

Indian Gaming Law

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Indian Gaming Law

Cases and Materials

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Preface

Although this is a legal casebook, it reflects an interdisciplinary approach to studying and understanding the law. Our collaboration on Indian gaming issues began more than a decade ago when we realized that tribal gaming gave rise to complex issues of law and public policy that crossed our respective disciplines of law and political science and public administration. At the University of North Dakota, we founded the Institute for the Study of Tribal Gaming Law and Policy in 2002 to foster research on Indian gaming and to understand its impact on intergovernmental relations and the lives of real people—Indian and non-Indian—across the U.S.

We strongly believe in the importance of informing our pedagogy with our research, and vice versa. Several years ago, one of us (Rand) taught one of the first Indian gaming law courses offered in a law school curriculum. She was amazed at how difficult it was to design the course, develop an easily understandable framework, and find appropriate readings. When the other of us (Light) sought to teach a short unit on the public administration of Indian gaming to graduate students, he was stymied by having to edit long law review articles or case law, and to guard against student reliance on inaccurate or incomplete information found on the Internet. Still today, instructors in this rapidly expanding area of interest and practice must adopt a do-it-yourself approach to assembling course materials—a difficult, time-consuming and resource-intensive task, even for an expert on federal Indian, tribal, or gambling law. Fortunately, this no longer needs to be the case.

Indian gaming is a particularly complicated and highly specialized topic for instructors, students, and practitioners alike to master. To meet the teaching and learning demands of the field, *INDIAN GAMING LAW: CASES AND MATERIALS* provides a clear, comprehensive, and accessible platform designed specifically for Indian gaming law and similar courses.

This casebook is one-stop resource for understanding Indian gaming law and the regulations and public policy that flow from it. This in large part is because our approach to the subject is informed by our sense that Indian gaming law and policy have evolved through political compromise as much as through litigation and law reform. Attention only to “black letter” law would be misleading as to the type and relative influence of extralegal variables that shape Indian gaming law. Similarly, discussion of the politics surrounding Indian gaming without grounding in the law would untether tribal gaming from its key legal context.

The focus of most existing casebooks that incorporate some discussion of Indian gaming is either as a form of gambling regulation or as an example of the application of federal Indian law. Our own work has emphasized that understanding Indian gaming requires explanation and exploration of both of these contexts. In this casebook, we fuse the necessary background on federal Indian law and the status of American In-

dian tribes in the American political system with legal approaches to regulating gambling, and provide a useful and usable overarching theoretical approach grounded in law and governance.

Students and other readers will hear from the legal, judicial, and political experts, American Indian and non-Indian alike, who shape Indian gaming today and will determine its future. We present excerpts from relevant case law, statutes, and regulations alongside excerpts from congressional testimony by noted public officials and scholarly journal articles and books written by key authorities in the fields of law, Indian studies, political science, economics, gambling studies, and more. To assist readers in working through such complex issues, we introduce teaching problems and notes and questions throughout. Accompanying the casebook is our *INSTRUCTOR'S RESOURCE MANUAL FOR INDIAN GAMING LAW: CASES AND MATERIALS*, in which we draw on our own experiences in the classroom to offer numerous suggestions to stimulate an engaging and exciting classroom environment.

A course in Indian gaming law has legal and political currency and thus can easily “connect” with students. But more than simply learning about current events, students should come away from such a course with a critical understanding of perhaps the most important legal and policy issues facing tribes today, and with a deeper sense of how tribal governments—the “third sovereign”—interact with the federal government as well as state and local governments in the American political system.

It is our sincere wish that students who use this casebook in a course on Indian gaming law will have the tools to enter the field as practicing attorneys, regulators, or policymakers and face with confidence the day-to-day complexities and nuances of Indian gaming law and policy. We also recognize that one of the primary functions of a law school education is to foster in students a sense of the interactions between law and society. We hope to further that important goal through this casebook's approach.

* * *

INDIAN GAMING LAW: CASES AND MATERIALS begins with Part I, Indian Gaming in Context. In this Part, we cover the necessary historical, legal, and political contexts for understanding the modern law of Indian gaming. In Chapter 1, we provide an overview of Indian gaming through multiple lenses. We discuss the growth and scope of tribal gaming and the legalized gambling industry in the U.S. before turning to an overview of how and why gambling is regulated. We then provide necessary background on the complicated area of federal Indian law and policy, and its historical and contemporary relationship to tribal sovereignty and tribal governments.

Chapter 2's focus is on the pre-statutory law that created the foundations for Indian gaming. We discuss traditional tribal games and Indian gaming's modern roots as a tool of reservation economic development, illustrated through case law arising out of state attempts to regulate tribal bingo operations in the 1970s and 1980s. The U.S. Supreme Court recognized the limits of state regulation in its landmark 1987 decision in *California v. Cabazon Band of Mission Indians*.

Part II, The Federal Regulatory Scheme, covers in detail the complex and comprehensive legal framework governing Indian gaming. In Chapter 3, we describe how *Cabazon* and the political activity it generated resulted in Congress's passage of the Indian Gaming Regulatory Act of 1988 (IGRA). IGRA's regulatory framework codified several key policy goals for Indian gaming while creating the basis for extensive civil and criminal regulation of tribal gaming at the tribal, state, and federal levels. IGRA also created a classification scheme for Indian gaming regulation.

Chapter 4 describes the statutory requirements for conducting bingo and other forms of Class II gaming. The definition of Class II gaming has generated considerable litigation and controversy, as new technology has blurred the distinction between Class II and casino-style gaming.

In Chapter 5 we focus on Class III, or casino-style, gaming. IGRA requires the negotiation in good faith of tribal-state compacts before a tribe can operate Class III games. In 1996, however, the Supreme Court in *Seminole Tribe v. Florida* held that tribes could not sue states without their consent to enforce IGRA's good-faith requirement. We examine how the post-*Seminole* environment has become increasingly politicized. IGRA limits tribal gaming to the types of games that are allowed under state public policy. The question of the scope of Class III gaming under IGRA's definitions has been extensively litigated.

Part III, Government Authority Over Indian Gaming, explores in more detail the various government officials, agencies, and institutions that exercise power over Indian gaming at the federal, tribal, and state levels. Chapter 6 discusses the scope and extent of federal authority concerning tribal gaming. IGRA delegates to the National Indian Gaming Commission extensive powers to issue opinions and approve tribal gaming ordinances, management contracts, and consulting agreements, as well as to promulgate regulations and investigate and enforce various investigation and compliance provisions. The U.S. Secretary of the Interior and other federal agencies play key roles in determinations concerning tribal-state compacts, per capita payments, and other regulations.

In Chapter 7, we consider the extent of tribal authority to formulate, implement, enforce, and interpret tribes' own gaming regulations and ordinances. Indian gaming has created many new challenges and opportunities for tribal governments to build effective and responsive governmental institutions.

Chapter 8 turns to state authority regarding tribal gaming. IGRA's tribal-state compacting requirement allowed state gaming commissions and other agencies to become involved in the implementation and enforcement of tribal gaming regulation. State courts have interpreted IGRA's provisions related to state public policy and the scope of gaming, as well as decided which state actors are authorized to negotiate compacts. In state court litigation over Indian gaming, tribes may be forced to sit on the sidelines.

In the casebook's final chapters in Part IV, Policy Implications, we bring public policy and politics to the forefront. Chapter 9 focuses on tribal gaming's socioeconomic impacts. Indian gaming has both economic and social costs and benefits that may accrue to Indian and non-Indian communities. One of the keys to developing effective Indian gaming law and public policy is using methodologically sound research to identify and weigh these effects.

Chapter 10 explores in some detail four recurring legal and political issues in Indian gaming: "off-reservation" gaming, tribal-state revenue sharing agreements, federal tribal recognition, and tribal employment issues. All four issues continue to generate legal and political controversy throughout the U.S. Overall, there is little doubt that Indian gaming is changing the calculus of intergovernmental relations as well as the meaning of tribal sovereignty.

* * *

INDIAN GAMING LAW: CASES AND MATERIALS has benefited from numerous conversations and interactions we have had with academics, practitioners, regulators, public officials, and students. All mistakes, of course, are our own. We very much would appreciate

hearing from those of you who use this book. Please feel free to contact us at the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota through our Web site, *Indian Gaming Today*, at indiangamingtoday.com or by e-mail at rand@law.und.edu or steven_light@und.nodak.edu.

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