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**Developing a Multi-Use
Gaming Project on Native
American Land**

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THE RISE OF INDIAN GAMING

***A FINANCIAL, POLITICAL AND
SOCIAL PHENOMENON***

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Brief History of Indian Gaming

- & While an often overlooked fact, Indian gaming had its inception well before Europeans settled in America
- & Large scale modern Indian gaming, mainly in the form of bingo, predated the Indian Gaming and Regulatory Act [IGRA] by about 10 years [mid 1970's]

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Brief History of Indian Gaming

- & The U.S. Supreme Court recognized Indian peoples' right to run gaming in 1987 when it ruled that States had no authority to regulate gaming on Indian reservation land if such gaming was permitted outside the reservation for any other purpose [California v. Cabazon Band of Mission Indians, 480 U.S. 409 (1987)]
- & The U.S. Congress established additional basis for this right when it passed IGRA in 1988

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A Brief Summary of the Relationship Between the U.S. Government and Indian Peoples – The March Toward Tribal Sovereignty

- & 1700's - Removal policy
- & 1800's - Reservation policy
- & 1880-1920 - Assimilation [which evolved into a termination] policy
- & 1970's – Self-determination policy - President Nixon rejects all prior policies and adopts this concept

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A Brief Summary of the Relationship Between the U.S. Government and Indian Peoples – The March Toward Tribal Sovereignty

- & Since President Nixon, all Administrations with the exception of the current one, have reinforced the concept of Indian sovereignty [President Bush favored the concept of having Tribal authority be subject to the States' when he was Governor of Texas]. President Reagan's position was emphatic:
 - "This Administration intends to restore tribal governments to their rightful place among the governments of this Nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs."

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The Clash Between State and Tribal Sovereignty

- & Taken in isolation, the argument could be made that sovereignty of Indian peoples in and of itself should not have major financial or political consequences in the United States
- & The key element of sovereignty is the status of Indian tribes and nations on a level consistent with the authority of the States and the United States government

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The Clash Between State and Tribal Sovereignty

- & Because of sovereignty, the States are not able to tax certain aspects of commerce which emanate from Indian reservation or trust land [e.g., cigarette sales and gaming]
- & States are unable to regulate Indian gaming except under the specific parameters delineated under IGRA

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Indian Gaming Regulatory Act

- & The victory of Indians in Cabazon is credited for motivating the U.S. Congress to push for the adoption of IGRA, which had originally been promoted by Indian leadership when the result in Cabazon seemed far from a certainty
- & There is a consensus among many involved with Indian gaming that Indian Tribes ceded some of their sovereign authority by buying into IGRA

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National Indian Gaming Commission

- & Established under IGRA, the National Indian Gaming Commission [NIGC] regulates Indian gaming at the Federal level
- & NIGC currently in the process of developing regulations that will establish technical standards and procedures for the classification and approval of electronic, computer and other technologic Class II gaming machines and aids

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National Indian Gaming Commission

& Classes of Indian gaming:

- CLASS I - Social games played for minimal prizes. Exempt from NIGC review
- CLASS II - Bingo, pull tabs and similar games. Regulated primarily by the Indian government in question and reviewed by NIGC
- CLASS III - All other forms of gaming that are not Class I or Class II. This Class is regulated by the Indian government and/or the States as may be agreed upon in a negotiated Tribal/State compact subject to NIGC approval

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National Indian Gaming Commission

& NIGC's Plan for Gaming Standards

- Assemble Tribal Advisory Committee
- Solicit Comments and Suggestions
- Develop Classification and Technical Standards
- Develop Compliance Protocol
- Adopt Governing Regulations

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States' Arguments Against Proliferation of Indian Gaming

- & Due to Tribal sovereignty, States lose substantial tax revenue because sales by Indians on reservation or trust land are exempt from sales tax and certain other State taxes
- & The "unfair advantage" argument made by non-Indians who are subject to State taxes for the sales of the same goods or services
- & The general clash between traditional non-Indian gaming and wagering and the rapidly proliferating Indian gaming industry

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The Counterpoint to the States' Economic Argument – Overall Economic Development

- & Economic Facts
 - Over 560 recognized Tribes
 - At least 207 gaming Tribes
 - Over 330 gaming facilities
 - Well over half the States have Indian gaming
 - Over 250 separate Indian/State gaming compacts

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The Counterpoint to the States' Economic Argument – Overall Economic Development

- & 2003 Indian Gaming Revenue - \$16.7 Billion (an increase of \$2 Billion over 2002 gaming revenues)
- & Over 500,000 jobs in the gaming industry created nationwide

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The Counterpoint to the States' Economic Argument – Overall Economic Development

- & Where does the money go?
 - To fund Tribe and reservation infrastructures
 - To fund healthcare and education for Tribal members
 - **KEY GOAL - SEEDING A STRONGER, MORE DIVERSIFIED ECONOMIC BASE OUTSIDE OF GAMING BUSINESS**

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The Counterpoint to the States' Economic Argument – Overall Economic Development

- & The ongoing tension between States' rights and Indian sovereignty
 - The initial attacks on Indian sovereignty with respect to Indian gaming tended to be broad attacks on the concept of sovereignty itself [Seminole Tribe of Florida v. Butterworth, 491 F.Supp. 1015 (1980); aff'd 658 F.2d 313 (1981)]

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The Counterpoint to the States' Economic Argument – Overall Economic Development

- & Challenges to Indian gaming tend to be more facility specific and usually relate to a particular category of Indian gaming which is alleged not to be in compliance with IGRA [United States v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000) - on New Years Eve 1997 Federal authorities with the aid of the Federal courts, closed electronic bingo conducted by the Cherokee Nation and the Seneca-Cayuga Tribe]

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The Counterpoint to the States; Economic Argument – Overall Economic Development

- & In 2003, the Supreme Court let stand two lower court opinions defining “electronic aids to bingo” and pull tabs as Class II devices [Seneca-Cayuga Tribe of Oklahoma, et al. v. National Indian Gaming Commission, et. al., 327 F.3d 1019 (10th Cir. 2003), cert denied, 540 U.S. 1218 (U.S. Mar 1, 2004); and United States v. Santee Sioux Tribe of Nebraska, 135 F.3d 558 (8th Cir. 2003), cert denied, 540 U.S. 1229 (U.S. Mar 1, 2004)]

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State Attempts to Restrict Indian Gaming

- & Indians’ assessment in 2004 of their position insofar as gaming is concerned, has to be one of significant vindication
- & The 8th, 9th and 10th Circuits Court of Appeals all have ruled in favor of Indian peoples and against the U. S. Attorney in what are arguably not sovereignty cases, dealing with gaming classifications under IGRA

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State Attempts to Restrict Indian Gaming

- & According to gaming industry figures, Indian gaming while only about twenty-five years old, comprises over 20% of Class III gaming operations in the U.S., **which is also why it is drawing more intense scrutiny and in some cases, outright assault, of Congress, the Executive Branch and non-Indian gaming factions**
- & On November 27, 2001, the U.S. Supreme Court held that IGRA did not exempt Tribes from paying those gambling-related excise and occupational taxes that States were not required to pay under Chapter 35 of the Internal Revenue Code [Chickasaw Nation v. United States, 534 U.S. 84 (2001)]

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State Attempts to Restrict Indian Gaming

- & The waiver of sovereignty case: C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001). The U.S. Supreme Court held that the agreement to arbitrate [and the enforcement of an arbitration provision in State Court] in a form contract, was sufficient to constitute a waiver of sovereign immunity by the Indian Tribe
- & Electronic gaming compacts, such as that approved by Oklahoma voters in 2004, will bring Indian casinos under State's oversight for the first time, allowing those casinos that contract with the State to offer additional electronic games, including video poker and some live card games, but will require waiver of sovereign immunity
 - The Oklahoma experience also benefited non-Indian race track facilities

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What are the Prospects for Co-Existence Between States' and Sovereign Indian Nations' Interests?

- & The increasing upsurge in the economies of many Indian tribes and the contemporaneous stagnation of much of the general U. S. economy, may result in increasing tensions between Indian and non-Indian interests
- & A critical question: **Are Indian Tribes succeeding primarily because (i) they are given an advantage on tax and regulatory issues, and (ii) of the controlling impact of sovereignty?**
- & The impact of the recently expanded majorities in both the House and Senate

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The Ultimate Solution – State and Tribal Cooperation

- & The overall potential for economic benefit is simply too great for continued adversarial relationships between Tribal economic development and States' financial interest to continue
 - Expand cooperation through State Compacts [e.g., Oklahoma 2004, approved by Bureau of Indian Affairs January 2005]
 - Tribal willingness to effectively be taxed
 - Reduction in non-Indian legal challenges

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Tax Incentives For Indian Gaming

& America Indian Lands Tax Credit

- Incentive provides cost savings for concerns relocating or expanding businesses on Indian lands
 - Accelerated depreciation
 - Employment tax credits for employed Tribal members and their spouses
- Recently extended until January 1, 2006
- Tax benefits can be compounded where State's income tax is based on Federal taxable income

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Indian Gaming

& In Summary:

- The reality of commercial Indian gaming is no longer in question
- The real quandary is how Indian gaming and perhaps more importantly, large multi-use projects created by Indian Tribes, will interface with the rest of the surrounding non-Indian financial and business infrastructure
- The current wisdom is that Tribes and the States, with Federal oversight, need to continue expanding their cooperative efforts so as to spread the economic benefits to both Indians and non-Indians

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Recent Source Materials

- & January 2005, the “Harvard Project on American Indian Economic Development”,
CABAZON, THE INDIAN GAMING REGULATORY ACT AND THE SOCIOECONOMIC CONSEQUENCES OF AMERICAN INDIAN GOVERNMENTAL GAMING A TEN-YEAR REVIEW
- Databook [Authors Jonathan B. Taylor and Joseph P. Kalt]
 - Annotated Bibliography [Authors Leigh Gardener, Joseph P. Kalt and Katherine A. Spilde]

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