TRANSCRIPT :
Task Force on Changes to the Maine Indian Land Claims Settlement Implementing Act
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Gaming

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
Good morning. Thank you very much for the opportunity to be here and to address the Task Force again this morning. The Task Force at its last session asked the Tribal attorneys to prepare an issue paper on the subject of gaming, and I will be summarizing that paper now.

My goal here is not to read from it, but I would encourage everybody to do so when they're able. At the outset for all of these issues, I feel it's very important to remember a very basic but critical rule of Federal Indian law, which is that Tribal Nations possess the inherent authority to conduct and regulate activities on their lands inherently, but that right exists to the extent that it has not been eliminated or limited by Federal statute or treaty. Tribe's authority to conduct economic development is an extension of that rule, and gaming is no different.

Across the United States going back into the 1970s and including the State of Maine, Tribal nations have been conducting gaming and have been doing it or had been doing it under their own inherent sovereign authority right through the 1970s. In 1973 the Penobscot Nation opened original Indian bingo, and there was bingo taking place at Indian Island. People were probably walking away very happy at times, very unhappy at other times, but this is all happening pursuant to Tribal law. At times, the United States Department of the Interior was approving some of these Tribal ordinances to provide for the operation of gaming, but generally speaking, all of these games are conducted under Tribal law. This more or less was a state of affairs right up until 1987. In the State of California, several Tribes had been conducting gaming under inherent Tribal authority, just like the Penobscot Nation was here in the State of Maine.

Two of those tribes, the Cabazon Band of Mission Indians and the Morongo Band of Mission Indians, were hosting regular bingo games and card games on their Tribal lands. Interestingly in California at the time and to this day, California is referred to as a Public Law 280 state where the State of California exercises criminal jurisdiction over those lands. And because of that extension of criminal jurisdiction that Congress delegated to the State of California, the State of California decided to raid games held by the Cabazon and the Morongo Bands. And they raided those games under the premise that State law reigns Supreme and that the Tribes had no rights to be conducting their own gaming. This case went to the Supreme Court and in a landmark decision that has created the foundation for a $30 plus billion annual industry, the Supreme Court's decision in California v. Cabazon Band of Mission Indians concluded that gaming could

be conducted under inherent tribal authority and that that conduct was not subject to State criminal or regulatory jurisdiction.

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
As Chief Francis pointed out earlier, correctly, Congress reacted to that through the passage of a law known as the Indian Gaming Regulatory Act, commonly referred to as IGRA. As the Chief said, IGRA limited Tribal sovereignty, but it also affirms Tribal sovereignty in the field of gaming and created a framework that very carefully balanced Tribal sovereignty, State sovereignty and Federal sovereignty in the area of gaming. The purpose of IGRA really was to promote Tribal economic development, Tribal self-sufficiency and strong Tribal governments, but Congress recognized in looking at the Cabazon example that there were really sensitive issues on all sides, on the Federal and the State side as well. So IGRA sought out to create a strong foundation for Tribal sovereignty that was respectful of the neighbors' interest as well.

There are a few principles of IGRA that I feel require discussing here today. First and foremost, gaming under IGRA must be conducted pursuant to Tribal law in one fashion or another. Under IGRA, Tribes are required to be the sole owners of their gaming facilities. Tribal gaming facilities that exist under IGRA cannot be owned by commercial interests. This is referred to as a Sole Proprietary Interest Rule and is a bedrock of IGRA.

Another very critical rule is that revenues from Tribal gaming, net revenues, can only be put to certain purposes which are specified in IGRA itself. Generally speaking, those purposes are intended to provide for the general welfare of Tribes through direct assistance to Tribal members, through the provision of funding for healthcare, education, and similar governmental services. In this way, IGRA is essentially allowing Tribes to regulate their gaming in a manner that is not too different from the ways that States sometimes engage in economic development through State enterprises such as a State lottery, State liquor stores and State racetracks. Tribal nations, just like the State governments in these situations, are simply raising revenues to support their people.

IGRA provides for three types of gaming. These are referred to as the three classes of gaming. Class I under IGRA primarily refers to social or traditional games that are played for minimal prizes. These are often games that are played in conjunction with ceremonies or celebrations. These games under the Class I of IGRA are not subject to the regulatory jurisdiction of the United States or the states. They are exclusively under the regulation of Tribes.

Class II gaming includes certain types of non-banked card games. Non-banked card games are generally games where players are playing against themselves as opposed to the house. Poker is an example of a non-banked card game. Baccarat is an example of a banked game in

contrast. Class II gaming also includes bingo games. Whether those games are played by a card or whether or not they are played by computer or through the use of technological aids.

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
Class II gaming is regulated in concert between Tribal nations and the National Indian Gaming Commission, which is a federal agency created under IGRA. Class II gaming is generally conducted without the regulation of States, but as I said, it must be done under Tribal law. It must be done in accordance with Federal law, and Class II gaming can only be conducted in States where such games are already permitted under law.

Class III gaming is your catch-all. Class III gaming is generally referred to as Las Vegas style gaming. Class III gaming generally includes the games that you would see on the Vegas Strip. We're talking about roulette, talking about blackjack, slot machines. These are games that can only be conducted in the Class III setting if they are conducted pursuant to a tribal state compact.

IGRA requires that this compact essentially be a negotiated agreement between Tribal Nations and the State in which the tribal nations seek to operate gaming. And that compact must also be approved by the United States. So in a sense, Class III casino style gaming, which is prevalent across much of the United States, is done with the concurrence of Tribal, State, and Federal entities.

Tribal state compacts and the negotiation of them can include a wide range of issues. And there is a fair amount of Federal common law on the edges of this, but the law states clearly IGRA what can be negotiated as a part of these compacts. This generally includes the allocation of civil and criminal jurisdiction as it pertains to the operation of gaming. Revenue sharing between Tribal Nations and State governments and local governments is permitted generally to the extent that such revenue sharing is necessary to defray the costs for operations of gaming or in exchange for a valuable consideration given to the tribes as a part of the gaming compact. Other issues that can be negotiated as a part of a compact are remedies for breach of compact and other public health type issues that might be relevant to gaming. So smoking rules, rules on the age of individuals who can enter the casino and engage in gaming.

But regardless of the class of gaming, I will go back to a couple of fundamental rules, which are that Tribal nations must hold the sole proprietary interest of their gamings and they hold the sole responsibility for gaming, the operation of gaming, under their own Tribal laws, which must be approved by the NIGC.

The positive impact of gaming is significant, and it's extraordinarily well documented. In one year alone, the Indian gaming industry is now generating well above $30 billion. And that's
Corey Hinton Esq. (Passamaquoddy Legal Counsel)
generally, I believe, revenue that is shared almost exclusively back in the local communities where the gaming takes place. In 2014 alone, $16 billion of Tribal gaming revenue was shared with State and local governments. That is sometimes done pursuant to the Class III compacts that I referred to, but in many other situations Tribal nations will enter into agreements with local municipalities and they will share revenues, as I mentioned, to defray the cost of operating gaming. And these revenue sharing agreements are really the cornerstone I believe of gaming because they to some extent represent the acknowledgement that gaming and the burdens of it are shared in a local community and the efforts to manage gaming are also borne by the local community. These sorts of agreements will also often touch upon cross-jurisdictional elements, such as who will respond to emergencies of the law enforcement or fire variety.

And so really IGRA has had positive impacts that range from the significant revenue generated for States, Tribal and local economies. But also it has in really major ways fostered local cooperation, and you really don't have to go far. You can just Google IGRA and revenue sharing, and you will see news bulletins and news articles celebrating the contributions of tribal nations to the local economies through gaming. And it's really quite remarkable.

This is of course how gaming is conducted under Federal Indian law. This is not how gaming is conducted in Maine despite the fact that Maine has been home to Tribal gaming since well before California v. Cabazon and since well before the Indian Gaming Regulatory Act of 1988. As I mentioned, original Indian bingo was taking place on Indian Island beginning in 1973. It was 15 years before IGRA.

But notwithstanding original Indian bingo, the Tribal nations in Maine have tried to expand their gaming operations and they've tried to do so working with the State and State lawmakers and State voters. But nonetheless, the Tribal Nations have been repeatedly rejected by lawmakers and the voters even as sometimes at the very same ballots, voters were approving the expansion of gaming to commercial non-governmental interests.

A report commissioned at the request of the State legislature found that the casinos that exist here in the State of Maine, of which there are two, were funded pursuant to a campaign referendum that was overtly funded by commercial casino interests. These commercial interests are multi-State, nationwide organizations that at this point own and operate many, many casinos across the United States.

There are arrangements in place to provide for the share of some revenues from these casinos to the State of Maine and to various municipalities and agencies, but this should be contrasted

Corey Hinton Esq. (Passamaquoddy Legal Counsel)

with gaming under IGRA because the owners of these casinos are not from Maine. And those shares of their net revenues that are not shared in Maine leave the state, and they therefore go to support corporate interests and economies outside of the State of Maine. Under IGRA, the Tribal nations would be required to keep all of these gaming revenues local and circulating throughout our economies and our communities here in Maine.

Maine law does provide Tribal Nations to engage in gaming now. 27 weekends a year, half of the weekends of the year, Tribal nations are permitted to operate high stakes bingo if they have approval from the State Gambling Control Unit. In addition, Tribal nations are allowed to operate for four hours, two hours before and two hours after high stakes bingo. Tribal Nations are permitted to sell Lucky 7 type tickets, which are dispensed from a machine that is in effect the bingo machine. This Lucky 7 game offers a player an opportunity, a chance to win, but again, these games are only allowed for four hours on either side of the 27 weekends per year when Tribal nations are allowed to conduct high stakes bingo.

There have been efforts by the Tribes here in Maine to revisit various aspects of this authority by introducing new technology to simply update the old Lucky 7 machines that we have in some of our bingo halls. There have been efforts to do this working directly with the State Attorney General's office, through looking at the intricacies of Maine statutory law in concert with Federal Indian law, and looking at how bingo is handled under Class II under IGRA for example. And there have also been efforts to expand the Tribes' authority to conduct gaming in the bingo context or otherwise through State law and amendments through the legislature. As I've mentioned, all of these efforts have been rejected in one way or another.

In closing, the Wabanaki Tribal Nations' proposed changes to the Maine Implementing Act would facilitate gaming related economic development for the benefit of Wabanaki communities, their neighbors and the State as a whole. The revenue generated from Tribal gaming in Maine would stay in Maine and would benefit Tribal and local economies for years to come. Woliwon (thank you)

Sen. Michael Carpenter:

Any questions for Corey?

Chief Kirk Francis, Penobscot Nation:

Thank you Corey for the presentation. Again, just to highlight a few of the things. I appreciate raising the issue of the continuous struggle to modernize what's statutorily allowable in this state right now. And I don't think anything in how policy has been approached has been more inequitable than the access to economic opportunities, especially through gaming when we're

protected by Federal Indian law on this issue. And to watch others do it at the expense of those very things you are talking about. We knew through our indicators at Penobscot Nation for example, we employed about 70 to 80 people there on a part-time basis. Most of our social indicators told us it was the only form of employment these people had. Yet while trying to survive in a casino environment, we lost that four-decade old business a few years ago, unfortunately. And so I appreciate you highlighting this issue and continuing that conversation.

Sen. Michael Carpenter:
So a question, Corey, has there ever been a test? So why doesn't IGRA allow for Class III gaming in Maine for the tribes?

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
There has-

Sen. Michael Carpenter
Is it because of 1735b?

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
That's generally correct, sir. But I would say that there's been a fair amount of litigation around this point going back to the early 1980s. And some of the more recent rules do suggest that IGRA is not applicable in Maine as a result of the Settlement Act. But I would say that that is not necessarily a final point of law. It could still subject to challenge. Thank you.

Sen. Michael Carpenter:
Other questions? So what's the latest, what decision are you relying on that says that the dictates if you will of IGRA don't apply in Maine because of 1735. Because IGRA says if you're running it in the State, the Tribes can run it basically. And so is there a decision of some competent jurisdiction that says, "No, you can't." I challenged Doug Luckerman years ago in a committee room where over there, "If you believe that IGRA allows you to do Class III gaming, why don't you bring a declaratory judgment action in the State court?"

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
It's an interesting idea. I'm not going to concede that IGRA does not apply in the State of Maine. I will say that there is again Federal common law on this point, and I would encourage anyone to read that decision. Passamaquoddy v. Maine is a first circuit decision, and I would say that there are some questionable parts of that analysis that I believe leave open certain questions that have been sort of debated in these halls at times. And so again, I would just say that I'm not willing to concede that IGRA does not apply in Maine at this time.

Sen. Michael Carpenter:
Back to my question, excuse me, Chief, just to follow up on that. There is no decision at this point that says that IGRA does not apply in Maine? Is that fair to say?

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
Yes. I believe that is fair to say. But as I said before, there is case law that looks at some aspects of this issue. But I'm not prepared today to talk about the gray areas of that decision.

Sen. Michael Carpenter:
Okay, sure. No, I understand. If you were to bring such an action as I suggested, would that perhaps clarify it? I mean after went through the process?

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
I don't believe so. And I think as we heard, litigation doesn't foster cooperation at the local level. There was an effort in the legislature to see the Maine judicial court review this issue. And I believe that that issue that the court ultimately declined to review the issue. And there are a whole host of jurisdictional issues that might bar that issue from ever even being considered by a court. And so it's not clear that the simple act of filing a complaint and seeking a declaratory judgment would have any effect at all.

Sen. Michael Carpenter:
Okay. Chief, do you have a question?

Chief Kirk Francis, Penobscot Nation:
No, just real quick. I was just going to add this. Some of the challenge though is also whether we believe this right still exists in Maine. And I think on our side we certainly do, but some of the challenges around it is these jurisdictional fights, having to be Tribally owned these facilities on geographically challenged land, going through landed trust processes that can often get contentious. All of these different obstacles. Tribes don't possess the resources to just write $200 million, $300 million checks to build these facilities. And we know through Federal studies that these jurisdictional battles have really stymied investment in Indian Country. And this is one area where that becomes increasingly challenging in Maine. You're not seeing these campaigns now for new gaming opportunities as we did 15 years ago. People not throwing risky money at those types of things, especially in States where these jurisdictional battles are prone to exist.

Chief Kirk Francis, Penobscot Nation:
So those are the challenges we have here. If we said it exists and we're going to move forward but at the end of the day, we need to be cooperative in this space because, well, that's what IGRA it was really set ... IGRA really was passed in my mind to address State interests and local interests. And so the idea that simply being able to do it, why aren't you just doing it? Because if there's a hint of that type of contention, investors just walk away from that.

Sen. Michael Carpenter:

Which brings me back another question. Does IGRA still require that the entity be solely owned by the tribe-

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
Yes.

Sen. Michael Carpenter:
And on trust land for lack of a better term?

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
Yes, it does. The Sole Proprietary Interest Rule that you just refer to is a bedrock. It's not only in the statute itself, it's also repeated in the regulations, the regulations that have been promulgated by the NIGC to implement IGRA. And really what those statute and regulations do together is point to Tribes in creating their laws that regulate gaming, require that Tribes in managing gaming control the sole proprietary interest of gaming. That is not to say that the Tribes cannot contract for other services to be brought forth, but all of those managerial relationships, which are very common throughout the gaming industry, are all vetted by a Federal agency for the purpose of determining that those relationships do not convey a proprietary interests to a non Tribal entity.

Sen. Michael Carpenter:
Second part of my question and I'll stop asking questions. Is it still part of IGRA that or was it ever part of IGRA that facilities have to be located on Tribal owned land, Tribal trust land or owned land?

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
Yes, yes, that's exactly correct. But IGRA is not as easy as that. IGRA doesn't say that gaming can be conducted on all Indian lands. There is a definition in the statute for Indian lands that are available for gaming and there are restrictions. So in other words, if lands are acquired today in certain areas, they may not be subject to gaming. IGRA has exceptions that allow for games that are acquired after a certain date to be eligible for gaming. Actually, the cutoff date is the date of IGRA. Lands that were held prior to then are eligible. Lands that are acquired afterwards are actually not eligible, but there are exceptions.

Exceptions provide for gaming on lands that are provided to restored tribes, which would include tribes that were terminated as a part of the termination era that Mr. Tebow referred to. Other settlement exceptions or other exceptions refer to two-part determination. So if a Tribal Nation were to acquire lands tomorrow, but there is an agreement by the Tribal Nation and the State in which the Tribe is located, that gaming can still go through, essentially pursuant to that

Tribal-State agreement and gaming can also be conducted in other situations. But again, this must all be done on Indian lands.

Sen. Michael Carpenter:
Thank you. Other questions for Corey? Thank you.

Corey Hinton Esq. (Passamaquoddy Legal Counsel)
Thank you.