



Memorandum

August 23, 2007

TO: Hon. John W. Warner
Attention: John Frierson

FROM: M. Maureen Murphy
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American Law Division

SUBJECT: The Anti-Gaming Provisions of H.R. 1294, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act

This responds to your request for a memorandum discussing whether H.R. 1294, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, as passed by the House on May 8, 2007, “gives the state of Virginia ‘iron clad’ protection against gambling interests gaining any further gaming rights than any other Virginian.”

To respond to your request, we will: (1) set forth the anti-gaming and jurisdictional provisions of H.R. 1294 and any relevant legislative history; (2) provide a brief background on the legal basis of Indian gaming; (3) briefly describe some of the factors that have been included in legislation upheld as curtailing tribal gaming or subjecting tribal gaming to state law; and (4) analyze the H.R. 1294 gaming and jurisdictional provisions in light of factors relied upon in judicial opinions upholding legislation denying gaming rights to other tribes.

It will not be possible, however, to predict or assert with any degree of certainty that H.R. 1294 provides “iron clad” protection against Indian gaming. Courts approach Indian law decisions against a backdrop of statutory and decisional law interpreting federal Indian policy as it has evolved historically and sometimes use canons of statutory construction favoring Indian and tribal rights. Unless lawmakers are cognizant of these decisions and policies and provide ample legislative history and precise and comprehensive statutory explication of their goals, they risk the possibility that their intent will not be actualized. This is particularly true in matters involving gaming and jurisdiction, both of which figure in H.R. 1294.

H.R. 1294. H.R. 1294 provides federal recognition for six Virginia Indian tribes: the Chickahominy Indian Tribe, the Chickahominy Indian Tribe–Eastern Division; the Upper Mattaponi Tribe; the Rappahannock Tribe, Inc.; the Monacan Indian Nation; and the Nansemond Indian Tribe (hereinafter, the Tribes or the Virginia Tribes). In extending federal recognition, the bill includes provisions applicable to each tribe which generally incorporate

and make applicable to the Virginia Tribes the general laws of the United States which are applicable to Indians and Indian tribes. The provisions read:

All laws (including regulations of the United States of general applicability to Indians or Nations, Indian tribes, or bands of Indians (including the Act of June 18, 1934 (25 U.S.C. 461 et seq)) that are not inconsistent with this title are applicable to the Tribe[s] and tribal members.¹

As passed by the House, the legislation contains language with respect to each of the these tribes that is intended² to preclude gaming. It reads:

The Tribe shall not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission.³

There is also language applicable to each of the Tribes, which are captioned “Jurisdiction of the State of Virginia.” It reads:

- (a) In General- The State of Virginia shall exercise jurisdiction over–
 - (1) all criminal offenses that are committed on; and
 - (2) all civil actions that arise on lands located within the State of Virginia that are owned by, or held in trust by the United States for, the Tribe.
- (b) Acceptance of State Jurisdiction by Secretary- The Secretary of the Interior is authorized to accept on behalf of the United States, after consulting with the Attorney General of the United States, all or any portion of the jurisdiction of the State of Virginia described in subsection (a) upon verification by the Secretary of a certification by a tribe that it possesses the capacity to reassume such jurisdiction.⁴

These provisions were added to the legislation during the April 27, 2007, mark up session held by the House Committee on Natural Resources, and are not addressed in the Report accompanying the legislation.⁵ Indicative of the congressional intent that these provisions preclude gaming under IGRA by the Virginia Tribes are statements made by various members during the House debate. Representative Rahall, Chairman of the House Committee on Natural Resources, assured the House that the anti-gaming provisions provided a broad prohibition on tribal gaming and had the full backing of the Virginia Tribes. He said:

¹ H.R. 1294, 110th Cong., 1st Sess., as passed by the House, May 8, 2007, Sections 103(a), 203(a), 303(a), 403(a), 503(a), and 603(a). All references to H.R. 1294 hereinafter are to this version.

² H.R. Rept. 110-124, 110th Cong., 1st Sess. 22 (2007), states: “The six Virginia tribes agreed to a prohibition on gaming and have repeatedly stated that they have no intention of pursuing gaming at this time. Accordingly, the tribes are prohibited from conducting any gaming pursuant to any inherent authority they may possess pursuant to the Indian Gaming Regulatory Act, or any other federal law.” [sic].

³ H.R. 1294, sections 106(b), 206(b), 306(b), 406(b), 506(b), and 606(b).

⁴ H.R.1294, sections 108, 208, 308, 408, 508, and 608.

⁵ H.R. Rep. 110-124, 110th Cong. 1st Sess. (2007).

To address claims that the tribes are only interested in Federal recognition so that they may conduct gaming, the six tribes supported an outright gaming prohibition which was included in this bill. This gaming prohibition precludes the Virginia tribes from engaging in, licensing or regulating gambling pursuant to the Indian Gaming Regulatory Act on their lands.⁶

Various supporters of the bill indicated that endorsement was premised on having been assured that the bill contained an absolute prohibition of casino gambling, whether or not they believed that stronger language was possible.⁷ Representative Moran, the sponsor of the legislation, and Representative Shays engaged in a colloquy that indicates that both believed that the provisions were intended to prohibit gaming by the Tribes. They differed in their views of whether the gaming prohibition would be efficacious. Representative Moran

⁶ 153 *Cong. Rec.* H4604 (May 8, 2007 daily ed.) (statement of Rep. Rahall).

⁷ Representative Goodlatte stated:

...in recent days I have begun to hear murmurs that the language is not as strong as we have been led to believe, and the tribes are considering challenging the gaming limitation. I have always believed the tribes when they have said they do not wish to pursue gambling, so I hope that there is no truth to a challenge.

I believe it is the desire of this Congress that if challenged in court, this language would be upheld, just as similar language was upheld in *Del Sur Pueblo v. State of Texas*, 69 Fed. App. 659. However I urge the Senate to look closely at this bill to see if the language can be tightened and strengthened to further ensure that casino-style gambling doe [sic.] not come to the Commonwealth. 153 *Cong. Rec.* H4606 (May 8, 2007, daily ed.) (statement of Rep. Goodlatte).

Representative Wolf spoke of similar “rumors that attorneys are being consulted about ways to overturn the limitation on tribal gaming” and provided a state of the rationale behind the limitation as follows:

Under the bill, no Virginia Indian tribe or tribal member...would have any greater rights to gamble or conduct gambling operations under the laws of the Commonwealth of Virginia than any other citizen of Virginia. Further, it is the expectation of Congress that the language restricting gambling operations by Indian tribes will be upheld if it is ever challenged in court, just as similar language was upheld in *Ysleta Del Sur Pueblo v. the State of Texas*, 69 Fed. App. 659.

If casino gambling were to come to Virginia, it would open the door to the myriad of financial and social ills associated with gambling. Virginia’s tourism sector, its economy and its communities are some of the strongest in the country. Places such as the Shenandoah Valley, Williamsburg and Jamestown are national treasures which draw visitors from all over the world. Small businesses thrive in Virginia. The Commonwealth’s reputation would be tarnished if it allowed casino-style gambling within its borders.

This legislation, I believe, does shut the door on the opportunity for these tribes to acquire land and eventually establish tribal casinos. As I said, I know that the current tribal leadership has indicated that they do not want to pursue gambling—and I believe they are sincere. But what the leaders today say doesn’t lock in the leaders of tomorrow. I have already started to worry that future leadership of the tribes will pursue establishing tribal casinos. I hope I am wrong. 153 *Cong. Rec.* H4607 (May 8, 2007 daily ed.) (statement of Mr. Wolf).

indicated that the prohibition was a necessary compromise and espoused it as effective because it was similar to other gaming prohibitions imposed on other Tribes, including the Narragansett Indian Tribe.⁸ Representative Shays, on the other hand, was concerned that future legislation or court decisions could open the way for gaming by the Virginia tribes.⁹

Background on Indian Gaming. Jurisdiction over criminal and civil matters arising on Indian reservations is a complex matter. Under federal law, any gambling that is conducted on Indian reservations, “whether or not it is sanctioned by an Indian tribe,” must conform to state laws and regulations; otherwise, it is generally subject to federal prosecution¹⁰ unless it is conducted under the terms of the Indian Gaming Regulatory Act (IGRA).¹¹

IGRA provides a basis for gaming activities on “Indian lands”¹² that need not conform to state law. The three classes of gaming authorized by IGRA progress from tribally regulated class I social gaming, through class II bingo and non-banking card games--regulated by tribes and the Indian Gaming Regulatory Commission, to class III casino gaming, which requires a tribal state-compact.¹³ The federal courts have long recognized that Indian tribes, as a matter of retained inherent tribal sovereignty, have certain territorial

⁸ 153 *Cong. Rec.* H4563-4565 (May 8, 2007 daily ed.) (statement of Rep. Moran).

⁹ *Id.* at 4564 (statement of Rep. Shays).

¹⁰ Under 18 U.S.C. § 1166,

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term “gambling” does not include -

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact proved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

¹¹ 25 U.S.C. §§ 2701, et seq.

¹² “Indian lands” is defined to include lands within Indian reservations and lands held in trust by the United States for an Indian tribe or individual. 25 U.S.C. § 2703(4).

¹³ 25 U.S.C. §§ 2703(6), (7), and (8).

jurisdiction with respect to civil and criminal law within their reservation borders.¹⁴ IGRA was enacted as part of a long tradition of federal legislation and judicial decisions that have established an intricate jurisdictional allocation among Indian tribes, states, and the federal government with respect to governmental power over reservation activities.

Under the Indian Commerce Clause of the U.S. Constitution,¹⁵ the federal government has exclusive authority over Indians on Indian reservations and Indian trust land.¹⁶ State authority over Indians on their reservations, thus, depends upon federal delegation. In the criminal law area, crimes committed by or against Indians in Indian country are subject to federal prosecution and, with the exception of major crimes for which there are federal statutory definitions or other offenses which tribes have punished exercising their concurrent jurisdiction, state criminal laws are used as the basis of federal prosecution.¹⁷ During the late 1970's, tribes began to authorize or conduct various types of gaming activity not permissible in other parts of their states. Eventually, the Supreme Court broadly upheld tribal authority to do so in *California v. Cabazon Band of Mission Indians*.¹⁸ The case is premised on the allocation of criminal and civil jurisdiction in "Indian country"¹⁹ under a federal statute, usually referred to as Public Law 280.²⁰ That statute was enacted in 1953. It delegates criminal jurisdiction over most crimes committed in Indian country and a degree of civil jurisdiction over matters arising in Indian country to certain states, including California.²¹ The criminal component of Public Law 280 reads:

Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the

¹⁴ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Montana v. United States*, 450 U.S. 544 (1981); *Lara v. United States*, 541 U.S. 193 (2004).

¹⁵ U.S. Const., art. I, § 8, cl. 3.

¹⁶ *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁷ 18 U.S.C. §§ 1151 - 1153.

¹⁸ 480 U.S. 202 (1987).

¹⁹ "Indian country," the geographical component of federal criminal jurisdiction over Indian lands, is defined in 18 U.S.C. § 1151 to mean "(a) all land within the limits of any Indian reservation..., (b) all dependent Indian communities..., and (c) all Indian allotments...."

²⁰ Act of August 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-126, 18 U.S.C. §§ 1360, 1360 note.

²¹ At first five states, California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation), were designated for delegation of this jurisdiction. Later Alaska was added. Pub. L. 85-615, 72 Stat. 545. In 1954, the Menominee Tribe was added. Act of August 24, 1954, ch. 910, 68 Stat. 795. Another provision allowed any state to assume jurisdiction. This was repealed by Pub. L. 90-284, 82 Stat. 79 (1968), but not before 10 states assumed some jurisdiction under it. It has since been amended and now requires consent of a tribe in a special election before a state may assume jurisdiction over criminal offenses; it also permits retrocession of state jurisdiction. 25 U.S.C. §§ 1326; 1321(a); and 1322(a). Since then, only one state, Utah, has accepted jurisdiction, Utah Code §§ 9-9-201 – 9-9-213, but no tribes in Utah have consented to state jurisdiction.

criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory....²²

The civil provision reads:

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State...

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.²³

In 1973, in *Bryan v. Itasca County*,²⁴ in an opinion on which the *Cabazon* Court relied, the Supreme Court held that the civil component of Public Law 280 did not authorize state taxation of Indian land in Indian country. Moreover, the Court read the legislative intent of Congress in enacting Public Law 280 as not conveying general regulatory jurisdiction over Indian country to the states.²⁵ The Court in *Cabazon* noted that while Public Law 280 conferred on California general criminal jurisdiction to prescribe and punish crimes committed by and against Indians on California reservations, its grant of civil jurisdiction was limited, as had been held in *Bryan*. According to the *Cabazon* Court's reading of *Bryan*, Public Law 280's grant of civil jurisdiction to states did not extend to general civil regulatory jurisdiction and, thus, did not give California—or any of the other Public Law 280 states—the authority to prescribe civil laws and regulations for Indian reservations. The Court, therefore, inquired as to the nature of California's bingo law in terms of whether it was a criminal-prohibitory law or a civil-regulatory law. It accepted the holding of the appellate court that the California gambling law was civil-regulatory, primarily because California did not prohibit all forms of gaming, but allowed and regulated some bingo operations and some card games, and operated a state lottery. The fact that unregulated bingo was subject to criminal misdemeanor treatment under California law did not alter the Court's analysis.

Finding that Public Law 280 had not delegated authority to California to regulate bingo on Indian reservations, the Court looked to whether or not there was implied federal preemption and found that there was. It found federal preemption by engaging in a balancing test of federal and tribal interests versus California's interest, all of which was considered against a backdrop of tribal sovereignty. It found that the federal policy and interest in tribal self-determination and economic development outweighed the interest advanced by California—preventing organized crime from taking hold.

²² 18 U.S.C. § 1162(a).

²³ 28 U.S.C. §§ 1360(a) and (c).

²⁴ 426 U.S. 39 (1973).

²⁵ *Id.*, at 387. According to the Court, “certainly the legislative history...makes it difficult to construe [the] jurisdiction...acquired...as extending general state civil regulatory authority, including taxing power, to govern Indian reservations.”

Federal Legislation Subjecting Tribal Gaming to State Law. Several federal laws settling Indian land claims or providing recognition to a particular Indian tribe contain clauses designed to subject tribal land to state jurisdiction or to preclude tribal gaming under IGRA. None contains language identical to that included in H.R. 1294. It might be useful to examine the language of some of these statutes and any judicial decisions interpreting them, particularly with respect to gaming.

*The Maine Indian Claims Settlement Act of 1980 (MICSA).*²⁶ Under MICSA, Maine laws are made applicable to Maine Indian tribes. The language reads, in pertinent part, as follows:

Except as provided in section 1727(e)²⁷ and 1724(d)(4)²⁸ of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

(B)(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.²⁹

Another provision of MICSA makes inapplicable any subsequently enacted federal Indian law “which would affect or preempt the application of the laws of the State of Maine”³⁰ as provided in the MICSA. IGRA was enacted after MICSA and has been held not to apply to

²⁶ 25 U.S.C. §§ 1721 et seq.

²⁷ Under 25 U.S.C. § 1727(e), the Indian Child Welfare Act is made applicable to Maine tribes.

²⁸ Under 25 U.S.C. § 1724(d)(4), the Secretary of the Interior is authorized to enter into negotiations with the State of Maine and the Houlton Band of Maliseet Indians respecting an agreement regarding trust acquisition of land or natural resources.

²⁹ 25 U.S.C. §§ 1725(a) and (b)(1). Under the Maine Implementing Act, there is a general provision containing language similar that of the federal statute subjecting all Maine Indians and Indian nations to the laws of the state. Me. Rev. Stat. Ann. tit. 30 § 6204. “Laws of the state” is defined to mean “the Constitution and all statutes, rules or regulations and the common law of the State and its political subdivisions, and subsequent amendments thereto or judicial interpretations thereof.” Me. Rev. Stat. Ann. tit. 30 § 6203(4). With respect to the Passamaquoddy Tribe and the Penobscot Indians, separate provisions define jurisdiction of their courts and their law enforcement authority. Me. Rev. Stat. Ann. tit. 30 §§ 6209-(A) and (B) and 6210.

³⁰ 25 U.S.C. § 1735(b). It reads:

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indian nations, or tribes or bands of Indians which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

the Passamaquoddy Tribe, thereby precluding IGRA gaming.³¹ Its effect upon another Maine tribe, the Aroostook Band of Micmacs, which was accorded federal recognition after IGRA was enacted, is not as clear. Under the terms of the Aroostook Band of Micmacs Settlement Act of 1991,³² federal law is applicable to the Aroostook Band of Micmacs to the same extent as it is applicable to other Maine tribes recognized in the MICSA.³³ There appears to have been no judicial decision precisely on point interpreting this provision. There is, however, a decision finding that the provision of the MICSA applying state law to “all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members”³⁴ subjects the Aroostook Band of Micmacs to state law. In *Aroostook Band of Micmacs v. Ryan*,³⁵ the U.S. Court of Appeals for the First Circuit held that the MICSA provision abrogated any common law tribal sovereign immunity which the Aroostook Band of Micmacs might claim and subjected the tribe to the authority of a Maine anti-discrimination law and to enforcement proceedings based on discrimination complaints filed by tribal employees. In reaching the decision, the court chose to respond to claims that the MICSA provision was similar to the provision of Public Law 280 at issue in *Bryan v. Itasca County*. It contrasted the legislative history and language used in MICSA with that of Public Law 280 and noted that “the Court in *Bryan* stressed that Public Law 280 lacked “any conferral of state jurisdiction over the tribes themselves,” [while the MICSA] expressly *does* apply to Indian tribes in addition to their members.”³⁶

The Catawba Indian Claims Settlement Act (CICSA).³⁷ CICSA provides that IGRA does not apply to the Catawba Indian Tribe. The provision reads:

- (a) The Indian Gaming Regulatory Act...shall not apply to the Tribe.
- (b) The Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement and the State Act, all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation.³⁸

The settlement agreement between the State of South Carolina and the Catawba Tribe, which was ratified by the federal legislation, permits the Catawba Tribe to conduct bingo. The CICSA contains a provision, which is similar to the savings clause in MICSA. It makes

³¹ *Passamaquoddy Tribe v. State of Maine*, 75 F. 3d 784 (1st Cir. 1996). In this case, the court interpreted the savings clause in MICSA to require a “later Congress to stop, look, and listen before weakening the foundation on which the settlement between Maine and the Tribe rests...[and as signaling] courts that, if a later Congress enacts a law for the benefit of Indians and intends the law to have effect within Maine, that indent will be made manifest.” *Id.*, at 789.

³² Pub. L. 102-171, 105 Stat. 1143, 25 U.S.C. § 1721 note.

³³ 25 U.S.C. § 1721 note, § 6(b). This provision reads: “For the purposes of application of Federal law, the Band and its land shall have the same status as other tribes and their lands accorded Federal recognition under the terms of the Maine Indian Claims Settlement Act of 1980.”

³⁴ 25 U.S.C. § 1725(a).

³⁵ 484 F. 3d 41 (1st Cir. 2007).

³⁶ *Id.*, at 52 (citation omitted, emphasis in original).

³⁷ 25 U.S.C. § 941 et seq.

³⁸ 25 U.S.C. § 941*l*. This section is implemented by S.C. Code § 27-16-110.

subsequent federal Indian legislation inapplicable unless it so specifies.³⁹ The CICSA contains various provisions which substantially subject the tribe and tribal land to state jurisdiction.⁴⁰ In a case in which the Catawba Tribe contested the authority of a state municipality to deny approval of a high stakes bingo operation, the U.S. Court of Appeals for the Fourth Circuit ruled against the tribe, affirming a district court opinion that had specifically found that “the federal implementing legislation expressly delegated regulatory authority over the Tribe’s gambling operations to the State of South Carolina and its political subdivisions.”⁴¹

*The Rhode Island Indian Claims Settlement Act of 1978 (RICSA).*⁴² RICSA, as amended in 1996,⁴³ has been held to preclude gaming.⁴⁴ As originally enacted, RICSA had a jurisdictional provision implementing a settlement arrangement executed by state and local government officials and private landowners in settlement of litigation involving claims by the Narragansett Indian Tribe that certain lands in Rhode Island had been illegally transferred in violation of federal law.⁴⁵ One of the terms of the settlement, as characterized by the House Report accompanying the federal legislation was that “[a]ll the laws of the State were agreed to continue in full force and effect on the settlement lands...”⁴⁶ The jurisdictional provision in the federal legislation reads, in pertinent part:

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.⁴⁷

³⁹ 25 U.S.C. § 941m(c). It reads:

The provisions of any Federal law enacted after October 27, 1993, for the benefit of Indians, Indian nations, tribes, or bands of Indians, which would affect or preempt the application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands, as provided in this chapter and the South Carolina State Implementing Act, shall not apply within the State of South Carolina, unless such provision of such subsequently enacted Federal law is specifically [sic] made applicable within the State of South Carolina.

⁴⁰ For example, 25 U.S.C. § 941h(1) subjects “[a]ll matters involving tribal powers, immunities, and jurisdiction, whether criminal, civil, or regulatory...[to] the terms and provisions of the Settlement Agreement [with the State] and the State [implementing] Act...unless otherwise provided...” Similar language applies to “[a]ll matters pertaining to governance and regulation of the reservation 9including environmental regulation and riparian rights”. 25 U.S.C. § 941h.

⁴¹ *Catawba Indian Tribe of South Carolina v. City of North Myrtle Beach*, 100 U.S. App. LEXIS 13987 (4th Cir. 2000) (unpublished opinion).

⁴² Pub. L. 95-395, 92 Stat. 813, 25 U.S.C. §§ 1701 - 1716.

⁴³ Pub. L. 104-208, Div. A, Title I, § 10(d) [Title III, § 3301], 110 Stat. 3009-227, 25 U.S.C. § 1708(b).

⁴⁴ *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F. 3d 1335 (D.C. Cir. 1998).

⁴⁵ 25 U.S.C. § 1702(h). For history of the dispute, see *Town of Charlestown v United States*, 696 F. Supp. 800, 801-805 (D.R.I. 1988), *aff’d* 873 F. 2d 1433 (1st Cir. 1989).

⁴⁶ H.R. Rep. 95-395, 95th Cong., 2d Sess. 7 (1978); 1978 U.S.Code Cong. & Ad. News 1948, 1950.

⁴⁷ 25 U.S.C. § 1708(a).

In a 1994 decision, *State of Rhode Island v. Narragansett Indian Tribe*,⁴⁸ the U.S. Court of Appeals for the First Circuit found that the jurisdictional grant to Rhode Island included civil regulatory jurisdiction and civil adjudicatory jurisdiction, but did not preclude tribal concurrent jurisdiction. It, therefore, held that the tribe had sufficient jurisdiction to satisfy the IGRA requirement that gaming be on “Indian lands within ...[a] tribe’s jurisdiction”⁴⁹ over which the tribe “exercises governmental power.”⁵⁰ Congress reacted by enacting a 1996 amendment to RICSA precluding gaming; it reads:

For purposes of the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*), settlement lands shall not be treated as Indian lands.⁵¹

This amendment has been upheld to deny the Narragansett IGRA gaming rights against a claim that it was a denial of equal protection. The U.S. Court of Appeals for the District of Columbia found that Congress denied gaming rights to the Narragansett Tribe based on elements of the legislative history of IGRA and the Settlement Act.⁵² These factors, according to the court, could be fairly interpreted by Congress as evincing tribal agreement to state control and that for Congress to exclude “from IGRA those tribes that have specifically agreed to state gambling regulation is an ‘appropriate’ governmental purpose.”⁵³

*The Ysleta del Sur Pueblo Restoration Act*⁵⁴ and the *Alabama and Coushatta Indian Tribes of Texas Restoration Act*.⁵⁵ These two statutes, which were enacted together, restored federal status and recognition for two previously terminated Texas tribes. Virtually identical provisions preclude the applicability of IGRA on their reservations and lands. The Ysleta del Sur Pueblo legislation provides that Texas is to exercise civil and criminal jurisdiction within the tribe’s reservation as if it had assumed Public Law 280 jurisdiction with the consent of the tribe.⁵⁶ However, a separate provision precludes gaming; it contains three subsections. One subjects gaming to Texas law. It reads:

⁴⁸ 19 F. 3d 685 (1st Cir. 1994), *cert. denied*, 513 U.S. 919.

⁴⁹ 25 U.S.C. §§, 2710(b)(1) and 2710(d)(3)(A).

⁵⁰ 25 U.S.C. § 2703(4)(B).

⁵¹ Pub. L. 104-208, Div. A., Title I, § 10(d) [Title III, § 330], 110 Stat. 3009-227, 25 U.S.C. § 1708(b).

⁵² *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F. 3d 1335 (D.C. Cir. 1998).

⁵³ *Id.*, at 1341. The court reviewed legislative histories of RICSA and IGRA and found sufficient evidence for its conclusion that Congress could have believed that the RICSA conveyed jurisdiction to Rhode Island and that the 1996 amendment was merely preserving the terms agreed on by the parties to the settlement. It noted that, although language that would have specifically excluded the settlement lands from IGRA’s coverage was dropped during the course of considering the IGRA legislation, there was a Senate floor colloquy in which the two Rhode Island Senators, Senators Chafee and Pell, and the Chairman of the Senate Indian Affairs Committee, Senator Inouye, clarified the intention that Rhode Island law would govern gaming on the settlement lands.

⁵⁴ Pub. L. 100-89, Title I, 101 Stat. 666, 25 U.S.C. § 1300g (1987).

⁵⁵ Pub. L. 100-89, Title II, 101 Stat. 669, 25 U.S.C. §§ 731 - 737.

⁵⁶ 25 U.S.C. § 1300g-4(f).

All gaming activities which are prohibited by the laws of the State of Texas are... prohibited on the reservation and on the lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.⁵⁷

Another emphasizes the limits of the grant of jurisdiction to Texas. It reads:

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.⁵⁸

The third subsection provides for federal enforcement of the Texas gaming laws and penalties made applicable in the first subsection and preserves the right of Texas to bring injunctive actions in federal court; it reads:

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of this section.⁵⁹

Similar language applies to the Alabama and Coushatta Indian Tribes of Texas.⁶⁰ The courts have upheld these statutes as requiring tribal gaming to comply with Texas gaming law and to be enforced in federal court either by a federal criminal action or by a suit brought by the Texas State Attorney General to enjoin violations.⁶¹

*Massachusetts Indian Land Claims Settlement Act of 1987 (Massachusetts ILCSA).*⁶² Massachusetts ILCSA settled claims of the Wampanoag Tribal Council of Gay Head, Inc,

⁵⁷ 25 U.S.C. § 1300g-6(a),

⁵⁸ 25 U.S.C. § 1300g-6(b).

⁵⁹ 25 U.S.C. § 1300g-6(c).

⁶⁰ 25 U.S.C. § 737. This refers to "Tribal Resolution No. T.C. -86-07, which was approved and certified on March 10, 1986."

⁶¹ See *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670 (E.D. Tex. 2002); *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668 (W.D. Tex. 2001); *modified, aff'd* 69 Fed.Appx. 659 (5th Cir. 2003), 2003 WL21356043, *cert. denied* 540 U.S. 985 (2003). In *Ysleta del Sur Pueblo v. State of Texas*, 36 F. 3d 1325 (5th Cir. 1994), *cert denied*, 514 U.S. 1016 (1995), the court ruled that IGRA was inapplicable to the Ysleta del Sur Pueblo by virtue of the language of the restoration legislation. Notwithstanding that ruling, the Alabama-Coushatta Tribes operated a casino without a tribal-state compact for five years before the court ruled, in *Alabama-Coushatta Tribes of Texas v. Texas*, that the restoration legislation made Texas gaming law applicable to tribal lands. According to the court, despite some indication in the legislative history (floor statement by a Member of the House) that could have been interpreted as applying the *Cabazon* decision to the legislation, the plain language of the gaming provision, the text of the tribal resolution, and language in committee reports combined to reveal that "Congress and the Tribe intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas." 208 F. Supp. 2d 670, 677.

⁶² Pub. L. 100-95, 101 Stat. 704, 25 U.S.C. §§ 1771 et seq.

a federally recognized Indian tribe now known as the Wampanoag Tribe of Gay Head (Aquinnah), to certain lands in Gay Head, Massachusetts (now, Aquinnah) by extinguishing tribal land claims, ratifying past land transfers, establishing a settlement fund with state and federal contributions, and setting rules for jurisdiction on lands to be purchased or transferred to the Wampanoags. Among the jurisdictional provisions are: (1) specific limited authority for the Wampanoag Tribe to regulate hunting on settlement lands⁶³; (2) authority for Massachusetts law and regulations to apply to any tribal land outside the town of Gay Head⁶⁴; (3) a limitation on tribal jurisdiction over lands within the town of Gay Head⁶⁵; (4) a provision specifying that “[a]ny after acquired land held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to the same benefits and restrictions as apply to the most analogous land use described in the Settlement Agreement”⁶⁶; and, (5) a general jurisdictional provision referencing gaming.⁶⁷ Tribal jurisdiction is severely restricted with respect to lands outside of Gay Head, the statute provides that:

Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc., that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.⁶⁸

Tribal jurisdiction over lands within Gay Head is confined to tribal members and subject to further restrictions. The statute specifically makes these lands subject to the settlement agreement⁶⁹ and further provides:

The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.⁷⁰

The general provision applying state law reads:

Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts (including those laws and regulations which prohibit the conduct of bingo or any other game of chance).

⁶³ 25 U.S.C. § 1771c(a)(1)(B).

⁶⁴ 25 U.S.C. § 1771d(g).

⁶⁵ 25 U.S.C. § 1771e.

⁶⁶ 25 U.S.C. § 1771d(c).

⁶⁷ 25 U.S.C. § 1771g.

⁶⁸ 25 U.S.C. § 1771d(g).

⁶⁹ 25 U.S.C. § 1771d.

⁷⁰ 25 U.S.C. § 1771e(a).

This legislation became law fourteen months before IGRA was enacted.⁷¹ Although there has been no reported case addressing the ability of the Wampanoag Tribe to conduct gaming under IGRA, the civil regulatory authority of the town under the legislation has been upheld. The case involved a tribal challenge to the town's enforcement of zoning requirements against the tribe's construction of a shed for shellfish hatchery on tribal land within the town.⁷²

Analysis of H.R. 1294 Anti-Gaming Language. The provision of H.R. 1294 specifically prohibiting tribal gaming reads:

The Tribe shall not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission.⁷³

This language does not appear in federal law and, thus, has not been tested in the courts. It precludes gaming “as a matter of claimed inherent authority,” thereby making inapplicable the rationale under which tribal gaming was upheld in *Cabazon*. It also precludes gaming under IGRA.⁷⁴ The criminal component of IGRA, 18 U.S.C. § 1166, criminalizes any gaming in Indian country that does not conform to state law or is not conducted in accordance with IGRA. This appears to leave only the possibility of gaming in accordance with Virginia law.

The language chosen in this anti-gaming provision may include a technical gap. H.R. 1294 states that the Virginia tribes shall not “conduct” gaming under IGRA. IGRA, however,

⁷¹ Both IGRA and the Massachusetts ICSA were enacted by the 100th Congress after *Cabazon*; the Massachusetts ICSA on August 18, 1987, and IGRA on October 18, 1988.

⁷² *Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corporation*, 443 Mass. 1; 818 N.E. 2d 1040 (2004). The court ruled that the settlement agreement, state implementing legislation, federal settlement act, and deed transferring town land to the Wampanoag Tribe constituted a waiver of tribal sovereign immunity with respect to zoning on the particular tract of land. The tribe did not contest the applicability of the local zoning requirement; it claimed that only the tribe could enforce it. Important to the decision was the explicit waiver of tribal sovereign immunity in the language of the settlement agreement and the fact that the federal legislation was expressly subject to the terms of the settlement agreement. See 25 U.S.C. § 17711e(b). The court held that the tribe had agreed to be treated as a non-profit Massachusetts corporation for zoning purposes. The tribal attempt to remove the case to federal court failed on the basis of the jurisdictional rule of the well pleaded complaint, i.e. a state claim may not be removed to federal court when the federal issue arises only with a defense to be offered by the defendant. *Weiner v. Wampanoag Aquinnah Shellfish Hatchery Corporation*, 223 F. Supp. 2d 346 (D. Mass. 2002).

⁷³ H.R. 1294, sections 106(b), 206(b), 306(b), 406(b), 506(b), and 606(b).

⁷⁴ There is also a prohibition on gaming activities under regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission. The Secretary of the Interior has issued regulations, under the authority of IGRA, for class III gaming procedures, 25 C.F.R., Part 291, in situations in which a tribal suit to compel a state to enter into negotiations for a tribal-state compact is dismissed after the state raises a defense based on its Eleventh Amendment immunity. NIGC has issued various regulations, 25 C.F.R. Parts 501 et seq., for tribal gaming under the authority of IGRA.

authorizes tribes to “engage in, *or license and regulate*, class II gaming...”⁷⁵ and sets procedures for any tribe proposing “to engage in, *or to authorize any person or entity to engage in*, a class III gaming activity....”⁷⁶ The term “conduct” is not defined in IGRA, but it is used in the criminal component of IGRA in such a way as to distinguish tribally-conducted gaming from tribally sanctioned gaming.⁷⁷ Since the term “conduct” is not defined in H.R. 1294 or in IGRA, there is the possibility that a court would find ambiguous its use in H.R. 1294 with respect to whether it covers a situation in which a Virginia tribe were to authorize another person or entity to conduct a class III gaming activity⁷⁸ and secure a tribal-state compact for gaming by that entity. The strong opposition to gaming evident in the House debate and the explicit statement by the Chairman of the Natural Resources Committee, Representative Rahall, that the language of the bill “precludes Virginia tribes from *engaging in, licensing or regulating gambling* pursuant to the Indian Gaming Regulatory Act”⁷⁹ appear to show that the sponsors of the gaming prohibition intended it to cover all gaming on tribal land. On the other hand, if a court were to find the legislation ambiguous on this point, it might follow the lead of past decisions invoking principles of statutory construction that call for resolving ambiguous language in Indian statutes in favor of Indian rights.⁸⁰ However unlikely that prospect may be, it may be avoided by substituting, “shall not engage in, *or license and regulate gaming activities....*” for the current language, “shall not conduct gaming activities....”

Analysis of H.R. 1294 Jurisdictional Language. In addition to the anti-gaming provision, H.R. 1294 contains language conveying criminal and civil jurisdiction over trust lands of the Virginia Tribes and providing for tribal assumption of jurisdiction. Each of these will be examined in light of judicial interpretations of existing legislation delegating jurisdiction to states. Essentially, the decisions show that in examining federal laws delegating Indian country jurisdiction to states, courts have examined both the statutory language and the legislative background to determine the intent of Congress. They have distinguished between legislative jurisdiction and adjudicative jurisdiction.⁸¹ In some cases, they have emphasized tribal willingness to agree to a limitation on jurisdiction in order to obtain federal ratification of a settlement with a state or federal recognition. H.R. 1294 includes no language which definitively conveys legislative jurisdiction, either criminal or civil, to Virginia; nor has the legislative history included a formal acknowledgment by the Virginia Tribes of their resolve to abide by Virginia law, including its gaming laws.

⁷⁵ 25 U.S.C. § 2710(a)(2).

⁷⁶ 25 U.S.C. § 2710(d)(2)(A).

⁷⁷ 18 U.S.C. § 1166(b); see n. 10, *supra*.

⁷⁸ Although IGRA permits tribes to issue gaming licenses to individual or other entities, it requires the tribal ordinance under which they are to operate to be at least as restrictive as state law and the operators to be eligible for a state gaming license. 25 U.S.C. § 2710(b)(4)(A).

⁷⁹ See *supra*, n. 6.

⁸⁰ In *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), the Court stated one of the canons of statutory construction applicable to Indian affairs legislation, “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”

⁸¹ “*Legislative jurisdiction* concerns a government’s general power to regulate or tax persons or property, while *adjudicative jurisdiction* concerns the power of court to decide a case or to impose an order.” Nell Jessup Newton (ed.), *Cohen’s Handbook of Federal Indian Law*, § 7.01 (2005 ed.).

Criminal jurisdiction. A comparison of the jurisdictional language included in H.R. 1294 with that of other statutes conveying criminal law jurisdiction over Indian reservations to states indicates the possibility that H.R. 1294 will be viewed as ambiguous. H.R. 1294 authorizes Virginia to “exercise jurisdiction over...all criminal offenses that are committed on...lands located within the State of Virginia that are owned by, or held in trust by the United States for” the Virginia Tribes. Because it does not clearly state, as does Public Law 280, that the criminal *laws* of the state are to apply to Indian country within the state, it raises questions as to whether it conveys legislative authority to define and prescribe criminal conduct; i.e., whether substantive offenses, such as those covered by the Major Crimes Act,⁸² including murder and manslaughter, are to be defined by federal law rather than Virginia law.

Another possible ambiguity may be seen by comparing the H.R. 1294 language with the provision of MICSA subjecting any Maine “*Indian nation, tribe or band of Indians*” to the “civil and criminal jurisdiction of the State, the laws, of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person.”⁸³ H.R. 1294 language does not clearly state whether the criminal law jurisdiction being conveyed to Virginia includes criminal law jurisdiction over the Virginia tribes, as sovereign entities. To be certain that Virginia will be able to define as well as enforce criminal law on Indian reservations or trust lands, language such as that used in the earlier statutes might be considered. To illustrate, the following language would provide Virginia with authority to punish crimes committed by the tribes as corporate entities or governmental entities and to enact criminal laws applicable to Indians and Indian trust land in Virginia:

The State of Virginia shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country in Virginia to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State.⁸⁴ The Tribe and its members and any lands held in trust for the benefit of the Tribe or its members shall be subject to the criminal jurisdiction of Virginia, the laws of Virginia, and the courts of Virginia, to the same extent as any other person or land therein.⁸⁵

Civil jurisdiction. H.R. 1294 conveys to Virginia the authority “to exercise jurisdiction over...all civil actions that arise on lands in the State of Virginia that are owned by, or held in trust by the United State for” the Virginia Tribes.⁸⁶ It is susceptible to being interpreted in precisely the same way as the parallel language in Public Law 280 was interpreted by the Supreme Court in *Bryan*. That would mean that it would be read as serving to convey adjudicatory jurisdiction to entertain lawsuits arising in Indian country if they are brought before it, but not to prescribe civil laws. As a model for language conveying civil regulatory jurisdiction, i.e., the jurisdiction to make and enforce civil laws and regulations, as well as civil adjudicatory jurisdiction, there are several federal land claim settlement statutes, including MICSA, which might be modified to make Virginia civil regulatory and

⁸² 18 U.S.C. § 1153.

⁸³ 15 U.S.C. § 1725(a).

⁸⁴ This language is based on 18 U.S.C. § 1162(a).

⁸⁵ This language is based on 25 U.S.C. § 1725(a).

⁸⁶ H.R. 1294, sections 108(a)(2), 208(a)(2), 308(a)(2), 408(a)(2), 508(a)(2), and 608(a)(2).

adjudicatory jurisdiction applicable to the Virginia Tribes. For example, language modeled on MICSA might read:

The Tribe and its members and any lands held in trust for the benefit of the Tribe or its members shall be subject to the civil jurisdiction of Virginia, the laws of Virginia, and the civil jurisdiction of the courts of Virginia, to the same extent as any other person or land therein.⁸⁷

Procedure for tribal assumption of jurisdiction. H.R. 1294 also has a provision which appears to be a means of providing the Virginia Tribes with some form of concurrent jurisdiction with the State of Virginia. It reads:

Acceptance of State Jurisdiction by Secretary- The Secretary of the Interior is authorized to accept on behalf of the United States, after consulting with the Attorney General of the United States, all or any portion of the jurisdiction of the State of Virginia described in subsection (a) upon verification by the Secretary of a certification by a tribe that it possesses the capacity to reassume such jurisdiction.⁸⁸

Because of the absence of legislative history, the intent of this specific language is difficult to interpret. One reading of it might be that if it is enacted, the governmental authority of the Virginia Tribes would be unchanged; they would have no governmental authority until the Secretary of the Interior accepted a cession from the State of Virginia. The language seems to be predicated on the assumption that under the civil and criminal jurisdictional provisions, there would be no change in the applicability of Virginia laws to the Virginia Tribes, their land, or their members after enactment of H.R. 1294 and the creation of tribal reservations. If a court were to take this view in interpreting the law, the result might be that the tribes would be without any governmental authority other than that mentioned in H.R. 1294 or in Virginia law.⁸⁹

On the other hand, because the legislation includes a clause that provides that “[a]ll laws (including regulations of the United States of general applicability to Indians or Nations, Indian tribes or bands of Indians (including the Act of June 18, 1934 (25 U.S.C. 461 et seq)) that are not inconsistent with this title,”⁹⁰ questions are likely to arise as to the applicability of various federal Indian statutes, such as the Indian Child Welfare Act (ICWA).⁹¹ Since ICWA provides that Indian tribes “have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled with the reservation of such tribe, except where such jurisdiction is vested in the State by existing

⁸⁷ This language is based on 25 U.S.C. § 1725(a).

⁸⁸ H.R. 1294, sections 108(b), 208(b), 308(b), 408(b), 508(b), and 608(b).

⁸⁹ This would eliminate what this memorandum labels the “technical gap” in the H.R. 1294 anti gaming provision. See *supra*, at 13-14. That is because without any governmental authority, the Virginia Tribes would not satisfy the IGRA requirements that a tribe must have jurisdiction over tribal land and that the tribe “exercises governmental power” over it. 25 U.S.C. § 2710(b)(1), 2310(d)(3)(A), and 2703(4)(B). See *State of Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685.

⁹⁰ H.R. 1294, sections 103(a), 203(a), 303(a), 403(a), 503(a), and 603(a).

⁹¹ 25 U.S.C. §§ 1911 et seq.

Federal law.”⁹² There might also be questions as to the extent of state authority to tax tribal trust land and tribal income. The fact that the Act of June 18, 1934, is specifically referenced may also inject a note of ambiguity. That legislation, known as the Indian Reorganization Act, includes a provision which authorizes tribes to organize as governments and adopt constitutions.⁹³

Conclusions. H.R. 1294, which provides for federal recognition of six Virginia Indian Tribes, contains certain provisions designed to prevent gaming on tribal land unless it conforms to Virginia law. There is a possible technical gap in the language used to prohibit gaming under IGRA because of use of the term “conduct” rather than including language specifically covering tribal authorization of another entity or person to engage in gaming activities. This potential defect may be overcome by sufficient legislative history or a judicial reading of the jurisdictional provisions as completely withholding all governmental authority from the Tribes until transferred under a procedure specified in H.R. 1294. The language used in the jurisdictional provisions of H.R. 1294, when compared with language used in other statutes which have been upheld to preclude tribal gaming, does not appear to be sufficiently precise in conferring legislative criminal and civil jurisdiction to the State of Virginia with respect to the Virginia Tribes, their members, or their lands. There are models in existing law which may be adapted to correct this, examples of which have been provided.

We hope this information is helpful to you and that you will call upon our office should you need further assistance.

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⁹² 25 U.S.C. § 1911(a).

⁹³ 25 U.S.C. § 476.