Member: Can you tell me what we're talking about today? What's the project or whatever?

Rebecca Wingo: Yep, we're talking about today tribal gaming in Montana specifically, and I'm writing my Master's thesis on the validity of IGRA and whether or not states should have the control over the regulatory power of gaming in Indian Country.

SM: I just want to let you know that, you know, that as a staff person normally we do not grant interviews or use our name, OK? If you want to refer to me as a staff person on the Finance Committee I think that'll be OK.

RW: OK.

SM: But I prefer that you not use my name if that's OK.

RW: Yep, that's fine.

SM: Alright, so I guess, you're going to ask me some questions? Is that how you want to do this?

RW: Yep, and I understand that you won't probably be able to answer all of them, but just to the best of your ability would be great.

SM: Right, right. Yeah I'm not an expert by any means, but you know, I do deal with these issues from time to time. So let me ask you about your, what, um, what you're getting your Masters in?

RW: Native American Studies.

SM: OK, at the University of Montana?

RW: No, Montana State University in Bozeman.

SM: Montana State, OK. Great! Well congratulations.

RW: Thank you. Hopefully I get to graduate.

SM: Are you a tribal member?

RW: No I'm not. I'm actually completely white and from North Carolina.

SM: I'll be darned.

RW: OK, well just for the record, we agreed that this could be recorded?

SM: Yes.

RW: OK. Just need to get that on the tape.

SM: Sure. That's fine.

RW: OK.

SM: And you're not going to use my name in the article?

RW: No. I will not.

SM: OK.

RW: I will use Max Baucus' Staff Member.

SM: That sounds good.

RW: First of all, I would like to place you in the context of my research. I would like to know exactly what your job [for Max Baucus] actually entails?

SM: OK. Typically what I do is, because I work on the Finance Committee, I handle, you know... The Finance Committee has jurisdiction over health, tax, social security, and trade. So, what I do, because Native American issues are handled typically by the Indian Affairs Committee of the Senate, what I handle for the Finance Committee is Indian tax, well, Indian tax issues and Indian health care issues. Now I also handle Social Security issues because I have experience in that, and I also was a trade lawyer at one time, but I don't really handle a lot of trade issues here. They have a whole separate team for that. But I also work with Senator Baucus' personal staff which handles all issues for Montanans. So I would help them if it's a housing, an Indian housing issue, or Law and Order, law enforcement type issues and also health issues as well, but typically it would be issues that normally the Finance Committee would not handle I would help the personal office with issues involving Native Americans in Montana.

RW: OK.

SM: But my job on a committee itself is handling issues nationwide. Or Indian Health or Indian Tax.

RW: OK. So again, if you can't answer a question, just let me know and we'll just move on. OK, so I was reading up on some of Senator Baucus' 2008 campaign in Indian Country. And would you be able to elaborate more on some of the legislation he has supported for tribal economic development?

SM: Oh, sure. He's always been a staunch opponent of tax, Indian tribal bonds, which are tax exempt bonds. And the recent Economic Recovery Bill, he was able to put in a provision that will authorize \$2 billion dollars worth of Indian Tribal Bonds nationwide. And there was some limiting language in the tax code that Indians can issue tax exempt bonds as long as they're for "essential government functions." Now those three words have caused a lot of problems in Indian Country nationwide. So in this bill, he was able

not only to get \$2 billion dollars worth on the rise, but he was also able to eliminate that restrictive language, which will be a good thing for Indian Country.

RW: OK, yeah.

SM: And there's a lot of other tax issues, like there's some specific Indian tax issues called accelerated depreciation and also Indian Employment Tax Credit. Both of those, accelerated depreciation and Indian Employment Tax Credits are part of what we call the extenders and they get extended every year and what we're working on right now is the result of a couple hearings we've had on tax issues, Indian tax issues that is, is to make those two provisions permanent. It's kind of tricky because those, well, that can be pretty expensive. But in the climate we're in now, this is probably the best time we'll ever have to make them permanent. So me and the tax team are working on clarifying the language on the Indian Employment Tax Credit and accelerated depreciation is pretty straightforward so we're just going to make both of those things permanent.

RW: OK, cool. What is Senator Baucus' stance on tribal gaming?

SM: I don't think he has a particular stance. He doesn't oppose it. I think he, like a lot of the tribes, realize that gaming is not that successful, not just in Montana, but in the United States. I think there's a common misunderstanding that just because you're an Indian tribe and you have gaming, you're rich.

RW: Right.

SM: And I think it's pretty well known that it's about 5% of the Indian gaming operations in the United States that are truly successful. The other 95% are not and it's mainly because in places like Montana, you have gaming going on all over the place. It's not just restricted to tribal lands, it's your local gasoline store or whatever, gas station, you can have a machine there. So, frankly, it's a matter of flooding the market so to speak. Yeah, it is a way for tribes to make some money, but I think Senator Baucus plus the tribes realize that the use of the natural resources might be a better way of going; more productive.

RW: OK. How would you gauge the current climate in Congress towards tribal economic development?

SM: I think there's a misunderstanding in parts of the country, particularly in the South, that I've encountered that they view legislation for Native Americans as being more race-based as opposed to political-based and I think it's a misunderstanding that they have. And, I don't think they fully appreciate what the government-to-government relationship is between tribes and the U.S. government, so I think it's an education thing for some of them, and I think that kind of colors the way legislation gets passed or doesn't get passed in Congress.

RW: On a race line as opposed to a political line?

SM: Yeah, they view it more as a race-based issue as opposed to a political-base. They don't fully understand the government-to-government relationship tribes enjoy with the United States government.

RW: And so that hinders a lot of tribal economic development-based legislation?

SM: Yeah, and it hinders a lot of health provisions, a lot of tax provisions, things that could help. You know, I think most of it's coming from the Republican side as opposed to the Democrats. You know, because most Republicans I think would prefer to see the tribes enhance their economic development and maybe let the gaming go. And yet, at the same time, when we try to do things that would help economic development, they say that they're going to vote against it because, now they're not going to say it's race-based, but they're voting against it even though it's something that typically Republicans kind of like. I mean, you're using your own resources to pull yourself up and make yourself, you know, economically viable.

RW: Right.

SM: I mean, that's pretty much the Republican stance on things, but at the same time if it's a special provision for Native Americans then they view that as being a race-based and they typically vote against it.

RW: But Senator Baucus isn't within that group itself. He's more of a political-based decision maker?

SM: Oh, absolutely. No, he understands, he completely understands the government-to-government relationship and he supports the tribes and their economic development as well.

RW: OK.

SM: He's done a lot for their, well, he's passed a lot of legislation that helps the tribes and not only in Montana, but throughout the United States.

RW: How would you gauge the current climate in Congress towards tribal gaming and casinos in particular? Not necessarily economic development as a whole, but just gaming? Kind of the same? Based on a race line?

SM: You know, there's pockets that absolutely oppose it, and there's other areas that view it as a means of economic development. You know, I think that the Abermoff scandal set back Indians decades. You know, I think it was viewed very poorly by the non-tribal world that gaming and Indian tribes is not a good thing and, you know, it's unfortunate.

RW: Right. OK, my next question was along the same line. It was do many members of the U.S. Congress support tribal gaming as a form of economic development? Why or why not?

SM: I think they do but I think they would also – I think it's like anything. The Indians get involved with selling tobacco, and you know with the tax-free tobacco in some places, and they set up bingo halls and gaming, and large-scale gaming operations... Yeah, there's some, this is purely my personal view of the thing that, I don't know what the percentage is, but there is a percentage out there that would just as soon see tribes not be involved in gaming at all. They'd just soon see that go somewhere else.

RW: Right.

SM: Or not exist at all, frankly. You know, they're just anti-gaming whether it's tribal or not. What I've noticed is that if tribes do something that provides income and a good living, or maybe beyond that, the non-Indian world wants a piece of it.

RW: Right. That's the way it usually goes...

SM: As an example, my grandmother grew up in Oklahoma and she was given 160 acres of pretty lousy land for farming purposes and they were willing to give her that land because it wasn't worth much, but it turned out there was oil and gas under it. So, she had 13 oil-producing wells at one time and made a lot of money. But she didn't get the kind of money – she got royalties. She didn't get a piece of the action and that's pretty typical all throughout the United States even up until today. Tribes are becoming more sophisticated and they want more than just a 1/18th or 1/8th of royalty interest. They want more of the actual money that comes from the sale of the oil. So, well OK, the tribes have these resources and they don't benefit from them as much as they could. And then they get involved in something like gaming, and though even only 5% are absolutely successful, that 5% makes a lot of money and, of course, as soon as that happens... Now if it's Class III gaming, as you know, they have to enter in to a compact with the governors of their states in which they reside, and they get concessions from the tribes for money from the state as a result of gaming.

RW: Yeah.

SM: So no one really seems to care about them until we have something they want, land, oil, or gaming. As soon as we get those sort of things then they want a piece of it.

RW: Right. That's generally the way it goes, huh?

SM: Yeah, it seems to be. Yeah.

RW: Now you're grandmother – what tribal affiliation are you?

SM: Muscogee Creek.

RW: OK. What are those in Congress who do support tribal gaming doing currently to promote gaming?

SM: I don't think members of Congress promote it at all. I mean, they're like anyone else. Tribes and gaming organizations can lobby Congress and they look for things that

help with industry, and there are some Congressmen that will view more favorably than others, but you know, they don't promote. Congress doesn't promote those things. It's really not their position to promote either.

RW: Alright. Yeah, I understand that. What do you think are the biggest road blocks to tribal gaming in Montana today?

SM: Oh, I think the biggest thing is that it's just reached the saturation point. When you have a gaming operation on every corner practically, and every bar in Montana, it's difficult to make money that way.

RW: Do you think that if the tribes had Class III gaming that it would create a bigger pull for people to come to the reservations and game?

SM: Well, you know, I'm not really sure how this works, but it's my understanding that if, well, let's take the Salish and Kootenai Tribes. When they did have Class III gaming at one time, and it's my understanding that if the tribe gets it then, because it's such a checkerboarded area, that non-tribal people will have Class III gaming.

RW: Yes, well actually, what Salish and Kootenai did was they allowed their non-tribal residents to have gaming operations which was something that's extremely uncommon and it's also something that was seen as an act of good will on the part of the Salish and Kootenai, but I don't think that necessarily holds true for all tribes.

SM: OK.

RW: And I think that independent business owners who have gaming operations on tribal land, if they are tribal members, those machines are tribally owned and they don't get the huge cut that some independent non-Indian business owner would get. So I think that a lot of reservations don't make that exception but the Salish and Kootenai did.

SM: OK.

RW: Yeah. So other than the saturation point, what else do you think some big road blocks are?

SM: Well, I think in places like Montana you've got people that go to Montana, I'm talking about tourists; they go to Montana for all types of reasons. I don't think they go to Montana for gaming. If they want that, they go to Las Vegas or Atlantic City. So you have a lot of people who got to Montana to go to the parks: the national parks, state parks... And typically those types of people don't gamble. I think just the fact that you have the type of recreation you have there, kind of limits the type of people that would normally go, or limits the number of people that gamble. So really I think that's an impediment, frankly.

RW: Right.

SM: And the weather. You know, I think just speaking for the tribes I know about in Montana that have a casino, like the Blackfeet for instance, there's months out there where nobody's going to be – You got the local residents who aren't very rich, who don't really have the money to go gaming, and you don't have a lot of tourists or other people to go the distance to Browning at that time of year. So the weather actually influences a lot of it too.

RW: Yeah, that's a good point. What possible repercussions could Class III gaming have within the state that makes the state so hesitant to sign "good" compacts, as opposed to compacts that mainly benefit the state and not the tribes?

SM: I don't think it's an impediment to the state. The state stands to gain with a compact for Class III gaming because in order to get the Class III, whoever, let's say the tribe, is trying to get Class III is going to have to enter negotiations with the governor's office and come up with something and they're going to have to make some concessions to do it. And as you know with the *Seminole* case, the Supreme Court case, it's not really arms-length negotiations. In other words, in the negotiating process, if the tribes feel like the state is not negotiating in good faith, there's nothing that the tribes can do about it now because of the *Seminole* decision. So really, everything is geared towards the state; the state has the upper hand and if the tribes aren't willing to give up, or they don't want to give up as much as the state, or any state, asks for then they just have to be satisfied with Class II. And I think most states will want as much as they can get out of the negotiations and out of the proceeds that the tribes would generate from Class III gaming. And unfortunately, the way the Supreme Court case is ruled, you can allege that the state was not negotiating in good faith all day long and it's not going to do you any good.

RW: Right, right. OK, I've got a quote here I'm going to read out to you: "Terry Matt, an attorney for the Blackfeet Tribe, said tribes can't negotiate with the state of Montana for better compacts. The state has an advantage and can dictate terms of a compact by claiming sovereignty, she said. Tribes like the Blackfeet don't have the money to challenge state decisions in court, so they either must accept Montana's terms or not run gaming operations."¹ How do you think Congressmen such as Senator Baucus can justify their continued support, or maybe not even support, but more of a non-action against IGRA knowing that it has not worked the way it was intended? Or does Senator Baucus have a solid stance against or for IGRA?

SM: Well, I think IGRA is a good act. I'm sure he supports it as it is a law, but again the Class III negotiation that was quoted there by the Blackfeet member, that's really something that's between the tribe and the governor and I don't think the Senator would want to weigh into that. It's not really his place to [do that] because it is a state issue.

¹ Becky Shay, "Tribes Seek Gaming Help From Agency," *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>.

RW: Yeah, OK. What could Congressmen do to change the course of tribal gaming? I know they could change the current law, make an amendment maybe to the good faith clause, but would they? And why or why not do you think they would?

SM: Well, first of all, there has to be some education because there's a lot of senators that wouldn't know about the good faith provisions and what the line of cases are that led to the decision in the Supreme Court. I think that in order to get any kind of amendment to the act or as a result to the *Seminole* case, there'd have to be a pretty good education going on up here, which, you know, organizations like NIGA could possibly do. But, well, I don't know what NIGA's position is on that, but I think it would take considerable education up here.

RW: OK, so it would take an outside group such as NIGA to come in and...

SM: Yeah, NIGA and National Congress of the American Indian. Those kinds of organizations.

RW: Is there any talk at all about changing that law?

SM: No, not that I'm aware of.

RW: What does the terminology "in good faith" mean to you? It seems to me that there is a problem in the supervision of Congress in the definition of "good faith." How then, can Congress support a law that they cannot regulate equally across the board?

SM: Well, I guess that's what courts are for, to interpret what we do here and it just so happens that's the way the IGRA decision came about and I think a lot of it had to do with the makeup of the Supreme Court. If we had more democratic appointed Supreme Court Justices it may have been a different result.

RW: The aim of IGRA was to ensure that Indian tribes can achieve economic self-sufficiency through gaming. Do you think that it has done more to help tribes accomplish this, or to hinder it?

SM: I think it's been a positive thing. Maybe not the extent that a lot of tribes would have hoped, but certainly the five percent have done quite well. And some of the five percent have helped other tribes with their gaming profits. So I think without it, we'd be worse off. It just hasn't perhaps fulfilled what it had hoped to.

RW: It's just ironic to me, I guess, that IGRA was set out to promote this economic self-sufficiency through gaming especially, but what it seems to me is that Congress twenty years ago used their plenary power to override a Supreme Court decision that was in favor of tribal gaming and then they set forth new laws to regulate it. And they set forth the new laws to regulate it on the state level as opposed to the federal level which is where those issues of sovereignty really come in. Tribes should be negotiating with the federal government if anybody. Do you agree with that, or disagree?

SM: Yeah, I would agree with that. It is ironic.

RW: Well, I think I kind of tapped into my next question a little bit, but I'll ask it anyway. In 2006, Montana had 20,000 gaming machines, only 700 of which were on reservations.² And as I'm sure you're aware, the compacts tribes signed with the state as far as Class III gaming go, limit their number of Class III gaming machines to 80, or some extremely small number. So I think 535 of those were Class II machines,³ and so that leaves 165 Class III machines in the entire State of Montana. It is said that one of the biggest issues facing Montana tribes in regards to gaming is this "lack of a government-to-government relationship with the state on gaming issues."⁴ Do you believe this statement is true? Do you think the State is kind of ignoring their responsibility for this government-to-government relationship?

SM: That's a question I wouldn't really know. I wouldn't know the answer to that.

RW: OK. What are the biggest benefits, you see, for tribal gaming, if any at all?

SM: Well, again it depends on whether you're talking about just Montana, I mean it does provide some jobs, it provides some income. Even though it is just Class II, there's still income being made, but it's not the end-all for economic development. There's a lot of other things going on out there, particularly in Montana with some of the natural resources (wind, solar, and geothermal) that probably are going to be a bigger income source than gaming will ever be, at some point. From what I've seen so far, a lot of tribes are really close to exploring all the options that they have and a lot of it is renewable energy, so if this country tries to move more and more away from oil and gas and move toward Green Energy I think the tribes are in a really good position to develop their economies.

RW: In your opinion, who do you think benefits most from IGRA, the tribes or the states? Do you feel, looking at it from afar, that Montana has taken advantage of the regulatory power granted to them over tribes?

SM: I don't know if I can answer that question either.

RW: OK. We're going to kind of go back to the tourism issue that we were discussing earlier. "In 2006, more than 700,000 foreigners visited tribal lands." And of the top 13 activities of overseas travelers in Indian Country, visiting a casino is number 12.⁵ How do you see Class III gaming affecting the tourism industry in Montana or do you think it would?

SM: I don't know. I have no idea really if it makes that big a difference.

² Becky Shay, "Tribes Seek Gaming Help From Agency," *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>

³ Jodi Rave, "Indian Gaming Proposal on Hold," *Billings Gazette*, June 8, 2008, <http://billingsgazette.net/articles/2008/06/08/news/state/44-gaming.txt>.

⁴ Becky Shay, "Tribes Seek Gaming Help From Agency," *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>.

⁵ Jodi Rave, "Montana Tribes Mull Tourism Marketing Strategies," *Billings Gazette*, December 3, 2007, <http://billingsgazette.net/articles/2007/12/03/news/state/32-tourism.txt>.

RW: In the newspaper, yesterday actually, the University of Montana completed their study on tourism in Montana's Indian Country. They found that tourists were more likely to visit a reservation for their cultural activities or museums than their casinos.⁶ Why do you think this is true? Is it just because there is no allure of the Class III gaming tourists are so familiar with on reservations (especially on the east coast)?

SM: Well, on the East Coast we're talking about Foxwoods. I've been there. That's one of the five percent. They have people spending a lot of money advertising in the cities to go to Foxwoods and I've been there. It's like Las Vegas. And they even have Las Vegas-style entertainment. I think people go to Montana to see the tribes for the cultural aspect, not for the gaming.

RW: There are several tribes, in particular the Blackfeet and the Salish and Kootenai just because of their location, who have run or are running an ecotourism business. Can you feasibly see gaming becoming part of an ecotourism industry? Are these two inherently opposing forces?

SM: No. I think that's the problem with Browning, with the Blackfeet, because people who typically go to that lodge there in East Glacier, or who go to Glacier National Park, those are not gamblers. They're there for the scenery and for the hiking and the camping and that sort of thing. They're not there to go to casinos. I mean, if they're staying at that lodge in East Glacier and they're bored out of their heads a night, they might go down there to spend twenty bucks, but they don't have a restaurant. They have a little take-out restaurant in the casino, but it's not known for the food. And at night, unless there's a powwow going on, there's not any cultural things going on typically. They do have a museum which closes at five o'clock, and then they've got a couple art galleries, but that's about it. So what are you going to do? I mean, those folks are not going to go into town for the night for that. I think they're going to sit there by the fire in the lodge.

RW: At the end of the Confederated Salish and Kootenai Tribes of Montana's gaming compact with the state, Governor Brian Schweitzer was quoted in saying, "I'm a friend of Indian Country, but I am not a friend of gaming. I do not support expanded gaming anywhere in Montana, and I will not support expanded gaming. I have stood in front of the Tribal Council and told them I do not support any expansion of gambling."⁷ Do you think the state, the governor especially, should have such a heavy hand, or a hand at all, in the regulation of gaming in Indian Country while local gaming operations seem to be growing?

SM: That's a good question but I don't have an opinion on it.

RW: Former Chairman of the National Indian Gaming Commission, Harold Monteau, is an attorney now working for law offices in Missoula. He believes the National Indian

⁶ Susan OLP, "Message to Tribes: Museum work," *Billings Gazette*, February 26, 2009, <http://www.billingsgazette.net/articles/2009/02/26/news/state/29-message.txt>.

⁷ The Associated Press, "Tribes Decline Gaming Compact," *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

Gaming Commission should “sue the state on behalf of the tribes to force better compacts and economic opportunities.”⁸In your experience, do you think the National Indian Gaming Commission is doing enough to work for the tribes in Montana? Are they helping on hindering?

SM: I don’t really have an opinion on that. I know that a lot of people who are members of the organization NIGA would probably say that that NIGC is not doing enough, but I really don’t have an opinion on it.

⁸ Becky Shay, “Tribes Seek Gaming Help from Agency,” *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>.

APPENDIX B

INTERVIEW WITH FRANK SMITH

Frank Smith is the former Chair of the State-Tribal Relations Interim Committee and served as a State Senator. He is a member of Assiniboine tribe on the Fort Peck Indian Reservation and currently works for the tribe's Gaming Commission. The interview was conducted on 3 March 2009 via telephone.

Rebecca Wingo: Sir, can I go ahead and ask you, is it OK if I record this conversation?

Frank Smith: Sure can.

RW: OK, perfect. As I think I told you before, I am writing my master's thesis on gaming in Montana, in particular tribal gaming, and so that's what the questions will be about today. So we'll just go ahead and get started. How long were you the chair of the State-Tribal Relations Interim Committee?

FS: Two years.

RW: What exactly does the State-Tribal Relations Interim Committee do?

FS: It goes around and takes information from all the reservations to decide what the state can do to help in economic development and also takes care of some of the questions like compacts and racial problems and stuff. It tries to deviate them before they turn into a bigger problem.

RW: And as chair of this committee, what was your role?

FS: To keep the committee in order and have it move along smoothly and make sure we get enough tribal input into our questions.

RW: Now we're going to get to some of the nitty-gritty questions. What is tribal sovereignty, as you understand it?

FS: Well, basically, we're quazi-sovereign. Not sovereignty, because sovereignty is where you are self-supporting. The way it is now, we're about half-and-half.

RW: What is your view on the Indian Gaming Regulatory Act of 1988?

FS: I think it's a good act, but I don't think it was clear enough for everybody.

RW: OK. The aim of IGRA was to ensure that Indian tribes can achieve economic self-sufficiency through gaming. Do you think that it has done more to help tribes accomplish this, or hinder them?

FS: Some tribes it has, some tribes it hasn't. The bigger tribes that have more population it has. For rural tribes, it hasn't.

RW: Ultimately, do you think the state is the appropriate power to make the decision over Class III gaming in Indian Country? If not, who then should the regulatory power reside with?

FS: No. Well, it should be with the tribes.

RW: Can you give me a couple reasons?

FS: The tribes know what they can do and whether they can afford it and what they can do. They also know the population better and they can keep the racial part of it out of the decision. May I say at this point that even if the tribes do get it back, it's the most regulated gaming in the United States. There's rule to it. There's no other gaming where 40% of it goes to economic development.

RW: That's a good point. So, based on your experience in the State Senate, what do you feel the state's reasons are for not wanting Class III gaming?

FS: I think all the tribes want it, but it just has so many organizations in the state that don't want to expand gaming of any type.

RW: And why do you think that is? Why is the state so hesitant to allow Class III gaming within Montana?

FS: I don't know. I've never figured that out. It's just like when we have a bill up there in the legislature, of gaming of any type, the same half-a-dozen people come in that don't have even have [anything] to do with it. It blows the heck out of it.

RW: What is your experience with compact negotiation?

FS: In the gaming? Well, I don't think the state has gone as far as what they can. They keep saying, well, it's up the voters, you know? Well, the voters didn't put deadlines on at all. And I think the tribes ought to be able to negotiate for what they feel is necessary. I'm not a gaming person.

RW: Yeah, you mentioned that you don't gamble yourself, but you're not opposed to it either.

FS: And you take like, North Dakota over there. They put in a casino. Got 350 people working that they didn't have before, plus they got two convenience stores open 24-hrs a day, plus they've got another motel. Plus they've got three or four cafes open again.

RW: Right, so even if the casino just breaks even, at least they're employing people.

FS: And besides, North Dakota, they figure that their sales have increased between ten and fifteen percent from people in the casinos. It's the motels, gas stations, and restaurants. It's not a one-sided deal.

RW: So within compact negotiation, you feel the tribes should be able to put in whatever they deem necessary, but how would you classify the state's response to their requests as far as negotiating the compacts go?

FS: Well, I've got some theories on things, but I've heard some things that shouldn't be in the papers or anything.

RW: OK.

FS: I was in on one negotiation, one compact, they just told the tribal leaders, they said, this is what you're going to negotiate with. If you don't like it, you don't have to have it. That's when they walked out. And they did what they thought was right, what they wanted to do. And then there's so many other laws that it's all one-sided, you know like, one organization can't have more than... You can't do your bookwork within two casinos, you know? Like Flathead, they've got two separate casinos, they keep it that way, and they can't do the books together.

RW: During your term, what compacts were negotiated between tribes and states, if any?

FS: Well we'd negotiate with tobacco and gasoline tax. Negotiated the ICWA, Indian Child Welfare Act, and also the oil and gas compact with the state.

RW: And those were tribal, correct? Tribal compacts?

FS: Yeah.

RW: And so what do you think the good points of those compacts were? What were their downfalls? Were there any shortcomings as far as the state is concerned or any misgivings from the tribes?

FS: Well on the tobacco, gasoline, oil centers, they had the wrong figures. They weren't giving the tribes back what they figured they should be getting back. On ICWA, they were overlooking a lot of Health and Human Services viewpoints. They were shorting both the state and the tribe. In fact, we figured they were probably shorting them anywhere from \$500,000 to a million dollars a year on this but they got payment back for child welfare. Until we negotiated that, the Welfare Department had no legal right to place any of our children. And as for the oil and gas, because of the way it was written back in 1979, there was no oil and gas activity on any of the reservations, and especially Fort Peck because they ended up with two taxes on it with the tribal entities.

RW: Well, that would jack up the prices a little bit.

FS: So we negotiated it. And the Oil and Gas Council, this Johnny Roads wrote the compact and affiliated with the same compact we wrote up within the entire state.

RW: And sir, what tribal affiliation are you?

FS: I'm Sioux. Well, I'm a Red-Shirted Sioux, but I'm Assiniboine.

RW: OK. At the end of the Confederated Salish and Kootenai Tribes of Montana's gaming compact with the state, Governor Brian Schweitzer was quoted in saying, "I'm a friend of Indian Country, but I am not a friend of gaming. I do not support expanded

gaming anyplace in Montana, and I will not support expanded gaming. I have stood in front of the Tribal Council and told them I do not support any expansion of gambling.”¹ Do you think the state, the governor especially, should have such a heavy hand, or a hand at all, in the regulation of gaming in Indian Country while local gaming operations seem to be growing?

FS: Well, he should have some authority in it. There should be agreements and compacts written out. Any compact, when we talk about negotiations, it should be give and take on both sides. I don't know, I've always heard it said, “A perfect negotiation is when both people walk away and say they got took.” I've heard that so many times by our people over here. One has got to give and the other has got to take. The actual negotiations should be done on a state-tribal negotiation. The governor and the tribal chairman like what Belknap tried to do, and the Kootenai Salish. I was in there the day that he said, “If you don't like what we offer you, you don't get nothing.” And with that, they said, “I guess we're done.”

RW: And they didn't renew their compact did they?

FS: Nope. But they set up just like Wyoming was. They can force it in federal court.

RW: Hasn't Montana historically claimed sovereign immunity under the Eleventh Amendment and refused suit from tribes?

FS: But if the state refuses then they can go to federal court.

RW: OK. So is the sole negotiating power now in Montana with the governor or does the state legislature have any say in it as well?

FS: The legislature can have a say in it and force them to negotiate, but they've never been able to get a bill far enough through there to do it.

RW: So if the governor said, “No, I'm not going to negotiate a compact with you, the state legislature could pass something through to force him to?”

FS: Mm-hm.

RW: But that's the extent of the legislature's control over as far as the compacts go?

FS: Yeah.

RW: But your committee would maybe look over the compacts and give suggestions or were they left out of it?

FS: Well, they were left out of everything.

RW: Well, I guess that should be known from the name, “State-Tribal Relations.”

¹ The Associated Press, “Tribes Decline Gaming Compact,” *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

FS: Yeah, but we had some very good non-Indians on there. They kept some wide-open viewpoints on economic development. In fact, they even talked about trying to get the bill through for gaming.

RW: And so, what were they talking about? What came of that discussion?

FS: We the discussion never came to fruition.

RW: It seems that there is a problem in the consistency of the definition of “good faith.”

FS: Well, we’ve got one big corporation here in the State of Montana that don’t want [anybody] else to have gaming except them.

RW: And that would be...?

FS: I can’t say, but they are in Butte.² Of course, they’re happy making their little \$67,000 a month.

RW: Wow. That’s a lot of money.

FS: I think they’re afraid if they open up the machines a little bit, then they’ll walk away with blackjack. My feeling is that blackjack is just as good as anything else. Now back in ’98 or ’99, [they did a survey] out of Minneapolis. And it surprised me what they come up with. Everybody says if you have gambling you have a lot of arrests and all that stuff. Well, they come up with a survey [says] their assaults on wives, spouses, went down [with gaming] because people were coming home broke and mad instead of drunk and mad. Both gambling and liquor are mental problems and if you get gaming it takes away the drinking. That’s what they said and it surprised the heck out of me, you know. Like down in Newtown now, you know, they have less problem with drinking because they cracked down on alcohol so much.

RW: That’s an interesting survey, I’m going to have to look that up.

FS: I never thought of it before until I read that.

RW: So going back to this idea of good faith, what does the terminology “in good faith” mean to you based on your experience in the Montana Senate? Do you think Montana negotiates their compacts within “good faith?”

FS: Well, the negotiations, they negotiate them within their favor. With good faith, it’s gone a lot further than it ever has.

RW: So they negotiate them within the favor of the tribes or the state?

FS: In the favor of the state.

² I believe this is Lucky Lil’s chain of casinos. They recently partnered with a large Montana gas station chain, Town Pump.

RW: Would you say that their idea of good faith is definitely one-sided?

FS: I don't think they think it's one-sided. I think it's like all negotiations, everyone thinks they're getting shorted. The state people have the whole state to look out for. They got their voters to look out for. In fact, when I was in the legislature, I had my people here to look out for. If it worked in say, Polson and everything, then it might work here. Exploit it, you know, because they might have something that we need later on. As you go across the state of Montana, because it's so big, everybody's ideas are so much different.

RW: What do you think the biggest roadblocks to Indian gaming in Montana are today?

FS: Interpretation of IGRA.

RW: Could you elaborate on that a bit?

FS: Well, everybody interprets it a little different. And my interpretation is that we can have anything on the reservation that we had before, OK? Until they took them away from us in 1976, we had slot machines. We had poker machines. We had blackjack, we had all that stuff. And they took it all away from us. We had it.

RW: So you should be able to still have those things.

FS: My interpretation is that we should still be able to have them.

RW: Right, but the state's interpretation is obviously a little different.

FS: Well, they're going by the law that was passed back in '85 I guess it was.

RW: I think it was '88.

FS: It was? I knew it was in the 80s...

RW: So I was reading something and it said that one of the biggest issues facing Montana tribes in regards to gaming is the "lack of a government-to-government relationship with the state on gaming issues."³ Do you think that statement is true or would you chalk it up to something else?

FS: Well, you know, I think it's a pretty good definition. I wasn't going to get into it, but the governor's left-hand man, Hal Harper, is 100% against gaming. When they had that bill in four years ago for gaming, the governor's people come in and supported it. He was out in the hall lobbying against it.

RW: What legislation of that four years ago that you're talking about?

FS: I can't remember. It think it was Lame Deer they had it.

³ Becky Shay, "Tribes Seek Gaming Help From Agency," *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>.

RW: Bixby?

FS: Bixby. Norma. And it was a little blonde-haired gal, originally from Kalispell but she listed in from Butte, she really lobbied hard against it.

RW: Do you think that signing a compact between the state and the tribes would greatly benefit the economy of the tribe? How so?

FS: Depends on the compact and what it's for.

RW: That's true. Do you think a less restrictive Class III gaming compact would benefit the economy of the tribes?

FS: I think it would, but the problem is that we don't have enough people going through here anymore to really pay for a decent building. They got Rocky Boy; they [aren't] making enough money to pay their bills. Fort Belknap, now they're going pretty good because they're getting people out of Havre.

RW: Right. It's kind of like real estate: location, location, location.

FS: And I say the same thing about Newtown. They're fifty miles down the road, but they're going to it. They put a \$5 million attachment on theirs six years ago. Four years ago, they put another \$5 million into their machine ramps and equipment down there. They're making money. I'm on Fort Peck inquiry over here, and we control the Tribal Express which is a tribal store, gas station, and it's got gaming in it. We make sure 52% of that money goes to where it's supposed to every month. And we've had tribal people come in and say, when are you going to hire this guy, going to hire that? I'm afraid not... they're down there to make money for the tribes and that's where they're going. We're paying off \$7,400 in bad debts every month.

RW: That's pretty good.

FS: Before they were going about \$30,000 a year in the hole. That's when I took over. They still have \$40,000 in the hole.

RW: Do you think it should be a higher percentage or do you think 40% is just about right?

FS: I think 40% is pretty good because it takes about, I've never put it down on paper, but I would say 38% for help. Most of it's the building keep up; you've got machines to keep up. So I don't think you'd want to take more than 40%.

RW: OK. So let's move on to tourism in Montana. "In 2006, more than 700,000 foreigners visited tribal lands." And of the top 13 activities of overseas travelers in Indian

Country, visiting a casino is number 12.⁴ How do you see Class III gaming affecting the tourism industry in Montana?

FS: Well, I think it draws but then you draw another parallel here. You know, I think would probably go to Canada, like Newtown. They like to drink and gamble together. A lot of reservations in Montana are dry reservations. You can't have liquor on them. I always felt if we had a good casino, and say Canadians come down to gamble, and they got thirsty, they'd move on down to the bars and gamble. Everybody would gain out of it.

RW: Do you think the casinos on tribal lands should be wet?

FS: Well they're dry now, on Fort Peck. Also Crow and also Rocky Boy.

RW: Wasn't Rocky Boy trying to get alcohol in their casino? Weren't they discussing it anyway?

FS: I don't know if they did get alcohol in it. I haven't stopped there for quite a while. Some of their board was fighting against it, some was pushing it.

RW: I can see the benefits and detriments of choosing it. Next question, former Chairman of the National Indian Gaming Commission, Harold Monteau, is an attorney now working for law offices in Missoula. He believes the National Indian Gaming Commission should "sue the state on behalf of the tribes to force better compacts and economic opportunities."⁵ In your experience, do you think the National Indian Gaming Commission is doing enough to work for the tribes in Montana? Are they helping or hindering?

FS: I think they've done about as much as they can because they're appointed. You can't step on toes when you're appointed. Although, I do it sometimes...

RW: Do you think they should be elected instead?

FS: No, I don't. I think you have noticed, even where you're from, we don't elect qualified individuals. School Boards, County Commissioners, Hospital Boards, any boards we ever elect: friends and relatives. Same as our legislators.

RW: Final question: What is your vision of gaming in the future of Montana? Where do you think it's going to go?

FS: Well, due to the economy and everything, I think it's going to open up in time. People want it opened up so they can draw more [revenue]. It's a money game now. People have realized how much they can make off of this and just about every year, you

⁴ Jodi Rave, "Montana Tribes Mull Tourism Marketing Strategies," *Billings Gazette*, December 3, 2007, <http://billingsgazette.net/articles/2007/12/03/news/state/32-tourism.txt>.

⁵ Becky Shay, "Tribes Seek Gaming Help from Agency," *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>.

know like last year they wanted to open up the, or two years ago, they wanted to open up horse-racing and put it under gaming or the Gaming Commission. Pari-mutuel. I think it will keep opening up. There will be different groups wanting more of this and more of that. I think at my age, I'll probably never see it open up too much more. Not unless somebody like Kootenai-Salish gets in a big lawsuit over it.

RW: Do you think they will?

FS: I kind of doubt it.

APPENDIX C

INTERVIEW WITH LANA PAGE

Lana Page is a Staff Attorney for the Confederation Salish and Kootenai Tribes on Flathead Indian Reservation. The interview was conducted on 11 March 2009 via telephone.

Rebecca Wingo: Before we get started, would it be OK if I recorded this conversation so I could transcribe it and then quote you in my paper?

Lana Page: Yeah. Is the only purpose of this paper thought going to be for your thesis?

RW: Yes.

LP: Then it's OK. I just wanted to double-check for that.

RW: What is your current position with the tribe and how long have you been in that position?

LP: I am a staff attorney here with the Confederated Salish and Kootenai Tribes. I've been in this position, currently, for probably going on my fifth year here, but I was here prior to this also. But I went to D.C. and worked with the National Indian Gaming Association. So I worked there for a year and then I worked, prior to going out to D.C., I worked here also. I was at law school and I worked my summers here interning. I graduated law school in 2001. So about eight years, seven years here.

RW: What forms of gaming do you currently have on Flathead Reservation?

LP: Class II. And Class I at different times of the year.

RW: Depending on...

LP: Depending on if there's any celebrations or there's singing hand game or any of those types that are allowable. We don't have Class III.

RW: Right, we'll get to that. What forms of gaming can non-Indian residents currently run on Flathead Reservation?

LP: None, unless it's for a charitable cause and it's been approved through the tribal council for allowing those types of games being played, which would be like 50/50 raffles, any type of raffles, and they have to submit something to the gaming commission to determine whether those are charitable causes. You know, what's the purpose of those raffles, or 50/50s, or drawings, or different things for minimal amounts of money being played will be used for.

RW: Now, it wasn't always like that, was it?

LP: No. Before the compact wasn't renewed in 2006, prior to that, when we had Class III, tribal member establishments that were incorporated under the tribe were allowed to ask for gaming license and hold so many machines at their establishments.

RW: Can you describe for me the current tribal stance on Class III gaming? What I mean by that is would you like to have Class III gaming and the negotiations just didn't go the way you had [planned]?

LP: Yeah, I mean of course we would like to have it but I believe I can only speak as to what I've seen as I was on the negotiation for renewing the compact; what actually happened there and what the council then was looking for. I can't tell you what the council now is currently looking for but I'm sure it's probably within the same parameters as that. The reason for the compacts failing and another compact being initiated and brought forth is because the tribes often felt that they were making less money on their own reservation under gaming. And so we wanted to assert more control over regulation of that gaming and that was just not going to happen. We wanted to say that we wanted more machines; let the market bear what amount of machines was allowable on the reservation, the payout. As you can tell in the State of Montana, lottery is unlimited amount; it can go up to any amount you can fathom I guess and it can get to that point. But we wanted, instead of being limited to a certain amount of \$1500, you know, for the maximum payout, we wanted to let that be unlimited [and] bear what the market could bear.

RW: Right.

LP: And so that's kind of where it kind of fell apart. The state wasn't willing to move a lot of the amount of numbers. They were willing to go up a couple machines or so; I can't recall the exact number but it wasn't a substantial amount of machines. Because right now under our other compact it was limited to an amount of machines. I mean, it was sort of opened up to however much would bear the market, but it was still a limitation on them. Some compacts you see out there, they can only have 100 machines in one establishment and different things as to that. And with us I guess, with our compact we could have brought more in and just had that approved. It would have shown that we're bringing more in and that type of thing, but it was still a matter of well, let's not even limit it then. Let's keep it open.

RW: Right.

LP: And then with the amount of money also they were willing to come up a couple hundred dollars maybe for that pot size, that pot limit, that jackpot limit, that payout. I think it was at \$1,500, and then they're willing to go \$1,800 or whatever, so it wasn't feasible. It wasn't and we were looking at "let's leave that wide open." What's it going to hurt?

RW: So they were still placing too many limitations on your compact?

LP: Yeah. And I believe that's just how the tribe felt. It wasn't about just that, it was about the sovereignty issue of treating us like a tribe and a separate governmental entity that's on the same footing, and not just treating us as another organization. Somebody had to deal with us in that respect and treat us on a government-to-government

relationship. And it was pretty tense as to the governor didn't even come to any of the negotiations table and talk about it. He sent his negotiation team but we had our tribal leaders there. And so it was contentious at that point, at some point in there, and those kind of stirred a little bit of hard feelings I think, but I think the tribe and the state have overcome those and are working in a better relationship now. But those were just some of the things that were out there then and I'm not sure what the feeling is now, but I'm seeing they're in more working towards the relationship and putting it on a government-to-government basis.

RW: OK, now I was reading an article, it was in the *Billings Gazette* in 2006, about the compact and how it was not renewed. Schweitzer said that he was surprised that you guys did not sign the compact because he was optimistic at the beginning of the day because whatever way he divided it up, you guys would walk away with about \$700,000 but you wouldn't have the amount of regulatory control that would have liked with Class III gaming.¹ Is that about right?

LP: No. I don't believe the amount of money. I'm not sure where he came up with that. It was never a question as to how that was going to be dealt with and I don't believe that was part of the thing. It was just a matter of saying we were going to get more of the increase in the limitations and all that and it was like I said, a couple hundred dollars more in that limit. I think it was about the sovereignty issue and the regulation; being on the reservation, the tribes being able to regulate, you know, what the Indian Gaming Regulatory was intended to do. You know, I think it was the constituents. The Montana constituents here had a lot of pull with what they didn't want to happen. And we have operated Mission Valley Power. Other entities were in a joint cooperative thing and we've regulated non-members here on the reservation. There has never been an issue with that and it was a matter of there shouldn't be an issue with gaming here also. We've shown that we're able to regulate our people here that are under us that fall under the Indian Gaming Regulatory Act in our ordinance and that. We're able to do that in regulating them, therefore we didn't regulate them any less than what was required under federal law or tribal law or state law because according to the compact there was state law that was applicable potentially under that compact.

RW: OK.

LP: It was just a matter of I think the people here on the reservation that had gaming, unaware and unwilling to have the tribes take over that. And talking with the Governor or his staff are different things of doing that, and allowing them to do that.

RW: Right and it's not fair for him to claim that he's trying to participate in a government-to-government relationship when he won't even show up at the negotiations.

¹ The Associated Press, "Tribes Decline Gaming Compact," *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes/txt>.

LP: Yeah, and that's kind of what a lot of the tribal leaders at the time were upset about. They were pretty vocal as to he's not treating us as a government.

RW: Right. Now, he was also quoted at the end of the negotiation, after the negotiations failed, he, Governor Schweitzer was quoted in saying, "I'm a friend of Indian Country, but I am not a friend of gaming. I do not support expanded gaming anyplace in Montana, and I will not support expanded gaming. I have stood in front of the Tribal Council and told them I do not support any expansion of gambling."² Do you think the state, the governor especially, should have such a heavy hand, or a hand at all, in the regulation of gaming in Indian Country while local gaming operations seem to be growing?

LP: And see, that was another problem we were having because if you look on the reservation, we have the Town Pump, all the different organizations that are associated with Town Pump: Lucky Lil's, Diamond Jacks, all the different things that they're coming up with now. They're setting up these separate establishments and hooking them on to their convenience stores. As long as they have that liquor license and all those different things, they're able to allow for so many machines within those establishments as long as they can determine that it's a separate door that comes in to those places. So they're setting those up all over the place if they're able to obtain that liquor or that beer and wine license and getting those. There's no control over how many amounts they're going to allow for them. And it seems like that was the grueling factor in too. They didn't want to touch on any of those types of issues because if you think about it, the family that runs those sits on a lot of different, or one of the ones sits on the board that he has, the Gaming Control Board or different things. So there's a lot of different ties with that, and then just their lobbying effort in order to keep it at that level I guess. It was a matter of saying, Ok, well if you're going to regulate that, then you need to start regulating how many of these different types of establishments you're going to allow to be open.

RW: Right.

LP: And the tribe isn't saying that we're going to expand gaming to that amount. We're just saying, we want to be able to make more than the state's making on our own reservation. And that's not happening. And [they're] trying to limit the numbers we want. You know, we're not even saying that gaming would get that big because it's what the market's going to allow for. And people aren't going to come into Indian Country and invest money, or we're not going to invest money into establishments that we know we're not going to make in return on. So we know we're not going to be the California tribes, the Connecticut tribes, those bigger tribes that are out there making tons of money. So I guess that was something that they just weren't willing to look at. And they were saying, "Public Policy, Public Policy." It was always about Public Policy, this is what the Public Policy is.

² The Associated Press, "Tribes Decline Gaming Compact," *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

RW: I see.

LP: And when we asked could you please show us what the Public Policy is or where are you getting this, it was always, "It's out there." There was never justification for a lot of this stuff. So I mean Governor Schweitzer has been a friend of the Native Americans here in Montana and it's been great, and a lot of people that were on the negotiation committee from the State of Montana were Indians that sat on the committee that he came in with when he first became governor. I think it just went beyond that and it was a matter of saying, but you have to respect a lot of our sovereignty and us being allowed to regulate on our own reservation and think of us as a government and think of us in a tribal-to-state relationship, more so than the other things that are out there.

RW: Now in IGRA, it never really defined who is the State which has become sort of a dispute in several states. If you had to choose between entering into negotiations with the state legislature or the governor, which would you choose? There's been legislation entered into the state legislature asking for more control from the governor, or even something so far as pass the compact through us and we can look at it and approve it. But there's nothing like that now. Most of the power rests with the governor and it doesn't necessarily have to.

LP: Well, see, that's the thing though. If you look at Montana's history in gaming they haven't really been out there really willing to change any of the gaming from laws. There's been proposals to allow for blackjack at one time and it was defeated. There's been a lot of legislation that has been attempted in the legislature and it's been defeated or hasn't even gone anywhere, basically died in committee or before it was even introduced. There's no interest. No one willing to bring it forth and I believe that's kind of what the next option was: looking at what types of strengths we have legislatively by amending some of this and the history of Montana, it just doesn't seem possible probably. Because if you look at each individual constituent within that representative, or that senator, or congressman, each of them is willing to say that this is where we don't want it and so they're likely to go with their local communities as opposed to the governor. We thought it wouldn't be so complicated as it went through the legislature in having that. I don't even know which way would be possible to do that. You know, it seems like a little bit of the legislators now, we're getting more of a showing from the Natives that are being elected out there and it's helping a little bit. I know we just recently had a water compact come through our tribe and that was being pushed, but that's everyone and the wellbeing of things. I think that Montana and a lot of the people in Montana are against gambling because of the negative things that can come along with it I guess. And I guess that would be the things as to, well, it's been difficult either way because I think the governor has to sure watch his Montana constituents also, not just the Native ones, but the non-Native ones that don't want that in their communities.

RW: Yeah.

LP: You know, it just so happens that we're an open rez and are a minority on our reservation so it hurts us to some degree also in that respect of having it go through the

governor. So it's kind of a no-win situation for us either way. But there's only ways of trying to further it, you know as to coming up with agreements or different thing where we can show and try to share how some of the revenue that comes out of that would be spent.

RW: Former Chairman of the National Indian Gaming Commission, Harold Monteau, is an attorney now working for law offices in Missoula. He believes the National Indian Gaming Commission should "sue the state on behalf of the tribes to force better compacts and economic opportunities."³ In your experience, do you think the National Indian Gaming Commission is doing enough to work for the tribes in Montana? Are they helping on hindering?

LP: Very much so hindering. We've always had this issue with the NIGC in regards to...And I've been out on the National Circuit trying to make sure Senators and Congress are aware as to what goes on. The NIGC was established for purposes of helping Indian tribes and the Indian tribes are the ones that fund that department. And it seems like in the last couple years or so that department, the NIGC, has worked against tribes in a lot of aspects. Trying to create regulation that basically would limit what type of machines Class II, Class III, or Class II machines particularly on reservations play and distinguishing what kinds of machines are Class II when case law has already determined that within a couple different circuits in the United States. The Supreme Court has even refused to assert, to take on any of those cases. Phil Hogan in pretty adamant about trying to push for regulations to distinguish that separation, which tribes would ultimately be the losers and lose millions of money, billions of money with regards to that.

RW: With regards to the Class II gaming machines?

LP: Yeah. Because of the lack of their support, and basically saying that the tribes and the states have to compact because of IGRA and they try to, I guess, stay out of it. What they are particularly saying is that it's a Class III for the tribal-state compacting authority. Yeah, they've tended to basically stay out of that and say that it's under IGRA, that Class III is basically for the states and the tribes to negotiate and then that compact goes to the Department of the Interior for review or approval. But the NIGC in every respect though, has tried to step in and say, under IGRA and under the regulations they have the authority to come in and do regulation on Class III gaming...

RW: Some of the arguments as far as IGRA goes, and when it was being passed these are some of the arguments they were making in the Senate I believe, that no matter what, recognizing sovereignty, recognizing the government-to-government relationship, recognizing fiduciary duty, the state still needs to have a say in the type of gaming that goes on within their borders, which would including Indian reservations within that state. So you think that the state should have a say at all in the types of gaming that go on in

³ Becky Shay, "Tribes Seek Gaming Help from Agency," *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>.

Indian Country or do you think that should solely be up to the tribe? Do you think there should be any sort of back-and-forth between the tribes and the states?

LP: Nope. And that was the compromise from IGRA.

APPENDIX D

INTERVIEW WITH NORMA BIXBY

Norma Bixby is a former State Representative and a member of the Northern Cheyenne Tribe. The interview was conducted on 18 March 2009 via telephone.

Rebecca Wingo: For the record, would it be OK if I recorded this conversation so I could quote you in my paper?

Norma Bixby: Sure, that's fine.

RW: Could you tell me how long you served in the House of Representatives?

NB: Oh, I served for four terms, which is eight years actually. They have term limits in Montana and that turned me out as of, well, this last election.

RW: At the time of your legislation, which was House Bill 132 and I believe that was in 2005, at the time who was in charge of negotiating Class III compacts with the tribes?

NB: Who was in charge of negotiating? Actually, the Governor of Montana is the one that negotiates the contracts so actually, all the tribes have to go through him in order to get their compacts approved.

RW: And the state legislature had nothing...no say in the compacts or anything like that?

NB: No, not really, but the bill I did carry was to put into a bill to have the tribes implement Class III gaming and so that bill if it passed, then the tribes would have the law to go back in with the governor to negotiate Class III gaming. Of course, that bill didn't pass because I think the governor didn't support it but he didn't oppose it. Who did come in really strong of course was the Tavern Association. They really didn't want that bill to pass and so they lobbied against it.

RW: And why didn't the Tavern Association want that to pass?

NB: Because they were afraid that would take business away from them and because they always worry that tribes are going to get more money than they will. With gaming with tribes, what the state of Montana doesn't understand and the legislature doesn't understand is that that money does not go into the pockets of the tribe. That money that is generated out of tribal casinos goes to the elderly, it goes to social programs, it goes to education, it goes to health care. So that money, if there ever is a surplus, then those dollars would go into those specific areas. And that's one thing that Montana doesn't understand but when you go to a casino in Billings, MT, whoever has that casino, all the profits go into that guy's pocket, or whoever the ownership is.

RW: Right.

NB: And so the tribes were just trying to be on the same playing field as the state's casinos and get Class III gaming into the tribal casinos. I think we also worked with the State Gaming Association. They were in support of it. In fact, he kind of helped drafted up the bill to assist the tribes in developing a pretty good bill.

RW: Now, part of that legislation said that, or maybe it was a different bill...

NB: Well see, there was another bill that Joey Jayne carried in the last session. Mine was four years ago and Joey Jayne's was in the 2007 session. Joey tried to say almost the same bill, but it still didn't pass and the same reason, you know? I just don't think the State of Montana understood how important tribal gaming is to the tribes. And they just feel...I guess they just want to protect the tribes from themselves is the way I look at it because they think, it's tribal people who go to the casinos and these poor people are on welfare and they're using their welfare money to run the machines and to do the gambling... Another thing that failed my bill was just before I came in, they had another bill that happened to do with something about addiction. And that's another thing that was just before me and they said that gaming machines, or the lights on the gaming machines, the flashing, that causes people to be addicted. And so that's another reason I say that they're trying to save us from ourselves, to keep us from getting addicted, I guess. But that was another reason the bill failed because of that other bill that was just before mine. I don't know why Joey's failed. I really didn't follow it, what Joey was about. For her bill, I didn't really follow it.

RW: Yeah.

NB: But I think what they're trying to do, they feel, the governors also feel this way, that there is other sources of economic development besides gaming.

RW: Yes, but they want you to use your natural resources.

NB: Yeah, they do. They want us to find other sources of economic development but when you go to the legislature to try to get some assistance in economic development, you fight tooth and nail for that. But this is an enterprise that the tribes can help out those people that need a little bit of help. And I'm sure that with our tribe also that we provide incentives for our graduates once they graduate from high school or 8th grade or college, the incentive money comes out of the gaming money. So the money goes to really, really good purposes but I think they just feel that you know, they don't want Indians to get addicted. They don't want to just throw their money away on a machine. I think what they want us to do with our money is to go out into the outer communities to spend our money which we do anyway.

RW: Right.

NB: Because we have no economic development on the reservation, or at least on my reservation anyway. A grocery store, a gas station but no clothing stores or entertainment of any kind. We have to do that off the reservation and so all of our dollars do go into Montana and I don't know if you ever picked up a report... In fact it was a really good report that was done by the Indian Economic Commission. It shows how much money that each tribe puts into the State of Montana and it's millions and millions of dollars. But that's a really good report that shows how much impact tribes have on the economy of Montana. Because most Indian people spend their money. They don't save it. Very

few Indian people save their money and they take their money, get paid, they go to the casino, spend a few bucks there, play bingo, and the rest of their money probably goes to buying clothing, going to Billings, going to Hardin, going to Sheridan, Wyoming from our reservation to spend the rest of their money.

RW: Yeah.

NB: So I just couldn't understand why they always want to save us from ourselves instead of letting us make decisions that we feel, or the tribes feel, that are important to them and how they want to develop their economic base and if gaming is the way to do it, you know, what's wrong with that? That's what I say anyway.

RW: Oh, no, I think I tend to agree with you on that one. I mean, even if a tribal casino breaks even, at least they're providing jobs in an area that has high unemployment rates.

NB: Yeah, really. And it does provide jobs for people and fairly good jobs it provides for the people. So it is contributing to the economic base. Those people that work in the casino take their money out off the reservation as well. The only employment that most tribes have are tribal programs, or the Bureau of Indian Affairs, or the Indian Health Service, and the school system. That is our employment base. And our casino, gee, I think it provides employment for maybe about 20 people who wouldn't have a job otherwise. And so you're right, it does contribute to employment opportunities for the reservation.

RW: Do you think that if they had Class III gaming, I understand that the Northern Cheyenne Tribe has a Class III gaming compact that severely limits their Class III gaming to video gaming and only X amount of machines, do you think if they had less limitations on their Class III gaming that they could pull in people from say Ashland or Colstrip, not necessary Native people, but pull in people from the surround white communities?

NB: Yeah, they sure would. In fact, our casino does pull people from Sheridan, Wyoming. A lot of people from Sheridan come out to gamble and they also love playing bingo and the prizes are pretty good. And so we do have a base, another group of people that are coming into the casino. We also have people stop by, the truckers out there. We really have a nice restaurant there, a very nice restaurant.

RW: I know, I've eaten there.

NB: And so we have people that stop by just to throw a few bucks in the machine and they come from Colstrip, they come from different areas because of the money with some of those video machines. I'm not a gambler so I can't really speak to what it is or how they work. I passed a bill on it and I don't even know how they work! My brother goes in and he tells me about it. People tell me about how they won big. They won thirty or forty thousand dollars. I say, wow, you know that's great but I just haven't got the, well, I'm not one of these people that puts a quarter in a machine and not get anything back for it. But anyway, yeah, there are more people that would come and I know Flathead, if you

can, talk to someone on Flathead because they got in a tiff with the governor over there in gaming.

RW: I've actually already talked to one of their lawyers over there, so...

NB: Oh good. Yeah, because they actually stopped the gaming other than on their reservation. I mean, they just couldn't negotiate with the governor. I don't know if that's changed though. I've kind of lost touch.

RW: No, they still haven't signed a compact. Theirs expired after five years, I think that was in 2006.

NB: Yeah, and so they were just going directly to the federal government rather than going through the State of Montana, which I guess according to the National Indian Gaming law you can do that, you know, if you just can't get anywhere with the state you can go to the federal government. [...] I guess the federal government wants to save us from ourselves too. Or they're afraid of tribes building casinos off trust land. We're in that situation with the Tongue River Reservoir. We have plans to build a casino there on the reservoir and I don't know... I haven't talked to the tribe recently to see how that's going or what the hang-ups are with that, but I know it's been approved by the federal government, it's just a matter of negotiating with the State of Montana again.

RW: I see. I wasn't aware you guys were trying to do one down at that reservoir.

NB: Yeah, we are. They've got the land designated. They've got drawings, really nice drawings of what it would look like and they have a boat dock I guess they're going to build. They want to make it a really nice on the Tongue River Reservoir but it's already gone through the federal government, they've approved it, and now it's in the hands of the state and I know the tribe has been meeting with the governor on that, so I don't know how those negotiations are coming...

RW: OK. Let's go back to your bill and I think part of your bill was trying to clarify the current language and make it clear who gets to negotiate those compacts because IGRA is very loose in its wording on exactly who is the state, whether it's the legislature or the governor. I was wondering, could you explain to me why it's important, especially in Montana, to clarify who gets to negotiate those compacts?

NB: Well, I think we were trying to stay away from the legislature and just have the governor do the negotiations. I think that was the purpose of that bill. The tribes would just negotiate with the governor on their compacts instead of having it run through the legislature. The legislature is so conservative anymore, you know. It's very difficult to get anything through there, especially if it has anything to do with reservations and Indians. They are getting better, but I think they're still, just looking at some of the Indian legislation, it's just so difficult. Or anything for poor people. Corporations or energy companies, they got a free reign, but anybody else with real human needs it seems that this legislature does not like helping people out very much. So just clarifying that

the governor would be the one doing the negotiating would have to go through the legislature.

RW: And so, I assume because the bill did not pass, the legislature didn't want to hand over that complete control to the governor?

NB: Yeah, they don't want to do that either.

RW: And so what's their role now? What's the legislature's role now?

NB: Well, their role now is that you have to have a bill. If it's a compact, it has to go back to the legislature.

RW: OK, so the governor comes up with a compact.

NB: Yeah, he negotiates and then it has to go back through the legislature for approval.

RW: Do they alter it at all or...

NB: Any kind of change. Tribes can do the same thing supposedly as the non-Indian casino but you still have to have a compact to do that, and it's got to be approved by the governor and then it's got to go back to the legislature.

RW: OK. And so what would you say the climate in the legislature is towards Indian gaming?

NB: Well, I think the climate is still the same. I think if we ever get a Democratic... well, I take that back. The Democrats comes from urban communities with lots of casinos, so some of those Democrats did vote against the bill; financially vote because of the Tavern Association in their particular districts. So they didn't really support it and so probably, I think that if a person could ever get anything past the Tavern Association, it might a good chance for a bill like that. But I think the way it is right now, the climate isn't good at all. And I don't think there was a bill this year, so I think everybody's saying, "Well, we've tried twice so..." I guess we just can't seem to get it through.

RW: OK. What happens now? Is the legislature's role in gaming, Class III gaming compacts, is approval?

NB: Yeah.

RW: OK. And if they said no, what would happen? It would go back to the drawing board?

NB: It would go back to negotiations again. But it's like our water compacts. You know, those are really, really tough bills to get through the legislature. It's not the same, but the same process applies for those as well. They have to go to the governor, negotiate, then it goes back to the legislature for approval.

RW: Now, at the end of the Confederated Salish and Kootenai Tribes Class III gaming compact with the state, Governor Brian Schweitzer was quoted in saying, “I’m a friend of Indian Country, but I am not a friend of gaming. I do not support expanded gaming anywhere in Montana, and I will not support expanded gaming. I have stood in front of the Tribal Council and told them I do not support any expansion of gambling.”¹

NB: Yeah, that’s his stance. That’s pretty much what he feels. He’s friend of Indians, but with limits. He still doesn’t believe, you know, that Indian tribes should be allowed to determine their own destiny.

RW: Right.

NB: You know, and they’re sovereign nations so he has his heart beating with the sound of the drum, but only as he perceives the drum should beat and not what the tribes feel is best for them and help them with their endeavors. Even if it’s gaming, no matter what it is, you know that’s the kind of governor I would like to see in Montana really is someone that would really truly work with the tribes as sovereign nations and support them. And no matter what they want to do, if they think this is good for them, provide that support, provide that encouragement, provide those dollars in the budget. But he’s just one of these governors, “Do it my way or sometimes the highway.” Which is really sad, because I thought he was a pretty good governor and he is. He’s a good governor; he’s good for Montana and I’m glad he is the governor, don’t get me wrong. I like Brian and I think he’s a good governor. He’s good for Montana, but he also needs to really, I guess, practice what he preaches.

RW: Right.

NB: You know, and he really needs to support the tribes and let the tribes take the lead role and support them and have his department support: provide technical support or even dollars to help the tribes accomplish what they’re trying to do on the reservations – even if it is casinos and gambling.

RW: Do you think that tribes, as sovereign nations, should have the state regulate gaming or do you think that should be something that is completely up to the tribe, as long as they comply with federal regulations of gaming?

NB: It should be up to the tribe. All our lives, Indian tribes have had to jump through hoops from education to religion; it’s always jumped through a hoop. Another one more step, one more step, one more step. And sometimes this stuff takes so darn long to get through the process that by the time you’ve got a change in leadership, then you’re on to another tangent. Getting an idea and seeing it through before our legislature fortunately is on four-year terms which helps a lot. But still, your leadership is changed every four years and so you don’t have [any] continuity there. You get one tribal president who thinks it’s a great idea and the next one doesn’t think it’s a great idea. You never seem to

¹ The Associated Press, “Tribes Decline Gaming Compact,” *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

get ahead because you're always waiting for someone to jump through a hoop to get something through. I think we could go a lot further if we just eliminate some of the barriers, some of the red tape that creates these problems for tribes.

APPENDIX E

INTERVIEW WITH VIRGIL HENDERSON

Virgil Henderson is a Compliance Officer for the Chippewa Cree Tribe on Rocky Boy Indian Reservation. This interview was conducted on 19 March 2009 via telephone.

Rebecca Wingo: For the record, would you be OK if I recorded this conversation so I can quote you in my paper?

Virgil Henderson: You can do whatever you want I guess.

RW: What is your current position with the tribe and how long have you been in that position?

VH: I am a Compliance Officer for the Chippewa Cree Tribe. I've been in this position for ten years. I do the backgrounds and the fingerprints for the tribal casinos.

RW: I see. And what forms of gaming do you currently have on Rocky Boy? You have Class III?

VH: We're Class II and III.

RW: Can non-Indian residents have any machines on your reservation?

VH: No, they can't.

RW: Can you please describe for me the current tribal stance on Class III gaming?

VH: You know, this is kind of new to the tribe. It's basically like a more or less a trial basis right now. We've only been doing it for a couple months. We got a compact with the State of Montana, every reservation in Montana does. The compact with the state is where we're only allowed so much gaming, payouts. Our payout is \$1,500 and we're only allowed in one facility 350 machines. We had 350 machines in our big casino, Northern Winz, but as of date we're probably back down to about 100 machines.

RW: And why is that?

VH: We kind of got into business with Bally, Inc. down in Las Vegas and I think, realistically, looking at the prices of the machines and the revenue that we're bringing in, we really couldn't handle that amount. So we cut back. And then we got another casino in Rocky Boy and the name of that is the Bear Paw Casino, which we only have 64 machines. That's the size of the building and [those] are all Montana games.

RW: And so the Bear Paw Casino only has Class II?

VH: Yep.

RW: OK and so it's only the Northern Winz Casino that you got into business with Bally, Inc.?

VH: Yep.

RW: OK. Do you think it was a wise decision to take an outside – well, are they investors?

VH: What do you mean? Are they invested?

RW: Are the investors or are they just contracted?

VH: Basically no, it's a company that owns machines and this is like a trial basis for us to go that route since they were willing to bring machines in and go in a percentage with us but that didn't work out very well.

RW: Oh, OK. Do you think they've been treating you guys fairly as far as the machinery goes?

VH: Well, I don't know. It just depends on the people in Montana to me, what they want to see like Las Vegas-style gambling or our gaming in Montana: what we're allowed and what we're not allowed.

RW: Right. I've been hearing things from a couple different reservations that maybe Governor Schweitzer has not been entirely fair in negotiating Class III compacts.

VH: Well, I think that's what everybody's saying right now. Matter of fact, this morning I was kind of looking at a Montana Tribal Gaming Association, the last meeting they had was I think in July of '06. Then there was a lot of discussion on Indian gaming on our reservation. I for one, our casino here, the Northern Winz Casino in Rocky Boy here, is we employ everybody that puts in an application. If we can employ them, we employ them whether they're from the reservation or not.

RW: How many employees does that casino have?

VH: How many we got that's not enrolled? I don't have that figure right off-hand. When we cut back on our machines we cut back on employees. A lot of people have different mixed feelings about the gaming, especially Las Vegas-style gambling. I've been to Albuquerque, to Vegas, just to different tribes in different states. Their gaming, they [have] the Class III gaming and I think it really helped their revenue and their employment on the reservations.

RW: Yeah, it's kind of all about location though, at the same time.

VH: Yeah, you got to look at that too and I thought that basically Hwy 2 coming through Havre, that's kind of a main highway and you think you'd get more tourists. In the summer time I guess we do fairly well. There's a lot of tourists that come through and stop and game. I think with a hotel we'd probably do better.

RW: Make it more of a resort?

VH: A resort.

RW: Yeah. Now, do you think that if the Class III gaming compacts that the state negotiates with you guys, do you think that if they decreased the limitations on the number of machines, the types of machines, and the maximum payouts that that would really draw in more people?

VH: I really do. I believe that because of the fact that I've been to a lot of facilities where the jackpots – progressive jackpots are high and you go to these different facilities in different states and you can see the amount of people that play the games. And I think that basically if you're a gambler, that's what you go after.

RW: The big prizes.

VH: Yep.

RW: At the end of the Salish and Kootenai Class III gaming compact with the state, Governor Schweitzer was quoted in saying, "I'm a friend of Indian Country, but I am not a friend of gaming. I do not support expanded gaming anyplace in Montana, and I will not support expanded gaming. I have stood in front of the Tribal Council and told them I do not support any expansion of gambling."¹

VH: Yeah... I think the tribes expected more from Governor Schweitzer on that.

RW: Do you think that the state, the governor especially, should have such a heavy hand, or a hand at all, in the regulation of gaming in Indian Country while local gaming operations seem to be growing?

VH: To me, I look at Lucky Lil's. If you look at Lucky Lil's and the State of Montana, that's all it is, is Lucky Lil's. They control the game, to me.

RW: Yeah, and they're out of Butte, aren't they?

VH: Yep. And Indian gaming [isn't] even near what they got in gaming. And I think the governor should have a hand in it, saying if we can or cannot have this; not the Tavern Association.

RW: OK and the Tavern Association is Lucky Lil's?

VH: Yep.

RW: Now, as sovereign nations, do you not feel that maybe having state regulatory power in Indian Country over gaming is a violation of a government-to-government relationship?

VH: I do.

¹ The Associated Press, "Tribes Decline Gaming Compact," *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

RW: So obviously the law mandates that you negotiate with the state if you want more than Class II gaming. If you had to choose between entering into negotiations with the state legislature or the governor, which would you choose?

VH: Hm. That's a tough one. You know, like I said, it's kind of mixed feelings. The seven tribes in Montana, they kind of formed a little association and we meet every now and then and talk about this gaming, lobbying the state for more gaming.

RW: Is there a name to that alliance?

VH: Well, what I could do is give you an individual you could contact and they're right there in Flathead. She should fill you in on everything that's going on in the state with gaming.

RW: Oh, OK. That would be fantastic. Now, I was reading something and it said that one of the biggest issues facing Montana tribes in regards to gaming is the "lack of a government-to-government relationship with the state on gaming issues."² Do you think that's true or would you chalk it up to something else?

VH: I think it's pretty much true.

RW: What are some other roadblocks to Indian Gaming in Montana today?

VH: Basically, that's what I'm looking at. Basically, state-to-state.

RW: Right, because the state doesn't treat tribes as equals?

VH: Yes, I believe so.

RW: What's your vision of gaming in the future of Montana and in particular, Rocky Boy?

VH: You know, I think myself if we had Las Vegas-style gaming in Montana on the reservation, it would help the tribe in a lot of resources and in a lot of different ways – fund a lot of our own programs.

RW: Or pad some programs that need padding because I understand a lot of programs on the reservation are kind of bare-bones when it comes to funding.

VH: That's true. Like I said, I never lived on the reservation for 24 years. After I graduated from high school, I went out and I worked construction. I lived in Vegas, Colorado, Boise – I just chased the construction work. But when you start getting older, you're looking to settle down and that's why I moved home. And ever since I moved home, I've been with the Chippewa Cree as a Compliance Officer.

² Becky Shay, "Tribes Seek Gaming Help From Agency," *Billings Gazette*, November 3, 2006, <http://billingsgazette.net/articles/2006/11/03/news/local/35-gaming.txt>.

APPENDIX F

INTERVIEW WITH KERMIT HORN

Kermit Horn is a Tribal Councilman on the Fort Belknap Indian Reservation and a member of the Assiniboine Tribe. The interview was conducted on 25 March 2009 via telephone.

Rebecca Wingo: Would you mind if I recorded this conversation just so I could quote you in my paper?

Kermit Horn: Not at all.

RW: Can you please tell me what your current role is for the tribe and how long you have been in that position.

KH: OK, I've been a member of the Fort Belknap Indian Community Council. I'm the Assiniboine River District Representative. Our reservation is broken into the River and the Mountain Districts, and then I represent the Assiniboine from the River District. Do you need a breakdown of the council or is that sufficient?

RW: No, that's good enough, thank you. And you currently have Class III gaming in your casino?

KH: Yes we do.

RW: As of 2007, right?

KH: Yeah.

RW: Do you feel that Class III games are a big pull for people to come to your casino? Have they brought in more people than say, solely Class II games did?

KH: No, I don't think the Class III games that we have at our casino are a big draw because, well, first of all, can I ask you where you're from?

RW: I'm actually from North Carolina, but I go to school out here.

KH: OK, the reason I don't think Class III is a big draw is because here in Montana we have to negotiate a compact with the State of Montana and the Class III games that we are allowed to run are only video poker and video keno. Our payout is \$2000. It's not the Class III gaming that tribes such as the Mashantucket Pequots; they have wide-open Las Vegas-style gaming. Ours is nowhere near that level.

RW: Right, you guys are only allowed 400 Class III gaming machines, is that correct?

KH: Yes, on the premises.

RW: What surrounding communities does your casino pull in from?

KH: Right now we're drawing people in from up in Malta, which is about 42 miles to the east. And also Havre, which is 45 miles from the west. We're located right on Hwy 2 which is the major highway on the highline up here so we do get traffic on Hwy 2. And

also Route 66 is the state highway that comes through Billings, MT which is approximately 212 miles south of Fort Belknap. We're kind of in the middle of an intersection of East and West, North and South.

RW: A pretty good location.

KH: Pretty good location, yeah. If we were able to offer the payouts that other tribes do, we might be able to lure more people in. More people would stop on their way to Glacier Park or something.

RW: Can you please tell me more about the compact that was negotiated? I understand that you have 400 Class III games with a max payout of \$2000, but what else is important about that compact?

KH: Well, we have the ability but we don't actually have 400 machines. Our casino that we built has 97 games in it but that's a mixture of Class II and Class III. And Class II – Class II is like the bingo-type games. I think the majority of the games in the casino are Class II actually. They have the unlimited payouts. You know, I don't know the exact amount; our gaming manager probably would be able to tell you the number of Class III machines that are actually in there. Class II are kind of the good draw right here right now.

RW: Because the payout on those is not limited?

KH: Yes, it's unlimited payout.

RW: Where do you feel in the negotiations the tribes had to – or maybe you don't feel this at all, so correct me if I'm wrong – where do you feel the tribes gave up too much and the state not enough?

KH: Well I feel we should have been able to determine our payouts based on the market rather than having to be stuck with \$2000. So it should have been market driven in my mind and also the number of games. I don't think we should have been limited on the number of games. If we were ever to get say a Las Vegas-style gaming agreement, we could be a destination resort type of place. To be limited by 400 games might be a hindrance if we were able to do that.

RW: I have heard from other tribes that Governor Schweitzer is not the most accommodating individual when it comes to gaming compacts. Do you feel the governor is negotiating compacts within good faith?

KH: No, I don't believe so.

RW: Now, what about your particular compact negotiations makes you say that?

KH: Just the limits on the payouts. And we're not allowed to do the slot machines and the blackjack type of games that draw people to Las Vegas or to the Foxwoods Resort Casino. Only limiting us to poker and keno is a real hindrance.

RW: OK, and how was it working with Schweitzer on this compact? Was he present at all the negotiations or did he send in his negotiation team?

KH: He set up what he calls his GAIN Counsel. It's G-A-I-N. I don't know what it stands for – Governor's – some kind of counsel he put up there. I don't know exactly what GAIN stands for but they were the people that we negotiated with and they weren't able to provide a yes or no answer. We would propose something to them and they wouldn't have the ability to truly negotiate. They were limited by what the legislature said, the legislative body said. I don't think it was a true government-to-government relationship; you know, Schweitzer to us.

RW: How much of a hand does the state legislature have in those compacts?

KH: They're the ones that dictate the payouts and the number of machines and they're the ones who do not allow us to have any games that are not provided by the local bars and casinos.

RW: So it's more the legislature that's limited you rather than the governor acting as the executive?

KH: Well, in a way. The reason I say that is because the legislature here said that the off-reservation casinos can only pay out \$800, but the governor was able to allow us to pay up to \$2,000. Why \$2,000? Why not, if he was able to go from \$800 to \$2,000, why couldn't he go from \$800 to \$800,000? He seemed to just pull a figure out of the air with no solid reason behind that \$2,000 payout. If he has the ability to go to \$2,000, why doesn't he have the ability to go to \$100,000?

RW: OK, I see. And so the pull to go to a tribal casino is that their games can payout more than what is allowed currently in the State of Montana?

KH: Yes, but it's not much. It's \$1,200 difference. It's \$800 as opposed to \$2000. That's not a big draw for someone to come, say, from 200 miles away to play our machines if they can only win \$1200 more than what they can win at their local casino.

RW: Should the tribes have to negotiate compacts with the state? Should the state have any say at all in the types of games conducted in Indian Country?

KH: I don't believe so. We're governed by what is called the National Indian Gaming Commission. I think we should be allowed to negotiate directly with the feds – federal government – because some states such as Montana are very, very anti-Indian, I guess.

RW: Yeah, I've noticed that.

KH: We live in Montana where it's kind of the Old West mentality out here. Tribes are in such poor financial shape that I think that we deserve an advantage at least to get us back up to some type of a par. Our reservation suffers from 70% unemployment, you know, and you have all of the social problems that were we able to make more money off of our casinos like the Pequots do, then I think we'd be able to solve a lot of our social

problems. We'd be able to create jobs. We'd be able to create youth programs. We'd be able to build new nursing homes for our elderly. Right now we have to send our elders to off-reservation nursing homes just because the economy on the reservation is so poor.

RW: Now, I understand that 40% of the profits from the casino must go back to the tribe. What kind of programs are currently being funded by casino money on the Reservation?

KH: Well, right now, we just opened our casino last June so we're still in the payback stages. Our project, our casino was funded by the Chickasaw Nation out of Oklahoma so we still have to pay. We're not making any profit I suppose because we're still in the payback, you know?

RW: OK. I didn't realize that the Chickasaw were the ones that funded you guys.

KH: Yeah, we went to the Chickasaw Nation and they came up, built our building, set us up with vendors and stuff like that and we made an agreement. We're set to pay them back over a three-year timeframe which is real short, but we're hoping to do that just to save on having to pay on huge interest dues.

RW: So there is currently very little hope of any change in IGRA, so which party would you feel negotiate a fairer compact: the Governor or the state legislature?

KH: I think the governor would be a fairer negotiant and my reason is because the legislature, each one of them has a specific district they represent. The tribes here are only 7% of the state, so we're up against the non-Indians who don't want to see the tribes get the upper-hand on them so they're not going to give us the ability to become financially secure like the other tribes who have the wide-open gaming compacts now. For instance, I believe it is in Minnesota that all the tribes there in Minnesota/Wisconsin are able to offer the gaming that enables them to become financially secure. It's just the environment here in Montana. They don't want the Indians to become successful.

RW: Where do you see the future of gaming, specifically tribal gaming, in Montana going?

KH: Well, I think we're kind of stuck with what we've got here. Because the tribes only represent 7% of the population of the state, we're never going to be able to convince the non-Indian legislators that we should have an advantage over all of their constituents I guess.

RW: What are the future plans for Fort Belknap Indian Community? Do you guys plan on expanding or is it just too soon to tell?

KH: It's a little bit soon to tell. We're just going to kind of feel it out here, see how this goes. It's just too soon. Right now we don't have a big, huge advertising dollars, so we're slowly getting our billboards out there. We'd like to get more electronic, more flashy signs. They alert people to what's there so people will know the casino is here.

RW: Right, something along the highways?

KH: Yeah. Once they get here and they're actually in and sit at the casino, they're very happy. It's a nice, alcohol-free casino. Tuesdays, I think we have Senior Citizens Day where the seniors come in and they have free soup and sandwiches throughout the day. One Wednesdays I believe we have Ladies Night where the 50 first ladies through the door get \$10 to play in the machines and I think there's a Men's Night of the same thing. Periodically they have specials for a flat screen TV, a washer and dryer, a four-wheeler I know they had, so there are really good incentives for – Oh and Friday night they had a drawing for the big screen, the parking lot was just packed.

RW: Oh, really?

KH: The word of mouth is really spreading and people from Malta are coming, from Havre, as far away as Great Falls and we get some Canadians stopping in here so it's increased our pull, our customer base. We're lucky to be right here on the intersection of Hwy 2 and 66.

RW: Yeah, that's going to be a good spot.

KH: Right now they're trying to make the Port of Turner, which is just north of us, a 24-hr port. So if that becomes a reality, then we're at the crossroads of Hwy 2 and 66; well, it connects to another highway north of Harlem that connects into Canada. That's really a junction-bunction between east and west, and north and south. So I'm sure we'll see more and more people going by.

RW: That will be good.

KH: Our future plans are, I myself have been pushing the casino for the last few years and my goal is to start a dialysis center and a nursing home here or a long-term care center for our tribal members. What I would like to see is for the casino to become successful and to use the revenue from the casino to help finance a dialysis and nursing home center. So once we start making money, then that will feed right into the next project.

RW: Yeah, and those are all good and necessary things too.

KH: We're also going to create a stop, a truck stop here. Say at the junction, it would be logical to have a truck stop and maybe move the casino over to the truck stop just across the street. The nearest truck stop is in Shelby, which I think is 120 miles to the west and I'm not sure where the nearest truck stop is to the east and to the south is Billings which is 200-some miles. I think a truck stop would work good here. That's one of our future plans. And also we want, as the casino makes money in some of our other branches we'd like to get more into youth prevention activities for our kids up here. Where we're located, there's really not a whole heck-of-a-lot for the kids to do here. Our show house in Harlem closed down. We have some recreation centers but we don't have the money to keep them open as much as we'd like. We'd like to be able to keep them open Sunday through Thursday until maybe 10:00pm and weekends maybe until midnight just to keep

our kids occupied and out of trouble. So that's one of our goals also for when the casino starts producing some good proceeds here.

RW: Well it sounds like you guys have it.

KH: We have a lot of needs here; we just don't have the money. The casino is one way to generate some money.

RW: And ultimately, you would like to see the state raise their limitations off of tribal gaming and let you guys decide for yourselves what the market demands.

KH: Exactly. I think we've been going uphill for the last 120 years. We tried to negotiate with the former governor back in 1994 and we said, you know, we need a level playing field. We've been going uphill for the last 120 years. His statement was, "I am not responsible for my forefathers' actions." Well, that's kind of the mentality we're up against. But I think the casino is a way to generate, to keep some of the money on the reservation because if we didn't have a casino here, our people, they're not going to quit gaming. They're just going to wherever the gaming facilities are like Harlem. It's the nearest town; it's three miles away. It used to be if you go there any hour of the day then there would be a tribal member sitting there gambling and we don't see anything back from that. At least with our gaming at any facility here, the dollars stay here. They turnover once at least and right now I think we employ about 16 tribal members at the casino.

RW: Sixteen?

KH: Yeah, it's a double bonus. The money turns out at least once and it creates some employment.

RW: That's excellent. So what do you think would have to happen to have those limitations lifted? As of now, Governor Schweitzer does not support expanded gaming anywhere in Montana, so what do you think would actually have to happen in order to get all of those limitations raised off of Class III gaming?

KH: I think we might have to file suit against the state and to go directly to the federal government and try to negotiate a compact with the feds. I don't think the attitude is ever going to change here in Montana about giving the Indians an advantage.

RW: Right, and in order to do that, you would have to go directly to the Department of the Interior, correct?

KH: Yes, ma'am.

APPENDIX G

INTERVIEW WITH MICHAEL MANSON

Michael Manson is a Special Counsel for the Northern Cheyenne Tribe. His work with the tribe has mostly dealt with the negotiations regarding some off-reservation trust land at the Tongue River Reservoir intended to be placed into trust for the sole purpose of gaming. The interview was conducted on 28 March 2009 via telephone.

Rebecca Wingo: First of all, can I record this conversation just so I can quote you in my paper?

Michael Manson: Yeah, that would be fine. I'll try not to say anything too crazy.

RW: What exactly is your role with the tribe, the Northern Cheyenne, and how long you have been in that position?

MM: Well, I have been Special Counsel to the tribe since July 2005. I currently don't have a contract with the tribe but I hope that's going to be renewed. There was discussion of doing that. I know the Gaming Commission wanted to do that. The primary work that I've been doing for the Northern Cheyenne Tribe is to secure the right to develop a casino at the Tongue River Reservoir on trust land which is 15 miles south of the reservation boundary, 25 miles north of Sheridan about. There's been a lot of aspects to that but we worked to get that through the federal system, which we were successful in October 28, 2008. Anyway, so that's what I've been working on mostly.

RW: OK, so that's fairly recent then, that approval. I really don't know much about – well, I've heard some things about the casino that they want to build at the Tongue River Reservoir, that they're talking about a boat dock and that kind of stuff – but I don't know much about it, so I'm hoping you'll be able to fill me in. Now, you've gone through the process and you've gotten that trust-land approved for a casino?

MM: Yes, by the Secretary of the Interior. He made a determination. In the Indian Gaming Regulatory Act, you're not really supposed to do gaming off the reservation. To do that, the Secretary of the Interior has to make what's called a two-part determination of suitability for gaming. And so you go through what's gotten to be a longer and longer process – it's an amazingly long process that the tribe had to go through, the hoops they had to jump through on a piece of land that...

Well, there's no opposition to this. No one stepped up and said, "We don't want this casino to be located on the tribe's trust land there." So it was odd that they made us jump through so many hoops, but anyway, the Secretary in any of the situations, the Secretary had to determine that gaming on that land would be beneficial to that tribe and not detrimental to the surrounding community. To do that, there [were] a number of things that had to be done and one was to complete either an environmental assessment under the National Environmental Policy Act or Environmental Impact Statement. If the project was big enough, there'd have to be an Environmental Impact Statement, but this project was not that big, would not be that big. So it just needed an Environmental Assessment.

It was the most complicated Environmental Assessment I've ever dealt with. I think, and saying a little bit more about my background, when the elder George Bush was president, I worked in the Department of the Interior in Washington, D.C. in the solicitor's office on environmental and land issues. I've seen a lot of Environmental Assessments; I've seen a lot of Environmental Impact Statements. I know basically what you have to do to complete those, and this was just astonishing the amount of work that they made the tribe go through over a fairly small building that would only have, we're talking, 350 gaming machines. We're not talking about a bingo hall or anything of that magnitude, but their plan is to have poker tournaments. Anyway, they went ahead and the EA, Environmental Assessment, was completed and signed off on with no significant impact on the environment by the Assistant Secretary of Indian Affairs back in March a year ago. And then things dragged on and dragged on to get the determination that we finally got in October.

A little more about the building, there would be a restaurant, a deli, at this point not a marina because there's already a marina down at the State Park which is only about a mile away. And there wouldn't be much of a venue for entertainment, so it's not that big. The market is basically Sheridan and surrounding area and the traffic to the park which is seasonal. It's basically from May to September. It is a very popular park, but it's a ghost town half the year anyway.

RW: As is much of Montana.

MM: Yeah, that's right. That is true, so that's a little bit about the facility. Again, the Secretary made that determination, the Secretary of the Interior. The governor has not yet concurred in the determination. One of the issues with this last administration there used to not be any deadline. Once the Secretary of the Interior said, "OK, I've determined the land is suitable for gaming," the governor had however long it took, or the tribe, I should say, had however long it took to persuade the governor to concur in that. Because this is a two part determination made by the Secretary, but under IGRA it had to be concurred in by the governor of the state.

RW: Right.

MM: So Governor Schweitzer indicated that he didn't really have any problems. His environmental people have looked at this, Montana DEQ and others have looked at it. Fish, Wildlife and Parks supports the project and they're closest land owner. They're the adjacent land owner just about.

RW: And they support the casino, the Fish, Wildlife and Parks?

MM: Yeah, they support that, but he didn't, he hasn't concurred yet. I know he's busy with the legislature; they're in session, so we're still waiting for that. But the thing is in the last year of this administration, they added some new regulations that say if a governor doesn't concur in the Secretary's suitability determination for gaming within a year, then it expires.

RW: What?

MM: So we have until October 28th. Now, you can then ask for a six month extension, so if the tribe by October 28th says, “Well, the governor hasn’t gotten around to this, we need another six months,” then OK, they’ll get until April, right? It’s like, well, wait a second. What’s changed? Nothing. If nothing has changed, then why wouldn’t it still be suitable for gaming? Why wouldn’t there still be a benefit, you know? In a year, what’s going to change? Now I don’t get it. This to me is incomprehensible. I can see then saying five years from now there might be changes where there’s no real benefit. For example, if the tribe pursued, and I have no idea if they will, but if the tribe pursued, for example they behaved more like the Crow Tribe and went out and mined coal, you might be able to say after that, “Well, you know, there’s employment from that and there’s income from that. We don’t need the casino that much.” So the benefit [then] is not very significant, but that’s not happening. It isn’t going to happen by October 28th. Anyway, it’s a little aggravating, but they’ve done that and it might get changed in this new administration. They might say, “Hold on. We don’t really think a year makes any sense.” But from my knowledge, the tribe hasn’t really made that pitch to the Department of Interior to say, “Hey, could you new guys, Secretary Salazar, could you roll this back?”

RW: Right.

MM: It’s a little early to try and do it because there’s no Assistant Secretary for Indian Affairs yet. It’s supposed to be Larry Echohawk, former Attorney General from Idaho, but so far his name hasn’t been – well, at least as of a couple days ago – his name hasn’t been put forward to the Senate, which has to approve the appointment.

RW: So who made this new rule that says that if the governor doesn’t concur within a year it becomes void?

MM: Well, that was a rule that Secretary Kempthorne wanted – Secretary of the Interior Kempthorne.

RW: What was his reasoning behind that?

MM: Well, it didn’t really make sense to me why it was a year. As I say, I took the point of his example of something that could happen in five years. I understood that, but I never understand why a year, a year and a half made any sense. So I never got the reasoning for it. We argued about it and said this isn’t appropriate. I mean, if you’re going to make this determination, make us jump through all the hoops you did for the Environmental Assessment – I mean, my God! We had to go out there and look for some endangered or threatened plant! You’ve probably been out to that site. I mean, they’ve got one tree on that that’s ten-feet tall and a bunch of sheet grass and what-not. There’s no endangered plant or whatever you’re worried about to be seen. It’s on a reservoir. It’s the biggest coal mines in the country within a few miles. There’s coal bed methane drilling to the north. I mean, the whole idea that there were environmental issues,

especially since no environmental groups were bringing up any issues, right? The Fish and Wildlife Services wasn't bringing up any issues. The only thing they brought up is, "Well, there's going to be more traffic on the roads between the highway and the casino, so we think there will be some roadkill." OK, and that's probably true and then bald eagles will go and probably feast on the roadkill.

So we agreed that the staff at the casino, on their way to and from work, would – certain staff would be assigned, probably security – would pull off, pull on their gloves, and pull off any carcasses on the road so that the eagles wouldn't get run over. Now, that's not much according to Environmental litigation, you know?

RW: Right.

MM: And there were a couple other little things that we had to do, but they were things we agreed to readily and didn't take really all this time and all this work that they made us do. And when you're doing all this work to say now this is only good for a year, year and a half, it's blatantly unfair and in fact, something that they don't do to anybody else. I mean, if you're planning to build a mine somewhere, they don't say, "Well, sorry. We're going to say it's OK for a year, but after that you're going to have to re-do it, you know, get more approvals."

RW: Right, because mining is something that they want.

MM: Yeah, well, that's part of it. So yeah, I'm kind of rattling on here.

RW: No, that's OK. You're enlightening me. So what work have you done since with Governor Schweitzer? Have you pressed him to approve of the Secretary of Interior's determination?

MM: Well, I'm not sure whether the majority of the council, but definitely representatives of the council have met with him in January and asked him to move forward on this and he asked for some more time to think about it. They said that was OK. Again, I think that has to do with – Governors get very, very busy when the legislature is in session. They don't have much time to think about anything else except the bills that are being considered and what they're trying to get passed and budgets. Especially in a crisis in a time like this, so it's understandable to wait until he's done with the legislature which is the end of April. So that's where we're sitting.

RW: OK.

MM: We're giving him the benefit, you know? But I will say I do not see any possibility of him finding any detriment to a surrounding community from this. I mean, the studies we've done, the work we've done with his department on it, there's no hint of any problem or any negative impact on anyone. I've talked about this with him a couple times and he's expressed a concern that it won't make that much money for the tribe and I have two answers to that: One is that we've had a study done that indicates that it will make some money and considerably more than Charging Horse, certainly over a million

dollars a year after the first year. But the other thing is, even if it didn't make money, it would employ over 100 people.

RW: Right.

MM: When you're that impoverished, it might not matter to a tribe that is already doing well with a large casino or something like that where almost everybody is employed, but at Cheyenne? A hundred people? That is huge to put that many people to work at once. So, I've had that discussion with him and I hope he will move forward on this.

RW: So you've done some studies that have predicted that after the first year it will be making a million dollars a year?

MM: Well, over a million. I don't have that in front of me. I don't really have the details of it. That would be up to the tribal council if they wanted to share any of that.

RW: OK. So the current compact with the Northern Cheyenne allows for 400 machines of Class III games with a max payout of \$2,000. Is that correct?

MM: Yeah, that's right and it wasn't that long ago that it was only \$1,500. We renegotiated it up to the \$3,000 a couple years ago.¹ It allows for total, no more than 300 machines at any location. So what we would do is you would have the 300 machines there at the reservoir and you'd also have room for some so-called Class II machines. The point of which, I don't know if you've been to some of the casinos, you'll see that some of them have a progressive jackpot, a larger jackpot with several machines together that are linked, well those are Class II machines because the State of Montana refuses to allow for that kind of progressive jackpot in Class III machines.

RW: Those are Class II and they can determine their own payouts for that, right?

MM: That's correct. The state doesn't have any say in how you play Class II games.

RW: On reservations.

MM: The National Indian Gaming Commission has oversight there, but the state doesn't.

RW: Right, and the state only allows \$800 payouts on their Class II games, is that right?

MM: You know, I'm not sure about that. I'm not sure about that, but we don't happen to think that should matter. Let the market determine it.

RW: Right, and so in your negotiations, what was that, three years ago you said?

MM: Yeah, that was almost two years ago. The effective date of the compact was April 30, 2007. It extended the term of the compact for ten years and the maximum jackpot's up to \$3,000. The limits on Class III poker also increased. They had seven year compacts before that. We're currently negotiating for 15 years, which I don't think we'll

¹ Here, Manson is incorrect. The max payout for the Northern Cheyenne is currently \$2000.

have any issue about a 15 year term on the contract or compacts. Yeah, if you want the federal register cite on that, it's Volume 72, Page 21284.

RW: Now that compact, you were present at the negotiations themselves?

MM: Oh yeah.

RW: Did Governor Schweitzer come or did he send his team?

MM: Well yeah, he sent his team. I'm trying to remember if there were five or six of them, including an Assistant Attorney General from the Attorney General's Office. Sara Bond is the person from the Attorney General's Office who has negotiated the compacts and administered the compacts for quite some time now. I think she's been in on it for about ten years, eleven years.

RW: OK. How was working with that group of people? Were they willing to give up a lot or do they expect the tribes to give up most of their requests?

MM: They weren't willing to go very far. We went in with a number of things. Some were pretty obvious like I mentioned the other day, like bill feed. We wanted to be able to let people be able to feed a \$50 bill or a \$100 bill into a machine and we wanted the limits to be higher than the limits they have. Some things seemed fairly straightforward. And then there's the things like the linking of machines to have higher jackpots.

RW: Right. Class III machines.

MM: They were just completely dug in on that. They were somewhat flexible on the number of machines and they were somewhat flexible on payouts. They were willing to go up on some things, there's no doubt. It was kind of startling to see how tough it was because I'm used to Oregon where it took us a while, but we got to the point of where the market pretty well determines the amount of machines you have. We did talk them up for a maximum, as I said early, a maximum payout of \$1,500 to a maximum of \$3,000 for the video machines, though that ought to be even higher. But we weren't able to talk them into increasing the bill feed and things like that. And maximum bets went up a but a little bit, we got a little bit on that.

I'm looking at some of the other things involved too. They were sort of flexible on the poker tournaments. I think once they realized what we were trying to do with the poker tournaments there was some flexibility there. For example, the state law is pretty rigid. You can't really have a poker tournament two weekends in a row. You can't have two different tournaments in this particular tavern or whatever. We were like, wait a second. We're talking about a very seasonal market from May to September. We won't be having any poker tournaments half of the year but we need to be able to have them successive weekends during the summer and they understood that and they were flexible about that. We haven't nailed that down yet. That's in our current negotiations. I guess they're suspended negotiations at the moment because they need to get the governor back to the table.

RW: So what you need the governor to do now is to approve the Secretary of the Interior's determinations to have that casino open on that off-reservation trust land.

MM: Yeah, he needs to concur in that which basically what he'd be saying is, "You know, I agree with you Secretary of the Interior. This will help the tribe and it won't hurt the surrounding community." He also needs then to sit down and – I mean, it's good for him to concur in that, but we also need an amendment to the compact because the compact, if you've read it, just talks about the reservation. It doesn't talk about trust land anywhere. So he would also need to agree to at least that expansion of gaming out to the reservoir site. Needless to say we'd like him to agree on some other things as well, but that's the big one. That's the big one, but I think in terms of financing it's important that he would also agree to a longer term than the ten years, two of which is already almost passed. We're almost two years out from negotiating that last amendment when the governor got us up to ten. We do need an extension. We can't get financing with a compact length under ten or twelve years. Probably twelve.

RW: And why is that? Why is it that a shorter compact is harder to get financing for? People want to see long-term gain?

MM: Well, it's not a tested market. Nobody has a casino in Wyoming – well the tribes have casinos in Wyoming – but nobody has a casino in northern Wyoming or that part of southern Montana, you know, south from Colstrip there's nothing besides Charging Horse. And Charging Horse only has a hundred Class III machines and I don't remember how many, I guess thirty Class II, but it's not a lot of machines. So this is a lot bigger facility than anybody's tried so there's that uncertainty, but that means they want to be able to have a long enough time to be able to pay off the loan. So they want to know that things won't just come to a halt.

Oh, that reminds me though, one of the things we did negotiate with them was that too, if something does go wrong that there will be some notice to workers if there are some games that are banned in Montana or something of that sort. The governor didn't want to just shut things down instantly. So that's something we're working on too.

And then there's a couple other things we need to do that. We need to amend, we've already drafted the amendments for the Tribal Gaming Department which we would have to get approved by the National Indian Gaming Commission. As I say, those are done. They've seen them; they've reviewed the amendments there in Washington at the National Indian Gaming Commission but we need to get them to approve them. It's not a big issue. Once the governor concurs, that will happen very quickly.

RW: Since there is currently little hope of any change in IGRA as far as the state having regulatory power over gaming in Indian Country, which party do you feel would negotiate a fairer compact: the governor or the state legislature?

MM: Well, it's very difficult to negotiate with the legislature. There's a lot of players involved. The reason I think there's concurrence by the governor and the reason I think

that Congress didn't bring legislatures into this is generally because people don't negotiate compacts with legislatures. It's too many people and plus they're at each other's throats politically – the democrats and republicans most of the time. You really need to negotiate with a person who has that final authority like the governor and he negotiates with his team certainly but he's the one who decides and agrees to provision X and provision Y.

So no, I think you have to negotiate with the legislature, well look at the example of New Mexico. When New Mexico decided, oh, well, all the compacts have to get approved here, you basically then negotiate with the governor and then once, you've laid out your position – I mean, it's totally unfair to the tribes because you lay out your position to the governor, you come to an agreement and then the governor kind of winks at you, hands it over to the legislature and then can go lobby them to go get a better deal. What kind of situation is that? Who else would be treated like that in this country? It's not good business; there's very few business people who would ever accept that kind of arrangement and it's the reason that most state constitutions and the U.S. Constitution have a clause that guarantees contracts so the legislature doesn't come back and undo them.

And of course with New Mexico what you get is 15, 16% has to be paid to the state? Well that's really sweet, and then they turned around and it actually had to be paid to the county. It had to be paid to the county in which the casino is located. Then what happened? The legislature came back and said, "Oh, county, now that you're making all this money from the tribe or the Pueblo that's in your county, we're going to cut your funding that amount." The whole thing, I mean really, it got to be a joke and most of it got thrown out in court after they did that because the state cannot tax tribal gaming and that's what they were really doing.

RW: Right.

MM: So, there's a lot of temptations for legislators, especially in lean budget years like this, to try to go after more and you know, they're not elected to make major business decisions. That's not what they're there for. Yeah, so anyway, I could go on and on. I'm happy to keep talking about the governor.

RW: Where do you see the future of gaming in Montana going? Under the leadership of Brian Schweitzer, he says he doesn't support expanded gaming,² so do you think that it's just going to be sort of stagnant for a while until there's a change in leadership or do you think that eventually he will lessen his limitations?

MM: Well, he has been willing to let it be expanded some and he does have some understanding of just how much poverty there is and the need to do that on the reservations. At the same time, I don't see him letting it expand very much.

² The Associated Press, "Tribes Decline Gaming Compact," *Billings Gazette*, November 30, 2006, <http://billingsgazette.net/articles/2006/11/30/news/state/30-tribes.txt>.

RW: Certainly not beyond keno games and video poker?

MM: Probably not. I think he's got that sense that it's unfair to do that – unfair to the taverns. But I don't see the taverns and the tribal casinos as directly competing much at all. There's only one that's anywhere near, well, there's a couple that are near major cities. Certainly the battlefield isn't far from Billings, but it isn't that close. It's not like most people aren't going to go down the street to their local mini-casino in Billings rather than drive out to the battlefield and play there.

RW: Right, and how much pressure can the Tavern Association lay on people to get them – well, from what I understand the Tavern Association has been very strong in lobbying against Indian gaming – so how much of their work is actually hindering Indian compacts in Montana?

MM: Oh, they've had a huge role. I don't think they had to work very hard with the Republican governors. I don't think it took much persuading with them. I never saw them really have any interest in tribal gaming or tribal progress anyway. I think that Governor Schweitzer actually does want the tribes to do better but it puts him in a difficult spot to have a very well heeled predecessor. I mean, one of the most powerful and effective lobbyists in Helena is the Tavern Owners Association lobbyists. It's very difficult for legislators to do anything that the tavern owners disagree with and they've got a very strong coalition on this. I certainly appreciate the governor taking the steps that he has taken. He's accurate in saying that it's difficult for him politically to expand gaming and he's not that fond of it anyway. He'd rather see more mining and more processing of coal and fisheries and that sort of thing. That's where he sees there being more benefit to the tribes.