THE NEW BUFFALO: TRIBAL GAMING AS A MEANS OF SUBSISTENCE UNDER ATTACK

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INTRODUCTION

The dire economic situation of most Native American tribes[1] is undisputed.[2] Even in New Mexico, a state burdened poverty, American Indians traditionally have been among the poorest of the poor.[3]

In an effort to improve their financial situation, tribes in New Mexico sought to open high-stakes gaming casinos on their respective reservations.[4] Federal law requires tribes interested in offering high-stakes gaming to obtain a tribal-state compact detailing the manner in which such gaming will be conducted.[5] In light of this requirement, several New Mexico peublos executed compacts with New Mexico Governor Gary Johnson.[6]

In 1996, nine of these pueblos appeared before the United States District Court for the district of New Mexico.[7] The tribes sought to

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[1] *See* Indian Gaming Regulatory Act (IGRA) 25 U.S.C. § 2703(5) (1994) (definition of "Indian tribe"). For purposes of this Comment, words such as "tribe," "Indian tribe," "Indian lands," etc. are used in the manner defined by the Indian Gaming Regulatory Act. *See generally id.*

[2] *See* George W. Hyde III, *The Indian Gaming Regulatory Act of 1988: Did Congress Forget About the Other Commerce Clause?*, 10 T.M. COOLEY L. REV., 665, 665–66 (1993); Douglas Holt, *High-Stakes Hand: New Mexico's Fight Over Indian-run Casinos Involves Jobs, Old Grievances*, DALLAS MORNING NEWS, Jan. 19, 1997, at 43A; Tina Griego, *Indian Wars 1996: Tribes Battle Federal Ruling Declaring Casinos Illegal in New Mexico*, ROCKY MTN. NEWS, Oct. 20, 1996, at 8A; Gwen Florio, *New Mexican Indians See Gambling Dispute as Betrayal*, PORTLAND OREGONIAN, July 25, 1996, at A11.

[3] *See* Griego, *supra* note 2, at 8A.

[4] *See* Florio, *supra* note 2, at A11.

[5] 25 U.S.C. § 2710(d)(1)(C) (1994).

[6] *See generally* Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1290 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997); *see, e.g.*, Holt, *supra* note 2, at 43A.

[7] *See generally Pueblo of Santa Ana*, 932 F. Supp. at 1284.

determine the validity of the compacts executed by Governor Johnson.[8] The district court agreed with an earlier ruling of the New Mexico Supreme Court holding that the state legislature, not the governor, possessed the authority to enter into the compacts at issue.[9] The district court further concluded that no subsequent action or event cured the invalidity of the tribal-state compacts.[10] The United States Court of Appeals for the Tenth Circuit affirmed the lower court's decision.[11]

As a result of these decisions, the tribes turned to the New Mexico legislature and renewed their attempts to obtain the required compact.[12] Well before the federal courts announced their respective decisions, however, the state legislature consistently indicated its unwillingness to discuss tribal-state compact negotiations.[13] The position of the New Mexico legislature on compact negotiations and on Indian gaming in general made it highly unlikely that the state would voluntarily enter into good faith negotiations regarding the required compact.[14]

Until recently, the pueblos could have procured the assistance of a federal court in obtaining a tribal-state compact.[15] Under the Indian Gaming Regulatory Act, the major federal legislation governing tribal gaming, tribes can file an action in federal court to compel a state to negotiate a compact in good faith.[16] The 1996 decision of the United States Supreme Court in *Seminole Tribe of Florida v. Florida*, however, eliminates this option by holding that the Eleventh Amendment renders states immune to such actions unless they have consented to the jurisdiction of a federal court.[17] Because the lawful operation of high-stakes gaming requires a tribal-state compact, the Supreme

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[8] *See Pueblo of Santa Ana*, 104 F.3d at 1548; *Pueblo of Santa Ana*, 932 F. Supp. at 1290–91.

[9] *See Pueblo of Santa Ana*, 932 F. Supp. at 1294–95; Clark v. Johnson, 904 P.2d 11, 26–27 (N.M. 1995).

[10] *See Pueblo of Santa Ana*, 932 F. Supp. at 1293.

[11] *See* Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1559 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997).

[12] *Tribe Says NM Stands to Lose Out on Casino Money*, DALLAS MORNING NEWS, Nov. 10, 1996, at 31A.

[13] *See Pueblo of Santa Ana*, 104 F.3d at 1549–50; Holt, *supra* note 2, at 43A; *Panel Hears Arguments in Suit Filed over NM Indian Gambling*, DALLAS MORNING NEWS, Nov. 21, 1996, at 26A [hereinafter *Panel*]; Griego, *supra* note 2, at 8A.

[14] *See* Holt, *supra* note 2, at 43A.

[15] *See* 25 U.S.C. § 2710(d)(7)(A), (B) (1994).

[16] *Id.*

[17] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47, 76 (1996). *Seminole Tribe of Florida v. Florida* renders states immune to suits by private parties if the state did not consent to being

Court's ruling essentially gives states veto power over Indian gaming.[18]

This concentration of power in the hands of the state is of special concern to the Sandia Pueblo, a tribe that opened the doors of its New Mexico gaming establishment in 1986, but who now must close those doors in response to the Tenth Circuit's decision.[19] Like many Native American tribes, the Sandia Pueblo commenced its gaming operations well before Congress created the compact requirement in the Indian Gaming Regulatory Act.[20] Because the states played no role in regulating gaming conducted on tribal lands prior to this enactment, these tribes opened high-stakes gaming establishments without a tribal-state compact.[21] For these tribes, a state's refusal to negotiate effectively criminalizes the continued operation of their high-stakes gaming facilities.[22] In so doing, the state's refusal to negotiate frustrates the tribes' hopes of earning big returns on what in most cases is a significant investment.[23] Because states do not compensate these tribes for the economic impact of refusing to negotiate, the states may be effecting a regulatory taking in violation of the Fifth Amendment.[24]

This Comment explores the potential for a Native American tribe to bring a regulatory takings challenge against a state for its refusal to negotiate a tribal-state compact in good faith. Discussion will be limited to those tribes that invested in and commenced high-stakes gaming operations before Congress passed the Indian Gaming Regu-

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sued. Because a tribe may still use the tribal-suit provision to sue a state that consented, the provision remains part of the IGRA. *See generally* 25 U.S.C. § 2710(d)(7)(A), (B).

[18] *See* Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 45 (1997); *Panel*, *supra* note 13, at 26A.

[19] *See Pueblo of Santa Ana*, 104 F.3d at 1549; *Pueblo of Santa Ana*, 932 F. Supp. at 1286.

[20] *See Pueblo of Santa Ana*, 104 F.3d at 1549; Eric D. Jones, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Power of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127, 131 (1993); Susan Voyles, GANNET NEWS SERV., May 12, 1987 (page unavail.). Approximately 100 tribes operated bingo establishments by 1988, most offering high-stakes bingo with cars, boats and prize money up to $1 million a night. During the mid-eighties many more tribes opened or expanded high-stakes gaming. *See* Jones, *supra* at 131; Voyles, *supra*.

[21] *See* Jones, *supra* note 20, at 129 (prior to Indian Gaming Regulatory Act, "states were powerless to regulate reservation gaming").

[22] *See Pueblo of Santa Ana*, 104 F.3d at 1552 ("Failure to comply with any one of the three conditions means the Class III gaming is subject to applicable criminal statutes.").

[23] *Id.* at 1550 n.6 (describing tribes' investments in gaming facilities). *See also* Holt, *supra* note 2, at 43A; Deborah Baker, *Tribal Casinos in Controversy*, ORANGE COUNTY REG., Nov. 7, 1996, at H1; *Mescalero Casino Forced to Close Down*, INT'L. GAMING & WAGERING BUS., Nov. 1, 1996, at 65 [hereinafter *Mescalero Casino*].

[24] *See* U.S. CONST. amend V.

latory Act.[25] Section I will detail this federal legislation, focusing specifically on the provisions that relate to high-stakes gaming. Section II will review the evolution of regulatory takings jurisprudence, explaining the current tests for determining whether the impact of the government action rises to the level of a taking. Section III will explain how a regulatory takings analysis would function in the context of tribal gaming, using a regulatory takings claim brought by a hypothetical New Mexico tribe to demonstrate the manner in which the analysis would operate. Section III will also identify an analogous situation that has produced successful Fifth Amendment challenges. The Comment will conclude by explaining the importance of tribal gaming to Native American tribes and will review the proposed solution to the tribes' current dilemma.

I. The Indian Gaming Regulatory Act

A. *An Introduction*

Prior to the Indian Gaming Regulatory Act, no regulatory framework existed expressly to govern gaming conducted on tribal reservations.[26] Though some statutes granted the federal government limited control over Indian gaming, this control was indirect at best.[27] A 1987 Supreme Court decision rendered the states without authority to *regulate* tribal gaming, though states could *prohibit* it if every kind of gambling was illegal in the state.[28] Because most states permitted gambling in some limited instances, there were few states in which tribal gaming was illegal.[29] As a result, the number of tribal gaming enterprises increased dramatically and by 1988, at least one hundred tribes operated gaming establishments.[30]

In response to the explosion in the number of tribes opening high-stakes gaming facilities during the 1980s and the decided lack of a

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[25] For reasons discussed *infra*, a tribe that began gaming operations after Congress passed the Indian Gaming Regulatory Act would likely be precluded from mounting a successful Fifth Amendment challenge since the regulatory scheme created by the Act existed at the time of the tribe's investment in the gaming facility.

[26] *See* Peter T. Glimco, *The IGRA and the Eleventh Amendment: Indian Tribes Are Gambling When They Try to Sue a State*, 27 J. Marshall L. Rev. 193, 206 (1993); Jones, *supra* note 20, at 129.

[27] *See generally* 25 U.S.C. § 81 (1994); Organized Crime Control Act, 18 U.S.C. § 1955 (1994). Section III, *infra*, discusses 25 U.S.C. § 81 in greater detail.

[28] *See generally* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987). Section III, *infra*, discusses *California v. Cabazon Band of Mission Indians* in greater detail.

[29] *See* Jones, *supra* note 20, at 131.

[30] *See id.*

regulatory framework to govern their activities, Congress passed the Indian Gaming Regulatory Act (IGRA, the Act).[31] The Indian Gaming Regulatory Act sought to balance the pro-gaming interests of the federal government and of the tribes against the interests of the states in controlling the nature of high-stakes gaming conducted within their borders.[32] The Act's provisions, along with its legislative history demonstrate this desire to strike a balance acceptable to all parties in interest.[33]

1. The National Indian Gaming Commission

One feature of the Act that demonstrates this attempted balance is the creation of the National Indian Gaming Commission (NIGC, the Commission) to oversee Indian gaming.[34] The Act requires the inclusion of two Native Americans among the Commission's three full-time members.[35] The NIGC allows federal oversight over such aspects of gaming as the gaming itself, the parties involved, and the accounting procedures.[36] More importantly, through the NIGC, the federal government also approves tribal ordinances related to gaming, as well as the required tribal-state compacts.[37] The responsibilities and composition of the NIGC ensure that every gaming establishment is a cooperative effort between federal, state, and tribal officials.[38]

2. Three Classes of Gaming

Another feature of the Act that demonstrates Congress's desire to balance the various interests involved in gaming is the division of games into three categories.[39] Games are separated into classes, noted

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[31] Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1289 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997); *see* 25 U.S.C. § 2702 (1994); Jones, *supra* note 20, at 131, 133; Statement of Deputy Assistant Attorney General Kevin DiGregory before the United States Senate Committee on Indian Affairs, Oct. 2, 1996 (available in Westlaw - 1996 WL 13104284) [hereinafter DiGregory Statement].

[32] *See Pueblo of Santa Ana*, 932 F. Supp. at 1289; Jones, *supra* note 20, at 132.

[33] *Pueblo of Santa Ana*, 932 F. Supp. at 1289; *see* Jones, *supra* note 20, at 132; *see generally* 25 U.S.C. §§ 2703, 2704, 2706, 2710 (1994).

[34] *See* 25 U.S.C. § 2704.

[35] *See id.*

[36] *See* 25 U.S.C. § 2706.

[37] *See id.*

[38] *See generally id.*

[39] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 50; *see generally* 25 U.S.C. § 2703 (1994).

as Class I, Class II, and Class III, respectively.[40] Each class of games has a varying degree of tribal, state, and federal control.[41]

Class I games are within the exclusive control of the tribe.[42] Class I includes social games played for prizes of minimal value or traditional Indian games engaged in as part of tribal ceremonies.[43]

The tribe and the federal government share control over Class II gaming.[44] The Act allows Class II gaming if two requirements are satisfied.[45] The first condition requires that the Indian lands on which the gaming will occur be located in a state which "permits such gaming for any purpose by any person."[46] The second imperative requires the tribe to conduct gaming pursuant to an ordinance properly adopted by the tribe and properly approved by the NIGC.[47] Electronic bingo, non-electronic bingo, and certain card games fall within the province of Class II gaming.[48]

Class III gaming refers to high-stakes gaming such as roulette, craps, and other casino style games; keno; slot machines; electronic versions of any game of chance; pari-mutuel wagers on horse racing, dog racing, or jai alai; and lotteries.[49] Class III gaming is the only category which allows—indeed requires—state involvement in shaping the character of Indian gaming.[50] As such, it is the only category that is significantly affected by the Supreme Court's ruling in *Seminole Tribe*.[51] For this reason, it is the exclusive focus of this Comment.

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[40] *See generally* 25 U.S.C. § 2703.

[41] *See Seminole Tribe*, 517 U.S. at 50–51; Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1289 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997); *see generally* 25 U.S.C. § 2710 (1994).

[42] *Pueblo of Santa Ana*, 932 F. Supp. at 1289; *see* 25 U.S.C. § 2703(6).

[43] *Pueblo of Santa Ana*, 932 F. Supp. at 1289; *see* 25 U.S.C. § 2703(6).

[44] Clark v. Johnson, 904 P.2d 11, 15 (N.M. 1995); *see generally* 25 U.S.C. § 2710(b).

[45] *See* 25 U.S.C. § 2710(b)(1)(A), (B).

[46] 25 U.S.C. § 2710(b)(1)(A). *See Pueblo of Santa Ana*, 932 F. Supp. at 1289. Courts have construed this requirement in a manner similar to the construction given Public Law 280 in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *See infra* notes 322–34 and accompanying text. If a state permits Class II gaming for any purpose at all, even in very limited exceptions, a tribe will be able to conduct similar games on its reservation. *See* Jones, *supra* note 20, at 132.

[47] *See generally* 25 U.S.C. § 2710(b)(1)(B).

[48] *See* 25 U.S.C. § 2703(7) (1994); *Pueblo of Santa Ana*, 932 F. Supp. at 1289.

[49] *Pueblo of Santa Ana*, 932 F. Supp. at 1289–90. *See* 25 U.S.C. § 2703(8).

[50] *Compare* 25 U.S.C. § 2710(a)(1) (no state involvement) *and* § 2710(b) (same), *with* § 2710(d)(1)(C) (requiring tribal-state compact).

[51] *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

B. *High Stakes Gaming Under the IGRA*

Under the IGRA, the prerequisites for lawful Class III gaming are similar to those set out for Class II gaming.[52] Both must be conducted in a state that "permits such gaming for any purpose and by any person."[53] Both must also be conducted pursuant to a properly adopted and approved tribal ordinance.[54] The similarity stops there, as the IGRA adds a third requirement for Class III gaming.[55] The lawful conduct of high-stakes gaming requires a tribal-state compact that governs the gaming activity offered on a particular reservation.[56]

In general, the compact requirement applies to all types of Class III gaming activity.[57] The IGRA does, however, have several exceptions that grant tribes some reprieve from the Act's compact requirement.[58] For instance, the IGRA contains a grandfather clause that applies to non-banking card games operated by tribes in Michigan, North Dakota, South Dakota, and Washington.[59] Tribes in these states offering non-banking card games that would, absent the grandfather clause, fall within the definition of Class III games need not obtain a tribal-state compact because their gaming activity is expressly defined as Class II gaming.[60] The IGRA also contains two amortization-like provisions that provide limited and temporary relief from the Act's compact requirement.[61] These provisions provide a grace period in which tribes that had no tribal-state compact could operate slot machines and electronic games of chance, as well as offer certain card games, provided that the tribes request that the state make a good faith effort to engage in compact negotiations.[62]

The limited protection these provisions provide, however, excludes the gaming activity of many tribes.[63] The grandfather provision, for

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[52] *Pueblo of Santa Ana*, 932 F. Supp. at 1290. *See* 25 U.S.C. § 2710(d)(1)(A)–(C).

[53] *Compare* 25 U.S.C. § 2710(d)(1)(B) (Class III gaming), *with* § 2710(b)(1)(A) (same requirement for Class II gaming).

[54] *Compare* 25 U.S.C. § 2710(d)(1)(A) (NIGC approval in Class III gaming), *with* 25 U.S.C. § 2710(b)(1)(B) (NIGC approval in Class II gaming).

[55] *See* 25 U.S.C. § 2710(d)(1)(C).

[56] *See id.*

[57] *See generally id.*

[58] *See generally* 25 U.S.C. § 2703(C)–(E) (1994).

[59] *See* 25 U.S.C. § 2703(7)(C); United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 360–63 (8th Cir. 1990). For a discussion of the grandfather clause including some legislative history, see *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 360–63.

[60] *See* 25 U.S.C. § 2703(7)(C)(i); *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 360.

[61] *See* 25 U.S.C. § 2703(7)(D), (E).

[62] *See id.*

[63] *See generally* 25 U.S.C. § 2703(7)(C)–(E).

example, has obvious geographic limitations.[64] It also excludes popular banking card games such as baccarat, *chemin de fer*, and blackjack.[65] The protection afforded by the amortization provisions similarly is of little assistance to most tribes since the provisions apply to only select games.[66] Moreover, all one year grace periods have now expired.[67]

1. The Compact Procedure

The IGRA sets out a specific procedure for tribes interested in obtaining the compact necessary for high-stakes gaming.[68] The compact requirement dictates that any tribe conducting or wishing to conduct Class III gaming on its lands must ask the state in which the lands are located to negotiate a tribal-state compact that will govern the conduct of gaming activities.[69] Upon receiving such a request, the state must negotiate in good faith with the tribe to enter into such a compact.[70]

If a state refuses to negotiate with a tribe in good faith, the Gaming Act authorizes the tribe to bring an action against the state in federal court.[71] Once the tribe makes the requisite showings and the court has considered the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, the IGRA requires a federal district court to order the state and Indian tribe to conclude a compact within a sixty day period.[72] If efforts by the district court to require cooperation from the recalcitrant state fail, the tribe could eventually take its problem to a federal mediator.[73] The Act allows a federal mediator to select a compact from the proposals suggested by the tribe and the state.[74] Should the state reject that proposal, the Act requires the mediator to notify the Secretary of the Interior, who would then prescribe procedures consistent with the proposed compact.[75] The language of the Act seems

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[64] *See* 25 U.S.C. § 2703(7)(C).

[65] *See id.*

[66] *See* 25 U.S.C. § 2703(D), (E).

[67] *See* 25 U.S.C. § 2703(7)(D), (E); *see also* Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1552 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997).

[68] *See generally* 25 U.S.C. § 2710(d)(3) (1994).

[69] 25 U.S.C § 2710(d)(3)(A).

[70] *Id.*

[71] *See* 25 U.S.C. § 2710(d)(7)(A), (B).

[72] *See* 25 U.S.C. § 2710(d)(7)(B)(ii), (iii).

[73] *See* 25 U.S.C. § 2710(d)(7)(B)(iv).

[74] *Id.*

[75] 25 U.S.C. § 2710(d)(7)(B)(vii).

to imply that each step in this framework is contingent upon the tribe's ability to obtain a court order requiring the state to conclude a compact.[76]

With the 1996 decision in *Seminole Tribe*, the United States Supreme Court struck a significant blow to this framework.[77] *Seminole Tribe* declared unconstitutional the provision of the IGRA authorizing tribes to sue states that refused to comply with the Act's good faith negotiation obligation.[78] In reaching this holding, the Court acknowledged that the Indian Commerce Clause gave Congress great law making authority in Indian affairs.[79] The Court further determined that, in enacting the IGRA, Congress's intent to abrogate state sovereign immunity was "unmistakably clear."[80] The Court concluded, however, that Congress could not constitutionally abrogate state sovereign immunity when acting pursuant to the Indian Commerce Clause.[81] As the Court explained, "[e]ven when the Constitution vests in Congress complete law-making power in a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states."[82]

This decision, which effectively immunizes states from suit, has a significant effect on Indian tribes.[83] *Seminole Tribe* altered the balance

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[76] *See generally* 25 U.S.C. § 2710(d)(7)(B)(iii)–(vii). For example, the Act does not contemplate the involvement of a federal mediator until the sixty day period provided in the court order expires. *See* 25 U.S.C. § 2710(d)(7)(B)(iv).

[77] *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

[78] *See id.* at 72–73.

[79] *See id.* at 62.

[80] *See id.* at 56–57.

[81] *See id.* at 72–73. In reaching this conclusion, the Supreme Court overruled the earlier precedent of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). In *Union Gas*, the United States Supreme Court held that Congress could abrogate the sovereign immunity of the states when acting pursuant to the Interstate Commerce Clause. *Union Gas*, 491 U.S. at 5. The Native American tribes involved in *Seminole Tribe* relied on this precedent to argue that the abrogation effected by the IGRA was constitutional. *See Seminole Tribe*, 517 U.S. at 61–62. The tribes reasoned that the Interstate Commerce Clause granted Congress plenary power over interstate commerce, but it left the states with *some* power to regulate interstate commerce. *Id.* at 60. In contrast, the Indian Commerce Clause makes "Indian relations . . . the exclusive province of federal law" and provides the state with no residual power. *Id.* (citing County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1994)). Essentially, the tribes argued that Congress must be able to abrogate sovereign immunity when acting pursuant to the Indian Commerce Clause since it can abrogate sovereign immunity under the (comparatively) more limited Interstate Commerce Clause. *See id.* at 62–67. The *Seminole Tribe* Court found this reasoning persuasive, but then proceeded to dismantle the *Union Gas* opinion that provided the basis for this argument. *Id.* at 62–67.

[82] *Seminole Tribe*, 517 U.S. at 72.

[83] *See* Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997).

of power between the states and Native American tribes in a manner that does not reflect the Congressional goals behind the IGRA.[84] By stripping Native American tribes of a weapon needed to avail themselves of federal assistance in procuring states' cooperation, the decision allows states to undermine tribal efforts to obtain tribal-state compacts simply by ignoring their legal duty to negotiate in good faith.[85] After *Seminole Tribe*, states can refuse to negotiate a compact in complete and utter bad faith, and can do so with impunity.[86] In essentially granting the states "veto power" of Indian gaming, the *Seminole Tribe* decision makes clearer the substantial burden Congress imposed on tribes when it created the tribal-state compact requirement.[87]

2. Effects of the IGRA's Compact Requirement

In assessing this burden, it must be noted that the first two requirements for Class III gaming do not seem to present a drastic departure from pre-IGRA law.[88] As to the first condition, the operation of Indian gaming has always been predicated on the notion that a state that prohibited gaming of any kind could also prohibit Indian gaming.[89] Similarly, the provision requiring federal approval of tribal ordinances related to gaming also does not present an entirely new idea to Indian gaming.[90]

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[84] *See id*; Jones, *supra* note 20, at 171.

[85] *See* Jones, *supra* note 20, at 171; *see generally Pueblo of Santa Ana*, 932. F. Supp. at 1297.

[86] *See Seminole Tribe*, 517 U.S. at 73, n.16; *Id.* 75–76. Justice Scalia suggests that *Ex Parte Young*, a doctrine that allows private parties to sue state officials, may still provide a remedy for the states' refusal to negotiate. *See id.* at 73 n.16. Yet the Court later holds that *Ex Parte Young* is not a viable remedy for tribes dealing with uncooperative states. *See id.* at 75–76.

[87] *See Pueblo of Santa Ana*, 932. F. Supp. at 1297; *see generally* 25 U.S.C. § 2710(d)(1)(C) (1994).

[88] *Compare* 25 U.S.C. § 2710(d)(1)(B) (must be conducted in state that permits such gaming by any person for any purpose) *and* 25 U.S.C. § 2710(d)(1)(A) (requiring federal approval of tribal ordinance), *with* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209–11 (1987) (state law can prohibit Indian gaming if law prohibits gaming by all persons for any purpose) *and* 25 U.S.C. § 81 (1994) (requiring federal approval of gaming management contracts if they relate to Indian land).

[89] *See Cabazon Band*, 480 U.S. at 209–11 (1987) (state law can prohibit Indian gaming if law prohibits gaming by all persons for any purpose); Jones, *supra* note 20, at 132.

[90] *Compare* 25 U.S.C. § 2710(d)(1)(A) (requiring NIGC approval) *with* 25 U.S.C. § 81 (requiring approval of the Secretary of the Interior for contracts related to Indian land). The requirement that a tribal ordinance authorizing gaming be subject to final approval by the Chairperson of the NIGC resembles the control held by the Secretary of the Interior prior to the enactment of the IGRA. *See generally* 25 U.S.C. § 2710(d)(1)(A); 25 U.S.C. § 81. Courts have held that in most circumstances, Section 81 requires the Secretary's approval for management contracts associated with Indian gaming facilities. *See generally* Barona Group of Capitan Grande Band

In contrast to the relatively minor changes these two IGRA provisions introduced to Indian gaming, the notion that Class III gaming requires a tribal-state compact represents a major change in the law.[91] Due to the status of Native American tribes as a sovereign nation subject only to the control of the federal government, the federal government is said to have plenary power over Indian affairs.[92] While this plenary power does not indicate that the federal government has absolute control, it does indicate that federal authority over Indian tribes is construed broadly.[93] As a result, states traditionally have had very limited control of Indian affairs.[94] In granting states the power to significantly influence an activity as important to tribes as high-stakes gaming, Congress immensely changed the role of the states in Indian affairs.

The requirement of state involvement via the tribal-state compact introduced a new player into the world of Indian gaming.[95] This player's interests are often contrary to those of the federal government and the tribe itself.[96] Whereas the federal government and the tribes seek to foster gaming as a major step toward economic and political self-sufficiency,[97] states fear the social evils that sometimes accompany the operation of a casino and often view casinos as a threat to other state businesses.[98] The legislative history of the IGRA indicates that the compact provision was viewed as a compromise that

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of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987); *see, e.g.*, A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986); Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc., 734 F. Supp. 455 (W.D. Okla. 1990). Morever, federal oversight is fairly common in Indian affairs as part of the unique trust relationship and the tribes' status as dependent sovereigns. *See* Amber J. Ahola, *"Call It Revenge of the Pequots," or How American Indian Tribes Can Sue States Under the Indian Gaming Regulatory Act Without Violating the Eleventh Amendment*, 27 U.S.F. L. REV. 907, 915 (1993) (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)).

[91] See Jones, *supra* note 20, at 129.

[92] *See Cabazon Band*, 480 U.S. at 207 (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980), United States v. Mazurie, 419 U.S. 544, 557 (1975)).

[93] *See* United States v. Mazurie, 419 U.S. 544, 557 (1975).

[94] *See Cabazon Band*, 480 U.S. at 214; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170–71 (1973); Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1288 (D.N.M. 1996), *aff'd*, 104 F.3d 1456 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997).

[95] *See* Jones, *supra* note 20, at 129 (no state involvement prior to IGRA).

[96] *See* T. Barton French, *The Indian Gaming Regulatory Act and the Eleventh Amendment: States Assert Sovereign Immunity Defense to Slow the Growth of Indian Gaming*, 71 WASH. U. L.Q. 735, 747 (1993).

[97] *See id.* at 744–46.

[98] *See id.* at 747; Louis Jacobson, *Are Tribal Gaming Halls a Good Bet?*, NAT'L J., Dec. 21, 1996 (page unavail.).

allowed two equal sovereigns to negotiate the problems presented by competing interests rather than have the federal government legislate a solution.[99] This compromise assumed that states would be willing to negotiate such problems with tribes, an assumption that some observers feel was naive.[100]

Regardless of whether or not Congress anticipated the antipathy of states toward Indian gaming, the source of this hostility seems to be the public's own aversion to high-stakes gambling on Native American lands.[101] In many states, voters rejected gaming proposals in 1994.[102] Gaming proposals on the ballot in 1996 met a similar fate.[103] The reasons behind the public's opposition to gaming range from fear of increased crime, to the deleterious effect gaming may have on the moral fiber of the surrounding moral community, to concerns about the effect of gaming on other businesses.[104]

With public sentiment so opposed to Indian gaming, states have little incentive to enter into negotiations for gaming compacts.[105] The amount of litigation and media attention surrounding attempts at tribal state compacts and the fact that many negotiations continue for years indicate that obtaining state approval is no easy feat.[106] For many tribes, the tribal suit provision in the IGRA offered the only hope of enforcing the Act's imperative for the states to negotiate a compact in good faith.[107]

Procuring the state's cooperation without the assistance of the federal government presents a dilemma for tribes seeking to establish future gaming operations, to be sure.[108] But the application of the Act's tribal-state compact requirement to tribes that operated gaming en-

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[99] *See* Jones, *supra* note 20, at 134. The legislative history also indicates that Congress may not have anticipated the states' resistance to Native American gaming. *See id.*

[100] *See* Hyde, *supra* note 2, at 693.

[101] *See* Jacobson, *supra* note 98 (page unavail.).

[102] *See id.*

[103] *See id.*

[104] *See* Holt, *supra* note 2, at 43A; Jacobson, *supra* note 98 (page unavail.). Some economists and developers refer to casinos as "economic black holes" that cannibalize a state's other tourist businesses. *See* Griego, *supra* note 2, at 8A.

[105] *See* Jacobson, *supra* note 98 (page unavail.).

[106] *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (litigation involving compact); Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423 (D. Kan. 1993) (same); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992) (same); Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057 (E.D. Wash. 1991) (same); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1990) (same).

[107] *See* Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297 (D.N.M. 1996), *aff'd*, 104 F.3d 1456 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997).

[108] *See generally id.*

terprises prior to the IGRA's enactment sounds the death-knell for the on-going gaming activity of many tribes.[109] Unless they can obtain a tribal-state compact authorizing high-stakes gaming, the gaming activity of many tribes—legal prior to the IGRA—will be unlawful.[110]

A tribe in this situation must close the doors of its casino or face criminal prosecution.[111] For tribes that commenced gaming operations prior to the IGRA's enactment, this not only means the elimination of future income, but also the present destruction and diminution of the value of some tribal property.[112] A state's refusal to honor its legal duty to negotiate a compact in good faith effectively "takes" the value of the tribe's property, potentially violating the Fifth Amendment's proscription on governmental takings of private property.[113] If the state's refusal constitutes a "taking" under the Fifth Amendment, Native American tribes possess another potential weapon to employ in attempts to obtain a tribal-state compact: a suit against a state for a regulatory taking in violation of the Fifth Amendment.

II. Regulatory Takings

A. *Introduction to Fifth Amendment Takings Law*

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation.[114] Though this proscription is directed at the federal government, the Fourteenth Amendment makes the prohibition against government takings applicable to the states.[115]

Courts have long distinguished between governmental takings that involve a permanent physical invasion or appropriation of private property and those in which a particular regulatory scheme so impedes the use of private property that the situation amounts to a taking.[116] Government action that results in a permanent physical

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[109] *See* Florio, *supra* note 2, at A11; *see generally Pueblo of Santa Ana*, 104 F.3d at 1552, 1558.

[110] *See Pueblo of Santa Ana*, 104 F.3d at 1552 (Failure to comply subjects the gaming to applicable criminal statutes).

[111] *See id.*; *see also Mescalero Casino*, *supra* note 23 at 65.

[112] *See Pueblo of Santa Ana*, 104 F.3d at 1550 n.6 (describing losses to various tribes, no figures are listed for the Sandia Pueblo, but it seems reasonable assume sample provided by the court is representative; *see also* Baker, *supra* note 23, at H1; *Mescalero Casino*, *supra* note 23, at 65.

[113] *See generally* U.S. Const. amend. V.

[114] *See id.*

[115] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

[116] *See* Geoffrey L. Harrison, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. Chi. L. Rev. 1101, 1109 (1991).

invasion of private property constitutes a compensable taking *per se*.[117] Since neither the IGRA, the decision in *Seminole Tribe*, nor a state's refusal to negotiate a compact involve physical invasions or appropriations of tribal property, this Comment discusses only principles of regulatory takings.

While government action that effects a physical taking impacts private property directly, regulatory takings affect the uses of property, not the property itself.[118] Since *Pennsylvania Coal v. Mahon*, courts have realized that a regulation may result in a taking of property if that regulation goes "too far."[119] This acknowledgment provided the impetus for the law of regulatory takings.[120]

Ascertaining whether a particular government action rises to the level of a regulatory taking requires a court to make two determinations.[121] A court must first conclude that the government's action affects cognizable property interests.[122] Second, the court must then determine that the state's action so significantly affects these interests that the government has in effect "taken" the property interests.[123] These determinations will be addressed in turn.

B. *Cognizable Property Interests*

The Fifth Amendment does not protect every property interest.[124] Consequently, in any claim alleging a governmental taking of private property, a court must ask the "logically antecedent question" of whether the affected property interest is among the "sticks" in the "bundle of rights" deserving of Fifth Amendment protection.[125] A survey of cases indicates a pattern of patchwork decisions by the

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[117] *Id.* at 1109–10; *see* Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

[118] *Compare Loretto*, 458 U.S. at 438 n.16 (two silver boxes and wire occupying approximately one and one half cubic feet of space), *with* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1008–09 (1992) (legislation preventing claimant from building permanent structure on beachfront lot).

[119] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[120] *Lucas*, 505 U.S. at 1014.

[121] *See* Peter L. Henderer, *The Inpact* [sic] *of Lucas v. South Carolina Coastal Council and the Logically Antecedent Question: A Practitioner's Guide to Fifth Amendment Takings of Wetlands*, 3 ENVTL. L. 407, 414–15, 435 (1997).

[122] *See id.* at 414–15.

[123] *See id.* at 415.

[124] *See id.* at 414–15 (quoting M & J Coal Co. v. United States, 30 Fed. Cl. 360, 367 (1994)); Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, C226 ALI-ABA 219, 228 (1988); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978).

[125] *See Lucas*, 505 U.S. at 1027; Henderer, *supra* note 121, at 414–15.

courts that provide a general framework for determining whether a particular property interest qualifies for constitutional protection. Within this framework, courts appear to rely on two theories to identify property interests worthy of Fifth Amendment protection, here noted as Theory I and Theory II, respectively.[126] Whether what I have termed Theory I or Theory II applies in any particular case depends upon the nature of the interest affected by the government action. If the interests affected are fundamental to the traditional concept of property, Theory I will apply.[127] If the interests are not fundamental, but are sufficiently related to the property owner's reasonable investment-backed expectations, a court may rely on Theory II to conclude that a cognizable property interest is at stake.[128] Each theory is explained below.

1. Theory I

The first theory is fairly straightforward. Case law indicates that some attributes and uses of property are fundamental to the bundle of rights commonly characterized as "property."[129] These attributes and uses are protected from excessive governmental intrusion.[130] Theory I seems to be an objective approach, with the main inquiry focusing on whether the property use at issue falls into the confines of what a court considers "fundamental."[131] Moreover, these confines appear to be very narrow.[132] In only two instances has the United States Supreme Court found the existence of cognizable property interests when employing the fundamental attributes theory.[133] To date, the Supreme Court has limited its interpretation of fundamental attrib-

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[126] *Compare* Hodel v. Christy, 481 U.S. 704, 716–17 (1985) (finding cognizable property interest where government action affected fundamental element of property rights—Theory I) *and* Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (same), *with Penn Central*, 438 U.S. at 124–25 (indicating property interests must be "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes"—Theory II).

[127] *See Hodel*, 481 U.S. at 716–17; *Kaiser Aetna*, 444 U.S. at 179–80.

[128] *See* Henderer, *supra* note 121, at 415.

[129] *See Hodel*, 481 U.S. at 716–17; *Kaiser Aetna*, 444 U.S. at 179–80.

[130] *See Hodel*, 481 U.S. at 716–17; *Kaiser Aetna*, 444 U.S. at 179–80.

[131] *See generally Hodel*, 481 U.S. at 716–17; *Kaiser Aetna*, 444 U.S. at 179–80.

[132] *See Hodel*, 481 U.S. at 716–17; *Kaiser Aetna*, 444 U.S. at 179–80; *see also* Andrus v. Allard, 444 U.S. 51, 65–66 (1979) (indicating right to put propoerty to most profitable use not fundamental because its elimination is not "dispositive").

[133] *See Hodel*, 481 U.S. at 716–17; *Kaiser Aetna*, 444 U.S. at 179–80.

utes or uses to the right to devise property[134] and the right to exclude others from property.[135]

2. Theory II

In addition to protecting attributes and uses of property deemed "fundamental," courts have employed a second theory to identify property interests worthy of constitutional protection from government actions.[136] In contrast to the objective approach of Theory I, this theory forces a court to inquire into the property owner's subjective expectations regarding the use of the property, and then determine whether those expectations were reasonable.[137] Under Theory II, property interests that sufficiently relate to the primary reasonable investment-backed expectations of the property owner constitute cognizable property interests.[138]

To determine whether a particular use relates to a property owner's "primary" investment-backed expectation (IBE), courts have looked to the past and present uses of the property in question.[139] For example, in *Penn Central Transportation v. New York City*, (discussed *infra*) the United States Supreme Court noted that the New York City law at issue in the case did not preclude the property's current use, but rather allowed the claimants to use the property "precisely as it had been used for the past 65 years."[140] Based on this observation, and without further explanation, the Court concluded "the law [did] not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel."[141] Apparently, the fact that a parcel of property is used or has always been used in a manner now affected by the challenged law predisposes a court to find that

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[134] *See Hodel*, 481 U.S. at 715–17.

[135] *See Kaiser Aetna*, 444 U.S. at 179.

[136] *See* Henderer, *supra* note 121, at 414–15.

[137] *See* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 232–33 (1995).

[138] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see* Henderer, *supra* note 121, at 414–15. Courts have not provided an explicit definition of investment-backed expectations (IBE). *See* Mandelker, *supra* note 137, at 249. According to scholars, however, IBE's are typically those expectations regarding property use that induced the owner to invest in the property. *See* Henderer, *supra* note 121, at 415; Mandelker, *supra* note 124, at 224. In this sense, they are, as the term suggests, expectations that are backed by investments. *See* Henderer, *supra* note 121, at 415; Mandelker, *supra* note 124, at 224. For an in depth discussion of investment-backed expectations, see Mandelker, *supra* note 137, and Mandelker, *supra* note 124.

[139] *See Penn Central*, 438 U.S. at 136.

[140] *Id.*

[141] *Id.*

the law interferes with the property owner's primary expectations.[142] The focus on past uses to define "primary" implies that a primary expectation arises at the time of the property owner's initial investment.[143] If this interpretation proves correct, courts will exclude from Fifth Amendment protection "new" uses that arise after the time of investment.[144]

In addition to finding that a particular use affected by a challenged law sufficiently relates to a property owner's primary IBE, a court using Theory II to determine whether a claim involves cognizable property interests must also conclude that the owner possessed "reasonable" investment-backed expectations.[145] Reasonable IBEs "must be more than a unilateral expectation or an abstract need."[146] Generally, property owners can demonstrate the reasonableness of their expectations by proving that they purchased or invested in the property "in reliance on a state of affairs that did not include the challenged regulatory scheme."[147]

Even property owners who purchased their property under circumstances that indicated a particular use of property might be prohibited or subjected to regulation at some time in the future may be found to have assumed the "regulatory risk" of investing in the property.[148] For instance, in *Avenal v. United States*, the United States Court of Appeals for the Federal Circuit concluded that the claimants did not possess reasonable IBE because they knew or should have known that their property could be negatively impacted by government

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[142] *See id.*

[143] *See* Mandelker, *supra* note 137, at 242–43.

[144] *See id.* Some state courts appear to have adopted this interpretation of primary expectation, refusing to protect IBE's that arose after the time of purchase. *See generally* Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.3d 1000 (Ind. 1989).

[145] Mandelker, *supra* note 124, at 232; *see* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (quoting Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980)); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

[146] *See Ruckelshaus*, 467 U.S. at 1005 (quoting Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980)).

[147] *Loveladies Harbor*, 28 F.3d at 1177. Some scholars suggest this rationale derived from the doctrines of estoppel and vested rights. *See* Mandelker, *supra* note 124, at 223. These doctrines protected landowners from a change in the regulatory scheme if they had made "substantial expenditures on a development project in good faith reliance" on government action, or more accurately, government inaction. *See id.* Property owners who purchased or invested with knowledge of the offending regulatory scheme either "have no reliance interest, or . . . have assumed the risk of any economic loss" in the use now impeded by government regulation. *See Loveladies Harbor*, 28 F.3d at 1177.

[148] *See* Mandelker, *supra* note 137, at 233–36; *see, e.g.*, Avenal v. United States, 100 F.3d, 933, 937–38 (Fed. Cir. 1996) (1997).

interference at any time.[149] In *Avenal*, discussions of building a freshwater diversion project had been on-going for at least ten years prior to the claimants' investment in leases for oyster cultivation.[150] The Federal Circuit acknowledged that the challenged government action reduced the value of the claimants' property "well beyond the level of mere diminution," but declined to find a taking specifically because the claimants' expected use of the property was unreasonable in light of the anticipated government action.[151] Other circumstances that may indicate a regulatory risk include a requirement that the owner obtain a permit for his or her intended use of the property, or the mere fact that the owner purchased the property at a low price.[152]

The reasonableness of a property owner's IBE also depends on the legality of the owner's intended use of the property.[153] Courts have limited Fifth Amendment protection to lawful uses of property.[154] Apparently, an investment-backed expectation that involves an illegal use of property is an unreasonable expectation.[155] As the United States Supreme Court explained in *Lucas v. South Carolina Coastal Council*, uses prohibited by common law nuisance principles and uses that did not inhere in the owner's original title cannot form the basis of a successful takings claim.[156] The Supreme Court's reasoning in support of this proposition closely resembles the logic behind the regulatory risk theory described above.[157] Because common law nuisance or other general property principles tacitly rendered the property owner's desired use unlawful prior to the challenged government action, "it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit" by enacting the challenged law or otherwise taking action that adversely affected the claimant's property interests.[158]

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[149] *See Avenal*, 100 F.3d at 938.

[150] *See id.* at 934–36.

[151] *See id.* at 937–38.

[152] *See* Henderer, *supra* note, 121 at 427–28; Mandelker, *supra* note 137, at 233–36, 247–48. *See, e.g.*, Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981) (permit); Ciampitti v. United States, 22 Cl. Ct. 310, 313, 321 (1991) (permit); McNulty v. Town of Indialantic, 727 F. Supp. 604 (M.D. Fla. 1989) (low purchase price).

[153] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026–30 (1992); Henderer, *supra* note 121, at 415.

[154] *See Lucas*, 505 U.S. at 1026–30.

[155] *See* Henderer, *supra* note 121, at 415.

[156] *See Lucas*, 505 U.S. at 1029–30.

[157] *See id.* at 1030; Mandelker, *supra* note 137, at 233–36.

[158] *Lucas*, 505 U.S. at 1030 (citing Frank Michelman, *Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1239–41 (1967)).

Regardless of which theory comes into play, a regulatory takings claimant who satisfactorily demonstrates that his or her claim involves cognizable property interests overcomes one of the two necessary hurdles required to prevail on the takings claim.[159] The remaining challenge involves assessing the effect of the challenged government action on the claimant's cognizable property interest.[160]

C. *Effect of the Government Action*

The government cannot be required to pay for every reduction in value that results from a change in the general law.[161] Consequently, a plaintiff alleging a regulatory taking must not only demonstrate that the challenged government action affects cognizable property interests, but also that the government action so significantly affects these interests that compensation is required.[162] Every takings claim requires this two part analysis.[163]

As regulatory takings jurisprudence evolved, courts have articulated three rules that apply to the second part of the takings analysis.[164] One rule applies to laws that do not substantially advance a legitimate public purpose.[165] This rule was explicity announced in *Agins v. City of Tiburon*,[166] but finds its underpinnings in earlier cases.[167] A second rule applies to cases involving government actions that completely destroy all economically productive or beneficial uses of the property in question.[168] This rule, expressly stated in *Lucas v.*

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[159] *See* Henderer, *supra* note 121, at 414–15; *see also Lucas*, 505 U.S. at 1030.

[160] *See* Henderer, *supra* note 121, at 415, 430.

[161] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[162] *See* Henderer, *supra* note 121 at 415, 429–30. *See also* Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 167 (1990), *vacated and remanded*, 18 F.3d. 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). The United States Court of Appeals for the Federal Circuit disagreed with the district court's assessment of the extent to which the permit denial at issue reduced the claimant's property value. *Florida Rock*, 18 F.3d at 1572–73. The case is cited here only as an example of a court first explicitly determining the existence of a cognizable property interest, then turning to the economic impact of the regulation. *See Florida Rock*, 21 Cl. Ct. at 167–68.

[163] *See* Henderer, *supra* note 121 at 415, 429–30. *See also Florida Rock*, 21 Cl. Ct. at 167.

[164] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015–16 (1992) (rule for laws that do not substantially advance legitimate public purpose and rule for laws that totally destroy all economically beneficial or productive uses of property; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (traditional takings rule for laws that diminish value of property but do not destroy all economically beneficial uses); Henderer, *supra* note 121, at 415–16. *See also Florida Rock*, 18 F.3d at 1568 (suggesting existence of partial and total takings rules).

[165] *See Lucas*, 505 U.S. at 1015–16; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Agins v. City of Tiburon, 447 U.S. 255, 262–63 (1980).

[166] *See Agins*, 447 U.S. at 262–63.

[167] *See Penn Central*, 438 U.S. at 123; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[168] *See Lucas*, 505 U.S. at 1016; *see also* Henderer, *supra* note 121, at 415–46.

South Carolina Coastal Council,[169] is also present to some extent in earlier cases.[170] A third rule governs situations in which a regulation diminishes, but does not destroy the economic value of the property.[171] *Penn Central Transportation v. New York City* provided the forum for announcing this rule, and its influence can be seen in later cases.[172]

Many takings claims require the court to consider first whether the second rule, involoving "total takings" applies, and if not, to conduct a second inquiry to determine whether the claim constitutes a regulatory taking under the traditional rules governing the takings analysis.[173] To better illustrate the application of and the purposes behind the rules announced in *Lucas* and in *Penn Central*, a brief discussion of the evolution of regulatory takings jurisprudence is set forth below.

1. *Pennsylvania Coal v. Mahon*

As noted above, *Pennsylvania Coal* sparked the birth of regulatory takings law.[174] The case involved a challenge to an ordinance that prevented a coal company from mining all the coal in its property due to the threat posed to the safety and property of people living near the area.[175] For the first time ever, the Supreme Court acknowledged that legislation enacted pursuant to the broad police power possessed by the states must balance both the needs of the community at large and those of the individual property owners.[176] The Court concluded that the legislation at issue failed this balancing test since the challenged legislation primarily served to protect the private interests of homeowners threatened by subsistence mining.[177] Because the Supreme Court found only a limited public purpose in the challenged act, it concluded that enforcement of the legislation required compensation.[178]

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[169] *See Lucas*, 505 U.S. at 1016.

[170] *See* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 495 (1987); *Agins*, 447 U.S. at 262–63.

[171] *See* Henderer, *supra* note 121, at 415–16; *see also Penn Central*, 438 U.S. at 124.

[172] *See Penn Central*, 438 U.S. at 124–25; *see, e.g.*, *Lucas*, 505 U.S. at 1015, 1019 n. 8.

[173] *See* Henderer, *supra* note 121, at 415–16.

[174] *See Lucas*, 505 U.S. at 1015; Pennsylvania Coal v. Mahon, 260 U.S. 393, 414–15 (1922).

[175] *See Pennsylvania Coal*, 260 U.S. at 414.

[176] *See id.* at 413–14.

[177] *See id.* at 414, 416.

[178] *See id.*

2. *Penn Central Transportation v. New York City*

Penn Central Transportation v. New York City provided more assistance in fleshing out Justice Holmes's admonition that a regulation must not go "too far."[179] The *Penn Central* Court employed a three factor test in evaluating a city ordinance that precluded a landowner from developing the air space over Grand Central Station.[180] In holding that the challenged ordinance did not work an unconstitutional taking, the Court considered the (1) character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with the claimant's distinct investment-backed expectations.[181]

In considering the character of the governmental action, the Court not only sought to characterize the government's action as a physical versus regulatory taking, but also to characterize the government action as benefiting public interests or private.[182] This reflects *Pennsylvania Coal*'s search for a broader public purpose in the challenged legislation.[183] The Court noted that Government action that affects property rights must further a general public purpose and not burden some property owners disproportionately.[184]

The second factor the Court incorporated in its three pronged test required an assessment of the regulation's economic impact on the property.[185] In explaining how this factor would be addressed, the Court noted that if the regulation allowed an owner to earn a reasonable return, it would not constitute a compensable taking.[186] The Court did not detail what would qualify as a reasonable return, apparently leaving that determination to be made by the lower courts.[187] The Court did, however, make clear that a diminution in property value, standing alone, does not amount to a taking.[188] The Supreme Court also indicated that the extent to which the regulation allowed the

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[179] *Compare id.* at 413–14 (balance test) *with* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (three factor test).

[180] *See Penn Central*, 438 U.S. at 115, 124.

[181] *See id.*

[182] *See id.* at 123 (public), *id.* at 124 (physical).

[183] *See Pennsylvania Coal*, 260 U.S. at 416.

[184] *See Penn Central*, 438 U.S. at 123, 134–35.

[185] *See id.* at 124.

[186] *See id.* at 136, 138.

[187] *See id.* at 136.

[188] *See id.* at 131.

property owner to retain valuable residual rights must be "taken into account in considering the impact of a regulation."[189]

As for the third component of the test—interference with the property owner's distinct investment-backed expectations—the Court did not explain what degree of interference would prompt a court to find a taking.[190] In fact, the Court did not even provide an explicit definition of investment-backed expectations.[191] The *Penn Central* Court looked to the past and present uses of Grand Central Station to determine "what must be regarded as [the claimant's] primary expectation concerning the use of the parcel."[192] The fact that the challenged ordinance permitted the claimants to continue using the property "precisely as it has been used for the past 65 years," helped the court conclude that the challenged ordinace did not interfere with the claimant's primary investment-backed expectations.[193]

3. *Agins v. City of Tiburon*

Not long after deciding *Penn Central*, the United States Supreme Court heard *Agins v. City of Tiburon.*[194] *Agins* presented a takings challenge to a zoning ordinance that limited the claimants' construction on a parcel of property they had hoped to develop.[195] In determining that the ordinance was not, on its face, unconstitutional,[196] the Supreme Court changed the language describing the factors of the traditional takings analysis and collapsed *Penn Central's* three pronged test into a two factor inquiry.[197] The Court held that government action constitutes a taking if it does not substantially advance

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[189] *See Penn Central*, 505 U.S. at 137. In *Penn Central*, the Court noted that the New York City ordinance challenged in the case not only allowed the claimants "to profit from the Terminal, but also to obtain a 'reasonable return' on [the] investment." *See id.* at 136. The Court further concluded that the value of the residual rights the ordinance afforded the claimants "undoubtedly mitigate[d] whatever financial burdens the law imposed" on the claimants. *See id.* at 137. These observations weighed in favor of the constitutionality of the ordinance in question. *See id.* at 136–37.

[190] *See generally id.*

[191] *See generally id.*

[192] *See id.* at 136.

[193] *See id.*

[194] *See generally* Agins v. City of Tiburon, 447 U.S. 255 (1980).

[195] *See id.* at 257–58.

[196] *See id.* at 260. Because the claimants had not sought the zoning board's approval of their development plan, there was not yet a controversy regarding the specific application of the zoning provisions. *Id.* at 260. The only question before the Court was whether the mere enactment of the zoning ordinance constituted a taking. *Id.*

[197] *See id.*; *Penn Central* 438 U.S. at 124.

legitimate state interests or if it denies an owner all economically viable use of the land.[198]

Despite the apparent reformulation of the traditional takings analysis, the factors influencing the Court's decision in *Agins* seem to remain the same as those that prompted the holding of *Penn Central*.[199] For instance, the first criterion in the *Agins* test requires an assessment of the purposes behind the challenged government action.[200] This mirrors *Penn Central's* inquiry into the character of the government action.[201] Both cases implicitly require that the legislation substantially advance a public purpose.[202]

The second element of the *Agins* two part test also reflects *Penn Central's* influence on the *Agins* decision.[203] In considering whether the regulation destroyed all economically viable uses of the property, the *Agins* Court incorporated both the "economic impact" and the "interference with investment backed expectations" aspects of the *Penn Central* standard.[204] If a regulation denied a property owner all viable use of her property, clearly it would have a significant economic impact on the property.[205] Further, a denial of all economically viable use would seem to constitute a substantial interference with the owner's investment backed expectations, simply because it eliminates virtually all uses.[206] The fact that the *Agins* Court itself adopted the language of *Penn Central* in noting the extent to which the regulation interfered with the claimants' reasonable investment-backed expectations supports the contention that both the second and third *Penn Central* factors are reflected in the second *Agins* element.[207]

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[198] *See Agins*, 447 U.S. at 260.

[199] *See id.*; *Penn Central*, 438 U.S. at 124.

[200] *See Agins*, 447 U.S. at 260.

[201] *See id.*; *Penn Central*, 438 U.S. at 124; *see also* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413–14 (1922).

[202] *See Agins*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 124; *see also Pennsylvania Coal*, 260 U.S. at 413–14. In *Agins*, the Court found persuasive the determination of the California legislature that the zoning ordinance advanced the long recognized legitimate government purpose of protecting citizens from the effects of urbanization. *See* 447 U.S. at 261.

[203] *See Agins*, 447 U.S. at 261; *Penn Central*, 438 U.S. at 124.

[204] *See Agins*, 447 U.S. at 261; *Penn Central*, 438 U.S. at 124.

[205] *See Agins*, 438 U.S. 261–62; *Penn Central*, 438 U.S. at 124–25, 136–37.

[206] *See generally Agins*, 438 U.S. 261–62; *Penn Central*, 438 U.S. at 124–25, 136–37.

[207] *See Agins*, 447 U.S. at 262–63. In *Agins*, the Supreme Court concluded that the property retained economically viable uses since the ordinance allowed the property owners to build as many as five houses on their property, allowing the claimants to pursue their investment-backed expectations. *See id.*

4. *Keystone Bituminous Coal Association v. DeBenedictis*

Seven years after the decision in *Agins*, its two part test still appeared to be the starting point for regulatory takings challenges.[208] In *Keystone Bituminous Coal Association v. DeBenedictis*, the Supreme Court used the *Agins* test to decide a case very much like *Pennsylvania Coal*.[209] The Court recognized the obvious similarities between the two cases, but found differences in critical and dispositive respects.[210] *Keystone* is significant both because it clarified the second prong of the *Agins* test and because it reaffirmed the importance of the *Penn Central* factors in a takings analysis.

In considering the second prong of the *Agins* inquiry, whether the legislation denied all economically viable uses, the *Keystone* Court noted the comparatively minimal effect of the legislation on the property in question.[211] In fact, the coal company bringing the challenge never even claimed that its general operations or even specific mines had been unprofitable since the enactment of the challenged statute.[212] This concession effectively foreclosed the ability of the coal company to credibly claim that the legislation had denied it all economically viable use of its property.[213] The Court further concluded that the small reduction in profit occasioned by the Subsistence Act did not "materially affect" the claimant's investment-backed expectations.[214]

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[208] *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 495 (1987); *Agins*, 447 U.S. at 260.

[209] *See Keystone*, 480 U.S. at 480 (Court agrees facts of *Keystone* are similar to those of *Pennsylvania Coal*, but distinguished so that *Pennsylvania Coal* did not control); Pennsylvania Coal v. Mahon, 260 U.S. 393, 414 (1922). Like *Pennsylvania Coal*, *Keystone Bituminous* involved a challenge to an ordinance that prevented a coal company from mining all of the coal from its property. *See Keystone*, 480 U.S. at 471; *Pennsylvania Coal*, 260 U.S. at 414. As in *Pennsylvania Coal*, mining of the coal in question would jeopardize the safety and homes of people living above the area to be mined. *See Keystone*, 480 U.S. at 471; *Pennsylvania Coal*, 260 U.S. at 414.

[210] *See Keystone*, 480 U.S. at 481 (noting similarities); *id.* at 484, 487 (distinguishing). For example, in considering the first prong of the *Agins* test—the nature of the state interests advanced by the challenged regulation—the Court distinguished the legislation challenged in *Keystone* from the leglislation challenged in *Pennsylvania Coal*. *See generally id.* at 485–93 (discussion of public purpose). In contrast to the limited public purpose found in *Pennsylvania Coal*, the *Keystone* Court specifically noted the Pennsylvania legislature's finding that enforcement of the legislation served important public interests. *Compare id.* at 485, 487 (Legislature's findings of public interest) *with Pennsylvania Coal*, 260 U.S. at 414, 416 (challenged legislation is "private benefit statute" protecting private landowners' homes).

[211] *See id.* at 493–96.

[212] *See id.* at 496.

[213] *See id.* at 496–97.

[214] *See id.* at 499.

As it considered the two pieces of the *Agins* test, the *Keystone* Court also reaffirmed *Penn Central*'s relevance.[215] Like the *Agins* Court's inquiry into the purposes served by the challenged ordinance, the *Keystone* Court's requirement that the challenged legislation substantially advance legitimate government interests mirrors *Penn Central*'s focus on the character of the government action.[216] Also, when the *Keystone* Court considered whether economically viable uses of the property remained, it assessed both the legislation's economic impact and the extent to which it interfered with the claimant's investment-backed expectations.[217] This inclusion again supports the contention that the second *Agins* criterion incorporates factors two and three of the *Penn Central* test.[218]

Because both *Agins* and *Keystone* demonstrate the continued importance of the *Penn Central* factors, one might wonder why the Supreme Court endeavored to modify the traditional framework at all. The significance of the Court's modification became more apparent in the *Lucas* decision.[219]

5. *Lucas v. South Carolina Coastal Council*

Lucas v. South Carolina Coastal Council involved a challenge to South Carolina's Beachfront Management Act (the Management Act).[220] As it applied to the claimant, the Management Act prevented the construction of any permanent structure on two lots he had purchased in hopes of developing them into single family residences.[221] The state court found that the property had no remaining economic value, but dismissed the takings claim because the legislation advanced a legitimate government purpose.[222]

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[215] *See generally Keystone*, 480 U.S. at 485–97.

[216] *See id.* at 485; Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124; *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413–14 (1922).

[217] *See Keystone*, 480 U.S. at 495–96, 499.

[218] *See id.* at 495–96, 499; *Agins*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 124.

[219] *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[220] *See id.* at 1007–10.

[221] *See id.* at 1009 (citing trial court's finding).

[222] *See* Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991). The United States Supreme Court, while acknowledging the importance of a legitimate government purpose, disagreed with the state court's interpretation of *Agins*. *See Lucas*, 505 U.S. at 1022, 1026; *Lucas*, 404 S.E.2d at 899. The Supreme Court did not read the decision in *Agins* to suggest that the presence of a legitmate government purpose would render a regulation constitutional. *See id.* at 1026. Instead, the Supreme Court apparently interpreted *Agins* to mean only that the

Writing for the Court, Justice Scalia affirmed the validity of the traditional, *ad hoc* inquiry conducted in other takings cases.[223] He explained, however, that the *Agins* decision identified situations in which a court need not engage in a fact-specific inquiry but rather could categorically find that a taking had occurred.[224] One such situation involves government action that does not substantially advance a legitimate government interest.[225] This type of action constitutes a taking *per se*.[226] The *Lucas* Court also indicated that *ad hoc* inquiries are unnecessary when the claim involves government action that destroys all economically beneficial or productive use of the property in question.[227] This type of action also constitutes a taking *per se*.[228]

The Supreme Court retreated from the broad implications of its second *per se* rule by creating an exception to its categorical effect.[229] Under this exception, government action that merely proscribes a use prohibited by background principles of nuisance or property law does not require compensation, even if it destroys all economically beneficial and productive uses of the property.[230] As the Court explained, a law or decree must do no more than duplicate the result that could have been achieved through the courts.[231]

Though various justices of the *Lucas* Court disagreed as to whether the plurality was voicing a new set of rules or merely applying existing doctrine,[232] it seems clear that, after *Lucas*, a court could base its finding of an unconstitutional regulatory taking on any one of three theories.[233] Under the *Lucas* Court's reading of *Agins*, courts can find a *per se* violation of the Fifth Amendment if the challenged government action does not advance legitimate government interests.[234]

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absence of a legitimate purpose would categorically render government action unconstitutional. *See id.* at 1016, 1022–23, 1026.

[223] *See Lucas*, 505 U.S. at 1019 n.8.

[224] *See id.* at 1015–16.

[225] *See id.* at 1015.

[226] *See id.*

[227] *See id.* at 1015–16.

[228] *See Lucas*, 505 U.S. at 1015–16.

[229] *See id.* at 1027–30.

[230] *See id.* at 1029–30.

[231] *See id.* at 1029.

[232] *Compare id.* at 1015–16 (Scalia indicating the categorical rule is not a new development) *and id.* at 1016 n.6. (same), *with id.* at 1036, 1043, 1045, 1046–47 (Blackmun, J., dissenting)(categorical rule is significant departure from existing precedent) *and id.* at 1063–64 (Stevens, J., dissenting) (same).

[233] *See Lucas*, 505 U.S. at 1015–16 (two categorical rules); *id.* at 1019 n.8. (traditional takings analysis).

[234] *See id.* at 1015.

Similarly, government action that goes beyond background principles of property law in denying an owner all economically beneficial uses of his or her land also constitutes unconstitutional takings *per se*.[235] Where government action destroys some, but not all, economically beneficial or productive uses, courts will employ the traditional takings considerations articulated in *Penn Central* to evaluate the takings claim.[236]

D. *Relevant Considerations in Evaluating the Regulation's Effect*

Once a court determines that the challenged government action affects cognizable property interests, it must then determine the action's effect on those interests.[237] In undertaking this second inquiry, courts typically measure the effect of the government action by considering both what was taken from the property as well as what remains in the property after the government action takes effect.[238] Courts focusing on the "residual rights" remaining in the property may assess these rights in economic terms, they may consider whether the residual rights allow the claimant to satisfy his or her reasonable investment backed expectations, or the focus on residual rights may be to ascertain whether the government action prevents the claimant from enjoying a "full bundle" of property rights.[239]

Penn Central and *Keystone* provide examples of instances in which the Supreme Court considered residual rights in economic terms.[240] In *Penn Central*, the Court indicated that valuable residual property rights should be taken into account when assessing the impact of

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[235] *See id.* at 1027, 1029–30.

[236] *Id.* at 1019 n.8 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1565 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). In *Lucas*, Justice Scalia omits the character of the government action in his recital of the traditional takings analysis. *See Lucas*, 505 U.S. at 1019 n.8. His explicit reference to *Penn Central*, however, likely indicates that this factor is to be included in the analysis as well. *See id.*; *Penn Central*, 438 U.S. at 124.

[237] *See* Henderer, *supra* note 121, at 430.

[238] Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 497 (1987) (test for regulatory takings requires comparison of value taken with value remaining); *see Agins v. City of Tiburon*, 447 U.S. 250, 262–63 (1980); *see also* Henderer, *supra* note 121, at 429–34 (discussing various methods of evaluating regulation's effect).

[239] *See Keystone*, 480 U.S. at 497 (considering residual rights in economic terms and whether claimant retains full bundle of property rights despite regulation); *Agins*, 447 U.S. at 262–63 (considering whether residual rights allow claimant to satisfy IBE); *Penn Central*, 438 U.S. at 136–37 (considering residual rights in economic terms and whether they allow claimant to satisfy IBE).

[240] *See Keystone*, 480 U.S. at 497; *Penn Central*, 438 U.S. at 137.

government action, even if the value of these rights may be insufficient to constitute just compensation if court concludes that a taking did indeed occur.[241] *Penn Central* instructs courts to weigh the value of the remaining property rights against the adverse economic impact of the government action in an attempt to mitigate the "financial burden" imposed by the challenged action.[242] *Keystone* made the Court's focus on the economic aspects of a claimant's residual rights even more clear.[243] In *Keystone*, the Supreme Court stated that its test for regulatory taking "required [it] to compare the value that has been taken from the property with the value that remains in the property."[244]

Some of the decisions outlined above also illustrate the Supreme Court's use of residual rights to determine the impact of government action on a claimant's investment-backed expectations.[245] For example, in addition to contemplating the claimant's residual rights in economic terms, the *Penn Central* Court also considered the residual property rights in concluding that the challenged ordinance did not impermissibly interfere with the claimant's primary expectation of using Grand Central Station as a railroad terminal.[246] The *Agins* Court similarly relied upon the residual rights unaffected by the ordinance in explaining that the claimants were free to pursue their reasonable investment-backed expectations of developing the property for residential use.[247]

Courts have also used residual rights to ascertain whether the government action prevents a claimant from enjoying a "full bundle" of property rights.[248] The imposition of a regulation will not amount to a taking if, despite the elimination of one use, the owner retains a "full bundle" of property rights when the property interests are viewed in the entirety.[249] The Court in *Keystone*, for example, relied on earlier precedent indicating that the destruction of one "strand" in the "bundle of property rights" did not necessarily constitute a taking.[250]

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[241] *Penn Central*, 438 U.S. at 137.
[242] *See id.*
[243] *See Keystone*, 480 U.S. at 497.
[244] *Id.*
[245] *See* Agins v. City of Tiburon, 447 U.S. 255, 262–62 (1980); *Penn Central*, 438 U.S. at 136.
[246] *See Penn Central*, 438 U.S. at 136.
[247] *See Agins*, 447 U.S. at 262–63.
[248] *See Keystone*, 480 U.S. at 497; Andrus v. Allard, 444 U.S. 51, 65–66 (1979).
[249] *See Andrus*, 444 U.S. at 65–66.
[250] *See Keystone*, 480 U.S. at 497 (citing *Andrus*, 444 U.S. at 65–66).

The focus on residual rights as a means to measure the government action's effect is consistent with the directives of other courts that have encouraged more than "formalistic inquiries" finding theoretical remaining uses.[251] As the United States Claims Court explained in *Florida Rock Industries v. United States*, the application of a regulation "invariably leaves the owner certain incidents of ownership that, on their face, appear significant."[252] Courts must therefore examine the substance of what remains as a result of the regulation and not merely accept the "legal trappings" of a remaining use.[253] If residual rights are hollow and important in theory only, they cannot bar a claim for compensation.[254] Though much of the lower court's decision was ultimately vacated by the United States Court of Appeals for the Federal Circuit, the final reported decision in *Florida Rock* indicates that the Federal Circuit appears to agree with the lower court's requirement that residual rights must possess real, not just theoretical, value.[255] The Federal Circuit seems to suggest that residual uses must be both available and economically realistic under the circumstances surrounding each case.[256]

E. *Summation of Regulatory Takings*

Regulatory takings jurisprudence has become very complex since its birth in *Pennsylvania Coal.* Several guiding principles, however, have emerged during its evolution. The Fifth Amendment does not protect every property interest.[257] The first step in assessing takings claims therefore requires determination of whether the use affected by the regulation constitutes a cognizable property interest.[258] Cogni-

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[251] *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1565 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).

[252] *Id.*

[253] *See id. But see Andrus*, 444 U.S. at 66 (claimants have not suffered a taking since, hypothetically, they could derive economic benefit from artifacts by displaying them and charging admission).

[254] *See* Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 166 (1980), *vacated by* 18 F.3d 1560, 1565 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (portion of procedural history omitted).

[255] *See Florida Rock*, 18 F.3d at 1571.

[256] *See id.* In listing factors to consider in determining the economic effect of government action, the Federal Circuit included the query "are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available?" *Id.*

[257] *See* Henderer, *supra* note 121, at 414–15; Mandelker, *supra* note 124, at 228; *see also* Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25, 136 (1978).

[258] *See* Henderer, *supra* note 121, at 414.

zable property interests can be found in uses of property that are fundamental and essential to the definition of property.[259] Interests that are sufficiently related to a property owner's primary reasonable investment-backed expectations regarding the use of the property may also constitute cognizable property interests.[260]

Once a court determines that the interests affected by the challenged regulation deserve Fifth Amendment protection, it must consider the regulation and the magnitude of its effects.[261] Regulations that do not substantially advance legitimate government interests constitute a taking *per se*.[262] Regulations that eliminate all economically beneficial or productive uses are also subject to a categorical rule unless the use eliminated by the regulation is unlawful or did not inhere in the owner's original title.[263] If a regulation does not qualify for either of these two *per se* rules, a court will then evaluate the claim using the traditional takings analysis of *Penn Central*.[264] Though it may label its factors differently, courts consider the nature of the government action, the economic effect of the regulation, and the extent to which the regulation interferes with the owner's reasonable investment-backed expectations.[265]

Courts assess the impact of a regulation largely by evaluating the residual rights remaining in the property after the government action takes effect.[266] This prompts inquiries into the economic value of the property after the regulation takes effect,[267] whether the residual rights allow the claimant to pursue his or her reasonable investment-backed expectations,[268] and whether the owner retains a full bundle of property rights after the regulation.[269] At least some courts require that residual uses of the property in question actually have substance,

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[259] *See* Hodel v. Christy, 481 U.S. 704, 715–17 (1989); *Kaiser Aetna*, 444 U.S. at 179.

[260] *See Penn Central*, 438 U.S. at 124–25.

[261] *See* Henderer, *supra* note 121 at 430.

[262] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (citing Agins v. City of Tiburon, 438 U.S. 258, 260 (1980)).

[263] *See Lucas*, 505 U.S. at 1015, 1030.

[264] *See id.* at 1019 n.8; Henderer *supra* note 121, at 416; *see generally Penn Central*, 438 U.S. at 124–25.

[265] *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 485–97 (1987); *Agins*, 447 U.S. at 260–63; *Penn Central*, 438 U.S. at 124–25.

[266] *See generally* Henderer, *supra* note 121, at 429–34.

[267] *See Keystone*, 480 U.S. at 497.

[268] *See Agins*, 447 U.S. at 262–63; *Penn Central*, 438 U.S. at 136–37.

[269] *See Keystone*, 480 U.S. at 497; Andrus v. Allard, 444 U.S. 51, 65–66 (1979).

rather than being "hollow" because of unavailability or economic impracticality.[270]

III. Regulatory Takings in the Context of Tribal Gaming

A Fifth Amendment challenge brought by a hypothetical New Mexico tribe engaged in gaming before the IGRA's enactment must go through each step of the takings analysis set out above.[271] A court must first conclude that the state's refusal to negotiate affects cognizable property interests.[272] Second, the court must then determine that the state's refusal to negotiate so significantly affects these interests that the state has in effect "taken" the property interests of the tribe and must provide just compensation.[273]

A. *Question One: Cognizable Property Interests*

1. Identifying the Affected Interest

As a preliminary matter, the property alleged to be "taken" must first be identified. Though the tribe would undoubtedly stand a better chance of prevailing on a takings claim if it could define very narrowly the property affected by the state's action,[274] the United States Supreme Court has "foreclose[d] reliance on . . . legalistic distinctions within a bundle of property rights."[275] Consequently, a court would likely reject attempts to confine the interests affected by the state's refusal to interests such as the tribe's use of the land for Class III gaming, or its property interests in equipment related to high-stakes gaming such as roulette wheels and blackjack tables.[276] As an alternative, a tribe could allege (assuming the facts support the contention) that the state's action "takes" tribal property because it prevents the

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[270] *See* Florida Rock Indus. Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); Florida Rock Indus. Inc. v. United States, 8 Cl. Ct. 160, 166 (1985) (procedural history omitted).

[271] *See* Henderer, *supra* note 121, at 416. *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8, 1027 (1992).

[272] *See Lucas*, 505 U.S. at 1027; Henderer, *supra* note 121, at 414.

[273] *See* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (if there is legitimate property interest, it cannot be taken without just compensation when the government exercises its regulatory power in manner that causes substantial devaluation of property).

[274] *See* Henderer, *supra* note 121, at 429.

[275] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500 (1987).

[276] *See id.*; *see also Penn Central*, 438 U.S. at 130.

tribe from putting the property to its most profitable use—in this case, as a center for high-stakes gaming.[277]

2. Application of Theory I

A court most likely would assess the legitimacy of the tribe's property interests in checklist fashion, beginning with the fundamental attributes approach of Theory I and moving to Theory II if necessary.[278] Courts readily recognize that "fundamental" property rights deserve constitutional protection.[279] Once a court concludes that a government action affects an "essential element" of property, it must acknowledge the presence of a cognizable government interest.[280]

The decision of the United States Supreme Court in *Andrus v. Allard* suggests that the right to use one's property in the most profitable fashion would not qualify as a cognizable property interest under Theory I.[281] In *Andrus*, a dealer of Native American artifacts challenged the constitutionality of legislation that prohibited the sale, transfer, or purchase of items containing feathers of protected birds.[282] The claimant argued that the legislation "took" his property because it destroyed the most profitable use of the artifacts, namely, selling them.[283] In evaluating the claimant's takings claim, the Court stated that the destruction of the most profitable use of a claimant's property is not dispositive to the resolution of the takings issue.[284] This statement indicates that the right to put property to its most profitable use does not qualify as a cognizable property interest under Theory I, since if this right were considered a "fundamental attribute" of property, the fact that government action impaired the right would indeed have been dispositive to the takings claim.[285]

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[277] *See generally* Jacobson, *supra* note 98 (page unavail.) (providing evidence that casinos are most profitable use); Baker, *supra* note 23, at H1.

[278] *See* Andrus v. Allard, 444 U.S. 51, 64 (1979). In *Andrus*, the Court apparently rejected the notion that elimination of the most profitable use qualifies as a fundamental element of property. *See id.* ("not dispositive"). The fact that the Court then continues its takings analysis suggests it concluded elimination of the best use qualified as a cognizable property interest under Theory II. *See infra* notes 288–92 and accompanying text.

[279] *See* Hodel v. Christy, 481 U.S. 704, 715–17 (1989); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

[280] *See Hodel*, 481, U.S. at 716–17; *Kaiser Aetna*, 444 U.S. at 179–80.

[281] *See generally Andrus*, 444 U.S. at 64.

[282] *See id.* at 53.

[283] *See id.* at 64.

[284] *See id.*

[285] *See* Hodel v. Christy, 481 U.S. 704, 716–17 (1989); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

3. Application of Theory II

The tribe's right to put its property to the most profitable use may qualify as a cognizable property interest under Theory II.[286] Under Theory II, if the right to put the property to its most profitable use sufficiently relates to the primary investment-backed expectations of the tribe, the right may qualify for Fifth Amendment protection, provided that the tribe's expectations were reasonable.[287] The opinion of the United States Supreme Court in *Andrus* provides some support for the argument that the right to put property to its most profitable use qualifies as a cognizable property interest under Theory II.[288]

As noted above, the *Andrus* Court stated that although the challenged legislation eliminated the best use of the claimant's property, this point was "not dispositive."[289] Yet the fact that the Court's evaluation of the takings claim did not end with this statement supports the inference that the Court found the right to put property to its most profitable use cognizable for Fifth Amendment purposes under Theory II.[290] The Court never explicitly states this conclusion, but the inference is also supported by the Court's consideration of the property's remaining uses.[291] Inquiries as to the economic value of residual uses and whether the claimants retain a full bundle of property rights are questions a court would reach only *after* concluding that cognizable property interests are involved in the claim.[292]

The *Andrus* Court ultimately concluded that no taking occurred on the facts of that case.[293] Its treatment of the right involved in *Andrus*, however, leaves open the possibility that that a contrary conclusion could be reached on a different set of facts.[294] If the facts of the hypothetical tribe's claim indicate that its right to put its property to the most profitable use sufficiently relates to its primary reasonable expectations concerning the use of the land, a court, based on what

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[286] *See Andrus*, 481 U.S. at 66.

[287] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978) (sufficiently related to primary IBE); Avenal v. United States, 100 F.3d 933, 937–38 (Fed. Cir. 1996) (IBE must be reasonable).

[288] *See Andrus*, 481 U.S. at 66.

[289] *See id.* at 64.

[290] *See id.* at 67–68 (opinion continues); *see also Penn Central*, 438 U.S. at 124.

[291] *See Andrus*, 444 U.S. at 67–68.

[292] *See* Henderer, *supra* note 121, at 414–16.

[293] *See Andrus*, 444 U.S. at 67–68.

[294] *See supra* notes 288–92, and accompanying text; *see generally Andrus*, 444 U.S. at 64–68.

appears to be implicit in *Andrus*, may find that a cognizable property interest is involved.[295]

In considering the facts of the hypothetical tribe's case, it seems reasonable for a court to assume the tribe included high-stakes gaming among its primary expectations.[296] This assumption is supported by the ability of Class III casinos to generate huge revenues.[297] The assumption receives further support from the fact that many tribes invested substantial amounts of capital exclusively to fund the development of high-stakes gaming on their respective reservations.[298]

If the court concludes that the tribe's interest in putting its property to the most profitable use–gaming–is "sufficiently bound up with"[299] the tribe's primary expectations regarding the use of the land, a court assessing the tribe's regulatory takings claim must next determine whether the tribe's expectations were reasonable.[300] The reasonableness of these expectations depends both on the lawfulness of the owner's intended use and the regulatory climate at the time of the investment.[301] If the tribe's intended use of the property as a high-stakes gaming facility violated federal or state law existing at the time it invested in the gaming facility, the unlawfulness of the intended use renders the tribe's primary expectation unreasonable.[302] Similarly, if the circumstances at the time of the tribe's investment indicated that Class III gaming was or could be subject to government control, this fact may render the tribe's expectations unreasonable.[303]

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[295] *See supra* notes 282–92, and accompanying text; *see generally Andrus*, 444 U.S. at 64–68.

[296] *See* Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1550 n.6, (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997) (providing evidence that high-stakes gaming was primary expectation of tribes involved in that case); Jacobson, *supra* note 98 (page unavail.) (same); Baker, *supra* note 23, at H1 (same); *see generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978).

[297] *See* Jacobson, *supra* note 98 (page unavail.); Baker, *supra* note 23, at H1;

[298] *See Pueblo of Santa Ana*, 104 F.3d at 1550 n.6.

[299] *See Penn Central*, 438 U.S. at 124–25.

[300] *See* Mandelker, *supra* note 137, at 228; *see generally* Avenal v. United States, 100 F.3d 933, 937–38 (Fed. Cir. 1996).

[301] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (lawfulness); Henderer, *supra* note 121, at 421, 427–28 (lawfulness and regulatory climate); Mandelker, *supra* note 124, at 233–36 (regulatory climate); *see, e.g., Avenal*, 103 F.3d at 937–38 (regulatory climate).

[302] *See Lucas*, 505 U.S. at 1030; Henderer, *supra* note 121, at 421.

[303] *See* Mandelker, *supra* note 124, at 233–26; *see, e.g., Avenal*, 104 F.3d at 937–38.

a. *Lawfulness of Intended Use*

Prior to the IGRA, the federal government possessed some degree of influence over tribal gaming.[304] Though federal policy reflects the notion that Native American tribes are a sovereign people, subject only to the federal government,[305] the unique trust relationship between tribes and the federal government confers on Congress plenary power over Indian affairs.[306] Pursuant to this power, Congress enacted Title 25, Section 81 of the United States Code (Section 81).[307] Section 81 enables the federal government to approve or disapprove of any agreement between a non-Indian and an Indian tribe or individual Indian that involves payment or delivery of anything of value for services that relate to Indian land.[308] Many federal courts applied Section 81 to agreements entered into for the management of tribal gaming operations.[309] The determination of whether a particular management contract relates to Indian land is a fact-specific inquiry particular to each case.[310]

While Section 81 vests considerable oversight powers in the federal government, it does not create a mechanism through which the federal government can directly control or prohibit the gaming con-

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[304] *See generally* 25 U.S.C.§ 81 (1994).

[305] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980), United States v. Mazurie, 419 U.S. 544, 557 (1975)).

[306] *See Cabazon Band*, 480 U.S. at 207.

[307] *See generally* 25 U.S.C. § 81.

[308] *See id.*

[309] *See generally* Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987); A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986); Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc., 734 F. Supp. 455 (W.D. Okla. 1990); Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987); Shakopee Mdewakanon Sioux Community v. Pan American Management Co., 616 F. Supp. 1200 (D. Minn. 1985), *dismissed on other grounds*, 789 F.2d 632; Wisconsin Winnebago Business Committee v. Koberstein & Ho-Chunk Management, 762 F.2d 613 (7th Cir. 1985).

[310] *See* Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993). Courts consider four factors in determining whether a particular is relative to Indian land. *See id.* at 807. First, the contract must relate to the management of a facility located on Indian lands. *See id.* Second, the contract must grant non-Indians the exclusive right to operate the facility. *See id.* Third, the contract must forbid the tribe from encumbering the property. *See id.* Lastly, the validity of the contract must depend upon the legal status of tribes as a separate sovereign in order for the Secretary's approval to be required. *See id.* Since most management contracts contain all of these elements in varying degree, Section 81 required Secretarial approval for the majority of these agreements. *See* 25 U.S.C. § 81; *Shakopee*, 616 F. Supp. at 1209.

ducted on a particular reservation.[311] Indeed, the parties typically did not even consider the presence or absence of federal approval of the management contract until one party sought to enforce the agreement in a court proceeding.[312] If the parties had failed to obtain federal approval, the extent of Section 81's penalty rendered the contract null and void.[313] This may have indirectly impeded the operation of a particular gaming enterprise, but Section 81 did no more to affect the gaming in question.[314] It did not criminalize or directly restrict the gaming activity solely because the parties failed to obtain proper approval.[315] Tribal gaming thus would not have violated applicable federal law at the time the hypothetical New Mexico tribe invested in its gaming enterprise.[316]

While Congress's plenary power over Indian Commerce made it possible, though unlikely, that the federal government would regulate Native American gaming, the sovereignty of Indian nations made it nearly impossible for states to impact tribal gaming.[317] Native American sovereignty is subordinate to the federal government, not to the states.[318] Consequently, states generally have no jurisdiction over Indian reservations.[319]

Because states generally do not possess jurisdiction on tribal reservations, state law applies to Native American affairs in very few instances.[320] One such instance is if Congress expressly consents to the applicablity of state law.[321] In the absence of congressional consent, state law will apply only when state interests in a particular activity are high enough to avoid state law pre-emption and sufficient to warrant assertion of state authority.[322] In order to determine when

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[311] *See generally* 25 U.S.C. § 81.

[312] *See* Green v. Menominee Tribe of Indians in Wisconsin, 47 Ct. Cl. 281, *aff'd*, 233 U.S. 558 (1914).

[313] *See generally* 25 U.S.C. § 81.

[314] *See generally id; Shakopee*, 616 F. Supp. at 1209.

[315] *See generally* 25 U.S.C. § 81.

[316] *See generally id.*

[317] *See* Jones, *supra* note 20, at 129; *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

[318] *See Cabazon Band*, 480 U.S. at 207 (quoting Washington v. Confederated Tribes of Colville Indians, 447 U.S. 134, 154 (1980)).

[319] *See Cabazon Band*, 480 U.S. at 207, 214–17; Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1288 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997).

[320] *See Cabazon Band*, 480 U.S. at 207, 214–17; *Pueblo of Santa Ana*, 932 F. Supp. at 1288.

[321] *Cabazon Band*, 480 U.S at 207.

[322] *Id.* 480 U.S. at 216 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–34 (1983)); *Pueblo of Santa Ana*, 932 F. Supp. at 1288.

state interests are sufficient to justify applicability of state law, courts conduct a balancing test that pits state concerns against the interest of the federal government and the tribes in preventing state encroachment on tribal sovereignty.[323]

In the context of Indian gaming, states failed to persuade the courts that Congress consented to the applicability of state law.[324] In *California v. Cabazon Band of Mission Indians*, the United States Supreme Court rejected the state's argument that Congress had consented to state regulation of Indian gaming by enacting Public Law 280.[325] The Court agreed that Congress enacted Public Law 280 in response to concerns about lawlessness on Indian reservations,[326] but relied on its earlier decision in *Bryan v. Itasca County* to interpret Public Law 280 as granting broad criminal jurisdiction to the states, but only limited civil jurisdiction.[327] Public Law 280 did not grant the states general civil regulatory authority.[328]

Because a state's regulatory authority depends on the nature of the state law in question, a court must determine whether state gaming law is criminal or civil in nature.[329] The *Cabazon Band* Court approved a test that distinguished between state "criminal/prohibitory" laws and state "civil/regulatory" laws.[330] Under this test, a state law is criminal if its intent is to generally prohibit certain conduct.[331] If state

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[323] *See generally Cabazon Band*, 480 U.S. at 207–09.

[324] *See generally id.*

[325] *Cabazon Band*, 480 U.S. at 207. *See* Hyde, *supra* note 2, at 667–70; *see generally* 18 U.S.C. § 1162 (1994), 28 U.S.C. § 1360 (1994). The state also claimed that the Organinzed Crime Control Act (18 U.S.C. § 1955 (1994)) conveyed congressional consent to the applicability of state law. *See Cabazon Band*, 480 U.S. at 212–14. This argument was rejected for three reasons: (1) the OCCA defines federal crimes, there is nothing in the Act indicating that the states are to have any part in enforcing federal criminal laws; (2) the Court rejected the proposition that states might be authorized to make arrests on reservations that, in the absence of the OCCA, it could not effect; (3) no exigent circumstances exist which would warrant state officers' intervention since unlawful gaming is not the type of situation where the unavailability of a federal officer would result in non-enforcement. *See id.* at 213–14. Because the argument was rejected by the Court and is not fact-specific, this avenue seems to be permanently closed as a means of arguing congressional consent. For this reason, this Comment does not discuss the argument in detail.

[326] *Id.* at 207; Bryan v. Itasca County, 426 U.S. 373, 374–75 (1976).

[327] *Cabazon Band*, 480 U.S. at 208; *see Bryan*, 426 U.S. at 385, 388–90; Hyde, *supra* note 79, at 669–70.

[328] *Cabazon Band*, 480 U.S. at 208; *see Bryan*, 426 U.S. at 385, 388–90. The Supreme Court affirmed the holding in *Bryan*, reasoning that a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values. *See Cabazon Band*, 480 U.S. at 208.

[329] *Cabazon Band*, 480 U.S. at 208.

[330] *See id.* at 209–10.

[331] *Id.* at 209.

law generally permits the conduct at issue, subject to regulation, it is civil in nature and Public Law 280 does not authorize its enforcement on the reservation.[332] *Cabazon Band* signified that tribes residing in states that generally prohibited gaming but allowed a few limited exceptions could establish gaming enterprises and remain free from state interference.[333] After *Cabazon Band,* states could not apply their laws to Native American gaming operations conducted within their borders unless state law completely prohibited all forms of gaming.[334]

The *Cabazon Band* Court also considered the argument that state interests in the context of tribal gaming were sufficiently high to warrant the applicability of state law.[335] In balancing the relevant interests involved in Native American affairs, the Court noted the federal government's express endorsements of tribal gaming and placed significant weight on the pro-gaming interests of the federal government and the tribe.[336] In assessing the state's interest, the Court rejected California's claim that its interest in preventing the infiltration of organized crime outweighed the pre-emptive force of the federal and tribal interests apparent in the case.[337]

Applying the principles of *Cabazon Band* to the situation of the hypothetical New Mexico tribe, it appears that New Mexico law did not apply to gaming conducted on Native American reservations when the tribe opened its casino in 1987.[338] At that time, New Mexico law generally made gaming illegal, subject to exception.[339] "Las Vegas Nights" constituted such an exception.[340] Las Vegas Nights allowed charities to raise money for various causes at limited times during the year.[341] Under the Supreme Court's holding in *Cabazon Band,* New Mexico's allowance of gaming in even these limited instances renders New Mexico's gambling laws permissive in nature and thus inapplicable to the tribe.[342] Because state law did not apply to Native Ameri-

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[332] *Id.*

[333] *See* Jones, *supra* note 20, at 132.

[334] *Id.*

[335] *See Cabazon Band,* 480 U.S. at 214–15.

[336] *See id.* at 216–18.

[337] *Id.* at 220–21, 222. A major flaw in the state's argument seemed to be its lack of concern for off-reservation bingo and lotteries, which the state permitted. *See id.* at 221.

[338] *See* N.M. STAT. ANN. § 30–19–1 to 15 (Michie 1978); Citation Bingo, Ltd. v. Otten, 910 P.2d 281, 283 (N.M. 1995) (with limited, exceptions, gambling is a crime in New Mexico); *see also Cabazon Band,* 480 U.S. at 207–09.

[339] *See* N.M. STAT. ANN. 30–19–1 to 15; *Citation Bingo,* 910 P.2d at 283.

[340] *See Citation Bingo,* 910 P.2d at 283–84.

[341] *See id.*

[342] *See Cabazon Band,* 480 U.S. at 208–09.

can gaming operations at the time the tribe made its investment in the property, the tribe's intended use of its property could not have violated any provision of state law.[343]

b. *The Regulatory Climate*

Courts limit takings recoveries to "owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory scheme."[344] Due to this limitation, circumstances that existed at the time of the tribe's investment—such as a low purchase price or the requirement of a permit for development or construction—indicating that Class III gaming could be subject to government control may render unreasonable the tribe's primary investment-backed expectation of conducting high-stakes gaming.[345] A court will therefore undertake an inquiry into the regulatory climate existing at the time of the tribe's investment.[346] For the purposes of this hypothetical, this Comment will assume the tribe purchased the property at a reasonable price that did not discount for regulatory risk.

The previous discussion illustrated that Section 81 did not present an impediment to tribes opening the doors of their casinos.[347] Section 81 granted the federal government the ability to influence, not control, Indian gaming.[348] The failure of Section 81 to provide the federal government with the ability to control tribal gaming counsels against a finding that the circumstances existing at the time of the tribe's investment indicated the existence of significant regulatory risk.[349]

Additionally, while it is true that Congress's plenary power over Indian affairs suggests that the federal government could, at any time, have subjected Native American gaming to regulation, the fact that federal policy openly favored gaming minimized the likelihood of

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[343] *See id*; *Citation Bingo*, 910 P.2d at 283. In 1995, the New Mexico Supreme Court declared "Las Vegas nights" unlawful, implying that until 1995, Las Vegas nights were presumed lawful. *See Citation Bingo*, 910 P.2d at 283. Whether such nights were indeed lawful need not be explored, however, since the language of the state court admits that some forms of gaming are *still* legal in New Mexico. *See id.* ("with limited exceptions, gambling is a crime in New Mexico"). The existence of *any* exception, regardless of its narrowness, renders state law permissible in nature and inapplicable on Indian lands. *See Cabazon Band*, 480 U.S. at 209–11.

[344] Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

[345] *See* Mandelker, *supra* note 124, at 233–36.

[346] *See* Henderer, *supra* note 121, at 426–28.

[347] *See generally* 25 U.S.C. § 81 (1994).

[348] *See generally id.*

[349] *See* Henderer, *supra* note 121, at 426–28; Mandelker, *supra* note 124, at 233–36.

anti-gaming legislation being enacted.[350] In the face of budget cuts designed to slow the growth of an increasing deficit, the federal government saw tribal gaming as a potential substitute for federal funds.[351] By 1987, the Secretary of the Interior, the Department of Housing and Urban Affairs, and the Department of Health and Human Services had taken steps to ensure that tribes could finance gaming enterprises.[352] Given the strong support the federal government expressed for Indian gaming, the hypothetical tribe's reliance on the federal regulatory state of affairs does not appear unreasonable.[353]

The tribe's reliance on the continuity of New Mexico's regulatory scheme also appears reasonable under the circumstances existing at the time the tribe invested in its gaming facility.[354] As previously noted, in the absence of Congressional consent, *Cabazon Band* made state law applicable to tribal lands only if it was criminal in nature.[355] Consequently, New Mexico could affect gaming on tribal lands within the state only if it enacted legislation completely banning gaming in any and all circumstances.[356] The fact that the state *still* has not enacted an absolute ban on gambling, but instead allows "limited exceptions" to its general prohibition affirms the reasonableness of the hypothetical tribe's reliance on a similar state of affairs.[357]

4. *Summation of Question One*

The success of the tribe's regulatory takings action depends, in part, on its ability to demonstrate that its claim involves cognizable property interests.[358] For this reason, the tribe should argue that its property has been taken by the state because the state's refusal to

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[350] *See* DiGregory Statement, *supra* note 31 (page unavail.); *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 217–18 (1987) (discussing federal approval of gaming).

[351] *See* DiGregory Statement, *supra* note 31 (page unavail.); *see also Cabazon Band*, 480 U.S. at 217–18.

[352] *Cabazon Band*, 480 U.S. at 218 (citing S. Rep. No. 99–493, at 5 (1986)).

[353] *Compare* Avenal v. United States, 104 F.3d 933, 934–35 (Fed. Cir. 1996) (circumstances indicated impending government action), *with* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1992) (no circumstances indicating impending government action).

[354] *See Cabazon Band*, 480 U.S. at 207–09; Citation Bingo, Ltd. v. Otten, 910 P.2d 281, 283 (N.M. 1995).

[355] *Cabazon Band*, 480 U.S. at 207–09.

[356] *See id.*

[357] *See Citation Bingo*, 910 P.2d at 283.

[358] *See* Henderer, *supra* note 121, at 414–15; *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992).

negotiate the tribal-state compact in good faith prevents the tribe from putting its property to its most profitable use.[359] The right to use one's property in the most profitable manner is unlikely to qualify as a cognizable property interest under the fundamental attributes theory,[360] but may, however, qualify for constitutional protection under Theory II.[361]

To determine whether Theory II renders the tribe's right to put its property to the most profitable use worthy of constitutional protection, a court must conclude that this right sufficiently relates to the tribe's primary expectation regarding the use of the land, and that these expectations were reasonable.[362] Because high-stakes gaming is the most lucrative form of gaming, and because so many tribes dedicate scarce financial resources to fund the development of gaming activities, the hypothetical tribe can likely convince a court that the most profitable use of its property–high-stakes gaming–was "sufficiently bound up with"[363] the tribe's primary expectations when it invested in the gaming enterprise.[364]

Having concluded that the tribe's interest sufficiently relates to a primary expectation, a court must then look to the lawfulness of the use and the regulatory climate that existed at the time of the tribe's investment to evaluate the reasonableness of the hypothetical tribe's expectations.[365] Since no federal law criminalized tribal gaming and New Mexico state law did not apply to Native American gaming conducted on tribal reservations, the tribe could lawfully use the property as a high-stakes gaming facility.[366] Further, circumstances existing at the time of the tribe's investment indicated a minimal risk

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[359] *See generally* Andrus v. Allard, 444 U.S. 51, 65–66 (1979); *supra* notes 288–92 and accompanying text.

[360] *See Andrus*, 444 U.S. at 64; *see also* Hodel v. Christy, 481 U.S. 704, 716–17 (1981); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

[361] *See Andrus*, 444 U.S. at 67; *see also supra* notes 288–92 and accompanying text.

[362] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Avenal v. United States, 100 F.3d 933, 937–38 (Fed. Cir. 1996); Mandelker, *supra* note 124, at 232.

[363] *Penn Central*, 438 U.S. at 124–25; Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1550 n.6, *cert. denied*, 118 S.Ct. 45 (1997); Holt, *supra* note 2, at 43A; Baker, *supra* note 23, H1.

[364] *See Pueblo of Santa Ana*, 104 F.3d at 1550 n.6 (providing evidence that casinos are most profitable use); Jacobson, *supra* note 98 (page unavail.) (same); Baker, *supra* note 23, at H1 (same); *see generally Penn Central*, 438 U.S. at 124–25.

[365] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992); Henderer, *supra* note 121, at 421, 427–28; Mandelker, *supra* note 124, at 233–36; *see, e.g., Avenal*, 103 F.3d at 937–38.

[366] *See generally* 25 U.S.C. § 81 (1994); Citation Bingo, Ltd. v. Otten, 910 P.2d 281, 283–84 (N.M. 1995).

of federal regulation,[367] and supported the tribe's reliance on New Mexico's continued exceptions to gaming prohibitions (rendering its gaming laws permissive and thus inapplicable).[368] Because the tribe's primary expectations entailed a lawful use of its property and circumstances at the time of the investment indicated little to no regulatory risk, the tribe's investment-backed expectations appear reasonable.[369]

Because the tribe's intentions of operating a high-stakes gaming casino (the most profitable use of its property) sufficiently relate to the tribe's reasonable investment-backed expectations a court could properly find that the tribe's regulatory takings claim involves cognizable property interests.[370]

B. *Question Two: The State's Refusal and Its Effects*

Having concluded that the tribe's right to put its property to its most profitable use constitutes a cognizable property interest, a court next must determine whether the effect of New Mexico's refusal to negotiate a tribal-state compact in good faith rises to the level of a taking.[371] A court would first consider the applicability of *Lucas*'s rules rendering government action unconstitutional *per se* if it does not substantially advance legitimate public purposes or if it denies all economically beneficial use of the property that was not otherwise prohibited by common law nuisance principles.[372] If neither of the categorical rules apply to the hypothetical tribe's situation, a court would then evaluate the effect of the state's refusal using the traditional takings analysis of *Penn Central*.[373]

1. Applicability of Categorical Rules

Since state action that does not advance a legitimate government purpose is unconstitutional *per se*, a court evaluating the takings claim of a hypothetical tribe from New Mexico must assess the motives

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[367] *See* DiGregory Statement, *supra* note 31 (page unavail.) (discussing federal approval of gaming); *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 217–18 (1987) (same).

[368] *See Citation Bingo*, 910 P.2d at 283–84.

[369] *See* Henderer, *supra* note 121, at 415, 427–28.

[370] *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978).

[371] *See* Henderer, *supra* note 121, at 416, 429.

[372] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015–16, 1029–30 (1992); Henderer, *supra* note 121, at 430–31.

[373] Henderer, *supra* note 121, at 431; *see Lucas*, 505 U.S. at 1019 n.8.

behind the state's refusal to negotiate.[374] Because state opposition is typically a manifestation of the public's fears regarding the infiltration of organized crime and potential deleterious effects on morals of the neighboring communities, New Mexico's refusal to negotiate a compact can reasonably be said to further a public purpose.[375] Statements made by various New Mexico legislators support the contention that the state's actions further a public purpose by enforcing the public's opposition to tribal gaming.[376] The state's action therefore cannot be rendered unconstitutional under the first of *Lucas's* categorical rules.[377]

A court assessing the hypothetical tribe's regulatory takings challenge would then consider whether the second categorical rule articulated in *Lucas* applies.[378] New Mexico's refusal to negotiate with the tribe will violate the Fifth Amendment if it destroys all economically beneficial or productive use of the tribe's property.[379] The situation is unlikely to be one in which a court would find that a "total taking" of the property has occurred.[380] Even the *Lucas* Court acknowledged the rarity of total takings situations.[381] In this instance, the fact that the property is still available for other economically beneficial uses precludes the tribe from seriously contending that the state's refusal to negotiate a compact renders its property entirely worthless.[382]

2. Traditional Takings Analysis

Having concluded that neither of the *Lucas* rules apply in the tribe's case, a court would next use the traditional takings analysis of *Penn Central* to consider the effect of the state's refusal to negotiate a tribal-state compact.[383] This test examines the nature of the government action, the economic impact of the action, and the extent to

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[374] *See Lucas*, 505 U.S. at 1015–16.

[375] *See* Holt, *supra* note 2, at 43A; Jacobson, *supra* note 98 (page unavail.); Griego, *supra* note 2, at 8A.

[376] *See* Holt, *supra* note 2, at 43A.

[377] *See Lucas*, 505 U.S. at 1015–16.

[378] *See id.*

[379] *See id.*

[380] *See* Henderer, *supra* note 121, at 424.

[381] *Lucas*, 505 U.S. at 1017.

[382] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496–97 (1987) (because the company could still make a profit on coal, it could not argue regulation denied all economically viable use).

[383] *See Lucas*, 505 U.S. at 1019 n.8; Henderer, supra note 121, at 431; *see generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 103, 124–25 (1978).

which the government action interferes with the claimant's reasonable primary investment-backed expectations.[384] Having previously determined that New Mexico's refusal to negotiate likely results from the public's concerns about the infiltration of organized crime and the negative effect the casino might have on surrounding communities, a court would easily dispense with the first criterion, finding the nature of the government action acceptable since it advances a legitimate public purpose.[385]

In considering the second factor in the *Penn Central* test, a court will evaluate what has been taken from the property in light of what remains in the property after the state's refusal to negotiate.[386] In assessing the residual uses remaining in the property, a court may consider their economic value, it may inquire as to whether the residual uses allow the claimant to satisfy his or her reasonable IBE, and/or a court may inquire as to whether the owner retains a full bundle of property rights despite the government action.[387]

Viewing the residual uses from an economic vantage point, the fact that the state's refusal eliminates the most profitable use of the property may weigh in the tribe's favor.[388] Yet although this fact is significant, courts have refused to allow the denial of the "highest and best economic use," standing alone, to constitute a compensable taking.[389] The availability of compensation for the hypothetical tribe depends on the court's assessment of the alternative uses of the property. This assessment will in turn depend upon the degree of scrutiny with which the court hearing the tribe's case views the residual uses of the property.[390]

For instance, if the court assessing the tribe's takings claim adopts the perspectives of the United States Supreme Court in *Andrus v. Allard*, the court will likely conclude that the state's refusal to nego-

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[384] *Penn Central*, 438 U.S. at 124–25.

[385] *See id.*; Holt, *supra* note 2, at 43A; Jacobson, *supra* note 98 (page unavail.); Griego, *supra* note 2, at 8A.

[386] *See Keystone*, 480 U.S. at 497.

[387] *See Keystone*, 480 U.S. at 497; Agins v. City of Tiburon, 447 U.S. 255, 262–63 (1980); *Penn Central*, 438 U.S. at 136–37.

[388] *See generally* Andrus v. Allard, 444 U.S. 51, 66 (1979).

[389] *See* Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981); Henderer, *supra* note 121, at 430.

[390] *Compare* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (finding taking despite valuable residual uses) *and* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (implying residual uses must be available and economically realistic), *with Andrus*, 444 U.S. at 66–67 (finding no taking despite residual uses of questionable value).

tiate a compact does not rise to the level of a taking.[391] In *Andrus*, the Court based its conclusion that no taking occurred largely on the fact that the claimant retained the right to possess, transport, donate and devise the property.[392] For the *Andrus* Court, the fact that the claimant retained a full bundle of property rights despite the regulation apparently countered the fact that the economic value of the property's residual uses was questionable.[393] The Court did not even consider the impact of the challenged legislation on the claimant's investment backed expectations.[394] If the court assessing the regulatory claim of the hypothetical tribe adopts the strict approach taken in *Andrus*, the tribe's chances of success appear very slim since the tribe not only retains the right to possess, donate and devise the property, but also the right to sell the property or use it for other purposes.[395]

The Supreme Court decided *Andrus* in 1979.[396] Subsequent cases may indicate that courts no longer follow such a strict approach in assessing the effect of the government's action on the claimant's property interests.[397] In *Lucas*, for example, the claimant retained the right to possess, donate, and devise his property as well as the right to sell the land, yet the United States Supreme Court concluded that the effect of the government action not only rose to the level of a taking, but inspired a categorical rule.[398] In direct contrast to *Andrus*, the *Lucas* Court apparently concluded that the claimant's retention of a full bundle of property rights was not sufficient to counter the economic effects of the regulation.[399] Perhaps the *Lucas* decision suggests that the Supreme Court favors the approach of the United States Court of Appeals for the Federal Circuit, which seems to require residual uses that are both available and economically realistic.[400]

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[391] *See Andrus*, 444 U.S. at 66–67.

[392] *See id.* at 66.

[393] *See id.* at 65–66.

[394] *See generally id.*

[395] *See id.*

[396] *Andrus*, 444 U.S. at 51.

[397] *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Loveladies Harbor, Inc. v. United States 28 F.3d 1171 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (1994), *cert. denied*, 513 U.S. 1109 (1995).

[398] *See Lucas*, 505 U.S. at 1015–16. The Court noted that it accepted as true the state court's finding that the legislation rendered the claimant's property valueless. Assuming, *arguendo*, that the property had no value and could not be sold, a strict application of *Andrus* would still force the *Lucas* Court to conclude that no taking had occurred since the claimants in both cases retained similar residual rights. *Compare id.* at 1007–08 *with Andrus*, 444 U.S. at 66.

[399] *See Lucas*, 505 U.S. at 1016.

[400] *See Florida Rock*, 18 F.3d at 1571.

Though it cannot be said definitively that courts now require residual rights of more substance than those that satisfied the Supreme Court in *Andrus*, if such a trend does exist it would serve to strengthen the regulatory takings claim of the hypothetical New Mexico tribe. A court would have difficulty finding a residual use of the property that is of comparable value to that of high-stakes gaming.[401] The particular circumstances of the case may prompt a court to conclude that alternative uses are neither available nor realistic.[402] For instance, a tribe that built a hotel-casino complex may retain the right to use the property as a hotel if the state refuses to negotiate a tribal-state compact, but a court could reasonably conclude that such a residual use is economically unrealistic if the prohibition on high-stakes gaming removes the major or only attraction to the tribe's reservation. In short, though the facts of each case would determine the effect of the state's action on the tribe's property, recent cases indicate a court may properly find that this factor of the traditional takings inquiry tips the balance in favor of the tribe.[403]

Lastly, a court hearing the regulatory takings claim of the hypothetical tribe must also assess the degree to which New Mexico's refusal to negotiate a tribal-state compact interferes with the tribe's investment-backed expectations.[404] This Section previously demonstrated the reasonableness of the tribe's expectation to operate a gaming facility on the property.[405] Due to the unique ability of Class III games to draw considerable business, it is most likely that the tribe considered high-stakes gaming an essential feature of its gaming enterprise.[406] In prohibiting the operation of high-stakes gaming by refusing to negotiate the required compact, New Mexico significantly interferes with what must be regarded as the tribe's primary expectation regarding the use of its property, possibly frustrating these expectations entirely.[407] The third factor of the *Penn Central* analysis thus also weighs in favor of the tribe's takings claim.

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[401] *See* Holt, *supra* note 2, at 43A; Jacobson, *supra* note 98 (page unavail.); Griego, *supra* note 2, at 8A.

[402] *See Florida Rock*, 18 F.3d at 1571.

[403] *See generally id.*

[404] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. at 104, 124–25 (1978).

[405] *See supra* notes 300–57 and accompanying text.

[406] *See* Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1550 n.6 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997); Jacobson, *supra* note 98 (page unavail.); Baker, *supra* note 23, at H1.

[407] *See Penn Central*, 438 U.S. at 136–37; *Pueblo of Santa Ana*, 104 F.3d at 1550 n.6; Jacobson, *supra* note 98 (page unavail.); Baker, *supra* note 23, at H1.

Because any analysis under the traditional takings analysis is very fact-specific, a court hearing the tribe's takings claim must look with scrutiny at the value of the residual uses and the impact that the state's action has on the investment-backed expectations of the tribe.[408] In theory, however, the potential weight of the factors in the takings analysis indicate that a court evaluating a Fifth Amendment challenge brought by a New Mexico tribe that became involved in high stakes gaming prior to the IGRA's enactment could properly find that the state's refusal to negotiate a compact in good faith, constitutes a compensable taking.

C. *An Analogy*

An apt analogy helps demonstrate an approach that a court may apply to a regulatory takings claim asserted by a tribe involved in gaming pre-IGRA.[409] The situation of tribes involved in gaming prior to the enactment of the IGRA is remarkably similar to problems involving wetlands regulation under the Clean Water Act.[410] In both situations, federal legislation establishes a regulatory framework that grants ultimate veto power to another governmental entity.[411] In the context of wetland protection, Congress created this arrangement by granting the Army Corps of Engineers jurisdiction and the authority to prohibit or permit particular uses of property.[412] In Indian gaming, this arrangement is a result of the requirements of the Gaming Act and the Supreme Court's decision vesting permit-like power in the states.[413] In either scenario, upon denial of a "permit," the claimant brings an action against the "issuing" entity.[414]

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[408] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (*ad hoc* inquiries).

[409] *See generally* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Deltona Corp. v. United States, 657 F.2d 1184 (Cl. Ct 1981); Formanek v. United States, 26 Cl. Ct. 332 (1992); Henderer, *supra* note 121, at 424–34.

[410] *See* Henderer, *supra* note 121, at 424–34 (discussion of property owners who had purchased before challenged regulation was enacted).

[411] *Compare* 25 U.S.C. § 2710(d)(1)(C) (1994) (compact is required), Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997) (*Seminole Tribe* grants veto power to states) *and Panel*, *supra* note 13 (page unavail.) (same), *with* Clean Water Act 33 U.S.C. §§ 1251–1387 (1994) *and* Henderer, *supra* note 121, at 411, 424–25 (description of regulatory framework under Clean Water Act).

[412] *See* 33 U.S.C. § 1344 (1994); *see also* Henderer, *supra* note 121, at 411, 424–25.

[413] *See* 25 U.S.C. 2710(d)(1)(C); Seminole Tribe of Indians v. Florida, 517 U.S. 44, 76 (1996); *Pueblo of Santa Ana*, 932 F. Supp at 1297.

[414] *See* Henderer, *supra* note 121, at 424–28. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1173 (Fed. Cir. 1992).

Wetlands' owners who invested in their property and developed their expectations in reliance on a state of affairs that did not include the government's ability to deny the claimant an expected use of the property have often prevailed in Fifth Amendment challenges.[415] Courts have found that when the Corps' denies such an owner a permit to use the wetlands in a manner that previously did not require the Corps' consent, the denial constitutes a taking.[416] Similar success may be realized by Indian tribes that opened high-stakes gambling casinos before Congress enacted the Indian Gaming Regulatory Act.

CONCLUSION

The plight and poverty of Native Americans is well documented.[417] One observer likened Native American communities to Third World countries operating within state borders.[418] In New Mexico, nearly half of the state's Indians live below the poverty level.[419] Even in 1996, one quarter of New Mexico Indians lived in homes without plumbing.[420] Unemployment rates as high as twenty-five percent stifled hopes of a better life.[421]

Many believe that the operation of high-stakes gaming casinos on tribal lands changed this situation for the better.[422] Some saw casinos as an opportunity for tribes to "dramatically improve the lives of their mem-bers and to experience the financial independence and security of true sovereigns."[423] During the period in which the tribes offered high-stakes gaming, revenue from casinos allowed many Native Americans to accomplish community, political, and individual goals.[424] Tribal casinos also elevated the standard of living for many individu-

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[415] *See generally Loveladies Harbor*, 28 F.3d at 1183; Formanek v. United States, 26 Cl. Ct 332 (1992).

[416] *See Loveladies Harbor*, 28 F.3d at 1177, 1179; *Formanek*, 26 Cl. Ct. at 333, 340–41.

[417] *See, e.g.*, Hyde, *supra* note 2, at 665–66; Holt, *supra* note 2, at 43A; Griego, *supra* note 2, at 8A; Florio, *supra* note 2, at A11.

[418] Florio, *supra* note 2, at A11.

[419] *Id.*

[420] *Id.*

[421] *See* Hyde, *supra* note 2, at 666; Griego, *supra* note 2, at 8A; Florio, *supra* note 2, at A11 (16% unemployment rate at the Pojoaque Pueblo).

[422] *See* Holt, *supra* note 2, 43A; Griego, *supra* note 2, at 8A.

[423] Holt, *supra* note 2, at 43A (quoting United States district court judge).

[424] *See id.*; Baker, *supra* note 23, at H1; Griego, *supra* note 2, at 8A; Florio, *supra* note 2, at A11. Tribes have used casino revenues to construct health and community centers, finance fire departments, fund alcohol rehabilitation programs, and provide money for schools and scholarship funds. *See* Holt, *supra* note 2, at 43A. Casinos revenue has also supported lobbying efforts for tribal interests and has been used for campaign contributions to candidates sympathetic to Native American issues. *See id.*; Griego, *supra* note 2, at 8A.

als.[425] Revenue from casinos has become such a life-blood that tribe after tribe is "hailing gambling as the new buffalo."[426]

Like its predecessor, this new buffalo is under attack.[427] The combination of the tribal-state compact requirement and the recent decision in *Seminole Tribe* seriously threatens the continued ability of Native American tribes to conduct high-stakes gaming activity on their respective reservations.[428] After *Seminole Tribe*, a state can criminalize the operation of Class III gaming enterprises by simply ignoring its federally created obligation to negotiate a compact in good faith.[429]

Tribes that began high-stakes gaming enterprises prior to the effective date of the IGRA suffer not only a significant loss in future income, but an enormous reduction in present property value when a state refuses to negotiate.[430] This Comment suggests that an analysis of the current standards applied in regulatory takings jurisprudence indicates the potential for tribes in this situation to successfully contend that the refusal of their respective state to negotiate a gaming compact unconstitutionally takes tribal property without just compensation.[431] Though the resolution of each case would be highly fact specific, the Fifth Amendment may provide a means through which Native American tribes can protect their latest buffalo.

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[425] *See* Holt, *supra* note 2, at 43A. Unemployment rates have dropped in New Mexico where eleven casinos employed as many as 4,275 people, both Indian and non-Indian. *See id.*; Florio, *supra* note 2, at A11. In 1996, the New Mexico Tax and Revenue Department estimated that nearly $400 million would be spent in Indian casinos. Baker, *supra* note 23, at H1. One gaming association study reported that these casinos provided tribes with an estimated $262 million and promised to provide New Mexico with as much as thirteen million dollars in fees to the state. Holt, *supra* note 2, at 43A. Estimates for 1995 include an income figure of $230 million. Baker, *supra* note 23, at H1. New Mexico officials are not accepting the $13 million in fees agreed upon in various Tribal-State compacts until litigation involving the compacts concludes. Holt, *supra* note 2, at 43.

[426] Griego, *supra* note 2, at 8A.

[427] *See id.*

[428] *See* 25 U.S.C. § 2710 (1994) (requirements); Seminole Tribe of Florida v. Floria, 116 S. Ct. 44, 76 (1996) (11th Amendment bars suits against state, *Ex Parte Young* not available); Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297–98 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1996), *cert. denied.*, 118 S. Ct. 45 (1997) (tribes have no recourse against states); *Panel supra*, note 13, at 26A (*Seminole Tribe* essentially gives states veto power over Indian gambling).

[429] *See* 25 U.S.C. § 2710(d)(1)(C); *Pueblo of Santa Ana*, 932 F. Supp. at 1297–98; *Panel, supra* note 13, at 26A.

[430] *See Pueblo of Santa Ana*, 104 F.3d at 1550 n.6.

[431] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015–16, 1030 (1992); Keystone Bituminous Coal Ass'n v. DeBendictus, 480 U.S. 470, 497 (1987); Agins v. City of Tiburon, 447 U.S. 255, 262 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 103, 124–25 (1978); Avenal v. United States, 104 F.3d 933, 937–38 (Fed. Cir. 1996); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1992).