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Commentary: Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements

COMMENTARY:
SPREADING THE WEALTH:
INDIAN GAMING AND REVENUE-SHARING AGREEMENTS

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MR. BUFFALO:[1] I'd like to thank the organizers for inviting me to participate in this symposium. I think it's very important to participate and develop information, discussion on this very important issue that is facing both tribal governments, state governments, and local governments. I very much enjoyed presentation by the presenters. I also enjoyed reviewing their paper, and, quite frankly, as a practitioner, it reminded me how much I am behind on some of my reading in the area. The academic reading, of

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1. Henry M. Buffalo, Jr. joined his current firm, Jacobson, Buffalo, Schoessler & Magnuson, Ltd., in 1991, bringing extensive experience representing Indian tribal governments and non-tribal entities doing business with tribal governments throughout the United States. He is an enrolled member of the Red Cliff Band of Lake Superior Chippewa Indians.

Before entering private practice, Mr. Buffalo served as in-house tribal counsel for the Red Cliff Band of Lake Superior Chippewa, and later for the Fond du Lac Band of Lake Superior Chippewa. Mr. Buffalo created and served as the first Executive Director of the Great Lakes Fish and Wildlife Commission, a body composed of Indian Tribes and Bands with reserved rights to hunt, fish, and gather in territories ceded by treaty to the United States.

During his tenure with the Fond du Lac Band, Mr. Buffalo had primary legal responsibility for obtaining Federal approval of the only Indian gaming operation located in a metropolitan area, away from a reservation, before the passage of the Indian Gaming Regulatory Act. Mr. Buffalo served as the lead attorney responsible for the first tribal governmental revenue bond issue, secured by gaming revenues, issued under the Tribal Government Tax Status Act. Mr. Buffalo, as counsel to the Fond du Lac Band, served as lead counsel to the National Indian Gaming Association from its inception through the passage and adoption of the Indian Gaming Regulatory Act.

Mr. Buffalo has extensive litigation experience on behalf of tribal clients. Some representative cases include, *Fond du Lac Band of Chippewa Indians v. Carlson*, 63 F.3d 253 (8th Cir. 1995) (affirming the rights of the Fond du Lac Band to hunt fish and gather free from State regulation on lands ceded by the Band to the United States in the Treaty of 1854); and *EECO v. Fond du Lac Heavy Equipment*, 986 F.2d 246 (8th Cir. 1993) (the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 is inapplicable to tribal employer).

Mr. Buffalo speaks regularly at lawyers' seminars and gaming trade conferences on the subjects of gaming development, Federal law, and tribal sovereignty. From 1988 to the present, he has served as a Judge on the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community in Minnesota.

course, in the area, because there are references to several other studies that I hadn't gotten a chance to look at yet that have come out over the years. It's surprising how much focus there has been from academia on this whole question of the ambiguous sharing the wealth.

Just a couple real quick things. As a practitioner I've worked as an in-house counsel for ten years for Indian tribes on reservations and for the last 12 years in a small firm that, for the most part, provides services to Indian tribes. I have been involved from the beginning in the development of these issues on a national level. I worked with the former chairman, Bill Houle, of the Fond Du Lac reservation in Minnesota, who was the first chairman of the National Indian Gaming Association, who assisted in providing direction to me and a group of Indian tribal lawyers, and who assisted the tribes in creating and developing what we viewed as protective legislation that ultimately became the Indian Gaming Regulatory Act. I also assisted Fond Du Lac in negotiating its original agreements with the State of Minnesota.

With that introduction, I really find some of the focus in this area, to be interesting. The focus, of course, being this question of wealth. I noticed that, for example, in the introduction to this, and granted it's about economics, it's about law and it's about public policy. But I noticed that in the introduction to this and probably in these other papers, some of the first things that we see are these statements about what Indian gaming is actually creating in terms of money, the amount of wealth. It seems to me that we go through the process, and throughout the entire process, we never see any evidence of the other economics that are involved here.

Those economics are of the deficits that these communities have suffered through the last 200 years. What are the costs of getting a tribal government, and we're seeing, now, restoration of tribes to federal status, so we're seeing tribes that are beginning, even today, in contemporary society, at the very basic level, when it comes to creating tribal governments, creating tribal infrastructures, providing services to deliver to their constituents.

And it seems to me that when the first thing we see are all the numbers associated with how much money is being made by the tribes and no balanced information that comes up as to what is the cost of the deficits and what is going to be the cost to the tribes of bringing their governments up to par, up to some equal standing and the creation of their infrastructures, the creation of their educational systems, the creation of their housing, and health and social services. I think those are equally important to sort of put up here when we're talking about wealth. And they're equally important, I think, to the dialogue that occurs. Because once we get into this situation

here, where all we're talking about is how much Indians are making, we're losing sight of the fact that this money is the only money that these tribes have been able to develop as a source for the support of their tribal government and the services that they provide to Indian tribes.

With that, I'll sort of just leave that as my opening remarks and I'll turn it over to Professor Miller.

MR. MILLER:[2] I'm Bob Miller, and I also am very thankful to Matthew Fletcher and the law school for inviting me to be here. I also thank the authors for letting me read this article. I've seen some of your articles in the past, but never read one as carefully as I read this one, since I'm supposed to be commenting on it. I am not a gaming expert, so I came at this article as perhaps many of you will, as sort of a neophyte in this setting.

When I was practicing law, I did a little bit of gaming work, but I had no experience with revenue sharing. Of course, this is all over the news now, so I was very interested to read this.

I am from the state of Oregon and our tribes in Oregon have probably been one of the early revenue sharing, but a different form, like you mentioned in that the tribes in Oregon pay money, a certain percentage, six percent of their net into a community fund that they then decide how to distribute.

And the Grand Ronde Tribe, for which I am a judge, and, in fact, I guess I should be thankful that they are a gaming tribe, because why can they afford a court of appeals, as Mr. Buffalo just mentioned, the tribe is using this funding to expand and improve its governmental abilities. And so for the last three years, now, they have had a court of appeals. So I guess my salary comes from gaming funds, so I'm very interested in this topic.

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2. Robert Miller is Associate Professor at Lewis & Clark Law School. He practiced with the Stoel Rives law firm in 1992-1995 and practiced Indian law with Hobbs, Straus, Dean & Walker in 1995-1999. Immediately upon graduating from law school, Professor Miller clerked for the Honorable Diarmuid O'Scannlain, U.S. Court of Appeals for the Ninth Circuit. Professor Miller is the Chief Justice of the Court of Appeals of the Confederated Tribes of the Grand Ronde Community of Oregon and sits as a judge for other tribes. His published articles include pieces on civil procedure and a wide array of federal Indian law issues. He is a board member of the Oregon Native American Business Entrepreneurial Network and the Tribal Leadership Forum. He helped found, and was on the executive committee of, the Oregon State Bar Indian Law Section, and was on the board of the National Indian Child Welfare Association in 1995-2004. Miller speaks regularly on issues such as cultural protection and sovereignty for Indian tribes, employment issues related to American Indians, issues regarding tribal governments, and the Lewis & Clark expedition. He is also actively involved in the Lewis & Clark Bicentennial because he was appointed by his tribe to be on the Circle of Tribal Advisors (COTA), which works with the National Council of the Lewis & Clark Bicentennial. He is an enrolled citizen of the Eastern Shawnee Tribe of Oklahoma.

The tribes in Oregon put the money, six percent of their net, into a community fund. The Grand Ronde Tribe is allowed to distribute that money in their service area, which is five Oregon counties. They have given like a million dollars to the Portland Art Museum, there's a whole wing of the Portland Art Museum now named after the confederated tribes of the Grand Ronde community of Oregon. They've helped local cities buy ambulances, buy new police cars, hire new policemen. The tribe has very wisely used that community fund as a public advertisement, really, for the tribe. People know in the state of Oregon what the Spirit Mountain Community Fund is and that's the fund that is named for the Grand Ronde Tribe.

So getting more to this subject, as I read your paper I came up with about five or six main questions that I was hoping I was going to get to drill you folks with. You know us professors, we practice the Socratic method, we never say anything, we just ask questions, right?

So I'm going to try to do that now, because I have no answers to these, I would like you folks to answer this.

First off, as I read this, I think of the word extortion. Maybe that's too strong of a word, but once the United States Supreme Court decided the *Seminole* case and tribes lost their remedy to protect the right that IGRA defined for them to conduct casino class III style gaming, the states held all the cards, to use a gaming analogy. The states could just say we won't agree to a compact. Do anything we ask or we won't give you a compact and you will not be allowed to do class III gaming. So that was my first thought as a read the article, just sort of a knot in my stomach of the unfair situation the tribes are facing now.

There's a case in the Ninth Circuit, I've never read it, so I can only tell you what I've heard it says, but the Spokane Tribe in eastern Washington, the Ninth Circuit, for whatever the strange reason that the Spokanes were under, they're allowed to game under the *Cabazon* case and not under the requirements of IGRA. I hope what I've stated is true, so I'm giving you that caveat. Every tribe in the United States would like to game under *Cabazon* now, wouldn't they, and not under IGRA, which has obviously given states a lot of power and the remedy that was supposed to protect the tribes went away. So the tribes have a right but no remedy.

Now, to my questions and another metaphor, a gaming metaphor. Are the states bluffing, when the states offer a tribe gaming exclusivity, is that a reality? Is that a real thing? So I'm asking my authors that.

The Oregon constitution and your article told me that the California constitution prevents and outlaws casino gaming. If the state cannot

provide casino gaming, what exclusivity for casino gaming is it giving tribes? Looks like zero.

That then leads me into my second question, because you cite a Ninth Circuit case from 2003, that says that California granting this exclusivity agreement to the tribes was a real benefit and so for the tribes to pay revenue sharing is not a violation of 25 U.S.C. § 2710(d)(4) that you cite us in that states cannot extort or ask for these sorts of payments. What did California really give the California tribes if the California constitution says the state cannot offer casino style gaming? So it looks to me like the tribes didn't receive anything.

Now, if the benefit were more slot machines, different styles of games, that's exactly what Oregon negotiated the new compacts with the Grand Ronde Tribe, were new types of games, more machines, a larger gaming floor. Well, maybe that's a concrete, real benefit, but I don't see how exclusivity is a benefit in a state where the constitution forbids casino style gaming.

So that's one and two questions are really sort of related, are the states bluffing? What does this exclusivity mean? And was the Ninth Circuit case correct, did the tribes receive anything for their revenue sharing?

My third question, will Congress correct and enforce § 2710(d)(4), the provision that they cite in their paper that states cannot, and I'm using the word extort, but states cannot ask for tribes to pay fees or to taxes or licensing?

Are tribes lobbying to bring that to Congress's attention? What is the thinking about how Congress would react now? The Seminole Tribe case got rid of the remedy in IGRA, 1996, right, we're now nine years later, has Congress considered putting a new remedy in for tribes to level this playing field that IGRA was supposed to provide?

When I teach Indian law I can't help but be almost a little cynical, you get the *Cabazon* case in 1987 that said states have no voice in tribal gaming. Now what do you get in 1988? IGRA, that gave the states a lot of voice in Indian gaming. Where's the level playing field and why has Congress not reacted now, nine years after the *Seminole Tribe* case?

So are the tribes working for that, lobbying for that kind of effort or are they—what's the word, not happy is the right word, or are they just going along and getting the best deal they can in this carrot and stick situation, the state is holding out the carrot and saying, well, we won't hit you with a stick and won't sign a compact if you don't like the carrot that we're holding out.

Now, for Dr. Meister, especially, I have this fourth question. The Oregon tribes just came out with a front-page headline in the Portland

Oregonian about how, and I've forgotten the dollar figure, something like $1 billion tribal gaming benefit to the state of Oregon.

Well, the counter response to that, and of course NIGA and lots of tribes talk about the benefit of tribal gaming not just to their own community, whereas, Mr. Buffalo said economic development is so desperately needed, but tribes are talking about how this is expanding to the state and county and city economies in the area.

But what I've heard, and so I would love to hear your response to this, is this new economic development for the state or is this just the reshuffling, to use another gaming metaphor, is it just the reshuffling of entertainment dollars that would have been spent in a bowling alley, at a movie theater, et cetera?

In fact, talking more about the state of Oregon, we have a horse-racing track in Portland, my hometown, and a dog racing track and both of them are closing and so there's lots of screaming that Indian gaming has caused this. And those entities wanted slot machines, too, and have been negotiating with the governor about that. So there's a lot of discussion about this and I'd love to hear what an economist has to say about that.

And then, finally, my fifth question, which may be, what, my twenty fifth question, you know how professors get going. The states are desperately looking for funding now. The authors mentioned that. There's crises in state budgets across the country, the federal government is cutting back on its sharing with the states and leaving them holding the bag of Medicare, Medicaid and all those sorts of other instances, so the states are thrashing about looking for any possible source of funding and they've latched on, as you say, the Governator said, make tribes pay their fair share.

What will happen when state economies turn around and things get good again? Maybe we'll have another dot com boom in the next decade or something. Will states then magnanimously tell tribes, gosh, thanks for kicking in those bad years, let's renegotiate those fee sharing agreements and we'll give you some money back?

Those are my questions. I hope there's time for you to address them. Thank you very much.

MR. BUFFALO: I think there's also a part of this, the focus of this particular study, and maybe others, that sort of give rise to some very fundamental questions about whether or not, when it comes to engaging in discussions between tribes and states over this, and Minnesota, I'll characterize it as demands by the mini me governor, Tim Pawlenty, of tribes to share their revenues.

In those situations when we come to the table in which those demands are made, I think part of what would be good for this discussion on, maybe sort of the legal policy side of things, is do we come to this table between the tribes and the states on an equal basis? And I think there's some suggestion in the paper that there is no equal basis at this point in time.

But aside from that, I think there are also several other questions that do arise with respect to when indeed it is appropriate, if at all, for a discussion on revenue sharing that should occur. And I think that I address in part, I think, one of the factors that needs to be considered, and that is the question of whether or not tribes have actually been able to erase 200 years of deficits within their communities in the short period of time that they have been able to engage in this gaming.

I think that there's also a question as to the standard of living. I know in the debate that we hear an awful lot in Minnesota is that, there's a certain quality of life that the majority society has attained and it seems to me that that issue in particular did come up in some litigation that I was involved in regarding hunting and fishing rights in the 1837 and 1854 treaty areas in Minnesota. And in that context the state was basically saying, the tribes have reached a certain level of standard of living, therefore, they no longer have the need to exercise these off-reservation rights.

One of the things that we were particularly responsible for in that litigation was looking at exactly where tribal people fit within those factors that measure quality of life. It was interesting, because I believe Oregon actually led the states in looking at these and developing measurements for measuring the quality of life and all the factors associated with quality of life in a particular state back in the '90s. Governor Carlson, who was a Republican governor at the time, embraced that and had all of his governmental departments look at developing sort of the same measures and then applying them in the state. So the interesting part of our work was going and collecting all of the information that the state had already developed. It was absolutely clear within that information that Indians, whether it was within tribal governments or Indian people within the state, continued to be at the bottom of every single one of those lists.

Another point at which it may be appropriate to begin discussing revenue sharing with states is when Indian people are on a par with the majority society in all of these different measures of quality of life. I think we need to really discuss that before they even get to the point of being able to discuss revenue sharing.

I also talked with you about tribal infrastructures and institutions operating effectively. I also believe that, one other consideration that the state tribal powers are unbalanced at the table. We don't have that now.

We suggest strongly that before these revenue sharing agreements can become legitimate and appropriate there must be equality at that table, and there needs to be legitimate purposes. From my perspective, there needs to be legitimate purposes under which you can engage this type of dialogue for revenue sharing.

By legitimate I don't mean these blatant demands, because all they see is the numbers associated with the amount of money that Indian gaming creates. I don't think it's appropriate.

One of the factors that hasn't been up here, which I think is a reality and is a reality in Minnesota, the only reason this governor that we have today has decided to engage the tribes in making these demands over revenue sharing is not because of a, "crisis in the state budget"—this year we're talking about a $200 million deficit which is a percent—a decimal point in the $30 billion budget of the state budget.

His concern isn't the $200 million. His concern [and what], I think what's driving [his policy] is the political backlash that's occurring in the partisan perception that exists out there with respect to which party the tribes support. I've heard this directly from the Speaker of the House, who has now been on about a five-year tear to try and get at Indian tribes, because he feels that the Indian tribes do not support his political party. That's the reality that's going on with these demands.

It isn't about fairness, it isn't about filling a budget crisis, it has nothing to do with that stuff. When it's time to sit down, let's have legitimate reasons. That's what I would suspect the tribes in many other places are trying to say we're fine to sit down, we're fine to talk to you, but we have to have some basis, some justification for doing that, some legitimate basis, and it just does not exist at this point.

There has to be mutual benefit. That's what the tribes have always said and that's why those compacts are created in Minnesota the way they have been created. We understand the intent of the law, the purpose of the law to prohibit the taxation or application of fees, and that's why those compacts only have within them the reimbursement of the costs associated or expenses associated with the state's obligations under those compacts.

If they want more, there has to be some mutual benefit. It can't be, you got it, I want it, and that's the end of discussion, which usually is the case when it comes to these, quote unquote, negotiations.

I question the use of the term negotiation in these proceedings, because I think that negotiation implies that you have two willing parties sitting there at the table that see some mutual benefit.

None of that has occurred, whether it's from the beginning at Pequat all the way to the latest arrangements that have occurred. Leverage is what

states have been using to get around the prohibition against taxes and fees. Their leverage, of course, is the ultimate leverage, either prohibition of gaming within the state, or expansion of gaming within the state. Those are the two things that they tend to use in their initial discussions with tribes about revenue sharing.

The other thing that I think is important is that the law has to change. We cannot agree to revenue sharing when the law prohibits it. And irrespective of what the Ninth Circuit has said, I still believe that the law prohibits revenue sharing agreements. Thank you.

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