

History of Tribal Gaming in California

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No other modern industry has had such a substantial economic impact on tribal economies, and no other tribal industry has made such significant contributions outside of tribal economies. Just two decades ago, as Congress deliberated over the bill that would become the Indian Gaming Regulatory Act of 1988 (IGRA), Indian gaming consisted of a few tribes' high-stakes bingo halls and card rooms in a handful of states. Today tribal gaming is one of the fastest growing segments of legalized gambling in the United States, fed by robust demand for casino gaming. In 1988, Indian gaming in a few bingo halls earned about \$121 million; in calendar year 2007, revenues from 524 gaming facilities operated by 230 tribes in 28 states topped \$26.5 billion.¹

California's Native Americans

California has 108 federally recognized Native American tribes within its borders. Of these, 61 have entered into some variation of a tribal gaming compact with the state of California. The initial compacts were negotiated in 1999, and a number of tribes have since renegotiated their compact terms, typically raising the limit on the number of slot machines to permit expansion. Since then, another nine tribes have negotiated tribal-state compacts, no all of which were ratified by the Legislature due to various issues. Only federally recognized tribes are eligible to negotiate such a compact.

Federal Recognition

The established Constitutional precedence for federal authority over Indian affairs stems from both the commerce clause of the U.S. Constitution² and through federal powers to negotiate treaties.³ Federal recognition acknowledges the tribe as a sovereign entity and permanently establishes a government-to-government relationship between the tribe and the United States. A federally recognized tribe is "eligible for services and benefits from the federal government available to other federally recognized tribes ... and entitled to privileges and immunities available to other federally recognized tribes".⁴ Federal authority to recognize Indian tribes is granted to the Department of Interior's Bureau of Indian Affairs (BIA).

BIA Criteria for Federal Recognition

Under the BIA's regulations, a tribe may petition the Interior Secretary for recognition, if it meets the following criteria: a) the tribe has existed on a continuous basis since 1900, b) evidence that a predominant portion of the group has existed as a distinct community from historical times, d) a copy of the tribe's governing documents, or equivalent, including membership criteria, e) official membership list, and evidence that current members descend from a historic tribe or tribes that combined, f) evidence that the tribe consists mainly of people not members of an already acknowledged tribe, and g) a statement that the tribe is not subject of congressional legislation that has terminated or forbidden the federal trust relationship.

Trust Lands

Under the Indian Regulatory Act of 1934 (IRA)⁵, tribes are allowed to obtain additional land and convert it into trust status. Tribal land is held in trust by the federal government for the benefit of tribal members. Tribes have the ability to acquire additional land in trust by purchasing lands or acquiring it from federal surplus lands. The Secretary of the Department of Interior Congress can then confer trust status to the newly acquired land.⁶

Tribal Compacts began with a California Tribe

In the 1980's the Cabazon Band of Mission Indians saw an opportunity to earn some income for the tribe by offering bingo. The tribe operated its bingo under the color of charitable gaming (such as that conducted by churches and non-profit organizations seeking to generate revenue). Cabazon, conducted bingo in accordance with its federally approved ordinance, its games were open to the public, and were played predominantly by non-Indians coming onto the reservation.

California v Cabazon

California attempted to apply its statute governing the operation of bingo games to the tribe's operations. Riverside County also attempted to apply its own ordinances regulating bingo, prohibitions on the play of draw poker, and other

card games. The tribe instituted an action for declaratory relief in Federal District Court, which entered summary judgment for the Tribes, holding that neither the State nor the county had any authority to enforce its gambling laws within reservation lands. In *California v. Cabazon* the U.S. Supreme Court upheld that ruling.

In response to *California v. Cabazon*, Congress passed the Indian Gaming Regulatory Act (IGRA) of 1988,⁷ which was enacted to create a balance between the tribes right to conduct gaming on their reservation and the public interest of the state.

Indian Gaming Regulatory Act (IGRA)

When President Reagan signed the federal Indian Gaming Regulatory Act (IGRA), recognizing that Indian tribes were allowed to conduct gaming (classified as Class III - e.g., lotteries, slot machines, video gaming devices) within Indian lands on the condition that the form of gaming is permitted to others in the state and the tribe has entered into a compact with the state to regulate its activities.

Among IGRA's other provisions:

- If a form of gambling south by a tribe is expressly prohibited by the state under criminal law, then the state can refuse negotiations for particular games on that basis.
- If a state refuses to negotiate in good faith with a tribe, the tribe can sue the state.
- Provides that the Secretary of the Interior can offer alternative compacting if regulations are in place and a state refuses to negotiate in good faith with a tribe.
- If a state regulates gaming, in any form, then gaming falls under civil law for which Indian tribes cannot be prosecuted and the state is obligated under federal law to enter into compact negotiations with a tribe.
- In its statement of find, Congress specifies that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands."
- Identifies three regulatory systems: the tribal regulatory office, State Department of Gaming, and the National Indian Gaming Commission.

Authorized Gaming Sites

Tribal gaming is prohibited on trust lands acquired after October 17, 1988, unless: a) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988, b) the Indian tribe has no reservation on October 17, 1988, or c) the Secretary, after consultation with the Indian tribe and appropriate

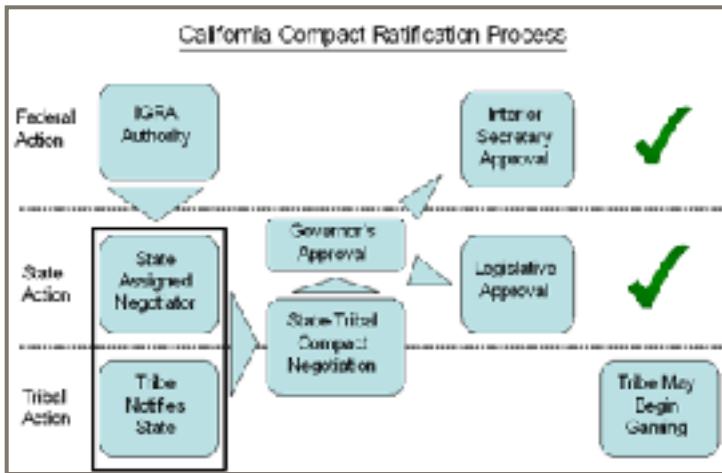


state, and local officials, including official of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

Federal Authority over Compacts

The Secretary of the Interior has the authority to review, approve or disapprove compacts "entered into" by an Indian tribe and a State. A compact must be approved or disapproved by the Secretary within 45 calendar days of being received. In the event the Secretary neither approves nor disapproves the compact, within that period, it will be deemed to have been approved to the extent it applies to IGRA. The Secretary may disapprove a compact if

it violates: a) any provision of IGRA, b) any other Federal law unrelated to gaming on Indians lands, or c) trust obligations of the United States to Indians.⁸



First Compact Attempts

Once IGRA was enacted, achieving the first tribal-state gaming compact in California still had to undergo a tortuous evolution.

Proposition 5, the Tribal Government Gaming and Self-Sufficiency Act of 1998, passed by a vote of 63 percent at the November 3, 1988 general election, Proposition 5 provided for both the form of compact and a procedure for its execution. The Act was later found to be of "no effect" in the resolution of *Hotel Employees & Restaurant Employees International Union v. Wilson*, and another case *Cortez v. Davis*, which were both decided by the California State Supreme Court. With Proposition 5 essentially nullified, no procedure existed for dealing with Indian gaming compact.

While these cases were pending, Governor Wilson attempted to comply with the requirements of IGRA and the demand of the tribes to engage in gaming by negotiating and executing compacts with 11 Indian tribes, led by the Pala Band of Mission Indians. Several legislators, among others, challenged his authority to do so in *Polanco, Battin, et al. v. Wilson*. The court ruled that the Governor had no authority to elute the compacts, a necessary prerequisite to their effectiveness, without authorization from the Legislature. While that case was on appeal, the Legislature passed SB 287, Chapter 409 of 1998, which ratified 11 compacts that Governor Wilson had negotiated and executed between several tribes and the state. However, the Agua Caliente Band was displeased with the

negotiation process and qualified a second ballot referendum on tribal gaming, which was to be voted upon at the March 7, 2000 primary election. Enactment of SB 287 was subsequently suspended in anticipation of the result of this ballot measure.

In March of 2000, voters cast their ballots on Proposition 1A (the Gambling on Tribal Lands Initiative), to resolve the impasse which had existed since the Hotel Employees and Restaurant Employees Union brought suit against Proposition 5. Proposition 1A gave clear authorization for the Governor to negotiate and execute tribal-state gaming compacts, subject to ratification by the Legislature. It also allowed the Governor to execute compacts for the operation of slot machines and for the conduct of lottery gaming and banking and percentage card games by federally recognized Indian tribes on Indian lands subject to compact terms authorized by IGRA.⁹

First Effective Compacts

On September 10, 1999, 56 tribes, again led by the Pala Band of Mission Indians, entered into Tribal-State Gaming Compacts permitting class III gaming devices on tribal lands. Implementation off the Compact was subject tot he approval of Proposition 1A. With 64.5 percent of California voters casting a "yes" vote, the initiative amended the State Constitution's ban on casinos and lotteries to allow gaming on tribal lands subject the the terms of the impacts By the end of 2002, there were 61 tribes which had entered into compacts modeled after the Pala-type compact. The legislature subsequently ratified these compacts.¹⁰

Basic Compact Provisions

While each compact has its own variations, most have included provisions which address the following broad issues:

- Facilities and Gaming Devices: the number of gambling devices (slot machines) and allowable games.
- Consumer Protection Standards: patron rights in the event of a dispute, the extent of legal liability, and dispute resolution processes and standards.
- Problem and Pathological Gambling: the minimum gambling age (18 or 21), business practices (such as advertising standards and exclusion programs), and information provided to assist problem and pathological gamblers.
- Distribution of revenues with non-gaming tribes through the Revenue Sharing Trust Fund (RSTF), and mitigation of state oversight costs

through the Indian Gaming Special Distribution Fund (SDF).

- Labor Standards: how union are certified (“card check”, submission of cards singly over half of eligible employees, versus a secret ballot conducted by the tribe),, health and safety standards, and dispute resolution processes.
- Local Government Agreements/Mitigation: whether binding and enforceable agreements are required, and the extent of required mitigation.
- Regulation and Enforcement: roles of the tribe, state, and federal government in establishing and enforcing licensing standards, the state and federal governments’ ability to enact regulations, audit and inspect records and premises, and the testing and certification of games.
- Environmental Standards: criteria for preparation and review of environmental impacts, local and state government involvement, and the extent of required mitigation and enforcement.

Establishment of the Tribal Environmental Impact Report.

- Building Standards: the level of conformity with local, state and federal building and safety codes, particularly for fire suppression, the number, scope and source of inspections, and required corrective actions.¹¹

Indian Gaming Revenue Sharing Trust Fund (RSTF)

The RSTF serves as the depository for payments made by gaming tribes, pursuant to the tribal-state gaming compacts, to provide for sharing with non-gaming tribal governments (those with fewer than 350 slot machines). Under the compacts, allocations from the RSTF to the non-gaming tribes can only be made upon appropriation by the Legislature.¹² For distributions to occur in the current year, requires that the California state budget to be enacted. In 2005, the last fiscal year for which data is available, \$50.5 million was appropriated and authorized for transfer and distribution to non-compact tribes. The aggregate shortfall in payments to all eligible recipient Indians tribes for fiscal year 2004-2005 was \$48.5 million.¹³

Indian Gaming Special Distribution Fund (SDF)

The tribal-state gaming compacts and existing law also establish the SDF, which is available to the Legislature for appropriation to fund specified purposes, among them is reimbursement for costs associated with compact implementation. Contributions to this fund were to be made quarterly by compacted tribes in accordance with a fee schedule calculated as a percentage of the

average slot machine “net win”, as defined, when tribes operate a specified minimum number of machines. The fee schedule determines the amount due from each compacted tribe based on the number of devices at its gaming facilities, with a higher collection rate imposed on those tribes that operate a greater number of machines.

State Oversight

Under the Tribal-state gaming compacts, there are two bodies primarily responsible for overseeing Indian Gaming in the state. The CA Gambling Control Commission was established to set policy, issue licenses, audit, adjudicate, and regulate matters relating to both Indian and non-Indian gaming in the State. The Attorney General’s office, through the Gambling Control Division, is responsible for enforcement of statute and regulation pertaining to gaming licenses.

Executive Order (D066-03)

In January 2003, Governor Davis issued an executive order which stated, in part, that the California Gambling Control Commission was authorized to collect and account for all contributions for deposit in the SDF (under Sec. 5.1 of the Tribal-State Gaming Compacts). The order authorized the California Gambling Control Commission to collect and analyze the certified quarterly reports submitted by the Tribes. It further delegated some of the state’s rights to enforce certain provisions of the Tribal-State Gaming Compacts to the California Gambling Control Commission with regard to the RSTF.¹⁴

Recent Compacts and Compact Amendments

Were signed by Governor Schwarzenegger to omit or eliminate payments to the SDF, while directing tribal payments to the State’s General Fund (GF). The SDF has been essential for backfilling the RSTF. Under the terms of all but one of the compact amendments ratified in 2007 (several were subjected to referendum in 2008), if revenues in the SDF are insufficient to meet the RSTF payment requirements to non-compact tribes, the state would be obligated to use GF monies to make up the difference and ensure that non-compact tribes receive their full \$1.1 million payment.

Rincon v. Schwarzenegger

In March of 2010, the Rincon Band of Luiseno Indians based in San Diego County, challenged Governor Schwarzenegger’s recent attempt to change the structure of the Tribal-State Compacts and extracting revenues from the tribe to contribute

directly into the state's General Fund for general expenditure in *Rincon v. Schwarzenegger*. A federal magistrate has found in the tribe's favor, finding that the administration had negotiated in bad faith by demanding payments for the state's general fund. The tribe won this suit. The state will be appealing the decision to the federal Ninth Circuit Court of Appeals. If it is upheld, it will mean that the state may not demand payment to the state for a tribe's right to engage in gaming under the IGRA.¹⁵

Conclusion

It is clear that the success tribal governments have had with their gaming operations, will lead to continued expansion of this industry. A number of tribes with existing tribal-state compacts appear to be interested in expanding their operations, while 23 non-compact tribes have applications to take land into trust for gaming purposes currently pending at the U.S. Department of the Interior.¹⁶

Tribal gaming has brought revenue to tribal lands in significant amounts to enable them to improve their local infrastructure, provide better schools, and medical care for their members.

However, many tribal governments are wisely concerned about reliance on the gaming industry as their sole means of support. Some have already begun to diversify their holdings into hotels, restaurants, real estate, golf-course development, retail, and other types of revenue streams.

1. "Indian gaming and beyond: tribal economic development and diversification"; *South Dakota Law Review*, Fall 2009, A, Meister, K. Rand, et al.
2. U.S. Constitution, Art. 1, sec. 8, clause 3.
3. 25 U.S.C. 4101
4. 25 CFR 83.12
5. P.L.No. 73-383, ch. 576, 48 Stat. 984 (1934).
6. 25 U.S.C. 2719
7. Indian Gaming Regulatory Act (Pub.L. 100-497, 5 U.S.C. 2701 et seq.)
8. 25 CFR 293
9. SCA 11, Burton, R. Chap. 142 of 1999.
10. AB 1385 (Battin), Chapter 874 of 1999.
11. Charlene Wear Simmons, Ph.D., *California Tribal State Gambling Compacts 1999-2006*, California Research Bureau, 2007, available at: <http://www.library.ca.gov/crb07/07-001.pdf>
12. California Gov. Code Section 12012.75
13. Indian Gaming Special Distribution Fund Report, California Gambling Control Commission, July 21, 2005.
14. Tribal-State Gaming Compact Sections 5.1 (a) and (b) and 5.3 (b), (c), (d), and (e).
15. Rincon Tribe Wins Slot Suit Against State, Onell Soto, San Diego Union-Tribune, March 27, 2010.
16. Charlene Wear Simmons, Ph.D., *Gambling in the Golden State, 1998 Forward*, California Research Bureau, 2006, available at: www.library.ca.gov/HTML/statseg2s.cfm

NOTE: This Issue Brief was prepared to be a resource for those looking for background on Indian Gaming. For more updated information, contact the author.