

Bingo?: An Overview of the Potential Legal Issues Arising From the Use of Indian Gaming Revenues To Fund Professional Sports Facilities

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The cost for new North American professional sports facilities continues to skyrocket. New arenas built to house National Basketball Association (NBA) or National Hockey League (NHL) teams now routinely exceed \$300 million in price.¹ New Major League Baseball (MLB) stadiums typically cost between \$450 million to \$700 million.² For example, Nationals Park, the new home of the Washington Nationals cost \$611 million upon its March 2008 opening.³ New National Football League stadium (NFL) projects routinely exceed \$600 million.⁴ Even new facilities for Major League Soccer franchises,

1. For example, Barclays Center, the new home of the NBA's New Jersey Nets, will cost a reported \$637 million upon its completion. Shelly Sigo, *Orlando Scouting \$770M Team: Firms Vying for Giant, 3-Part Project*, BOND BUYER, July 30, 2007, at 1; Andrew Conte, *Penguins Cancel Migration After Deal Struck for New Arena: Team Staying in Pittsburgh*, NAT'L POST (Toronto, Ont.), Mar. 14, 2007, at S3; Jotham Sederstrom, *Name Deal a Net Gain for Barclays*, N.Y. DAILY NEWS, Jan. 19, 2007, at 1.

2. Both the Minnesota Twins and Florida Marlins are scheduled to open new ballparks in the next five years that will cost a projected \$480 million and \$629 million respectively. Citi Field, the New York Mets' new home, cost a reported \$600 million. Yvette Shields, *Hennepin County Ballpark Bonds Earn High Scores Ahead of Sale*, BOND BUYER, May 10, 2007, at 6; Matthew Haggman, *Total Cost of New Marlins Stadium put at \$2.4 Billion*, S. FLA. SUN-SENTINEL (Ft. Lauderdale, Fla.), July 8, 2009, http://www.sun-sentinel.com/news/local/breakingnews/sfl-marlins-stadium-cost-bn070809_06734272.story; Jack Buehrer & Carolina Worrell, *New York Region Finally Kicks Off New Generation of Sports Facilities*, N.Y. CONSTRUCTION, Aug. 1, 2007, at 69.

3. Michael Brick, *A Stadium, and With It a Season, Opens With Fanfare in Washington*, N.Y. TIMES, Mar. 31, 2008, at D6.

4. Steve Kaelble, *Lucas Oil Stadium: There'll be Room For TDs, Hoops, Meetings in New Arena*, MIDWEST CONSTRUCTION, Mar. 1, 2007, at 30.

a relative newcomer on the major league sports scene, can cost over \$200 million.⁵

Perhaps the most surprising fact regarding the aforementioned figures is that they are relatively cheap when compared to some of their cohorts throughout professional sports. In April 2009, Major League Baseball's New York Yankees opened a new version of Yankee Stadium at a reported cost of \$1.2 billion.⁶ The National Football League's Dallas Cowboys are scheduled to open a new stadium in Arlington, Texas in late 2009 that will be the most expensive facility in that league with a projected cost of \$1.1 billion.⁷ However, the Cowboys will only keep the league's "most expensive" title for one year as the New York Giants and New York Jets are scheduled to open a new, joint-use facility in New Jersey at a projected cost of \$1.6 billion.⁸

Even renovations of existing major league sports facilities routinely equal or exceed the cost of new facilities built a mere decade or two ago. The Verizon Center, home of the National Basketball Association's Washington Wizards and National Hockey League's Washington Capitals, recently underwent a \$50 million renovation described by team officials as an effort to keep the facility current.⁹ In early 2008, the owners of New York City's Madison Square Garden, home of the National Basketball Association's New York Knicks and National Hockey League's New York Rangers, announced plans to undertake a \$500 million renovation of the facility that will start in 2009 and conclude in 2011.¹⁰

Minor professional sports leagues have not escaped the dramatic escalation in sports facility development costs. Smaller arenas designed to house minor league hockey, lacrosse, football and basketball teams can now

5. The New York Red Bulls' new stadium in Harrison, New Jersey is expected to cost \$200 million upon completion of the project in 2009. Dave Caldwell, *New Soccer Stadium Under Way in Harrison*, N.Y. TIMES, Sept. 28, 2008, <http://www.nytimes.com/2008/09/28/nyregion/new-jersey/28stadiumnj.html>.

6. Richard Sandomir, *You Can't Buy Naming Rights, But Call It the Billion-Dollar Ballpark*, N.Y. TIMES, Feb. 8, 2008, at D2.

7. Crayton Harrison, *Fans Lash Out At Cowboys' New Cash Cow: Devotees Required To Spend Up To \$150,000 Just To Earn Right to Buy Season Tickets at Stadium Expected to Open in 2009*, MONTREAL GAZETTE, Dec. 23, 2007, at B10.

8. Richard Sandomir, *Jets and Giants Fans May Pay for the Right to Pay for Tickets*, N.Y. TIMES, Mar. 22, 2008, at A1.

9. Nikita Stewart, *Verizon Center Ticket Tax to Rise to 10%*, WASH. POST, Apr. 20, 2007, at B1; David Nakamura, *Verizon Center Marks a Decade and a Dramatic Change of Scene*, WASH. POST, Dec. 2, 2007, at C1.

10. Charles V. Bagli, *Garden Unfurls Its Plan for a Major Renovation*, N.Y. TIMES, Apr. 4, 2008, at 3.

easily exceed \$30 million to \$50 million. The U.S. Cellular Coliseum in Bloomington, Illinois, which houses the Bloomington Prairie Thunder of the International Hockey League and the Bloomington Xtreme of United Indoor Football opened in 2006 at a cost of \$37 million.¹¹ In 2006, the Village of Hoffman Estates, Illinois opened the \$60 million Sears Centre, an 11,000-seat arena that houses the Continental Indoor Football League's Chicago Slaughter and the Lingerie Football League's Chicago Bliss.¹²

The rising cost of minor league venues has extended to both affiliated and independent league baseball. In April 2008, the Class-AAA International League's Lehigh Valley Iron Pigs, an affiliate of Major League Baseball's Philadelphia Phillies, opened Coca-Cola Park, a new 9,000-seat, \$49.4 million stadium in Allentown, Pennsylvania.¹³ Later that year, the Grand Prairie AirHogs of the independent American Association of Independent Professional Baseball opened a new \$20 million, 5,445-seat facility named QuikTrip Park at Grand Prairie.¹⁴

A growing problem for sports franchises is that facility construction costs are rising at a time when the economy is slowing, governmental budgets are tightening at all levels and voter revolt over increased taxes seems to be at an all-time high.¹⁵ Unfortunately, these factors make financing new and renovated sports facilities increasingly difficult for sports franchises and governmental entities with each passing year.¹⁶

11. U.S. *Cellular Coliseum – Bloomington, IL: Questions and Policies*, USCELLULARCOLISEUM.COM, <http://www.uscellularcoliseum.com/guest/questions/> (last visited July 12, 2009).

12. Pamela Dittmer McKuen, *Sears Centre: A Playing Field on the Prairie*, MIDWEST CONSTRUCTION, June 1, 2006, at 85; Ashok Selvam, *Hoffman Pins Sears Centre Turnaround on Concert Promotion*, DAILY HERALD (Arlington Heights, Ill.), July 8, 2009, <http://www.dailyherald.com/story/?id=305361>.

13. Marcus Hayes, *IronPigs Are Flying in Lehigh Valley*, PHILA. DAILY NEWS, Mar. 31, 2008, at 104.

14. Kevin Reichard, *QuikTrip Park at Grand Prairie: Grand Prairie AirHogs*, BALLPARK DIGEST, http://www.ballparkwatch.com/visits/index.html?article_id=802.

15. An example of taxpayer revolt against the funding of a professional sports facility occurred in Racine County, Wisconsin where voters forced former Wisconsin state senator George Petak from office in a recall election after he voted in favor of extending a 0.1 cent sales tax into Racine County in order to help finance the construction of Miller Park, the home of MLB's Milwaukee Brewers. Joe Williams, *Senator Blames Madison Liberals: Group Files Papers to Recall Petak, Committee Cites His Vote in Favor of New Brewers Stadium*, MILWAUKEE J. SENTINEL, Dec. 16, 1995, at 5; Crocker Stephenson, *It's a Whole New Ball Game: Park Gives New Life to Old Pastime*, MILWAUKEE J. SENTINEL, Mar. 31, 2001, at <http://www2.jsonline.com/sports/brew/mpark/mar01/fan31033001.asp>.

16. A perfect example of these difficulties occurred in Miami with regard to the lengthy search for a possible new home for MLB's Florida Marlins. *Marlins Stadium Timeline*, S.FLA. SUN-

In an attempt to close this financing gap and get projects completed, sports facility developers have continually added more economic generators to their projects such as luxury suites, club seats, naming rights, sports bars, restaurants, specialized parking options, team stores, unique advertising opportunities and seat licenses.¹⁷ For example, the aforementioned Coca-Cola Park that houses the minor league Class-AAA International League's Lehigh Valley IronPigs features 20 luxury suites with a variety of catering and decorating options, Coca-Cola as a naming rights sponsor and numerous advertising opportunities including a 90-foot scoreboard featuring a giant Coca-Cola bottle on top which shoots off fireworks after every IronPigs home run.¹⁸ Unfortunately, in today's marketplace, the inclusion of these additional revenue sources is still usually not enough to close the financing gap.¹⁹

Despite the significant challenges professional sports franchises face in trying to secure a new or renovated facility, a strong demand for new facilities still exists in the industry.²⁰ In an attempt to get more projects funded, the industry has continually sought new financing sources that can provide capital for new or renovated professional sports facilities while at the same time creating minimal impact on the taxpayers.

From both the sports industry and governmental perspectives, Indian gaming might be an ideal financing source to help fund new sports facilities in

SENTINEL (Ft. Lauderdale, Fla.), July 18, 2009, <http://www.sun-sentinel.com/sfl-marlins-ballpark-timeline-071809,0,4134680.story>.

17. Thomas Heath, *Cherry Trees Among Enhancements To Nationals' New Ballpark in Southeast*, WASH. POST, Mar. 14, 2007, at E4; *Prudential Play Devils' Advocate with New Arena*, BUS. INS., Jan. 15, 2007, at 23; Andy Newman, *Record Price for Name on Nets' Arena*, N.Y. TIMES, Jan. 18, 2007, at D5; Juan Gonzalez, *You Pay for Yanks' Sweet Parking Deal: That Spot Will Cost Double Soon*, N.Y. DAILY NEWS, Jan. 2, 2008, at 7; Leah Boyd, *High-Tech Niche Options Change Sports Marketing*, CRAIN'S DETROIT BUS., Mar. 17, 2008, at 14; Richard Sandomir, *Yankees' Top Seats Grow Pricier*, N.Y. TIMES, Mar. 21, 2008, at D7.

18. Arlene Martnez, *Suite Life: In Coca-Cola Park Boxes, Corporate Fans Watch IronPigs Play and do a Little Business*, THE MORNING CALL (Allentown, Pa.), May 16, 2008, at B1; *Ironpigsbaseball.com: Coca-Cola Park Info*, IRONPIGSBASEBALL.COM, <http://www.ironpigsbaseball.com/cocacola/ccparkinfo/> (last visited July 12, 2009).

19. Detractors of public financing for sports facilities would likely argue the reason these revenue generators are not covering the increasing costs of the new sports facilities is because the sports franchises often retain most, if not all, of these revenues.

20. For example, the National Football League has several franchises seeking new stadiums including the San Francisco 49ers, Minnesota Vikings and San Diego Chargers. *Niners' New Stadium has Green Roof*, ESPN.COM, July 15, 2009, <http://sports.espn.go.com/nfl/news/story?id=4330537>; Bill Salisbury, *Vikings Want 'Metrodome Next.' Legislators' Response: Not Now*, ST. PAUL PIONEER-PRESS, July 25, 2009, http://www.twincities.com/politics/ci_12910799; Matthew T. Hall, *Chargers Again Mull Oceanside for Stadium Site*, SAN DIEGO UNION-TRIB. June 18, 2009, <http://www3.signonsandiego.com/stories/2009/jun/18/bn18chargers-eye-aside/?chargers>.

many markets across the country. The Indian gaming industry, which started in 1975 on the Oneida Reservation in New York with one bingo hall, has expanded to include electronic games, slot machines and other similar high-stakes games of chance.²¹ According to the National Indian Gaming Association (NIGA), 225 tribes across 28 states participate in the \$25.7 billion industry.²² This rapid development has led some observers to call gaming the "white buffalo" for many Indian tribes.²³

As the aforementioned numbers indicate, Indian gaming generates significant amounts of revenue for many tribes across the country.²⁴ At the same time, as discussed later in this article, many of these same tribes are looking for ways to diversify their economic interests away from gaming and have expressed an interest in being part of the financing process for professional sports facilities.

This article explores the IGRA in an attempt to examine how Indian gaming revenues could be utilized to fund sports facilities around the country. Part I will provide an overview of the history of Indian Gaming within the sports industry. Part II gives a historical overview of the IGRA along with an in-depth examination of the provisions relevant to this discussion. Part III examines the various methods that might be utilized to use Indian gaming

21. The Oneida began to offer bingo games on their reservation in an attempt to raise money for their own fire department. The tribe hoped such a fire department would prevent a reoccurrence of a trailer fire which killed two tribal members. On the first weekend of games, the tribe had a profit of \$150. Many reports link the commencement of Indian gaming to the Seminole Tribe in 1979 but the Oneida were really the first tribe to begin such efforts. Perhaps these reports are due to the fact that one of the first major Indian gaming issues ever litigated was the case of *Seminole Tribe v. Butterworth*, 658 F.2d 3110 (1982). Dennis McAuliffe Jr., *Casinos Deal Indians a Winning Hand: Billions in Revenue Ease Tribe's Dependence on Federal Funds*, WASH. POST, Mar. 5, 1996, at A1; Akiko da Silva, *Native Americans Look to Reclaim Hollywood Image*, DAILY YOMIURI (Tokyo), Aug. 3, 2002, at 12.

22. These numbers reflect the 2006 reporting by NIGA which were the most current numbers posted at the time this article was submitted for publication. Many media sources list different facts and figures for the number of tribes participating in gaming and the dollars generated. However, the NIGA is viewed by many as the trade group of the industry for the Indian gaming tribes. It is also important to note that not all Indian tribes engage in gaming operations and not all gaming tribes generate significant net revenues which result in per capita payments to tribal members. NIGA, *Indian Gaming Facts*, <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml> (last visited June 24, 2008).

23. "Among many Native Americans, the "white buffalo" is viewed as a spiritual symbol, a sign of good fortune. Today, it has become a metaphor for Indian gaming. In terms of its positive contribution to economic development on the reservation, nothing compares to Indian gaming." Heidi L. McNeil, *Coin of the Realm: Prospering Tribes Locked in High-Stakes Gaming Battle with States*, ARIZ. REPUBLIC (Phoenix, Ariz.), Nov. 19, 1995, at H1.

24. See NIGA, *supra* note 22.

revenues to fund sports facilities and examines their legality under the IGRA. Finally, Part IV concludes the article by offering the authors' view of the future regarding the use of Indian gaming revenues to finance sports facilities.

PART I: HISTORY OF INDIAN GAMING IN SPORTS

Several Indian tribes with gaming interests (i.e. gaming tribes) have already secured connections with professional sports. Perhaps the most-well known of these efforts is the Mohegan Tribe's ownership and operation of the Women's National Basketball Association's (WNBA) Connecticut Sun franchise for the past seven years.²⁵ The Mohegan Tribe acquired the former Orlando Miracle franchise prior to the start of the 2003 season for a reported \$10 million.²⁶ The tribe subsequently moved the team to a 9,700-seat arena located within its casino and entertainment complex in Uncasville, Connecticut that also includes a spa, restaurants and a 1,200-room hotel.²⁷ The Mohegan Tribe's ownership of the Sun creates two issues that differentiate the team from its WNBA brethren. First, under Connecticut law, Sun players are not allowed to gamble at the facility because they are employees of the gaming tribe.²⁸ Second, the team has been restricted by the WNBA in how it utilizes sponsorship and advertising opportunities that draw a connection between the team and its gaming operations.²⁹

The other example of a gaming tribe acquiring a professional sports franchise occurred in June 2005 when the Yakama Nation in the State of Washington purchased the Continental Basketball Association's Yakima Sun Kings for \$140,000.³⁰ The tribe renamed the franchise the Yakama Sun Kings to reflect the tribe's history and their new ownership of the team.³¹ However, according to published reports, the purchase was not welcomed by all tribe

25. Mike Adams, *Women's League Bets on Casino's Money: Professional Sports Have Long Shunned Ties to Gambling. But the WNBA is Knocking Down the Wall*, BALT. SUN, Jan. 29, 2003, at 1A.

26. *Id.*

27. Tim Griffin, *Women's League Rolls the Dice: WNBA Hopes Gamble Pays Off with New Franchise in Connecticut*, SAN ANTONIO EXPRESS-NEWS, Feb. 3, 2003, at 1D.

28. Mel Greenberg, *WNBA's Gamble in Connecticut is Paying Off for Now*, PHILA. INQ., Aug. 10, 2003, at D6; Jeff Goodman, *A Casino Finds its Place in the Sun: Gaming Establishment Owns WNBA Franchise in a Successful Partnership*, WASH. POST, June 13, 2003, at D1.

29. Michael Hiestand, *Slots & Jump Shots: As Casino Lures Customers with WNBA Team, Alliance Creates Concern About Purity of Sports*, USA TODAY, June 19, 2003, at C1.

30. Shannon Dininny, *Yakamas Buy Professional Basketball Team*, SEATTLE TIMES, June 23, 2005, <http://community.seattletimes.nwsourc.com/archive/?date=20050623&slug=webyakama23>.

31. *Id.*

members and the team eventually ceased operations in early 2008 after two years of operations.³²

The developing connection between gaming tribes and professional sports extends beyond the two aforementioned team ownership situations. Numerous gaming tribes have secured sponsorship or advertising deals with professional sports franchises since the early 1990s.³³ An indicator of the potential economic impact that could be created by the developing relationship between gaming tribes and professional sports can be seen in the \$1.5 million title sponsorship deal between the Sycuan Band of the Kumeyaay Indians and Major League Baseball's San Diego Padres which led to the team's 2000 playing season being titled "Padres 2000 Presented by Sycuan."³⁴ However, it should be noted that the Sycuans were reportedly not allowed to bid on the naming rights for the Padres' new home, which were eventually sold to animal supply retailer Petco because Commissioner Bud Selig reportedly had concerns about the connection between gaming and baseball.³⁵

In 2008, MLB's Atlanta Braves completed a multi-year deal with the Mississippi Band of Choctaw Indians that renamed a portion of the premium seating level of Turner Field as the Golden Moon Casino Pavilion.³⁶ As part of the reported eight-figure deal, the tribe also received signage, video board features and program advertising.³⁷

In a further show of the growing connection between Indian gaming tribes and professional sports, two different tribes operate significant aspects of the new Yankee Stadium. The Mohegan Tribe has a three-year contract to run the Batter's Eye sports bar, while the facility's Hard Rock Café is owned and

32. Sarah Kershaw, *Tribe's Basketball Passion Turns Into Business*, N.Y. TIMES, Nov. 21, 2005, at A1; *Tribe Pulls Plug on Sun Kings*, SEATTLE TIMES, Apr. 11, 2008, at C12.

33. According to published reports, MLB teams that had gaming tribes as sponsors during the 1990s included the Arizona Diamondbacks, Chicago White Sox, Florida Marlins, Houston Astros, Los Angeles Dodgers, Minnesota Twins and Montreal Expos. Dan Christensen, *Baseball's Big New Gamble: Once Anathema to Major League Baseball, Gaming Operations are Courted by Some Clubs, Including the Florida Marlins, To Boost Advertising Revenues*, BROWARD DAILY BUS. REV. (Ft. Lauderdale, Fla.), May 7, 1998, at A1.

34. The deal included extensive advertising placements inside and outside of Qualcomm Stadium, the team's then-home facility. Philip J. LaVelle, *Sycuan Indians Buy Right to Link Name With Padres: Sponsorship Deal Could be a First*, SAN DIEGO UNION-TRIB., Feb. 8, 2000, at A1.

35. Tanya Rodrigues, *Sycuan Denied Stadium Naming Rights*, SAN DIEGO BUS. J., July 3, 2000, at 1.

36. John Manasso, *Indian Casino to Sponsor Braves*. ATLANTA BUS. CHRON., Mar. 28, 2008, <http://atlanta.bizjournals.com/atlanta/stories/2008/03/31/story9.html>; Atlanta Braves, *Seating and Pricing*, ATLANTABRAVES.COM, http://atlanta.braves.mlb.com/atl/ballpark/seating_and_pricing.jsp (last visited July 12, 2009).

37. Manasso, *supra* note 36.

operated by the Seminole Tribe of Florida, the owner of the restaurant chain.³⁸ Besides their ownership, marketing and operational connections, gaming tribes have also served as the promoters and hosts for major boxing events with the Seminole Tribe of Florida and the Sycuan Band in California among those staging such events.³⁹

In addition to these existing connections with professional sports, many gaming tribes have expressed strong public interest in working with franchises and governments to create new professional sports facilities. One of the first examples of this interest occurred in the mid-1990s when several tribes with gaming operations in the State of Wisconsin offered to help finance a new stadium for Major League Baseball's Milwaukee Brewers in exchange for the right to expand their gaming operations.⁴⁰

Over the past fifteen years, numerous other gaming tribes have indicated interest in working with professional sports franchises on new stadium or arena projects. In the late 1990s, the Mashantucket Pequots and the Gila River Indian Tribe proposed stadium projects with the National Football League's New England Patriots and Arizona Cardinals, respectively.⁴¹ Arizona's Fort McDowell Yavapai Nation proposed a stadium project for the Arizona Cardinals and spring training facilities for Major League Baseball's Texas Rangers and Los Angeles Dodgers.⁴² During the 2000s, the Confederated

38. Phil Roura, *Tribe Has a New Game: Bar at Yankee Stadium*, N.Y. DAILY NEWS, May 23, 2008, at 57; Amy Driscoll, *Hard Rock Planned For Yankee Stadium*, MIAMI HERALD, June 19, 2008, <http://www.miamiherald.com/business/v-print/story/575320.html>.

39. Greg Boeck, *Tribes Make Inroads in Sports Industry: Professional Basketball, Boxing Help Raise Profiles of Gaming Operations*, USA TODAY, Feb. 22, 2007, at 4C; Mike Anthony, *Smorgasbord of Sports Casinos are Key Players*, HARTFORD COURANT, Feb. 22, 2004, at L25; *Native Americans Nearly Hosted Super Bowl XLII*, FOX SPORTS.COM, Jan. 30, 2008, <http://msn.foxsports.com/nfl/story/7731210/Native-Americans-nearly-hosted-Super-Bowl-XLII>.

40. The Menominee Tribe offered to build a \$500 million entertainment complex which would have included a stadium and casino in downtown Milwaukee. The Forest County Potawatomi Tribe offered to pay up to \$8 million for a new stadium and the Lac Courte Oreilles, the Red Cliff and the Mole Lake Tribes also offered to contribute to such a facility. The request made by these tribes was that they be allowed to expand their Class III gaming operations throughout the state. Jeff Mayers, *Lawmakers Snub Stadium Offer*, WISC. ST. J. (Madison, Wis.), Apr. 6, 1995, at 1A; Rich Kirchen, *Tribes Still Push Gaming Proceeds to Fund Stadium*, BUS. J. MILWAUKEE, Nov. 18, 1995 at 49; Matt Pommer, *Tribe Renews Stadium Casino Pitch*, CAP. TIMES (Madison, Wis.), Aug. 30, 1995, at 3A; Pat Doyle, *Against the Odds: Casinos Unlikely to Finance a New Stadium*, STAR-TRIB. (Minneapolis, Minn.), Sept. 27, 1995, at 3C.

41. Tina Cassidy, *Kraft, Tribe Reported to Discuss a Stadium*, BOSTON GLOBE, Jan. 17, 1997, at A1; *Native Americans . . .*, *supra* note 39;

42. Bob Ford, *On Arid Indian Land, Stadium Plan Blooms: The Yavapai Hope the Cardinals Will Come*, PHILA. INQUIRER, Dec. 17, 2000, at C1; Dennis Maffezzoli, *Arizona Tempts Texas Rangers: An Indian Reservation is Trying to Lure the Baseball Team Away from Charlotte County*, SARASOTA

Tribes of Grande Ronde indicated a willingness to be part of a proposed new stadium project for an expansion Major League Baseball franchise in Portland, Oregon while the Muckleshoot Indian Tribe indicated their willingness to be part of a new arena project for the National Basketball Association's Seattle Sonics before the team's relocation to Oklahoma City.⁴³

In addition to the previous efforts that were initiated by the respective gaming tribes, the State of Minnesota also considered the use of Indian gaming revenues as part of a failed plan to finance a new stadium for Major League Baseball's Minnesota Twins in the late 1990s.⁴⁴ This was the most visible attempt at using Indian gaming revenue for a professional sports facility that was not embraced by at least one of the gaming tribes.

Finally, there are two existing situations in which Indian gaming revenues have been used to a small extent to indirectly fund new professional sports facilities. However, in each instance, the gaming tribes paid a portion of their revenues to the state (or a related entity) as part of the negotiation process for a tribal-gaming compact which is a contract that allows tribes to conduct gaming operations. The respective states subsequently chose to use a portion of those revenues toward the construction of a sports facility. In both situations, the gaming tribe had no direct legal connection with the facility or the financing in question.

In the mid-1990s, the State of Michigan utilized approximately \$26 million in funds paid by several Indian gaming tribes to augment the coffers of the Michigan Strategic Fund.⁴⁵ The Michigan Strategic Fund subsequently provided approximately \$55 million (including all \$26 million paid by the gaming tribes to that date) toward the construction of Comerica Park, the

HERALD-TRIB., Sept. 22, 2000, at A1; Luke Cyphers, *Tax Dodger Murdoch Looks to Native Americans for Subsidy*, N.Y. DAILY NEWS, Apr. 4, 1999, at 79.

43. John Hunt, *Casino-Backed Ballpark Idea Gains Currency*, THE OREGONIAN (Portland, Ore.), Feb. 22, 2003, at A1; Jim Brunner, *Sonics' Owner Tours Racetrack: Arena Proposal Muckleshoots Consider Building Near Emerald Downs*, SEATTLE TIMES, Sept. 6, 2007, at B3.

44. Pat Doyle, *Law Meant Casino Profits for Tribal Use: State Pressure for Indians to help Finance a New Baseball Stadium Runs Counter to the Intent of the Congressional Act*, STAR-TRIB. (Minneapolis, Minn.), May 16, 1997, at 1B; Gail Marks Jarvis, *Stadium Talk Worries Indian Casino Leaders*, ST. PAUL PIONEER PRESS, Aug. 28, 1997, at 1C.

45. The Michigan Strategic Fund used to be solely funded through the revenues generated by oil and gas wells developed on state-owned land. This was changed to also include the eight percent of Class III Indian gaming revenues paid to the state through tribal gaming compacts. Amy Lane, *Tribes' Pact Entangled in Stadium Funding*, CRAIN'S DETROIT BUS., Oct. 9, 1995, at 28; *Hart v. Engler*, 217 Mich. App. 439 (C. App. Mich. 1996); Amy Lane, *High-tech Businesses Hungry for Capital; Survey Shows Demand for State's \$2b Venture Plan*, CRAIN'S DETROIT BUS., Feb. 21, 2005, at 1; Doyle, *supra* note 40.

home of Major League Baseball's Detroit Tigers.⁴⁶ A similar approach was utilized by the State of Wisconsin in 2001 when it allocated \$1.5 million from Indian gaming revenues toward the construction of the Resch Center, an 11,000-seat arena in the Village of Ashwaubenon that houses several minor league sports franchises in the Green Bay market.⁴⁷

At this point, it is clear that some gaming tribes and members of the sports industry are interested in exploring the use of Indian gaming revenues to fund sports facilities. However, the potential use of such funding is not without its challenges as there are a variety of legal issues which could inhibit wide-scale usage.

PART II: A HISTORICAL AND LEGAL OVERVIEW OF THE IGRA

In 1988, the United States Congress (Congress), in response to significant growth in Indian gaming and the United States Supreme Court's decision in the *California v. Cabazon Band of Mission Indians*⁴⁸ case, passed the Indian Gaming Regulatory Act (IGRA).⁴⁹ The IGRA was designed to address a variety of issues with regard to the development and operation of Indian gaming throughout the country.⁵⁰

A. History of the Act

After its modest beginnings in the mid-1970s, Indian gaming continued to expand throughout the late 1970s and early 1980s.⁵¹ Ambiguous federal statutes combined with a series of inconsistent decisions by the courts led to confusion throughout the industry and unequal status for different tribes

46. *Hart*, 217 Mich. App. at 444.

47. Scott Hildebrand, *No New Funding for Arena in McCallum's Plan*, GREEN BAY PRESS-GAZETTE, Feb. 21, 2001, at 2A.

48. 480 U.S. 202 (1987).

49. 25 U.S.C. §§2701-2721 (2009).

50.

S. 555 (the U.S. Senate version of the IGRA) is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands. In developing the legislation, the issue has been how best to preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons. An additional objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests.

Indian Gaming Regulatory Act. S. Rep. No. 100-446, at 1 (1988).

51. See McAuliffe, *supra* note 21.

depending upon the jurisdiction they were located in.⁵² Even the federal government itself had divergent views as the Bureau of Indian Affairs encouraged Indian gaming by making loans and loan guarantees to tribes for gaming operations, while the Department of Justice stated its opposition to such efforts.⁵³

In 1984, after being prompted by a number of state and federal agencies, Congress began to hold hearings about Indian gaming in order to examine concerns raised by the rapid proliferation of gaming and the possibility of organized crime making inroads into tribal activities.⁵⁴ Over the next several years, numerous attempts at legislation regulating the industry were made both in the United States House of Representatives and the United States Senate with little success as the pro-gaming and anti-gaming parties, combined with the small amount of leverage that the tribes possessed, seemingly ensured that no compromise would be reached.⁵⁵

In 1987, the United States Supreme Court (Supreme Court) affirmed a decision by the United States Ninth Circuit Court of Appeals in the case of *California v. Cabazon Band of Mission Indians*.⁵⁶ In this case, the Supreme Court ruled that because the State of California allowed other forms of gambling its laws were civil-regulatory in nature regardless of the fact that criminal penalties were placed into California Penal Code §326.50.⁵⁷ This meant that the California law did not fall under the purview of federal Public Law 280 making illegal the state's attempt to enforce certain criminal code provisions against the tribes, and thus, ensuring the growth of the Indian gaming industry.⁵⁸

A major consequence of the *Cabazon* ruling was that the Indian tribes gained much needed leverage in future negotiations on Capitol Hill. As a result of this increased leverage, the Indian Gaming Regulatory Act was

52. See Indian Gaming Regulatory Act, S. Rep. No. 100-446; Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L.R. 769 (1995); Marianne Caulfield, *Will It Take a Move by the New York Yankees For the Seneca Nation to Obtain a Class III Gaming License?*, 44 CATH. U. L.R. 279 (1994).

53. Cox, *supra* note 52, at 772.

54. *Id.*

55. A number of bills were introduced both in the House and Senate. These bills tended to reflect the interests of their sponsors, thereby ensuring that one or more sides of the Indian gaming issue would not agree with the proposal. *Id.*

56. 480 U.S. 202 (1987).

57. *Id.* at 211.

58. *Id.* at 212.

passed in 1988.⁵⁹ Unfortunately, as former General Counsel for the National Indian Gaming Commission Michael Cox later noted, the IGRA was legislation that satisfied virtually no one because of the compromises that were necessary to secure its passage.⁶⁰

B. A Brief Overview of the IGRA

The twenty-one provisions of the Indian Gaming Regulatory Act can be classified into one of three groups. The first group of provisions contains legislative findings of Congress about Indian gaming and the goals that it hopes to accomplish via passage of the Act.⁶¹ The second group defines the various classifications of Indian gaming and the requirements imposed upon the tribes while conducting such gaming under the Act.⁶² Finally, the third group creates the National Indian Gaming Commission and other various enforcement mechanisms for the Act.⁶³ For the purposes of this article, only the second group of provisions will be explored in great detail because they are the only provisions that have a significant effect on the potential use of Indian gaming revenues for sports facilities.

C. The Definitions & Requirements of the Act

The IGRA breaks down the various forms of Indian gaming into three separate categories based upon the types of games that the tribes offer. Each category imposes different legal requirements upon a tribe

1. Class I Gaming

Class I gaming consists of social gaming and traditional forms of Indian gaming which are used in tribal ceremonies or celebrations.⁶⁴ In terms of

59. 25 U.S.C. §§2701-272.

60. Cox, *supra* note 52, at 774; See David G. Savage, *Fate of Indian Reservation Gaming Lies With Justices*, L.A. TIMES, Oct. 10, 1995, at 5; Tony Batt, *Most Unhappy With Indian Gaming Law*, LAS VEGAS REV.-J., June 5, 2006, <http://www.washingtonindiangaming.org/uploads/WIGA%20News%20Clips%20June%206%202006.doc>.

61. 25 U.S.C. §§2701-2702.

62. *Id.* §§2703, 2710-12 & 2719.

63. *Id.* §§2704-09, 2713-18 & 2720-21.

64. "The term "Class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" *Id.* §2703(6).

requirements, there are none. Tribes are free to conduct Class I gaming at their own will under the Act.⁶⁵

2. *Class II Gaming*⁶⁶

Class II gaming is defined as all forms of bingo games.⁶⁷ In addition, card games that are explicitly authorized by a state, or are not explicitly prohibited by state law and are played at any location in the state, are allowed as Class II gaming.⁶⁸

An important item to note is that Congress explicitly stated that banking card games such as blackjack, and electronic games of chance, or slot machines, are not Class II gaming under the Act.⁶⁹ This distinction is important because banking card games and electronic devices create the most revenues for Indian gaming operations.⁷⁰

65. An item to note here is that Class I gaming, which generates little or no revenue, is the only unregulated form of gaming for the tribes. "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of the Act" *Id.* §2710(a)(1).

66. The National Indian Gaming Commission is currently contemplating making changes to the definition of Class II gaming. The proposed changes generated opposition from tribes and the NIGC is still working through this process as of the date of submission for publication. Jodi Rave, *Indian Gaming Proposal on Hold*, BILLINGS GAZETTE, June 8, 2008, at 44.

67.

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; which is played for prizes, including monetary prizes, with cards bearing numbers or other designations; in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated are drawn or electronically determined, and; in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other similar games to bingo.

25 U.S.C. § 2703 (7)(A).

68.

The term "Class II gaming" means card games that are explicitly authorized by the laws of the State, or are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of such card games or limitations on wagers or pot sizes in such card games.

Id. §2703(7)(A)(ii).

69. "The term 'Class II gaming' does not include any banking card games, including baccarat, chemin de fer, or blackjack(21), or any electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" *Id.* §2703(7)(B).

70. Mercedes M. Cardona, *Gambling Money Piles Up: Casino Revenues Generate New Assets for Indian Tribes*, PENSIONS & INVESTMENTS, Oct. 30, 1995, at 40.

Before a tribe engages in Class II gaming under the IGRA, it must fulfill two requirements. First, as stated by the Act, the state that the tribe is located in must allow such gaming by any person, organization or entity in that particular state.⁷¹ Various courts have consistently interpreted this provision of the Act to allow Class II gaming if the State allows any form of gaming such as a state-operated lottery, or other similar activities by non-profit organizations.⁷² Therefore, if a state allows any games of chance it has no role in regulating Class II gaming.⁷³

Second, the governing body of the tribe must adopt a tribal gaming ordinance which meets the approval of the Chairman of the National Indian Gaming Commission, the regulatory body Congress created to enforce the IGRA.⁷⁴ In order to gain this approval, the tribal gaming ordinance must contain a number of items including a provision which specifies that the revenues from such gaming will be used for the economic benefit of the tribe or other charitable organizations.⁷⁵ Also, if the tribe desires that an outside

71.

An Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction if such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal laws. . .

25 U.S.C. §2710(b)(1)(A).

72. *See*, Mashnantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Cir. 1990) (State allowed "Las Vegas Nights" for charity organizations requiring it to allow Indian gaming); Lac du Flambeau of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991) (State allowed lotteries involving prize, chance & consideration meaning it was required to allow Indian gaming). *But see* Rumsey Indian Rancheria of Wintun Indians v. Wilson, 41 F.3d 421 (9th Cir. 1994) (United States Ninth Circuit Court of Appeals ruled that electronic games were allowed by the State, but banking card games were not, Court upheld similar regulations for Indian gaming).

73. Cox, *supra* note 52, at 775.

74. "An Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction if . . .the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman of the National Indian Gaming Commission" 25 U.S.C. §2710(b)(1)(B).

75.

The Chairman of the National Indian Gaming Commission shall approve any tribal ordinance or resolution concerning the conduct, or regulation of Class II gaming on the Indian lands within the tribe's jurisdiction if such an ordinance or resolution provides that . . .net revenues from any tribal gaming are not to be used for purposes other than to fund tribal government operations or programs; to provide for the general welfare of the Indian tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies. . .

Id. §2710(b)(2)(B). For the additional requirements of a valid tribal gaming ordinance, *see id.* §2710(b)(2).

entity operate the tribal gaming facility, it will be required to meet additional requirements under the Act.⁷⁶

3. *Class III Gaming*

Under the IGRA, Class III gaming is ambiguously defined as all forms of gaming that do not fall under the Class I or Class II categories.⁷⁷ Other Act provisions and judicial rulings delineate that games such as keno, blackjack, video pull-tab machines, lotteries, jai alai, pari-mutuel wagering and slot machines fall into the Class III gaming designation.⁷⁸

In order to conduct Class III gaming, a tribe must satisfy all of the aforementioned requirements in place for Class II gaming and enter into a tribal-state compact with the particular state that the tribe wishes to conduct its gaming operations in.⁷⁹ The tribal-state gaming compact must then be approved by the Secretary of the Interior.⁸⁰ However, according to the Act, the Secretary should disapprove the gaming compact only if it violates provisions of the IGRA, other Federal law or the trust obligations of the United States to Indian tribes.⁸¹

In anticipation of reluctant states refusing to negotiate tribal-state compacts with tribes, Congress put a provision into the IGRA which allows tribes to initiate a cause of action in United States District Court.⁸² This process creates a tribal-state gaming compact by requiring the tribe and the state to submit proposed gaming compact terms and allowing a court-appointed mediator to select the document that in the mediator's opinion best conforms to the goals of the Act.⁸³

76. *Id.* §§2710(b)(4), 2711 & 2712.

77. *Id.* §2703(8).

78. *Id.* §2703(B); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 827 F. Supp. 26 (D.D.C. 1993) (video pull-tab devices are Class III gaming); *Shakopee Mdewakanton Sioux Community v. Hope*, 798 F. Supp 1399 (D. Minn.1992) (keno is Class III gaming); *Spokane Tribe of Indians v. United States*, 972 F.2d 1090 (9th Cir. 1992) (pick-6 lotto machines are Class III gaming); *Oneida Tribe of Wisconsin v. Wisconsin*, 951 F.2d 757 (7th Cir. 1991) (lotteries are Class III gaming); Frank Shafroth, *Senate Agrees to Overhaul Nation's Indian Gaming Policy*, NATION'S CITIES WEEKLY, Aug. 14, 1995, at 12.

79. 25 U.S.C. §2710(d)(1).

80. *Id.* §2710(d)(3).

81. *Id.* §2710(d)(8)(B).

82. This provision has been the subject of substantial litigation including the case of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). 25 U.S.C. §2710(d)(7).

83. 25 U.S.C. §2710(d)(7).

PART III. THE POTENTIAL METHODS FOR FUNDING PROFESSIONAL SPORTS FACILITIES THROUGH INDIAN GAMING

There are a variety of ways in which Indian gaming revenues can be used to fund a professional sports facility. For sake of ease, we have grouped them into four different categories

A. Voluntary Gift

The first method for using Indian gaming revenue to fund professional sports facilities, a voluntary gift, is also the most unlikely in terms of actual implementation. For purposes of this article, a gift is defined in its most literal sense. Thus, if a tribe received any benefits, such as advertising signage, or advantageous gaming opportunities, it would fall into one of the later categories that we discuss.

In terms of legality, the IGRA states that net revenues derived from tribal gaming revenues are to be used solely for funding tribal government operations or programs, for the general welfare of the tribe or its members, to promote tribal economic development, or for local charitable or governmental organizations only.⁸⁴ In addition, per capita payments to members are allowed if a series of conditions are met by the tribe.⁸⁵

Unfortunately, no court has interpreted the aforementioned sections in order to determine what constitutes "the general welfare of the tribe" or what promotes "tribal economic development" under the Act.⁸⁶ Thus, observers are left to ponder what such terms mean under the Act.

Perhaps the best way to look at this provision is to examine some of the items that tribal gaming revenues have already been spent on without drawing a challenge. Tribes have been allowed to use gaming revenues to purchase homes and furniture for tribal members, as well as building tribal medical clinics, playgrounds and rodeo arenas.⁸⁷

84. 25 U.S.C. §2710(b)(2)(B).

85. *Id.* §2710(b)(3).

86. While §2710(b)(2)(B) has not been interpreted by the courts, §2710(b)(3), which allows per capita payments has been adjudicated by the courts. Unfortunately, these cases dealt more with the implementation of the per capita payment procedure and do not shed any light on our usage of funds issue. See *Maxam v. Lower Sioux Community of Minnesota*, 829 F. Supp. 277 (D. Minn. 1993); *Smith v. Babbitt*, 875 F. Supp. 1353 (D. Minn. 1995).

87. Jo Fleischer, *Foxwoods to Fund Pequot's Future*, FAIRFIELD COUNTY BUS. J. (White Plains, N.Y.), May 15, 1995, at 1; Carol Sowers, *New Homes Rise at Fort McDowell, But So Do Taxes: Tribe Puts Casino Wealth to Work*, ARIZ. REPUBLIC (Phoenix, Ariz.), Jan. 26, 1996, at A1; Lawrence W. LaPointe, *Viewpoint: Reservation Games Fund Programs, Boost Regional Economy*, TACOMA

By examining these items, it appears that the IGRA has been broadly interpreted in terms of allowable gaming revenue uses by tribes. If this is truly the case, then the donation of gaming revenues to fund a professional sports facility could be permissible under the Act if the tribe or tribal members were to benefit in some modest way. For instance, if a facility was built adjacent to tribal lands and this led to subsequent economic development opportunities for the tribe, the requirements of the Act could be satisfied. Again, the question would be whether this is truly a gift.

In conclusion, the voluntary gift of tribal gaming revenues toward the funding of a professional sports facility could be permissible under the IGRA. The legality of such an event would be uncertain but the Act may be defined broadly enough to allow such an occurrence. Of course, it is highly unlikely the developers of a professional sports facility would be willing to undertake the construction process when there was any level of doubt about a potentially substantial piece of funding. As such, even this apparent minor level of uncertainty casts a strong doubt upon the use of this approach to fund a professional sports facility in the future.

More likely, the IGRA does allow gaming tribes to make gifts to charitable or local government organizations.⁸⁸ Assuming a proper legal structure was in place, it is possible that a tribe could participate in the funding of a professional sports facility through this approach. For example, if a non-profit municipal authority were established, this could allow the gaming tribe to make a donation to the new authority and satisfy the requirements of the IGRA.

B. Local or State Taxation

Perhaps the most obvious method of attempting to generate funding for a professional sports facility through the use of Indian gaming revenues would be via the imposition of a tax by a state, county, or other municipal body, on the gross revenues generated by the gaming tribe.

However, the IGRA specifically prohibits any such attempts. Section 2710(d)(4) of the Act states that

nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe or upon any other

NEWS-TRIB., Oct. 15, 1995, at D5; Jenni Jeras, *Casino Cash to Build Clinic*, BUS. J. PHOENIX & THE VALLEY OF THE SUN, Nov. 24, 1995, at 1.

88. 25 U.S.C. §2710(b)(2)(B).

person or entity authorized by an Indian tribe to engage in Class III gaming.⁸⁹

In addition, the courts have continuously rejected any attempts to impose such a tax. In *Cabazon Band of Mission Indians v. Wilson*,⁹⁰ the Cabazon and Sycuan bands entered into an agreement with the Southern California Off Track Wagering Inc. (SCOTWINC) to simulcast their horse races to the tribes' gaming operations for the purpose of taking wagers on such races.⁹¹ Under this agreement, the tribes received 2.33% of the revenues derived from such wagering, which was the standard agreement in the industry.⁹² Under its agreement with the State of California, SCOTWINC paid a license fee to the state that varied depending upon the type of wagering which was taking place.⁹³ The tribes sued claiming that this additional fee constituted a tax upon their gaming revenues under the Act.⁹⁴

The United States Court of Appeals for the Ninth Circuit agreed with the tribes and ruled that the license fee imposed upon SCOTWINC violated the IGRA.⁹⁵ Interestingly, the ruling stated that the Act "is not on its face a prohibition of state taxation."⁹⁶ Instead, the Court argued that the imposition of the license fee undermined the goals of the IGRA, which seek to ensure that tribes are the primary economic beneficiaries of tribal gaming operations.⁹⁷ By collecting a license fee from SCOTWINC, which brought the State of California more revenue than the tribes earned from the gaming operations, the Court ruled that California violated the Act, and ruled that the license fee was not permissible under the IGRA.⁹⁸

89. *Id.* §2710(d)(4).

90. 37 F.3d 430 (9th Cir. 1994).

91. The tribes had already each entered into a valid Class III compact with the State of California in order to conduct such wagering. *Id.* at 432.

92. *Id.*

93. Location of the wager (on- or off-track), the type of wager (conventional or exotic) and the type of race (breed of horse and distance) were all factors utilized in determining the fee. *Id.*

94. *Id.*

95. *Id.* at 435.

96. The Ninth Circuit rejected the tribe's §2710(d)(4) argument stating that "the [tribes'] reasoning is flawed because it equates the failure to confer authority to tax (under §2710(d)(4)) with a prohibition to tax." *Id.* at 433.

97. "The Congress finds that. . .a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal government. . ." *Cabazon*, 37 F.3d at 433 (citing 25 U.S.C. §2701 (1988)).

98. For example, between November 1, 1990, and March 3, 1991, the State of California collected \$440,175 in license fees from wagering at the Sycuan facility while the tribe only received \$318,743 for the same period. *Id.*

Thus, in light of the seemingly clear language in §2710(d)(4) of the IGRA, and the Ninth Circuit's *Cabazon* decision, it is unlikely that any attempts by states or other municipal bodies to tax Indian gaming revenues to fund sports facilities will be seriously entertained by such bodies.⁹⁹

C. Tribal-State Compact Negotiation Process

The use of revenues derived from the tribal-state compact negotiation process for the operation of Class III gaming has been the most successful option to date in terms of generating financing capital for the development of professional sports facilities with two uses to date.

As noted in Part I of this article, the State of Wisconsin used \$1.5 million derived from tribal gaming compact payments to pay for a portion of the Resch Center in suburban Green Bay.¹⁰⁰ The State of Michigan also used this type of revenue funneled through the Michigan Strategic Fund to pay approximately \$26.1 million of its \$55 million portion of the funding for Comerica Park, home of Major League Baseball's Detroit Tigers.¹⁰¹

When examining the potential use of tribal-state compacts as a means of funding professional sports facilities, two key points need to be addressed. First, the IGRA clearly precludes states from refusing to enter into gaming compact negotiations because those bodies do not have the ability to impose a tax, fee, charge or assessment on the tribe.¹⁰² As such, it is difficult to see how a state could impose a condition such as the securing of revenues through the compacting process as a pre-condition for discussions with potential gaming tribes.

99. Again, a key practical consideration to consider here is the significant potential for litigation. The speculative nature of such attempts could be tied up in the courts for many years and it is unlikely professional sports facility developers and teams would be willing to wait for the resolution of these matters. See *Hart v. Engler*, 217 Mich. App. 439 (C. App. Mich. 1996).

100. Hildebrand, *supra* note 47.

101. The State of Michigan, the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians ended up in litigation in the mid-2000s when the tribes ceased making payments into the Michigan Strategic Fund. The tribes claimed that a change in the state's lottery games had violated the previously negotiated gaming compacts with the tribes. The parties settled their dispute in March 2008 and divided up \$52 million in escrowed money among the three parties. Again, in light of nature of professional sports facility funding, potential disputes such as this one could be viewed as a potential impediment toward such usage. Bill O'Brien, *State, Tribes Settle Dispute Over Kenosha*, TRAVERSE CITY RECORD-EAGLE, Mar. 22, 2008, http://www.record-eagle.com/local/local_story_082095050.html; *Hart*, 217 Mich. App. at 444; Amy Lane, *State Wins First Round in Casino Revenue Fight: Court Says Tribes Must Pay Into Strategic Fund*, CRAIN'S DETROIT BUS., June 11, 2007, at 3; Lane, *supra* note 45.

102. 25 U.S.C. §2710(d)(4).

Second, as discussed earlier, the IGRA does not allow states to tax tribes beyond any similar taxes that they impose upon every other operator in the state as part of the tribal-state compact process.¹⁰³ As such, any proposed tax would have to be extended beyond Indian gaming to other forms of gaming, likely making it more politically difficult to pass such a tax.

In light of the explicit restrictions imposed upon states under the Act, it might appear that the tribal gaming compact process would offer little value in terms of financing professional sports facilities. However, while the IGRA prohibits states from imposing fees or taxes as part of the compact process, the Act does not restrict states from accepting negotiated voluntary payments made by tribes that accelerate completion of the negotiation process or provide other tribal benefits.¹⁰⁴ As such, it appears that if gaming tribes strike properly negotiated gaming compacts with states that include negotiated voluntary payments as part of the process, the state can then utilize a portion of those negotiated payments for the funding of professional sports facilities.¹⁰⁵

This approach was used by the State of Michigan to provide funding for Comerica Park. In 1990, several Indian tribes filed a lawsuit against the State of Michigan, and later the Governor of Michigan, claiming the defendants failed to negotiate in good faith for a tribal-gaming compact.¹⁰⁶ In August 1993, the parties entered into a consent judgment that stated the tribes would pay eight percent of certain gaming revenues to the Michigan Strategic Fund as long as tribal-gaming compacts were in effect and that the tribes had the exclusive right to specified types of gaming in the state.¹⁰⁷ The Governor, and then the Michigan Legislature, subsequently negotiated and approved the gaming compacts.¹⁰⁸ In March 1994, the tribes began making payments to the Michigan Strategic Fund, which later provided approximately \$26 million in funding for Comerica Park.¹⁰⁹ A state senator and a fan group supporting the

103. *Id.* §2710(d)(3)(c)(iv).

104. *Hart*, 217 Mich. App. at 452-453.

105. If one wonders why a tribe might make additional negotiated voluntary payments to a state as part of a gaming compact, there would undoubtedly be economic value to the tribes in securing a quick, beneficial political agreement with the respective states in order to create a long-standing, stable environment upon which to build a platform for their gaming and other business ventures. Such an approach could allow them to secure outside capital financing necessary to expand or renovate their operations. See, Jeff Jones & Charles Brunt, *Tribes Seek New Gaming Compacts: Longer-Term Deal is Aim of Renegotiation*, ALBUQUERQUE J., Jan. 13, 2007, at A1.

106. *Hart*, 217 Mich. App. at 443.

107. *Id.*

108. *Id.* at 444.

109. *Id.*

continued use of Tiger Stadium challenged the financing plan but the Michigan Court of Appeals upheld the structure.¹¹⁰

As we examine this potential approach, it certainly appears to be a viable financing mechanism should the industry choose to pursue it. Any league concerns about being associated with gaming would likely be mitigated by the fact that the revenues are sent to the state and then disbursed back to the sports facility. The fact that one major league (Major League Baseball) already accepts such usage could give that league and any other professional sports leagues the justification they might need in order to defend such usage. The main question that has to be considered is whether this approach would be politically viable on a larger scale. Simply stated, could a substantial portion of these revenues be diverted from general economic development, schools and other worthy causes in order to fund a professional sports facility? This is a political question that elected officials will have to answer on a state-by-state basis.

D. Traditional Contract Arrangements

The last potential use of Indian gaming revenues to finance professional sports facilities would be through the use of standard contract arrangements such as advertising, sponsorship, leases or other joint venture-type arrangements. As noted in Part I, this approach has seen the most extensive use to date. However, the funding has not been large enough to constitute a majority of the facility's financing.

For example, in 2007, the Shakopee Mdewakanton Sioux Community announced that its charitable foundation was donating \$12.5 million to the University of Minnesota as part of the school's efforts to construct TCF Bank Stadium, a new 50,000-seat, on-campus football stadium.¹¹¹ Ten million dollars will be utilized for stadium development and the remaining \$2.5 million will be utilized to create a scholarship program for Indian students.¹¹² The tribe will receive naming and design rights for the main entrance plaza of the facility which includes the placement of native shrubbery, educational

110. *Id.* at 439.

111. Heron Marquez Estrada & Jeff Shelman, *Shakopee Tribe Plans Stadium Showcase: A \$12.5 Million Gift to the U for Naming and Design Rights to the Main Plaza is to Promote the Role of Indians, the Tribal Chairman Says*, STAR-TRIB. (Minneapolis, Minn.), Oct. 20, 2007, at 1B.

112. *Id.*

kiosks, statues, benches and a pond.¹¹³ One could easily envision a similar deal structure being employed for a professional sports facility.

Another, and perhaps the best example of this approach occurred in Connecticut where the Mashantucket Pequot tribe contributed a reported \$500,000 to \$700,000 to the City of Norwich, Connecticut for the construction of Dodd Memorial Stadium, the home of the Class-AA Eastern League's Connecticut Defenders.¹¹⁴ The funds were reportedly utilized to construct 18 luxury suites at the facility.¹¹⁵

Perhaps most importantly, it appears that this approach will be the one most likely to be utilized going forward because many tribes have indicated a strong desire to diversify their economic interests away from gaming.¹¹⁶ And, as discussed earlier in this article, many tribes have already expressed an interest in working with sports franchises as a way of achieving this goal.

In examining the IGRA, it appears that the use of tribal gaming revenues for economic arrangements such as advertising, sponsorships, naming rights, land leases or leasing a constructed sports facility to a privately-owned sports franchise would all be permissible under the Act. In §2710(b)(2)(B), the IGRA specifically states that tribes may use net gaming revenues for purposes such as tribal economic development, or to provide for the general welfare of the tribe and its members.¹¹⁷

In reviewing the types of contractual arrangements that could be contemplated between gaming tribes and sports franchises, it appears that most traditional forms of contracts used in the sports industry would be legal. For

113. *Id.* This also explains why the donation is not classified as a true "gift" for the purposes of this article.

114. This contribution has been viewed as a gift by some and a business arrangement by others. Some published reports indicate that the tribe received the use of two luxury boxes at the facility and advertising rights in a picnic area. These facts likely make the latter interpretation more correct. Sam Libby, *Pequots Planning Norwich Revival*, HARTFORD COURANT, June 19, 1995, at A1; Sean Horgan, *A Good Time: In Connecticut and Beyond, The Minors are Hot*, HARTFORD COURANT, July 16, 1995, at E1; Jack Cavanaugh, *How a Yankees Farm Team, Newly Named, Landed in Norwich*, N.Y. TIMES, Mar. 26, 1995, §13, at 1; Jonathan Rabinovitz, *A Tribe's Casino Profits Invested in Indian Film: Feature Movie Stars Native Americans but Focuses on Human Commonalities*, N.Y. TIMES, Sept. 5, 1997, at B1.

115. Cavanaugh, *supra* note 114.

116. Christopher Palmeri, *Parlaying Casinos Into Empires: Why Indian Expansion Beyond Gaming is Triggering a Backlash on Main Street*, BUS. WEEK, Mar. 26, 2007, at 112; Drake Bennett, *Hedging Their Bets: Casino Gambling may be Coming to Massachusetts, Courtesy of Mashpee Wampanoag Indians. But Around the Country, Other Native American Tribes are Finding Casinos an Increasingly Risky Bet - -and are Spreading Their Chips Around the Table*, BOSTON GLOBE, Mar. 4, 2007, at E1.

117. 25 U.S.C. §2710(b)(2)(B)(iii-iv).

example, securing advertising, sponsorship, luxury suite, or naming rights opportunities could enhance the profitability of tribal ventures, and thus, be permissible under the IGRA. A different scenario could see the development of a new sports facility by a gaming tribe built for the use of a professional sports franchise with a private, non-tribal owner. This type of development could annually draw millions of people to tribal lands for sporting events, and could employ tribal members for the operation of the facility. Again, it appears that this would be an allowable use of net gaming revenues under the Act.

If one accepts the underlying premise regarding the ability for tribes to use gaming revenues for the development of sports facilities under the IGRA, the next step is to examine the legal steps necessary to set up such a venture. First, as described throughout this document, the tribe must follow the IGRA requirements in order to conduct Class II and Class III gaming. Second, a contract or development plan must then be drawn up which satisfies all of the IGRA requirements. Finally, the document must satisfy all of the United States Code requirements for dealing with Indian tribes.¹¹⁸ For example, Title 25, Section 81 of the United States Code requires that no agreement that encumbers Indian lands for a period of seven or more years is valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.¹¹⁹

PART IV: THE FUTURE

As noted throughout the introduction of this article, gaming has become a huge revenue generator for many Indian tribes.¹²⁰ It has allowed some participating tribes to develop substantial economic power over the past three decades. For example, the Seminole Tribe of Florida, which was described by many in the media as being nearly destitute in the 1970s, now generates \$1.2

118. This article does not attempt to address the numerous legal issues that can arise during the creation of contracts or joint ventures with Indian tribes. In keeping with the theme of this article, the focus is solely on the IGRA and its effect on the potential use of gaming revenues for the financing of professional sports facilities. For a review of such additional requirements, see William V. Vetter, *Doing Business With the Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994); Leah L. Lorber, *State Rights, Tribal Sovereignty, and the "White Man's Firewater": State Prohibition of Gambling on New Indian Lands*, 69 IND. L.J. 255 (1993).

119. 25 U.S.C. §81 (2009).

120. Of course, it is again important to note that many tribes do not participate in any gaming ventures and that some of the gaming tribes are not as financially successful as others. NIGA, *supra* note 22.

billion in annual revenue and recently acquired the Hard Rock Café restaurant chain as part of its growing gaming and entertainment empire.¹²¹

It is quite likely that successful gaming tribes will continue to seek out new business ventures that allow them to diversify their economic interests over the next several years. As seen with the Mohegan Tribe's acquisition of the WNBA's Connecticut Sun franchise, and other connections between Indian gaming tribes and professional sports discussed in this article, there appears to be a natural fit between professional sports and the existing operations run by many gaming tribes.

At the same time, professional sports leagues, franchises and the governmental entities that have traditionally been participants in the financing of new facilities are facing significant negative issues with regard to the financing model that has been utilized by the industry over the past three decades. Thus, a need exists for a new capital financing source if the leagues and franchises hope to continue developing new sports facilities.

Perhaps not so coincidentally, professional sports leagues have recently become less hesitant about associating with gaming-related entities (both Indian and non-Indian). For example, the National Basketball Association played its 2007 All-Star Game in Las Vegas, Nevada.¹²² And as National Football League spokesman Greg Aiello told the *Boston Globe* about a subsequently failed effort by the Mashantucket Pequots to bring the New England Patriots to Connecticut in 1997,

We're going to play the Super Bowl next week in New Orleans next to legal riverboat casino gambling. There's nothing in our league rules that would rule out a stadium being near a legal gambling establishment. But again, we would have to know particulars before any decisions could be made along those lines.¹²³

In light of their matching assets and needs, it is easy to envision a scenario in which the connection between Indian gaming tribes and professional sports grows larger in the near future. To be sure, the ever-present uncertainty surrounding the future of the Indian Gaming Regulatory Act and the overall regulation scheme of the Indian gaming industry will undoubtedly be a challenge that advocates of a growing connection between gaming tribes and professional sports will have to overcome.

121. Driscoll, *supra* note 38.

122. *NBA.com: All-Star 2007*, NBA.COM, <http://www.nba.com/allstar2007/> (last visited July 12, 2009).

123. Cassidy, *supra* note 41.

However, in the end, any problems are likely to be overcome because the two sides have significant incentives to work together and resolve any open issues. While the future form of the relationship is still uncertain, it is easy to envision the connection between Indian gaming and professional sports growing closer going forward.

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