

Indian Gaming Law

Indian Gaming Law

Cases and Materials

SECOND EDITION

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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 two decades 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 United States.

We strongly believe in the importance of informing our pedagogy with our research, and vice versa. Years ago, one of us (Rand) taught one of the first Indian gaming law courses offered in a law school curriculum. She was surprised 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 that didn't necessarily identify important underlying policy issues. At the same time, there is an abundance of inaccurate or incomplete information to be found on the Internet. Those experiences, along with requests for materials from other instructors in this rapidly expanding area of interest and practice, led us to author the first edition of this casebook.

Now, a decade later, Indian gaming is the largest segment of the U.S. casino industry. Some 500 tribal casinos in 28 states generate over \$32 billion—five times the gaming revenue of the entire Las Vegas Strip. Indian gaming is a fast-growing and fascinating area of legal practice, as attorneys face issues in contracts, corporate finance, government relations, regulation, taxation, torts, tribal sovereignty, and more. Lawyers, as well as state, tribal, and local regulators, public officials and policymakers, business leaders, and hospitality and tourism management executives all benefit from knowledge of the complex law, policy, and regulation of tribal gaming.

Indian gaming remains 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* (2d ed.) provides a clear, comprehensive, and accessible platform designed specifically for Indian gaming law and similar courses, and suitable for tribal gaming modules in a wide range of curricula. 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 the few 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 the second edition, we continue to fuse the necessary background on federal Indian law and the status of American Indian tribes in the American political system with legal approaches to regulating gambling, and provide a useful and usable overarching theoretical approach grounded in law, policy, and governance.

We also benefit from our respective administrative experience as deans (Rand at the School of Law and Light at the College of Business and Public Administration) and, in the case of Light, as a senior administrator in the university’s academic affairs office, over the course of the last decade. Our approach to the second edition of the casebook is enhanced by our heightened appreciation that each course necessarily must accomplish learning outcomes relevant to the institution’s mission and students’ career paths. As our own Indian gaming courses over the past several years have varied in credit hours and method of delivery; included simulation exercises, “flipped” classrooms, and other high-impact practices; and pivoted to “fit” within a focus on transactional practice or tribal government and business administration, we understand that an effective casebook must provide an instructor with flexibility to meet institutional and student needs.

Throughout the casebook, students, instructors, 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 congressional testimony and scholarly commentary by key authorities in the fields of law (including both academics and practitioners), Indian studies, political science, economics, gambling studies, and more. To assist readers in working through such complex issues, we have thoroughly updated the teaching problems, simulation exercises, and notes and questions throughout to reflect current issues and to encourage and aid pedagogical best practices. Accompanying the second edition is our revised *Teacher’s Manual*, in which we draw on our own experiences in the classroom to offer numerous suggestions to stimulate an engaging and exciting classroom environment, as well as to make recommendations for focusing a course’s or module’s coverage on, for example, gaming law, tribal economic development, business management and practice, law- and policymaking and implementation, or professional skills development, depending on a school’s curricular needs and the interests of the instructor and students.

This second edition includes thorough and wide-ranging updates of every chapter and subject to reflect current legal and political developments in the field. We provide current tribe- and state-specific examples and accounts throughout. The second edition's expanded and refined coverage of topics emphasizes new court decisions and agency actions, matters critical to practice, and dynamic and developing issues. Updates include:

- Important, informative, and engaging new case law from federal and state courts, and all-new tribal court cases illustrating intersections of gaming law with administrative and constitutional law, employment law, federal Indian law, contracts, and torts;
- Land-into-trust and gaming on newly acquired lands after *Carciari v. Salazar*;
- In-depth analysis of key tribal-state compact negotiations and provisions, including current case law and administrative actions related to revenue sharing;
- Evolving and expanding regulatory roles of the National Indian Gaming Commission (NIGC), tribal gaming commissions, and state agencies, as well as the U.S. Department of the Interior, U.S. Department of Justice, Bureau of Indian Affairs, Office of Indian Gaming, and Office of Federal Acknowledgment;
- New interpretations of the federal Indian Gaming Regulatory Act of 1988 (IGRA), including the distinctions between Class II and Class III gaming, minimum internal control standards (MICS), management contracts and collateral agreements, tribal gaming ordinances, and compacts;
- State-of-the-art research on social and economic impacts of gambling (commercial, state lotteries, and tribal), including addiction, employment and income rates, per capita distributions, tax revenue, and tribal, state, and local economies;
- Sovereign immunity issues arising after *Michigan v. Bay Mills Indian Community*;
- Focus on tribal casinos as businesses, including analysis of issues related to labor, bankruptcy, commercial partnerships, and alternatives to operation under IGRA;
- Expansion of legalized gaming: online and mobile, sports wagering after *Murphy v. NCAA*, and betting on eSports, Daily Fantasy Sports, and other skills-based games; and
- Specific state updates from influential developments in Arizona, California, Connecticut, Florida, Massachusetts, Michigan, Minnesota, Mississippi, New Mexico, New York, Oklahoma, Texas, Virginia, and more.

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, 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, and the responsibilities of adopting an informed, ethical, and inclusive approach to career and citizenship. We hope to further that important goal through this casebook's approach.

* * *

INDIAN GAMING LAW: CASES AND MATERIALS (2d ed.) 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 United States before turning to a survey of how and why gambling is regulated. We then provide necessary background on the complicated area of federal Indian law and policy, situated in its historical and contemporary relationship to tribal sovereignty and tribal governments. Chapter 1 includes a new overview of the commercial casino industry along with updates to all industry data, with new excerpts on gambling policymaking and its socioeconomic context, including a 2018 U.S. Commission on Civil Rights report.

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 3's discussion of IGRA's "Indian tribe" and "Indian lands" requirements includes updates related to the 2015 amendments to federal tribal acknowledgment regulations and recent congressional actions, as well as the significant impacts on land-into-trust of the U.S. Supreme Court's 2009 decision in *Carciere v. Salazar*. Teaching Problems 3.1 and 3.2 are revised to reflect current issues of tribal acknowledgment and Indian lands.

Chapter 4 is reorganized to describe the statutory requirements for conducting both Class II and Class III gaming. Revisions include an expanded discussion of per capita payments; new developments in tribal self-regulation of Class II gaming; and updated and focused discussion of Class II aids, including new and revised federal

regulations. Problems 4.1 and 4.2 capture the continued controversy over, respectively, the legal line between Class II and Class III machines and IGRA's "permits such gaming" requirement.

In Chapter 5 we focus fully on the tribal-state compact requirement for 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, impacting how states and tribes approach compact negotiations. The Chapter also includes an updated discussion of administrative gaming procedures under 25 C.F.R. pt. 291 and recent cases; an excerpt of a tribal-state compact along with numerous examples of various provisions from other compacts; an expanded discussion of the U.S. Secretary of the Interior's compact approval process and outcomes; and an updated discussion of revenue sharing with careful examination of several emerging issues raised through recent cases, current data, and examples of compact provisions as well as approval letters. Problem 5 is revised to reflect the increasingly complex and nuanced approach to compacting issues.

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 (NIGC) 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 compliance provisions. The Interior Secretary and other federal agencies play key roles in determinations concerning tribal-state compacts, per capita payments, and other regulations. Updates in Chapter 6 center on the NIGC: its current strategic areas of focus; the mixed success of its efforts to promulgate game classification standards, including new Class II technical standards; examples of NIGC administrative opinions and other actions; its role in approving management contracts with recent cases and critiques; and its recent "guidelines" for Class III minimum internal control standards. Problem 6 similarly focuses on issues related to the NIGC's authority.

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 7 includes the 2018 NIGC Revised Model Gaming Ordinance along with an updated discussion of tribal gaming commissions. We also feature selected examples of tribal court opinions, with which an instructor can choose to focus on tribal court practice, a particular area of tort or contract law, or the various kinds of cases that arise from the operation of a casino.

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 regulation of tribal gaming. 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. Chapter 8 includes detailed and current descriptions of state regulatory authority with regard to Class III gaming as well as a focused discussion of state separation of powers in relation to compact validity.

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 socio-economic impacts, with an emphasis on research methodology and findings. In the past decade, more studies have focused on legalized gambling's impacts on individuals and populations, communities, and regions, including Indian gaming's economic and social costs and benefits that may accrue to tribal reservations and surrounding communities. The Chapter includes discussion of these and other recent studies, and posits how to use methodologically sound research to develop and implement effective Indian gaming law and public policy. The Chapter's discussion of gambling disorders is updated to reflect current Diagnostic and Statistical Manual (DSM-5) terminology and diagnostic criteria. The Chapter also includes expanded discussion of social impacts of Indian gaming with regard to per capita payments, intra-tribal disputes, and tribal disenrollment issues.

Chapter 10 explores in some detail several pivotal legal and political issues in Indian gaming: "off-reservation" gaming; issues related to the business side of tribal casinos, including application of the National Labor Relations Act and federal bankruptcy laws; and the expansion of Indian gaming into online and mobile gaming, sports betting, and other new games reflecting the changing demographics that are reshaping the casino industry. All are issues that continue to generate legal and political controversy throughout the United States. As the entire gaming industry—not just tribal—works to meet challenges and leverage opportunities presented by the continuing expansion of legalized gambling, it is fitting to close with issues that may particularly constrain or create opportunity for tribes as they reach beyond "bricks-and-mortar" operations to realize IGRA's policy goals.

* * *

INDIAN GAMING LAW: CASES AND MATERIALS (2d ed.) 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 by e-mail at kathryn.rand@und.edu or steven.light@und.edu.

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